Chapter 16

Motions Hearings; Motions Arguments

Part A. Motions Hearings Generally

§ 16.01 EVIDENTIARY AND NON-EVIDENTIARY MOTIONS HEARINGS

Section 7.01 *supra* discusses the various aims that defense motions can serve. Section 7.02 provides a roster of motions counsel should consider. Section 7.03 examines the strategic question whether counsel should raise issues by pretrial motion or at trial when local practice allows both options. It concludes with a discussion of tactics and procedures relating to motions *in limine*. Sections 7.04-7.06 deal with other procedural aspects of motions. Sections 7.08-7.09 discuss the drafting of written motions and the advisability of invoking state constitutional law as well as federal constitutional law in both written and oral motions that raise constitutional claims. Section 7.07 canvasses considerations bearing on the decision whether to present claims in the form of an evidentiary motion or a non-evidentiary motion. That section is the prelude to this one.

Depending upon the type of motion involved and the specific facts at issue on the motion, a motions hearing can be either a non-evidentiary legal argument by the attorneys or a trial-like evidentiary hearing.

Motions that raise purely legal issues, such as motions challenging the sufficiency of the Petition or the jurisdiction of the court (see Chapter 17) and motions for a bill of particulars (see § 9.07(a)) are presented at non-evidentiary hearings, since they involve no factual disputes that need to be resolved through the presentation of testimony. The same is true of motions that turn upon facts already known to the court, such as most motions for recusal of the judge (§§ 20.04-20.07 *infra*), or facts fully ascertainable through a review of court records, such as most motions to dismiss the Petition on double jeopardy grounds (§ 17.08 *infra*) or for a violation of speedy trial guarantees (§ 15.04 *supra*).

The quintessential type of motion that turns upon factual issues and therefore requires an evidentiary hearing is a motion to suppress evidence. Motions to suppress tangible evidence (Chapter 23), incriminating statements (Chapter 24), and identification testimony (Chapter 25) all typically result in an evidentiary hearing followed by legal arguments on the law and facts. In some jurisdictions the defense must demonstrate the right to an evidentiary hearing by arguing, in a non-evidentiary legal argument, the sufficiency of the facts alleged in the suppression motion to state a claim under the applicable law. See §§ 7.06-7.08 *supra.* The prosecutor can, of course, obviate the need for an evidentiary hearing on a motion to suppress by stipulating to the facts alleged by the defense, thereby reducing the hearing to a legal argument on whether the stipulated facts satisfy the legal rules governing suppression.

Local practice may require that a motion for an evidentiary hearing be supported by affidavits setting out the facts that the respondent intends to establish through testimony at the hearing. See § 7.06 *supra*. This requirement for a *preliminary* demonstration of the factual merits of the respondent's claim to a motions remedy is distinct from the procedure of submitting the motion for final adjudication of the merits on affidavits instead of live testimony. These procedures are discussed in §§ 7.07-7.09 *supra*, together with the relevant tactical considerations in handling them.

Motions for severance (Chapter 18), motions for discovery (§ 9.07 *supra*), and motions to dismiss for prosecutorial misconduct can be either evidentiary or non-evidentiary, depending upon the specific issues and facts that they raise. Thus, for example, a motion to sever co-respondents based upon a co-respondent's statement implicating the respondent (see § 18.10(a) *infra*) would ordinarily go to a non-evidentiary hearing in which the judge reviews the statement and hears arguments on its legal implications, but a motion to sever based upon the defense's intention to present the testimony of the co-respondent in the defense case might necessitate an evidentiary hearing on the contents of the testimony. See § 18.10(b) *infra.* Most motions for discovery turn upon undisputed facts about the general nature of the materials that the prosecution is unwilling to turn over to the defense; but a particular discovery motion could involve an evidentiary hearing on the question, for example, whether witnesses were unconstitutionally instructed by the prosecutor or police officers to refuse to speak with defense counsel and his or her investigator. See § 8.13 *supra.* Motions to dismiss for prosecutorial misconduct might turn upon facts already known to the judge – such as acts of misconduct that occurred in proceedings at which the judge was presiding, or acts reflected in the transcript of a prior proceeding – or they might, in certain cases, require direct and cross-examination of the prosecutor and witnesses to the prosecutor's behavior outside the courtroom.

