"The client who pays the least complains the most."[1]

COMMENCEMENT

By Donald G. Rehkopf, Jr., Esq.

Theoretically any lawyer can "try" a criminal case. But to "try" a criminal case does not make one a criminal lawyer any more than picking a grape makes one a vintner. What metamorphosis takes someone "practicing" law by "trying" a criminal case and turns him or her into a trial lawyer? What catalysis is necessary to transform someone merely practicing law or trying criminal cases, into an effective advocate? The answer is simply, cerebration - thinking, thinking and more thinking.

The trial in a criminal case, while perhaps the most notorious event in the process, is certainly not the introductory act for a trial lawyer, and if unsuccessful, will not be the final chapter. The goal of this outline is to assist you, the trial lawyer, in doing what is necessary to be an effective advocate for your client. After investigating *and learning* the facts of your case, the most important and fundamental part of the criminal process in either avoiding trial or preparing for a trial, is the ***motion*** process. To be successful requires some hard work and cerebration. Thinking about the known facts, the missing facts, inferences and innuendoes, applying law, and using common sense; all require deliberation.

[1] *Murphy's Law for Lawyers*, Menthuen London Ltd. (1977).

During this embryonic cerebral process, a plan or goal should begin to form on how to achieve the desired results for the client. Implementing the "battle plan" for a successful defense begins with the "motion" process.[2] As a corollary to thinking about your motions, a proper mindset is also necessary: defending your client does *not* imply a reactionary posture. The old maxim, "the best defense is a good offense," should be a primary feature of any criminal motion practice.

I. INTRODUCTION

A. What is a "Motion?"

The CPL in section 255.10(1), states *inter alia*:

> "Pretrial motion" as used in this article means any motion by a defendant [[3]] which seeks an order of the court:
>
> (a) dismissing or reducing an indictment pursuant to article 210 or removing an action to the family court pursuant to section 210.43; or
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> (b) dismissing an information, prosecutor's information, simplified information or misdemeanor complaint pursuant to article 170; or
>
> (c) granting discovery pursuant to article 240; or
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> (d) granting a bill of particulars pursuant to sections 100.45 or 200.90; or
>
> (e) removing the action pursuant to sections 170.15, 230.20 or 230.30; or

[2]If bail has already been set, the "motion" process may then begin with a Motion to Reconsider the Amount or Form of Bail. *See generally*, Articles 500 - 530, Criminal Procedure Law [hereinafter, "CPL"].

[3]Note the use of the word "defendant," as opposed to "party." Keep this in mind when served with various prosecutorial, pretrial pleadings.

(f) suppressing the use at trial of any evidence pursuant to article 710; or

(g) granting separate trials pursuant to article 100 or 200.

The Civil Practice Laws and Rules [CPLR] utilizes a clearer definition in section 2211, *i.e.*, "A motion is an application for an order." Simply speaking, you want the Court to do something - something that your cerebral efforts have conjured up as part of the master game plan for the case. The rationale for all of this historically dates back to the Roman Law concept of "*magister litis,*"[4] or master of the lawsuit. A motion and the motion process is simply the advocate's guiding and focusing the trial process by asking the Court to do something that will ultimately help the attorney control the case.

B. How Do You Do It?

The old saying, "*Lex non curat de minimis*"[5] does not apply to opposing counsel (and probably not to the Court either) when it pertains to the ***procedure*** for making motions. Once the Defense advocate begins utilizing creative motions, that body of "practitioners" sworn to seek "justice" rather than convictions, like the mythical Phoenix will rise off their ashes and espouse all types of procedural irregularities and incantations. Form *will* take precedence over substance and to prevent malpractice, the statutory procedures must be followed.

One might expect that CPL section 255.20, which is titled, "Pre-trial motions; procedure," would give appropriate guidance for making motions. But, like so many other things, a little knowledge can be

[4]"[T]he person who controls the suit or its prosecution." *Black's Law Dictionary*, p. 857 (5th ed., 1979).

[5]The Law does not care about trifles.

dangerous. As a basepoint, the statute sets forth three procedural requirements:

1. **TIMING:** Generally speaking, CPL section 255.20(1), requires that *all* motions be filed ***or*** served within forty-five [45] days "after arraignment and before commencement of trial, *or within such additional time as the court may fix* ***upon application of the defendant***. . . ." [Emphasis added].[6]

2. **CONTENTS:** CPL section 255.20(2), generally requires that:

> "All pre-trial motions, with supporting affidavits, affirmations, exhibits, and memoranda of law . . . ***shall be included*** within the same set of motion papers and shall be made returnable on the same date . . . ." [Emphasis added].

