General Instructions

1. **General Information.** The class will meet Tuesday nights from 6:30 to between 9:30 and 10:00 p.m. A few classes may run until 10:30 p.m. For the first session, we will meet in the Courtroom at 6:30 p.m. on **Tuesday, August 23** for an introduction to direct and cross examination and a “brainstorming” session on Problem 1. Classes after the first session will include student performances of assigned problems, demonstrations of trial skills and occasional brief substantive lectures or demonstrations. Some student performances will be recorded on videotape and reviewed one-on-one with your instructor.

2. **Required Materials.** All students should purchase a 120-minute VHS format video cassette, the *Problems in Trial Advocacy (2003 Edition)* published by the National Institute for Trial Advocacy (NITA), West's Federal Rules of Evidence Annotated (if you don't already have it) or the Federal Rules of Evidence, published by NITA, and *Modern Trial Advocacy* [Law School Edition] by Steve Lubet and published by NITA. In addition, later in the semester, you will need to purchase a relatively inexpensive case file for your full trial. The library has a bibliography of all its trial practice books, arranged by specific topics, for anyone who is interested.

3. **Assignments.** Your reading and performance assignments for each class are found in a later section of this syllabus. Unless the schedule says otherwise, every student is to prepare both sides of every problem assigned. You will not know in advance whether you will be called upon. Any problem referred to in an assignment, e.g., Problem 1, can be found in *Problems in Trial Advocacy* or, in the case of the expert witness problem, will be provided in class.

4. **Videotape.** Several times during the semester your performances will be videotaped. Early in the semester, each student must review a videotaped performance one-on-one with their instructor. Videotape reviews are optional after your first tape has been critiqued. If you wish to see a tape outside of class, please make arrangements with your instructor.

5. **Witness Roles.** In addition to performance assignments, each student should be prepared to play the witness for another student who has been
assigned to conduct the direct examination. The students performing the direct examination should prepare their witness to testify as they would in an actual case. That means that counsel who will inquire on direct will prepare the witness for direct and redirect examinations and work with the witness to prepare them for expected cross-examination. Witnesses may testify to any fact which is consistent with or supported by the facts contained in the problem itself. Witnesses should not speak with opposing counsel (that is, counsel who will cross-examine). **IT IS EXTREMELY IMPORTANT THAT YOU BE PREPARED TO BE A WITNESS AS AN UNPREPARED WITNESS UNDERMINES THE EXPERIENCE.**

6. **Writing Assignments.** At the conclusion of every class (other than the first), for each simulation exercise assigned, you must turn in the original or a copy of all materials you created in preparing for and conducting the examination or other portion of the trial assigned. These will not be returned, so if you want a copy, please keep one. The materials may be handwritten (if legible); complete sentences or questions are not required. The materials should simply reflect your thought processes in preparing the problem. If you wish, you may e-mail me the material on the day of class.

7. **Reading Assignments.** Reading the suggested portions of the Rules of Evidence and *Modern Trial Advocacy* before class will improve your preparation and performances of the various trial skills. Please allow sufficient time to complete the reading assignments before beginning your class preparation.

8. **NITA Conventions.** The NITA materials use the designations YR-0, YR-2 and the like. YR-0 is the current year (2005), YR-2 would be two years ago (2003), and so on. When performing as counsel or a witness, please state the year, e.g. 1995, and not the NITA date designation. Also, NITA materials set various cases in Nita City or the State of Nita. Nita is correctly pronounced "knee-ta."

9. **Objections.** During all classes, the "all object" rule will be in effect even if a second student has been designated as opposing counsel to the student then performing. The all object rule means that all students other than the students performing and playing the witness are opposing counsel and should make all appropriate objections. A list of common courtroom objections is attached to this syllabus. **BEWARE: CHOOSING NOT TO MAKE ANY OBJECTIONS IN THE HOPE THAT NOBODY WILL MAKE ANY DURING YOUR PERFORMANCE IS MISGUIDED - I AM PREPARED TO MAKE OBJECTIONS IF YOU DO NOT.**

