

Monday, March 26, 2007

### The potential gold of criminal motions.

Most jurisdictions set strict deadlines for filing and responding to criminal and civil case motions. A colleague once humorously asserted that the criminal rules are written to help prosecutors rather than to help defendants; sadly, many rules seem to fit that concept. (Image from public domain). One day a criminal defense colleague remarked with surprise to me: "You file and litigate motions?" Unfortunately, he did not seem to be joking. As dull as the written procedural rules, procedural and substantive statutes, and court orders may often appear on their face, those rules and laws provide criminal defense lawyers with many critical and powerful swords and shields to defend their clients. The key for the criminal defendant is to achieve the best possible result, rather than needing to obtain that result with a sensational flourish. Often the governing procedural rules provide that mechanism to success -- even when the mechanism is far from sexy -- including, but not limited to, keeping out unlawfully seized evidence, keeping out damning testimony when chain of custody is not proven, keeping out damning hearsay evidence, and forcing the prosecution to dismiss a case by referring to courts' procedural rules and practice in successfully opposing a prosecutor's motion to continue a trial date. As but one of many examples, I once used the District of Columbia's procedural rules to lead the prosecutor to dismiss my client's drunk driving prosecution when the prosecutor had failed to file a written response to my procedural motions. The prosecutor emphatically informed me that he would simply re-charge the case and withdraw the last plea offer. This all happened over five years ago, and the prosecutor never re-charged the case, and it now is too late for him to do so. Pursuing well-argued written motions and motions hearings sometimes is the key to victory and pleasant surprises. In the pleasant surprise department, one day I was chewing the fat with my opposing prosecutor while waiting for the courtroom to open for us to argue motions in a drug case. The judge advised the prosecutor to call his first witness. The prosecutor asked for fifteen minutes to get his witness there, who was on call. The judge refused to wait, and I won my motion to suppress evidence. Aside from pleasant surprises, the arguing of motions on paper and in court can help educate the judge about the defense's theory of the case and about the applicable law; this is preferable to leaving the judge only to make on-the-spot decisions during the trial. Moreover, the motions hearing enables the lawyer to ask open-ended questions, which often provides more information to prepare for cross examination of opposing witnesses, which ordinarily is controlled and filled with yes-no questions. In the well-argued motions department, recently I obtained a diversion-dismissal agreement with a prosecutor only after all parties and the judge had invested substantial time into the hearing on my motion to suppress evidence in an assault case. The thrust of my motion was that the police unlawfully kept my client detained even after an unduly suggestive on-scene identification of him. I argued that absent the unlawful ongoing detention, my client would have been released, nobody would have known his name or address, nobody would have known who to prosecute, and, therefore, none of us would be in court on my client's case. The judge was skeptical about this argument, where two prosecution witnesses at the hearing positively identified my client (which was easy to do, with him being the only non-lawyer at the counsel tables) as the assailant, and testified that the police did not ask them for an on-scene eyeball identification. The motions hearing in this assault case started at the end of the court's docket. The prosecutor asked his witnesses many questions about the alleged assault rather than just about the identification, and this helped me very much in further crystallizing my trial strategy. Ordinarily, it is advisable to hold motions hearings prior to the trial date. Such an approach, for instance, provides time to obtain and subpoena any needed additional evidence and witnesses, and to obtain a transcript of key testimony of opposing witnesses. In this instance, the motions hearing immediately preceded the trial, because it was a bench trial for a matter jailable no longer than 180 days in a jurisdiction (Washington, DC) that does not ordinarily afford jury trials where the maximum possible sentence is not longer than 180 days. At the end of the day during our motions hearing, the judge instructed the parties to return the next day, when just before the lunch break, the judge informed both parties of concerns he had about the strengths and weaknesses of each side on my motion to suppress evidence. When the judge broke for lunch, I saw this as a fresh opportunity to reinvigorate my efforts to dispose of the case without a trial or guilty finding. I suggested to the prosecutor that a diversion-dismissal agreement (with conditions on my client for obtaining the dismissal) would help both parties hedge their bets. By avoiding collapsing the motions hearing into our trial itself, I gave the prosecutor more opportunity to consider my diversion proposal. Had the motions hearing and trial been collapsed together, jeopardy already would have attached with the commencement of testimony, and diversion probably would not have been considered by the prosecutor, in that the diversion program delays the case several months to a status conference, at which the case may be set for trial if the defendant has not satisfied the conditions for obtaining a diversion dismissal. About fifteen minutes before court was to have resumed, we had a diversion-dismissal deal. One of my colleagues who brainstormed the trial with me came to the courtroom after the lunch break specifically to watch the trial, only for me to tell him that the fruits of our brainstorming would not be played out at trial. The key to obtaining the diversion-dismissal result in this case was investing time, persuasion, and skill. Prosecutors often can obtain convictions without thorough trial preparation. However, criminal defendants' lives and liberty are on the line and need thorough case preparation from their attorneys.

For that reason, for instance, I visited the scene of the alleged assault prior to our motions hearing and trial date, and spoke with the complainant at the scene. Sometimes taking the trouble to visit the scene and to speak with witnesses yields gold, sometimes not. However, the only way to know if gold will be yielded is to search for it, and sometimes the gold will not make itself readily apparent until as late as the trial date. Pursuing thorough case preparation also helps earn client confidence in the criminal defense attorney. With increased client confidence, the criminal defense lawyer can focus on winning and obtaining more confident and persuasive testimony from the client if the client testifies (and more beneficial consultations with the client before and during the trial), and a more persuasive client presentation to the judge at sentencing in the unfortunate event that the client is convicted. The value of investing time into thorough case preparation reminds me of a joke once told by one of the nation's premiere cross-examination teachers, that instead of going out on Saturday nights, he stayed home preparing for cross examination. Jon Katz.

Posted by Jon Katz in Criminal Defense at 06:00