3. **EXTENSIONS:** As noted, CPL section 255.20(1), provides that upon "the application of the defendant," *i.e.*, upon "motion," the Court can extend the time for filing of motions. This presupposes that the application for additional time is made before the expiration of the 45 days. Subparagraph 3 addresses those motions filed "late." You ***must*** show:

   a. "Due diligence;"
   b. "Good cause," and
   c. Why it is "in the interests of justice."

All of this may seem to be quite clear and easily followed. However, while CPL section 255.10(1), defines "Pre-trial motion" as "any ***motion*** by a defendant[7] which seeks an order of the court. . . ," a little cerebration generates the inescapable conclusion that the real details of *how to* make a motion did not quite

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[6]Note that this extension is not automatic. The *Defense* must first apply for it, meaning that if you need more time, you had better ask for it *prior to* the expiration of the 45th day. Indeed, failing to comply with this time requirement generally results in a ***waiver*** of any motion that could have been raised, other than jurisdictional ones. *See generally*, People v. DePillo, 168 AD2d 899 (4th Dept. 1990), *appeal denied* 78 NY2d 965.

[7]Remember this and remember it well. The clear and plain statutory language is *expressly* limited to a "defendant." Thus, the Legislature did *not* authorize the Prosecution to file "pre-trial motions" under this statutory framework. *Query:* if there is no authorized, statutory basis for the prosecution to file a "pretrial motion," what is a Court's jurisdictional basis for entertaining such? That should *always* be the first avenue of analysis and attack in responding to any motion by the prosecution.

make it into this statute. As an advocate of the ancient doctrine of "better safe than sorry," one is advised to extend their jurisprudential search. Section 2214(a) of the CPLR, is entitled, "Notice of Motion." This statute provides that a "notice of motion" ***shall*** specify:

1. The ***time*** and ***place*** of the hearing on the motions;

2. The "supporting papers upon which the motion is based," which requires you to go back to CPL section 255.20(2), to find out what "papers" are (**"**affidavits, affirmations, exhibits *and* memoranda of law.**"**);

3. The ***relief demanded***, *i.e.,* what you want the Judge to do [keep this simple for obvious reasons];

4. The ***grounds for relief,*** *i.e.,* why you need relief *and* why you are legally entitled to it; and

5. **"**Relief in the alternative or of several different types may be demanded.**"** This means that you are limited only by the confines of your own mind, so think about the relief that you want *and need*!

SERVICE: Finally, as a matter of good practice and because some judges actually follow it, CPLR section 2214(b), gives some additional timing restrictions. Thus, unless the Court allows otherwise, a Notice of Motion and its supporting cast, "shall be served at least eight (8) days before the time at which the motion is noticed to be heard.**"**[8] From a psychological, if not legal, standpoint, a very good reason exist for criminal defense attorneys to follow this time standard. That is because section 2214(b) then requires that , **"**answering affidavits ***shall be*** served ***at least*** two (2) days before [argument].**"** [emphasis added]. Why is this important? If the defense attorney has complied with the timing of the service requirements, you

[8]*See also,* NY Uniform Rules For Courts Exercising Criminal Jurisdiction section 200.4, noting that service upon the Court is via the appropriate court clerk**'**s office, ***unless*** **"**the judge so directs, papers may be submitted to the judge *and* a copy filed with the clerk *at the first available opportunity*.**"** [Emphasis added].

can at least make a supportable argument as the prosecutor hands you his/her response in court, that the "law" gives you at least two [2] days to read and think about the prosecution's position, *before* you are required to argue or respond.[9] If knowledge is power, more knowledge should be more power: *translation*: beware of "winging it."