10. **Grades.** Grading in this course is based upon your final trial. Your level of effort throughout the semester can increase but not reduce your final grade. However, unexcused absences will result in a lower grade. Due to relatively few class meetings, ordinarily no more than one absence will be excused.
11. **Trials.** Instructions regarding your pretrial conference and your trial can be found at the end of this syllabus. **PLEASE READ THEM CAREFULLY BEFORE YOU START PREPARING FOR YOUR TRIAL.**
**SYLLABUS**

**Tuesday, August 23 - Introduction and Theory of the Case**

Reading assignment - Lubet, Chapter 1 & 2

This class will cover preliminary administrative matters and will prepare you for next week's class. **IT IS ESSENTIAL THAT YOU ATTEND THIS CLASS AND HAVE READ PROBLEM 1 CAREFULLY BEFORE CLASS.** This problem is attached to the syllabus for those of you who don’t get a chance to buy your books before class.

Come to class prepared to describe the following as to each side of Problem 1:

1. Your legal theory of the case (why the law allows you to win);
2. Your factual theory of the case (what you will say really happened and why you know that is so); and
3. Your persuasive theory of the case (why it is fair and equitable for your client to win).

In addition to a "brainstorming" exercise on the facts and theory of the NITA Liquor Commission case, we will have a set of exercises on open-ended and leading questions. No preparation is necessary for this portion of the class.

At the end of the class tonight, you will receive a hand-out with further instructions on the Problem 1 and the theories to be employed for each side in preparing the direct and cross-examinations for next week's class.

**Tuesday, August 30 - Direct, Cross and Redirect Examination of Lay Witnesses I**

Reading assignment - Lubet, Chapters 3, 6 & 8

Performance Assignment - Problem 1 Direct, cross, and redirect examination of James Bier. Prepare witnesses as explained in General Instruction 5, above. Feel free to use any testimonial aids, e.g., diagrams drawn by the witness at trial or prepared by you or the witness before trial, on direct and cross examination.

**Tuesday, September 6 - Lay Witness Examination II**

Reading assignment - None - work on your performances
Performance assignment - Problem 2, both Brown and Byrd. Prepare witnesses as explained in General Instruction 5, above. Feel free to use any testimonial aids you choose. If pressed for time, prepare a portion of a direct or cross well, rather than the entire direct or cross poorly.

Tuesday, September 13 - Exhibits I - Documents

Reading assignment - Lubet, Chapter 9; Federal Rules of Evidence 104, 401-403, 803(6) and (8), 901, and 1001-1008.

Performance assignment - Offer and oppose the admission of the exhibits identified in Problems 22, 24 and 25. You will need to become familiar with the basic facts of the problems as well as the exhibit aspect of the problems. For the purposes of the exhibit exercises this week and next, students should pair up with another person in their group to prepare them to play the witness or witnesses necessary to offer the assigned exhibit.

Your preparation for this class should equip you to:

1. Make a statement of the purpose for which you would offer the exhibit at trial;
2. Lay a persuasive foundation for the exhibit (showing through questioning why the jury should give weight to the exhibit);
3. Lay a legal foundation (showing through questioning why the judge should allow the exhibit in evidence);
4. Make use of the exhibit after it has been introduced in the way you would in an actual trial; and
5. Consider how the exhibit could be made more persuasive by creative use of graphics, highlighting, demonstrative aids, etc.

Tuesday, September 20 - Exhibits II - Testimony Aids and Tangible Objects

Reading assignment - See Exhibits I assignment

Performance assignment - Offer and oppose the admission of evidence in problems 12, 16 and 19. Have a fellow student prepared as your witness(es), necessary to introduce the exhibits you are offering.
Your preparation for this class should equip you to:

1. Make a statement of the purpose for which you would offer the exhibit at trial;

2. Lay a persuasive foundation for the exhibit (showing through questioning why the jury should give weight to the exhibit);

3. Lay a legal foundation (showing through questioning why the judge should allow the exhibit into evidence);

4. Make use of the exhibit after it has been introduced in the way you would in an actual trial; and

5. Consider how the exhibit could be made more persuasive by creative use of graphics, highlighting, demonstrative aids, etc.

**Tuesday, September 27 - Impeachment & Rehabilitation**

**Reading Assignment** - Lubet, Chapter 5

**Performance assignment** - Problems 28, 29 and 33. For both problems be prepared to conduct both the cross (impeachment) and redirect (rehabilitation) examinations.