Motions for a change of venue (§§ 20.01-20.03 *infra*) and motions challenging jury selection procedures (§ 21.03 *infra*) may turn upon case-specific facts (such as the nature and extent of prejudicial pretrial publicity in the case) or upon more general, less disputable facts (such as the county's standard procedure for selecting the venire). Some jurisdictions require that the facts supporting such motions be established through affidavits; other jurisdictions require that the facts be presented at an evidentiary hearing; still others permit the defense to choose between these two options. The factors that counsel should consider in making the choice are summarized in § 7.07 *supra.*

§ 16.02 SCOPE OF THE CHAPTER

The following sections deal solely with non-evidentiary motions hearings, describing the procedures followed in such hearings and suggesting approaches to take in arguing motions. Techniques for conducting evidentiary hearings on motions to suppress are covered in Chapter 22; and much of the tactical advice offered in that chapter applies to other evidentiary motions hearings as well. See, *e.g.,* §§ 22.02, 22.04-22.06 *infra*.

Part B. Non-Evidentiary Motions Arguments

§ 16.03 PROCEDURE

Usually, defense counsel, as the proponent of the motion, argues first, and the prosecutor responds thereafter. Depending upon local practice and the preferences of the judge presiding over the motions hearing, defense counsel may or may not be offered the opportunity to reply to the prosecutor's arguments. Counsel should always request leave to reply if s/he has something useful to say, whether or not rebuttal argument is standard operating procedure in this court. When practicing in courts that are less formal, where the question of who argues first is decided by which lawyer starts talking first, defense counsel should usually seize the initiative and speak first. The attorney who argues first has the invaluable opportunity to acquaint the judge with the facts and issues in the light most favorable to the presenter – a matter of particular importance inasmuch as the judge may very well not have read the motion. To some extent the first speaker can also control the order in which issues are taken up, addressing first the issues on which s/he is strongest.

Most judges conduct motions arguments like appellate arguments, feeling free to interrupt and pepper attorneys with factual and legal questions. Techniques for responding to judges' questions are described in § 16.07 *infra.*

Although counsel has the right to object to statements made by the prosecutor, many judges insist that counsel refrain from interrupting his or her opponent and instead make all objections at the conclusion of the prosecutor's argument. If this is the local custom, counsel should conform to it *unless:* (i) appellate caselaw suggests that "contemporaneous objection" rules require counsel to object at the moment when the prosecutor makes the improper statement; or (ii) the prosecutor is reciting information that is both very likely to be ruled inadmissible and strongly prejudicial to the respondent, in which case defense counsel should object and insist that the judge prohibit the prosecutor from continuing to relate the prejudicial information.

§ 16.04 GUARDING AGAINST UNDUE DISCLOSURES OF DEFENSE TRIAL EVIDENCE AND TRIAL STRATEGY

Whenever s/he is arguing pretrial motions or conducting any type of pretrial hearing, counsel must carefully guard against revealing to the prosecutor aspects of the defense trial evidence or strategy. This is particularly important with respect to matters that involve weaknesses of prosecution witnesses (such as their inconsistent statements to defense counsel's investigator) when the prosecutor does not already know about these matters, since their disclosure could lead to the prosecutor's coaching the witness to avoid defense traps.

Usually, the objective of avoiding revelation of defense secrets will not conflict with the objective of winning a motions argument. Most non-evidentiary motions focus upon aspects of the legal history of the case (such as the length of delays, as pertinent to speedy trial issues; the

existence and nature of prior proceedings, as pertinent to double jeopardy issues; and so forth) that do not implicate the facts of the offense and accordingly do not call for any discussion of defense evidence or the defense theory of the case. However, some motions may be problematic. For example, when counsel is litigating a motion for severance of respondents on the ground of conflicting defenses, see § 18.10(c) *infra,* the judge may well reject counsel's attempt to describe his or her projected defense in broad, ambiguous terms and may demand of counsel a detailed description of the defense that counsel will offer at trial as a predicate for the judge's assessment of whether that defense so severely conflicts with the co-respondent's as to require a severance. Or a motion for diversion (see Chapter 19) might well be strengthened by a disclosure of facts that show the respondent to be innocent or, at worst, a passive follower in a crime committed by an older and more aggressive youth or adult.

