

Motions in Limine: Admitting Key Evidence, Educating the Court, Capturing Settlement Leverage

TUESDAY, DECEMBER 8, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Robert H. McKirgan, Practice Group Leader, Partner, **Lewis Roca Rothgerber Christie**,
Phoenix, AZ

Frederick Petti, Partner, **Petti and Briones PLLC**, Scottsdale, AZ

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Lewis Roca
ROTHGERBER CHRISTIE

PETTI AND BRIONES
PLLC

Motions In Limine: A Case Study and Best Practices

Prepared by

**Robert H. McKirgan, Lewis Roca Rothgerber Christie
Frederick R. Petti, Petti and Briones**

The John and Heather Grossman Case

- Heather's marriage and divorce to Ron Samuels
- The marriage of John and Heather
- The attempted hit job
- Heather and John's recovery and move to Arizona
- Heather's allegations against John
- The divorce and criminal cases

Heather's Perjury Conviction

- Heather had been convicted of criminal contempt for falsely testifying in the Heather/Ron Samuels divorce proceeding
- Heather sentenced to 48 hours of jail time
- The conviction was 9 years and 8 months old when we discovered it
- Civil case was in early stages

The Applicable Rule of Evidence Re: Perjury Conviction

- Arizona Rule of Evidence 609(a)(2): “for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.”
- Arizona Rule of Evidence 609(b): “This subsection (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if: (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.”

Why File an Early Motion In Limine: Strategic Considerations

- We wanted to file the motion before the 10 year anniversary of the conviction
- We wanted to give “notice of the intent to use...”
- The perjury conviction was obviously an important piece of evidence– whether it was admissible or not would impact how we tried the case
- Leverage in settlement
- Appellate insurance
- Opening statement

Overview of Motions In Limine

- Authority
- Standards
- Effect of grant or denial
- Standard of review on appeal and appellate issues
- Offensive motions in limine
- Strategic considerations
- Types of motions in limine
- Best practices in drafting motions in limine

The Court's Authority

- Federal Rule of Evidence 104(a): “The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”
- Federal Rule of Evidence 104(b): “When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.”
- Federal Rule of Evidence 104(c): “The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and so requests; or (3) justice so requires.”
- Federal Rule of Civil Procedure 16(c)(2)(C)
- Court's inherent authority

Standards

- Rules of Evidence
- Federal Rule of Civil Procedure 37(b) and (c): failure to comply with discovery order or to disclose

Effect of Grant or Denial

- Ruling does not necessarily end the issue
 - If motion denied, issue can be re-asserted at trial
 - If motion granted, issue can be reconsidered at trial
- Order precluding evidence
 - No reference to excluded evidence
 - Violating order can lead to contempt

Standard of Appellate Review

- Typically abuse of discretion
- Preserving the record for appeal
 - “definitive ruling”
 - Reassert objection at trial
 - Raise other bases at trial
- Evidence proffers

“Offensive” Motions in Limine

- Definition of “in limine”
- Benefits of offensive motion in limine
 - Settlement
 - Opening statement
 - Give the court time to fully consider
- Risks of offensive motion in limine
 - Denial may weaken settlement position
 - Educating opponent

Other Strategic Considerations

- Timing of motions
- Is the evidence so bad that you want a ruling outside the presence of the jury?
- To file or not to file?
- Educating the Judge vs. educating your opponent
- Avoiding repeated objections at trial
- Settlement vs. trial

Types of Motions in Limine

- Relevance vs. Prejudice
 - Rule of Evidence 401 defines relevance
 - Rule of Evidence 403 excludes evidence for prejudice, confusion, delay, cumulative
 - meaning of “prejudice”
 - Comment to Rule 403: “Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”
- Expert testimony
 - Daubert
 - Qualification
 - Speculation
 - Conduit for inadmissible evidence
- Existence of a privilege
- Qualification of witness
- Hearsay

Best Practices in Drafting Motion in Limine

- Focused
- Simple
- Base motion on rules of evidence
- Specify exactly what should be precluded (or admitted)
- Theme
- Know your Judge
- Brevity
- Do not file a disguised motion for summary judgment
 - *Louzon v. Ford Motor Co.*, 718 F.3d 556, 563 (6th Cir. 2013) (“Where, as here, the motion in limine is no more than a rephrased summary judgment motion, the motion should not be considered.”)
- Anticipate and address opposing arguments if no reply allowed

Responding to Motions In Limine

- No reason to rule now rather than at trial

Questions?

Robert H. McKirgan, Lewis Roca Rothgerber Christie
rmckirgan@lrrc.com

Frederick R. Petti, Petti and Briones
fpetti@pettibriones.com