**Notes:**

(1) **At this class, we will discuss trial assignments for the final trials.** Please come to class having already identified the other person with whom you would like to be teamed for your trial, whether you want a civil or criminal trial, and on which of the available dates (to be announced) you prefer to try your case. **Tentative** dates are noted in the syllabus section on Trials.

(2) **You will be provided with the expert witness problem which will be discussed in detail at the next class.** It is essential for you to have carefully read this problem and Chapter 6 in Lubet on Expert Witnesses before the next class.

(3) **Assignments for the expert witness problem will be decided at this class.**

**Tuesday, October 4 - Lay Witness Examination III and Expert Witness Deposition**

**Reading Assignment** - Lubet, Chapter 8
Performance Assignment - Problem 9. Assume all exhibits have been stipulated to be admissible. Prepare witnesses as explained in General Instruction 5, above.

We will spend the second half of the class on Problem 9. The first half will be devoted to the expert witness problem for the next class. We will begin with a brief discussion of the problem with the experts. You will then take a deposition of the adverse expert, and defend the deposition of your expert. This is designed to both teach some deposition skills, and allow you to prepare for the examination that will take place in the next class. This will only work if you have given some thought to the problem before class.

Notes:

(1) The trial schedule will be announced at this class.
(2) This class often runs long.

Tuesday, October 11 - No Class - Fall Break

Tuesday, October 18 - Expert Witnesses

Reading assignment - Lubet, Chapter 7

Performance assignment - Problem to be provided - prepare direct and cross.

Tuesday, October 25- Opening Statement

Reading assignment - Lubet, Chapter 10

Performance assignment - Give the opening statement for the opposing party in your full trial (7 minute maximum). Don't prepare a 10 minute opening and try and squeeze it into 7; instead, prepare a 5 minute opening and allow it to expand to 7.

Tuesday, November 1 - Closing Argument

Reading assignment - Lubet, Chapter 11

Performance assignment - Class will meet in two groups tonight. Plaintiffs counsel and prosecutors in the final trial will meet from 6:30 to 8:00 p.m. Defense counsel will meet from 8:00 to 9:30 p.m. Your assignments is to give the closing argument for the party in your full trial. (15 minute
maximum). Don't prepare a 20 minute opening and try and squeeze it into 15; instead, prepare a 10 minute opening and allow it to expand to 15.

**TRIALS AND PRETRIALS**

November 8th - Full Trials

**NOTE:** **TRIALS WILL BEGIN ON NOVEMBER 8th; SPECIFIC DATES WILL BE ANNOUNCED IN CLASS. DO NOT MAKE ANY OTHER PLANS FOR THE WEEK FOLLOWING THE 18TH UNTIL YOU KNOW YOUR TRIAL DATE.**

Pretrials and trials will be governed by the rules provided below.

**LOCAL RULES OF COURT**  
(Revised: 2/06)

**RULE 100: GENERAL INFORMATION**

101 **Philosophy of Rules.** These rules will be construed to avoid delay and permit fair trials. The rules are stated in regular type. *Advisory comments are in italics.*

102 **Citation.** These rules should be cited as Local Rules [insert number], Duke.

103 **Pretrial Discovery.** No interrogatories or other formal discovery devices may be utilized. You may, subject to normal ethical limitations, interview opposing witnesses who are willing to talk to you.

**RULE 200: FINAL PRETRIAL CONFERENCE**

201 **Purpose.** The purpose of the pretrial conference is to consider and resolve legal and procedural matters that can be determined before trial, and to resolve any other matters that will expedite the trial.

202 **General Information.** Pretrial conferences will be held several days before the trials. All counsel must attend the Pretrial Conference. Typically, these conferences last about one half hour. Counsel are not required to wear courtroom attire.

202 **Required Exchange of Information Between Counsel Before Pretrial Conference.** At least twenty four hours before the pretrial conference, each party shall provide every other party:
1. Witness lists.

2. Exhibit lists.

3. Proposed fact stipulations.

4. Requested jury instructions. Specific jury instructions relating to the law and facts of each particular case are with the trial materials for that case. Ask your instructor for additional preliminary and general jury instructions such as credibility of witnesses, burden of proof, preponderance of the evidence, reasonable doubt, etc.