[9]Remember, prosecutors attend CLE seminars also. If they can get away with giving you 5 minutes to review their responses to your "Motions," do not be naive enough to think that they will not try it. Either ***insist*** upon at least a two [2] day adjournment [chargeable to the People for CPL section 30.30 purposes], or alternatively, orally "Move to Strike" an out of time pleading. If you are entitled to have two days to review a response in a "contract" case, why does your client facing the loss of liberty or even death, not deserve *at least* the equivalent amount of justice as a civil litigant? Have a copy of Rule 200.4 [NY Uniform Rules For Courts Exercising Criminal Jurisdiction], available to show that *absent a Court Order*, papers ***must*** be filed through the Court Clerk's office, *not* handed to counsel and the Judge in court.

Finally, a *caveat*. Unless you affirmatively consent, the court cannot (legally) shorten the minimum, 45 day period set by CPL section 255.20(1). *See,* Veloz v. Rothwax, 65 NY2d 902 (1985).[10] The question of whether a defense attorney *should* consent to such is more problematic and obviously, case-specific. If you are satisfied that discovery is completed and have had sufficient time to prepare, maintaining good relations with the Court is probably "good cause" for agreeing to a shorter time limit. Otherwise, consider the following material.

C. Move Ethically, or Not at all.[11]

A fundamental premise of the cerebral activity necessary in the motion process is for the defense advocate to comply with both the spirit and the letter of the profession's ethical requirements. The defense attorney's ethical obligations flow in three directions:

- To the *Client*;
- To the *Court*; and
- To the *Legal Profession*.

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[10]Justice Rothwax, no stranger to controversy nor friend of the Accused, prompted the following appellate response, "A criminal proceeding is not a game, and a defendant is not a ping pong ball to be swatted back and forth." Agnew v. Rothwax, 121 AD2d 906 (1st Dept. 1986).

[11]Defense Counsel should be aware of, if not own, a copy of the "bible" in this area, J.W. Hall, Jr., *Professional Responsibility of the Criminal Lawyer*, 2nd ed. (West Group, 1996)[hereinafter "Hall"]; *see also*, R. Uphoff (editor), *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions*, (ABA, Criminal Justice Section, 1995).

An analysis of the ethical aspects of "motion practice" and their impact on counsel, will be discussed *seriatim.*

1. *Obligations to the Client.*

It is beyond cavil that counsel for the accused has a duty to provide the effective assistance of counsel, an obligation grounded in the 5th and 14th Amendments guarantees of Due Process, as well as the explicit 6th Amendment's guarantee of counsel, meaning "effective" counsel. Powell v. Alabama, 287 U.S. 45 (1932). First, there is the obligation to represent the client *zealously*, which means an "earnest and diligent enthusiasm, as for a cause."[12] Webster's *Desk Dictionary*, 1047 (1990). Thus, in the motion arena this requires counsel to raise any point that is not palpably frivolous *and* which might support the Accused's position. *See generally,* Anders v. California, 386 U.S. 738 (1987). However, keep in mind that:

> [A] lawyer is not justified in asserting a position in litigation that is frivolous.
> ABA *Code of Professional Responsibility*, Ethical Consideration 7-4.

The second fundamental obligation of Defense Counsel is the duty to represent the Accused "competently." Competence is a mean and does not connote perfection, as the law only requires that an Accused have a *fair* trial, not a perfect one. Strickland v. Washington, 466 U.S. 648, at 688 (1984). However, "competence" does include the requirement of "preparation adequate to the circumstances" [Disciplinary Rule 6-101], *i.e.*, investigation, research and cerebration in the motion process. Or, beware of "canned" motions. *See generally,* Kimmelman v. Morrison, 477 U.S. 365 (1986); Huynh v. King, 95

[12]This does ***not*** mean having sex with one's client! *See,* In re Weinstock, 241 AD2d 1 (2nd Dept. 1998), where the attorney was suspended from practice for 2 years when he "went to a conference room in the Bronx Family Court Building where he exposed his penis and engaged in oral sex with [his client]."

F.3d 1052 (11th Cir. 1996)[failure to make appropriate motions ineffective assistance of counsel].

