

CREATIVE MOTION PRACTICE

**Trial Organization, Preparation &
Strategies: Skills that Will Give You the
Edge**

by:
Sam D. Dennis
Maniklal and Dennis, L.L.C.
and
John Lentine
Sheffield & Lentine, P.C.

**“ Preparation is the be-all of good trial work.
Everything else-felicity of expression,
Improvisational brilliance-is a satellite around the sun.
Thorough preparation is that sun.”**

Louis Nizer

Pretrial motions are often vehicles with which a criminal case and your theory of defense can be advanced. Many criminal defense practitioners believe that a pre-trial motion should only be filed if you believe that you can win it. A pre-trial motion should be filed in all situations where you have a good-faith basis upon which to make a motion. Remember, the decision in *Miranda* was not the result of one individual motion filed one time. It was the result of a creative motion that was filed many times before the Supreme Court actually took it seriously. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Forms

Lawyers often like to have forms as a guide for preparing all sorts of pleadings. **Forms are extremely dangerous.** Have you or anyone you know ever filed a motion in a murder case that applied in a DUI case? Or used “Mr. Client” instead of their client’s name? Well, maybe you haven’t seen an example that bad, however, we have all seen examples (if we are not guilty of it ourselves) where a pre-trial motion was filed from a form and when you prepared for the hearing (this means the first time you read the motion because it was a form), you realized that it applied to a different case. In this situation, you go into the court room wondering, “Has the prosecutor or the judge read it? Will I have to defend my pleading?” Obviously you do not want to be a position of defending your pleading; you want to be in a position of arguing the merits of your motion. Forms can be helpful but they are no substitute for analyzing and developing the knowledge of your case.

Out of an abundance of caution, we submit to you a typical table of contents that is the face sheet of several of Sam’s pre-trial motions packages. Obviously the style of the case and the correct indictment

numbers need to be added. Generally, it is good to file or consider filing the following motions in almost every case:

1. Motion for Disclosure of Impeaching Information (or its equivalent in your jurisdiction)
2. Motion to Preserve Evidence
3. Motion to Produce Exculpatory Evidence
4. Demand of Defendant's Statements
5. Demand for List of Witnesses
6. Motion to Suppress Statements
7. Motion for Disclosure of Rule 404(b) evidence
8. Demand for Disclosure of State's Experts and the data and facts underlying their opinions
9. Motion to Extend Time to File Pretrial Motions
10. Motion for More Definite Statement
11. Motion to Preserve Evidence

We have attached, as an example of this initial table of contents that Sam has used in many cases. We generally request that our office staff provide “basic” motions along with the newly opened file and the newly received discovery from the State or prosecutor. If you do not have reciprocal discovery, these motions should be given to you after your staff member, or you, type up your “Brady” review. These basic motions should be regarded as a **starting point**. This is not your motion package in every case. They should, however, be filed in almost every case.

Should I file a Motion to Suppress Statements if there are no statements?

Answer: **Yes.** If there are no statements or no statements of the defendant have been provided to you, a Motion to Suppress Statements will be a very short hearing. However, it does require that the prosecutor on the record says that there are no statements. If the

prosecutor says on the record that there are no statements that the defendant made, then you may simply ask the Court to grant your Motion to Suppress Statements. There is no harm in granting the motion because there are no statements. Therefore, when the inevitable “statement” is “remembered” by the officer at trial, he will not be able to fudge and use it. This motion is a way of wearing your proverbial belt and suspenders.

Caveat: Be very cautious and listen carefully to what the prosecutor says on the record regarding the Motion to Suppress Statements. For instance, a prosecutor may say, “There are no *in custody* statements made by the defendant.” In this situation or something like it, you must insist and demand a hearing on the issue of suppressing the statements. These are the basic motions that a criminal defense lawyer practitioner should start with in almost every case.

Building a Better Motion

One of the best articles concerning pretrial motion practice is “The Building Blocks of Capital Cases: Motions and Objections,” The Champion, p. 16 (March 1984), by Millard Farmer and Joe Nursey. While specifically dealing with pretrial capital motion in this article, the basic elements necessary in constructing a better motion is universal:

- I. HEADLINE/TITLE - They suggest making your motions eye-catching to the reader rather than same old same old title.

- II. THE “CAN OPENER” - The opening phrase- simple, direct, and free of convoluted legalese.

- III. THE LEAD – The next sentence(s), highlighting the point you are trying to make.

- IV. THE FACTUAL BASIS – The heart of the motion, facts favorable to the defense and to the issues of the motion – the opportunity for unanswered advocacy.