5. Proposed verdict form.

6. Any motions for determination at pretrial. Motions must include a list of all Rules of Evidence that will be argued as authority. Motions not exchanged will not be ruled on at the pretrial conference.

7. Any charts, blow-ups or other items to be used as evidence which are not exact copies of items in your trial materials. This requirement does not apply to items to be used solely in closing argument.

203 Preliminary Pretrial Conference Between Counsel. After the exchange of information required by Rule 202 and before the Pretrial Conference, all counsel shall meet to resolve the following matters:

1. Factual Stipulations.

2. Stipulations as to exhibits.


4. Motions. Counsel are encouraged to anticipate and to attempt to resolve evidentiary motions before the Pretrial Conference.

Stipulations and agreements on jury instruction, verdict form, and motions are not required. If counsel cannot agree on instructions, the verdict form, and motions, the Court will rule on these matters at the Pretrial Conference.

204 Conduct of the Pretrial Conference. The conference will consider the following matters, typically in the order shown below:

1. Stipulations. Inform the judge of any stipulations of facts or other stipulations reached between the parties relating to any aspect of the case other than exhibits which are considered later in the conference. There is no requirement, however, that the parties make any stipulations.
2. List of Witnesses. Each side must prepare before the pretrial conference a list of their witnesses in the order they will be called at trial. Only the witnesses listed in the trial materials may be called at trial. Prudence dictates that each party add a note at the bottom of their exhibit list saying, "All witnesses listed by the opposing party;" and, that any party with a burden of proof add, "All witnesses necessary for rebuttal." Next to each witness, each side should estimate the time necessary for direct and cross-examination of that witness. These estimates are not binding.

3. List of Exhibits. The parties shall present at the pretrial conference a list of all documents, charts, and exhibits of any kind that will be offered in evidence at the trial. All exhibits must be marked for identification before the conference: plaintiffs use 1, 2, 3, etc. and defendants use A, B, C, etc. You need not pre-mark items that will be used only to refreshing recollection or to impeach, or for closing arguments. No exhibit may be offered in evidence by a party on whose list the exhibit does not appear. As a result, prudence dictates that the exhibits list include catch-all language such as "any items listed by the [opposing party], or necessary for refreshing recollection or impeachment.

4. Stipulations Regarding Exhibits. The parties shall present at the pretrial conference a list of stipulations (if any) reached as to the authenticity or admissibility of exhibits. No stipulations, other than those contained in the case materials, are required.

There are two basic stipulations pertaining to exhibits -- admissibility and authenticity. A stipulation to the admissibility of an exhibit means that it will automatically be received into evidence if it is offered at trial. That fact that it will be admitted does not mean that it has been admitted. In order for the exhibit to be received in evidence, the proponent of the exhibit must offer it on the record at the trial. To do so at trial, the proponent need merely say, "Your Honor, we offer Exhibit 1 which the parties agree is admissible."

The other common stipulation on an exhibit is a stipulation to its authenticity. A stipulation to the authenticity of an exhibit means that the document is genuine and authenticity need not be established at trial. Even with such a stipulation, counsel must lay any other necessary foundation (e.g. hearsay, relevance, etc.).

5. Motions in limine. At the Pretrial Conference, the Court will rule on timely made and exchanged motions in limine at the pretrial conference. Motions must be in writing and must state any Rules of Evidence on which they are based. No authority other than the Rules of Evidence and their comments will be considered in ruling on the motions.
The emphasis of this course is on trial litigation, not motions practice. If in doubt, please put your emphasis on trial preparation. Think carefully about your motions and make the ones that are tactically advisable, but do not turn this into a legal research and writing exercise.

6. Jury Instructions. If the parties have not agreed on jury instructions, at the Pretrial Conference the Court will decide what instructions will be given. No jury instructions other than those included with your case file or obtained from your instructor will be considered unless opposing counsel received notice under Rule 202 of the request. Requests for other forms of the general instructions, i.e., credibility of witnesses, or preponderance of evidence, are discouraged.