Whenever confronted with the dilemma of whether to reveal defense secrets whose disclosure might win the motion for the defense, counsel must calculate the relative prospects of winning the motion with and without the revelation; whether winning the motion will terminate the case, and, if not, the degree to which winning the motion would improve the defense's chances of winning the trial; and the degree to which revealing the defense evidence or trial strategy would impair the defense's chances of winning the trial. In unusual cases in which the revelation is extremely important to winning the motion, extremely damaging to the defense's chances of winning the trial, and arguably protected by the respondent's Fifth Amendment Privilege Against Self-Incrimination (see § 9.12 *supra*), counsel should consider asking leave to present certain facts or arguments to the court *ex parte,* either in a sealed affidavit or in chambers. Judges will be resistant to this suggestion because it is untraditional and deprives the prosecutor, to some extent, of the right of reply. But proceedings conducted partly in the open and partly *ex parte* are becoming customary in a number of contexts (such as defense motions for state-paid expert assistance (see § 11.03(b) *supra*); prosecution submission of prior statements of prosecution witnesses to the court for screening before their production to the defense at trial (see § 27.12(a) *infra*); and prosecution submission of electronic surveillance logs to the court for screening and redaction before their production to the defense), and it is therefore possible that the judge will consider a similar procedure in the present context. In theory, the same request could be made in all cases in which the information that counsel seeks to withhold from the prosecutor is defense "work product" (see § 9.13 *supra*). But this is a very dangerous position for the defense to urge in most jurisdictions, because "work product" protection is usually extended to the prosecutor as well as defense counsel, and the defense has much to lose from any general legitimation of *ex parte* proceedings as a means of limiting pretrial disclosure in a system in which the prosecutor has every investigative advantage over the defense. See Chapter 9.

§ 16.05 THE EXTENT TO WHICH COUNSEL SHOULD ORALLY RECITE FACTS AND LAW ALREADY SET FORTH IN THE MOTION

In arguing a motion, counsel cannot assume that the judge has read the motions papers or any other pleadings in the case. Many trial judges are so overloaded (or lazy) that they are unable to find the time to read motions papers. Or they are prevented from reading particular motions

papers because the administrative processes of the court have caused the motion to sit unread in the clerk's office, awaiting filing in the court file. Nor can counsel assume that the judge will supplement what s/he hears in the oral argument by reading the motion and other pleadings after the argument. Many trial judges rule on motions from the bench at the conclusion of the attorneys' arguments.

Accordingly, unless counsel knows for certain that the judge has read the motion (as, for example, when the judge's opening remarks or question refers to a particular passage in the motion), counsel will need to recite in the oral argument any facts and law that are essential to the defense position. On the other hand, counsel cannot take the risk of offending the judge by stating or even implying counsel's assumption that the judge has not read the motion. For this reason counsel should avoid giving the impression that s/he is reiterating information and legal analysis contained in the motion. Also, as explained in § 16.06 *infra,* counsel typically wants to avoid engaging in detailed legal documentation in the oral argument.

Usually, the best way of reconciling all of these concerns is to touch upon each of the essential facts and legal points, while mentioning the pages of the motion on which important legal points are more extensively developed and supported with citations. As long as counsel couches the references to the body of the motion as if they were shorthand substitutes for lengthier argument rather than directions to the judge to read a motion s/he has never looked at, this approach will be inoffensive. It may also have the salutary effect of inducing the judge to read at least those portions of the motion prior to ruling, if s/he has not done so already.

§ 16.06 THE INADVISABILITY OF STRING-CITING CASES OR ANALYZING COURT DECISIONS AT LENGTH

Counsel should almost never recite strings of citations to court decisions or engage in complex legal analysis in oral argument. Such matters are extremely tedious, and counsel's dwelling on them may lead the judge either to tune out or to cut counsel's argument short. Moreover, because these are not matters that the judge is going to remember (and few judges take notes during attorneys' arguments), spending time on these matters is unproductive and wastes the opportunity to use the argument to make more memorable and persuasive points.