- V. THE INSTRUCTIVE ELEMENT – A mixture of law and facts to persuade the court that the motion is based on reason, law, and morality.

- VI. THE RULE OR STATUTORY BASIS - Stated concisely for persuasive impact and record preservation.

- VII. THE CONSTITUTIONAL BASIS- Raising all all issues to a constitutional level in both a state and federal context.

- VIII. RELIEF – Seek to extend the law by the relief requested. Request both a remedy that it would be error to deny, and a remedy that aims for a more perfect level of justice but that may not be granted under the current state of the law.

Also use the client’s name whenever possible in lieu of the word “defendant” throughout your motions. It is an absolute necessity to personalize the client with a jury and it should be the same with the court. Another unmentioned goal of motion practice is to promote fairness throughout the proceedings. An accused person may well

have a greater chance at fair treatment from the court when he or she is thought of and referred to as more than a defendant.

Another extremely important aspect of effective motion practice is that is imperative that any motion has some evidence upon which a ruling can be based. Unless an issue in motion is solely a legal one, there has to be some factual record upon which an error can later be alleged by the denial of the motion. So, in offering evidence via motions, evidentiary hearings to present testimonial, physical, and documentary evidence is critical. Motions themselves need exhibits such as affidavits, records, etc. If a court refuses an evidentiary hearing, a written offer of proof on the record is essential to preserve an issue. An evidentiary hearing also gives you the opportunity to use subpoena power to secure the production of other documentary evidence.

Magic Language, Magic Buzz Words

There are no magic words and no magic language and no magic buzz words in pre-trial motion practice. There is no limit to what a practitioner may develop or create in any one particular case. Here are some ways to think about your case when building your better pre-trial motions:

Wish List: As you are reading through the State or prosecutor's discovery, develop your wish list. A wish list is anything and everything about the case that you wish you could have, or do or, most importantly, exclude in the case.

1. What do I wish I could have?

- a. Photographs
- b. A court order to visit the scene
- c. A prior criminal history of all of the witnesses
- d. A photograph of the interview or interrogation room
- e. Your own expert
- f. Etc.

The "wish list" of what you would like to have in a case is limited only by your creativity. It is limited only by what you can think of.

Once you have decided what it is you want, it is important to

consider the law in any particular area. For instance, if you want your own expert, and assuming this is an indigent or court appointed case, does the State have a requirement to provide you with funds to hire an expert of your own choosing? Even if they don't have one themselves? Are there constitutional reasons that require it?

2. What do I wish I could do?

Another way of analyzing your case as you are working through the State or prosecutor's discovery is to ask yourself the question, "What do I wish I could do?" In other words, what do I wish the Court would let me do? For instance:

- a. Can I visit the complainant's scene, the bedroom (assuming it is a rape case), the "crime scene."
- b. Will the Court order a law enforcement officer to accompany me to the "high crime area"?

- c. Will the Court order witnesses, including police officers, to talk to the defense lawyer?

3. What do I wish could be excluded?

Okay, everyone wants everything excluded. It is unrealistic to assume that you will win every motion to exclude or suppress any evidence. However, if there is evidence in any case, an effort to exclude it should be made. There is no limit to the way evidence can be attacked. There are the obvious constitutional arguments, but there are also fairness arguments that may or may not be found verbatim in the constitution or in statutes. For instance, a sample title for a motion to suppress might be Motion to Suppress Because the Police Lied to a Citizen. This can be used, for instance, in an undercover drug operation where the police have obviously lied to your client about their identity.

The Theory of Defense and Pre-Trial Motions

The theory of defense should always be considered in every pre-trial motion. Filing a pre-trial motion should not be done just for the sake of filing. However, filing a pre-trial motion should always be done consistent with your theory of defense or in a manner to get whatever it is you want. As well as having a theory of defense overall in a case, you can certainly have theories for certain pre-trial motions. Here are some examples of pre-trial motions and their titles:

- Motion to Produce, Inspect, Examine, and Photograph One Mitsubishi Eclipse
- Motion for Scientific Examination of Swabs and Alleged Victim's Blood
- Motion for Funds to Hire Investigators and Expert Witnesses
- Motion for Scientific Examination of Fingerprints