7. Any Other Matters Which Would Expedite The Trial. At the Pretrial Conference, counsel should bring to the attention of the judge and attempt to resolve any matters which would expedite the trial. Any matters relating to the mock nature of the trial or the trial materials should be raised at this point. If counsel have a problem or foresee any difficulties relating to the mock nature of the trial, it should be discussed at the pretrial conference so that the trial runs smoothly and in a realistic fashion.

205 Pretrial Order. After the Pretrial Conference, the Plaintiff or Prosecution shall prepare for signature of all parties a Pretrial Order. A sample pretrial order is attached as Appendix A to these Rules. The purpose of this Order to provide the trial judge with the information necessary to judge the trial. The pretrial order must be signed by all counsel and presented to the trial judge before the trial begins. If the parties cannot agree on the contents of the Pretrial Order, notify the judge who presided at the Pretrial Conference immediately.

RULE 300: TRIAL

301 Jurors. Each student is responsible for providing two jurors for the next trial indicated on the trial schedule, except those in the last trial provide jurors for the first. Jurors should arrive about fifteen minutes before the trial is scheduled to begin. Jurors may not be law students. Each group of students is responsible for providing the juror they obtain lunch or dinner, as appropriate. Jurors should receive no other compensation.

302 Length of Trial. Trials will begin on time. Jurors will be needed for no longer than six hours but should be told that the trial and deliberations could last that long. Counsel’s commitment will be a maximum of seven hours. After the jurors depart, you will receive a critique from the judge, which will last no more than an hour.
Witnes ses. Each side must provide people to play the witnesses designated for their side; however, you need not call every witness for your side and you are free to call any of the other side's witnesses consistent with the fifth amendment. Witnesses may be law students, but you will probably prefer to have the roles played by lay people who better fit the descriptions of the witnesses. In fact, the learning experience is greatly enhanced when roles are played by people in those same roles in real life. If you choose to use a law student, you may not use a student who has taken this course.

The quality of the trial depends to a large extent on how well the witnesses know their roles. Witnesses should testify without notes unless use of notes is consistent with the part they are playing, i.e., police officers and doctors. Please explain to your witnesses what YR-1, YR-2, etc. mean. Also, tell them how to pronounce Nita and the names of other witnesses.

When Witnesses Must Arrive At Trial. Witnesses should be advised of the time they are to testify. If a witness does not appear on time, even if it is because the trial is running ahead of schedule, you will be asked to call another witness. If you have no other witnesses, you will rest your case without calling that witness. The burden is on you to make sure your witnesses are there.

Parties. The trial works better if witnesses who are parties attend the entire trial. This is particularly true of the criminal defendant since other witnesses may need to identify the defendant. This is a requirement; however, if the defendant does not attend the entire trial, at appropriate times when identifications would otherwise be made, the Court will instruct the jury that the parties have stipulated that if the defendant were present, the witness would be able to identify him or her.

Order of Trial. The order of trial will be as follows:

1. The Court will conduct a brief voir dire of jurors. No juror may be challenged.
2. Presentation of the case-in-chief for plaintiff (or defendant, if plaintiff has no burden of proof); case-in-chief for defendant (unless defendant went first); and, rebuttal by the party who went first.
3. Mid-trial motions, if any.
4. Presentation of the case-in-chief for the opposing party.
5. Rebuttal case, if any. Rebuttal usually is not necessary in mock trials.
6. Closing argument will begin with the party with the burden of proof (or the plaintiff, if both parties have a burden). Then the other side will close next.
Finally, the party that began the closing arguments will have an opportunity for rebuttal. *The term rebuttal is liberally construed.*

**307 Examination of Witnesses.** Only one counsel per party may examine any witness. Additionally, the counsel for each side who will examine the witness is the only counsel for that party who can object during that witness' testimony.

**308 Division of Labor Between Counsel.** The person who gives the opening statement should not give the closing argument. If your team has three members and you represent the plaintiff or prosecution, the same person should not do both closings. Also, every lawyer should conduct at least one direct and one cross-examination unless anticipated witness are not called. Beyond that, allocation of the work is up to each team with the goal being to make it as even as possible.