As a general rule of thumb, counsel should treat the law bearing on the motion merely as a legal framework for organizing the key points to be made about the case at hand. S/he should state the legal framework simply and briefly and then devote most of the argument to fitting facts into that framework. Counsel should focus particularly on things that: (i) are dramatic (speaking to the heart of the case and making the judge *want* to rule in the respondent's favor); (ii) are factually persuasive; and (iii) give the judge some overall feeling about the case, enabling him or her to see the forest rather than the trees.

In those cases in which it is necessary to depend upon detailed analysis of prior caselaw, counsel should ordinarily set forth the analysis in the written motion and then direct the judge's

attention to the relevant pages of the motion instead of orally reiterating the analysis. See § 16.05 *supra;* see also § 22.06 *infra.* If counsel refrained from setting forth a detailed legal analysis in the written motion for strategic reasons (see § 7.08 *supra*), s/he can sometimes offer to brief the issues in a supplementary memorandum of points and authorities. But this is more commonly done in argument at the close of an evidentiary motions hearing, particularly one in which extensive testimony has been taken. It is often impracticable in a non-evidentiary hearing, either because the judge intends to rule from the bench or because counsel simply has no good reason for failing to brief the issues fully beforehand. When, in these or other situations, counsel's only option is to analyze the caselaw orally, s/he should bring to the argument copies of any court decisions that were not amply covered in the written motion, and, upon reaching the points in the argument that depend on those decisions, offer to hand copies of the decisions to the judge and prosecutor rather than citing and quoting at length. Counsel can then alleviate much of the tedium and confusion of oral legal analysis by directing the judge's attention to relevant passages of the opinion (which should be highlighted, if they are short), essentially using the opinion as a prop in counsel's argument.

§ 16.07 THE IMPORTANCE OF BEING RESPONSIVE TO THE JUDGE'S QUESTIONS

The key to arguing motions is to be responsive to the judge's questions and address his or her concerns as thoroughly as possible. Since most judges rule on motions from the bench, they depend upon counsel's answers to their questions to resolve the issues that the judge finds most troublesome. The judge's questions will usually pinpoint the areas in which the judge most sorely needs to be persuaded in order to rule in the respondent's favor.

Counsel cannot afford to give short shrift even to questions that seem irrelevant or uninformed. Anything that is troubling the decision-maker is, by definition, relevant. And questions that betray the judge's unfamiliarity with the issues or caselaw show a need to educate the judge through the answer to the question.

In preparing for oral argument, counsel should attempt to anticipate the questions that the judge is likely to ask and should develop persuasive answers. Since trial judges are generally concerned with staying well within established rules of law, counsel should be prepared to demonstrate that the rule counsel is advocating is wholly consistent with the controlling caselaw, and s/he should bring copies of the cases to the hearing to use as props in the argument if necessary See § 16.06 *supra.* Since trial judges are usually disinclined to adopt rules of great breadth and scope (either because they are cautious about binding themselves in the future or because they fear that the adoption of sweeping new rules invites appellate reversal), counsel should be prepared to show the limits of the rule s/he is advocating, preferably by distinctions that limit the rule to the unique facts of counsel's own case.

When the judge asks questions of counsel's opponent, counsel should listen to the questions as carefully as if they were directed to counsel himself or herself. As previously noted, the judge's questions usually identify the concerns that are of paramount importance to the judge.

Accordingly, counsel cannot afford to allow the prosecutor to be the only party to address these matters. During counsel's reply to the prosecutor, counsel should say that s/he would like to state the respondent's position on the question that the judge addressed to the prosecutor, and then do so. If local practice does not normally afford counsel the opportunity to reply to the prosecutor, but counsel has a very persuasive answer to a question directed at the prosecutor, counsel should – at the close of the prosecutor's argument – ask leave to state the position of the defense in regard to the prosecutor's answer to the judge's question.