- Motion for DNA Examination of Defendant's Wife's Unborn Child
- Motion Reserving the Right to File Additional Motions
- Motion to Suppress Audio Tape
- Motion to Produce all Documents Alleged to Have Been Signed or Authored by the Defendant or in the Alternative Motion to Suppress
- Motion to be Tried Last in Line
- Motion to View, Inspect, Photograph, Videotape, and Measure Alleged Crime Scene
- Motion for an Order to Make Inmate Witnesses Available to Defense Counsel
- Motion to Disclose all Lies, Fabrications and Misstatements made by the alleged victim other than those previously disclosed by the State to the Defense
- Motion to prohibit the term "victim" (if your theory is there really is not victim just an "accuser" or "complainant")

- Motion to Disclose Identity of Confidential Informant and the Informant's "Handler"

Conclusion

In addition to the creation or building of pretrial motions, they must be prepared and organized so that each motion builds upon the one before it .We suggest that you file a motion index and/or proposed motion hearing outline when you file a large number of motions. This will give the court direction and, hopefully for you, will convince the court to hear the motions as they are outlined. Ultimately, your assessment of the facts particular to the given case drives what should and what should not be filed. Once you decide what motions to file, you must consider the order in which you present them. For example, you should not agree to litigate suppression issues until every issue of discovery is disposed of unless the suppression motion will dispose of the case entirely and can be resolved based on information already provided, it is imperative that a suppression hearing not be held until you have received all the information concerning the investigation of the case.

Finally, some courts attempt to put "deadlines" on the filing of motions. If a motion to extend the time to file pretrial motions is not

granted you must challenge and litigate that denial to the hilt. This may mean filing motions under seal with an affidavit explaining why the motion must be filed. This may mean running afoul of contempt. This may mean litigating issue to the appellate courts. You must be prepared to travel every legal avenue to protect your client.

We hope these ideas, concepts, and motions included in this outline prove helpful to you and please feel free to contact us for any assistance in this area.

**IN THE SUPERIOR COURT OF LOWNDES COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,	:	
	:	
	:	
vs.	:	INDICTMENT NO.: XXXXXXXX
	:	
	:	CHARGE: FELONY
	:	AGGRAVATED ASSAULT ON A
	:	CORRECTIONAL OFFICER
Defendant.	:	

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0-2 min	1. Motion for Leave to File Out of Time Motions
0-2 min	2. Motion to Preserve Evidence
0-2 min	3. Motion to Produce and Motion for Exculpatory Evidence
0-2 min	4. Demand of Defendant's Statements and Demand of Scientific Reports
0-2 min	5. Demand for List of Witnesses
5-10 min	6. Motion to Suppress Statements
10-15 min	7. Motion to Suppress Evidence
10-12 min	8. Motion to View, Inspect, Photograph, Videotape, and Measure Alleged Crime Scene
10-12 min.	9. Motion for an Order to Make Inmate Witnesses Available to

Defense Counsel

10-12 min. 10 Motion to Produce.

IN THE SUPERIOR COURT OF LOWNDES COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA :
 :
 : CHARGES:
 vs. : FELONY: ARMED ROBBERY;
 : POSSESSION OF A KNIFE
 : DURING COMMISSION OF
 : A CRIME;
 : MISDEMEANOR:
 Defendant : CRIMINAL TRESPASS

TABLE OF CONTENTS

0-2 min	1.	Demand for List of Witnesses
0-2 min	2.	Demand of Defendant's Statements and Demand of Scientific Reports
0-2 min	3.	Motion to Produce and Motion for Exculpatory Evidence
0-2 min	4.	Motion to Preserve Evidence
0-2 min	5.	Motion for Disclosure of Impeaching Information
0-2 min	6.	Motion to Suppress Statements
5-10 min	7.	Motion to Produce, Inspect, Examine and Photograph One Mitsubishi Eclipse
10-15 min	8.	Motion to Inspect, Examine, Photograph and Test Co-Defendant's Machete
0 – 5 min	9.	Motion for Scientific Examination of Swabs and Alleged Victim's Blood
0- 5 min.	10.	Motion for Funds to Hire Investigators and Expert Witnesses
0- 5 min	11.	Motion for Scientific Examination of Fingerprints
0– 5 min	12.	Motion for DNA Examination of Unborn Child

IN THE SUPERIOR COURT OF LOWNDES COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA

vs.

Defendant.

:
:
:
:
:
:
:

CHARGE:

WARRANT NO.:

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8. Motion to Suppress Audio Tape
9. Motion to Produce All Documents Alleged to Have Been Signed or Authored by the Defendant or in the Alternative Motion to Suppress
10. Motion to Produce
11. Notice to Produce
12. Defendant's Witness List