**309 Time Limits.** The time limits for the trial are:

1. Opening Statements 7 minutes per side **maximum**
2. Closing Arguments 15 minutes per side **maximum**
3. Witness Examinations 90 minutes per side **maximum**
   
   The 15 minute limit for closing includes the first and last closing for the side with the burden of proof. The 90 minutes limit for each party’s witness examinations include direct and cross examinations conducted by that party. *These Time Limits Are Mandatory.* Rather than rush, cover the most important points well and skip those points that are less important.

**310 Facts Not in the Case File.** If the case file does not include a fact that a witness would be expected to know, he or she may make it up, but the created fact must be one that neither helps your case nor harms your opponent's.

**311 Objections.** No objections may be made that "those facts are not within the materials." If you believe that the witness has gone outside the trial materials, then impeach the witness on cross-examination by using his or her statement or deposition.

**312 Attending Other Trials.** You may, and in fact are encouraged to, attend other trials before and after your own. You may not, however, attend a trial of the same case file you are trying before your case is heard.

**313 Cameras In The Courtroom.** We can tape your trial if you like. To do so, bring three rewound 120 minute VHS tapes. Only one set of tapes can be made per trial, so if more than one person wants a set, the originals will need to be copied.
Ex Parte Conferences. Although it is normally improper to have an ex parte conference with the Court, if you have questions about your trial, you are free to contact your instructor without notifying the other side. If the matter you raise is one that requires that opposing counsel be contacted, the Court will ask you to arrange a conference call or meeting.

RULE 400: COURTROOM DECORUM

401 Attire. For trials, counsel will wear suitable courtroom attire.

402 Leave of Court. Leave of court must be obtained before approaching the witness or the bench, asking a witness to approach an exhibit, or publishing an exhibit to the jury.

403 Addressing the Court. When addressing the Court for any purpose, including making objections, counsel will first rise.

405 Exhibits. Unless directed otherwise by the Court, before showing an exhibit to a witness, counsel will show it to opposing counsel or identify for the record the exhibit being shown.

406 Impeachment by Prior Inconsistent Statement. Before counsel reads from or asks a witness to read from a prior inconsistent statement, he or she should identify to the Court and opposing counsel the document, page and line or paragraph number.

404 Position In The Courtroom. When delivering an opening statement or closing argument and when examining witnesses, counsel may sit at counsel table or stand in any reasonable place in the courtroom. Counsel is not required to use a lectern in addressing the jurors or witnesses.
APPENDIX A: SAMPLE PRETRIAL ORDER

State of Nita                     Superior Court Division
County of Nita                    Trial No. _____

Plaintiff (or Prosecution),

v.                                  FINAL PRETRIAL ORDER

Defendant.

The parties, pursuant to Local Rule 205, Duke, file this Final Pretrial Order:

1. Stipulations

A. Stipulations Required By The Case File

B. Additional Fact Stipulations

2. Witnesses

A. Witnesses for the Plaintiff (or State)

   John Smith         20 minutes
   Mary Jones         5 minutes
   Dr. Jane Doe       30 minutes

B. Witnesses for the Defendant

   (See format for plaintiff's witnesses)

3. Exhibit lists and Stipulations as to Exhibits

A. Exhibits for the Plaintiff (or State)

<table>
<thead>
<tr>
<th>No.</th>
<th>Title</th>
<th>Stipulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Insurance Policy</td>
<td>Admissible</td>
</tr>
<tr>
<td>2</td>
<td>Letter to John Smith</td>
<td>Authentica</td>
</tr>
<tr>
<td>3</td>
<td>Deposition of Richard Jones</td>
<td>Authentic</td>
</tr>
<tr>
<td>4</td>
<td>Statement by Mary Williams</td>
<td>None</td>
</tr>
</tbody>
</table>

B. Exhibits for the Defendant
4. Jury Instructions. Include the verbatim text of all Jury Instructions agreed to by the parties in the order the parties want them given. If there were disputes, include only the text of those instructions selected by the judge at the Pretrial Conference. This section can be a "cut and paste" of photocopied instructions.

5. Proposed verdict form. Include the Verdict form agreed to by the parties or, if the parties did not agree, the verdict form selected by the judge at the Pretrial Conference.

6. Motion Rulings. Briefly state any motions considered by the judge at the Pretrial Conference and the rulings, if any, made. For example:

A. Plaintiff's motion to exclude any mention of liability insurance. Granted.

B. Plaintiff's motion to exclude any mention of plaintiff's conviction for tax evasion. Denied.

C. Defendant's motion to be allowed to use learned treatise. Ruling deferred until trial.

This _____ day of __________, 19__. 

Counsel For The Plaintiff (or State): Counsel for the Defendant:

__________________________________  ________________________________
__________________________________  ________________________________
__________________________________  ________________________________
__________________________________  ________________________________
APPENDIX B: MOTIONS IN LIMINE

Motions in limine are usually made for evidence which is clearly inadmissible or for evidence which is of such a nature that once the jury has heard it the cautionary or limiting instruction will not be effective (often characterized as "you cannot un-ring a bell"). However, many jurisdictions allow an affirmative motion in limine seeking a pretrial ruling that evidence will be admissible.

The judge at the pretrial conference will either rule on the motion at that time or reserve the matter to be handled at trial. The judge will rule on the motion at the pretrial conference when the evidence is such that even at this preliminary stage of the proceeding the law is clear that it is either inadmissible or admissible. That is, no matter what foundation is laid or how the evidence comes out at trial, the evidence is clearly either inadmissible or admissible. The judge will reserve the matter for trial when the evidentiary point is one that the admissibility of the evidence depends on how the facts are developed at trial. That is, a foundation for its admissibility must be laid at trial, the relevance of the evidence may or may not outweigh the prejudicial impact depending on what facts are developed at trial or, broadly speaking, the judge determines that the evidentiary point is such that it is best determined within the context of the facts as they are developed at trial.

If the judge grants the motion in limine to exclude evidence, the evidence, of course, may not be mentioned in the opening statements or otherwise brought to the attention of the jury by the counsel who opposed the motion. Many lawyers do not consider this sufficient protection since a witness may "inadvertently" blurt out the evidence at trial. Unfortunately, some lawyers play a part in this "inadventure" during the trial preparation -- "I can't ask you about this information, but __________________." The "blurring out" of the evidence totally circumvents the motion in limine and forces the lawyer to choose between requesting a mistrial and gambling on the jury verdict, a poor choice under any circumstances. To prevent this, many lawyers who are successful on a motion in limine then request the Court to order opposing counsel to instruct their witnesses not to blurt out the evidence or in any way bring it to the attention of the jury. Most judges will also add that they are holding counsel responsible for the conduct of their witnesses in this regard.

If the motion in limine is reserved for trial, attention should be given to the use of the evidence in the opening statements. The proponent of the evidence should consider that mentioning the evidence in the opening statement may be sufficient grounds for a mistrial if the evidence is later ruled inadmissible. However, the enticement to get the evidence out early and up front in the minds of the jury is often so great that counsel will gamble that it is admissible or not sufficiently inflammatory for a mistrial. Unfortunately, some lawyers do it intentionally either as a delaying tactic or when their client can afford protracted litigation. Therefore many counsel, as a matter of practice when a motion in limine is reserved, make a motion requesting that the evidence not be mentioned in the opening statement or otherwise brought to the attention of the jury until the Court has had an opportunity to rule on the admissibility of the evidence. It is an eminently fair
request and is usually granted. If this request is granted, again many counsel request the Court to order opposing counsel to instruct their witnesses not to blurt out the evidence and that they are not permitted to testify about that evidence unless they are specifically asked about it.

If a motion in limine has been reserved for trial and counsel has been instructed not to bring the evidence to the attention of the jury until the court has ruled, the proper procedure is for counsel, at the appropriate time during the trial (the foundation has been laid or the facts are fully developed), to approach the bench and request a ruling on the admissibility of the evidence that was the subject of the motion in limine.

The rulings of the judge at the pretrial conference shall not be re-litigated with the trial judge. The trial judge will be aware of the action taken on the motions in limine from the written pretrial order. Counsel may wish to direct the trial judge's attention to the pretrial order for informational purposes, particularly any motions which were reserved for his/her action during the trial. However, to preserve your record for appeal, if important evidence was excluded, you must make an offer of proof at trial (outside of the jury’s hearing) so the appellate court knows what was excluded. If evidence you believe is objectionable was ruled admissible before trial, to preserve the point for appeal, renew your objection when your opposition offers the evidence at trial.