2. *Obligations to the Court.*

How many times has it been said that a lawyer is "an officer of the Court?" But, how often has anyone thought about what that means for a defense counsel drafting motions? Fortunately for the Defense Bar, the ethical requirements are basic and simple. First, "a lawyer is not justified in asserting a position in litigation that is frivolous." Ethical Consideration 7-4. Second, in spite of the "heat of combat," there is the common sense requirement of courtesy and civility to the Court. *See*, Burger, "The Necessity for Civility," 52 F.R.D. 211 (1971). In case there are any doubts, refer to the many cases decided under New York's Judiciary Law section 90(2), which generically precludes (as well as provides grounds for disciplinary action), "conduct prejudicial to the administration of *justice*." While the parameters of this probably defy precise definition, suffice it to say that a perusal of the case law includes *inter alia* the following examples of "misconduct:"

- Intemperate and irrelevant motion arguments, *In re Simon*, 20 AD2d 46 (4th Dept. 1963);
- Missing Court appearances in a criminal case, *In re Linn*, 129 AD2d 219 (1st Dept. 1987);
- Unilaterally withdrawing as counsel in a criminal case after being directed by the Court to file a Motion to be Relieved, *In re Ripps*, 228 AD2d 129 (1st Dept. 1997);
- Misrepresenting to the Court that a trial transcript had been ordered in a criminal appeal, *In re Bridges*, 196 AD2d 43 (4th Dept. 1994);
- Engaging in "willful, unlawful, and contumacious behavior in the presence of the court" during criminal trials, *In re Giampa*, 211 AD2d 212 (2nd Dept. 1995); and
- The failure to return telephone calls, *In re Leibowitz*, 82 AD2d 646 (2nd Dept. 1981).

Finally, and perhaps the toughest one to accept as an advocate, is counsel's obligation to disclose

adverse legal authority to the Court.[13] The simple way to deal with this in drafting motions is to cite it and then distinguish it. Or, if after much cerebration that is not possible, argue for a change or exception in the law, rule or precedent and explain why each is necessary. Who knows, perhaps like the (hopefully) immortal case of Ernesto Miranda, some court may actually agree and change the law.[14]

3. *Obligations to the Legal Profession.*

These obligations, at least within the motion process, are more amorphous and tempered by the higher obligations to the client. With that *caveat*, the obligations of civility to opposing counsel and perhaps co-counsel, certainly apply. But, one area that deserves attention in criminal cases, is counsel's obligation to point out potential or actual *conflicts of interest* regarding prosecutors.[15] This, as the Court of Appeals has noted, can easily be worked into a motion to dismiss the charges in the case where a conflict, in fact exists with the prosecutor. *See,* People v. Zimmer, 51 NY2d 390 (1980). Or in the alternative, bring a Motion to Appoint a Special Prosecutor. *People v. Leahy*, 72 NY2d 510 (1988).[16]

In summary, zealous representation never requires unethical motions - be it by commission (*e.g.*, misrepresentation) or omission. The three "C's" of ethical motion practice are nothing more than

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[13]*See* Hall, *op cit.*, ' 3.13.

[14]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[15]Conflicts of interest relating to the Defense Counsel, obviously fall within the parameters of one's ethical obligations to his/her client. Dealing with that topic is beyond the scope of this paper, but, *see generally*, Hall, *op cit.*.

[16]Follow the specified procedure for doing this, *i.e.*, NY County Law ' 701; and Uniform Rules for Courts Exercising Criminal Jurisdiction, ' 200.15.

"cerebration," "common sense" and "civility." If one cannot juxtapose these concepts with zealous defense advocacy, a change in careers should be contemplated.

II. OCEANS OF MOTIONS. . . .

Now that a motion has been defined, procedural roadmaps outlined and ethical parameters made clear, just what type of creatures inhabit this legal sea? For those curious enough to read on, common *areas* of motion advocacy will be given below. Counsel is reminded however, that like the tide, motions ebb and change. The areas that follow are certainly not exhaustive, as diligent cerebration will most always be rewarded in unique situations. As the old adage was certainly intended to say, "necessity is the mother of all motions."

A. MOTIONS LOOKING FOR THINGS.

1. *Discovery: CPL section 240.40(1).*

A "Motion for Discovery" implies a working knowledge of the definition of "property" per CPL section 240.10(3), which is as expansive as your cerebral powers, provided that you have complied with the "demand" requirements of CPL section 240.20. Relevance to the charges and "work product" are the only limitations on an accused's right to look for things necessary for the Defense.

2. *Appointment of Experts: County Law section 722-C.*

For indigent clients, this statute provides for *Court* appointment of experts necessary for their defense. Prior to the defense decision to utilize such an expert in court, a prosecutor has no *standing* to object or even to learn of such an application. Therefore, the *ex parte* procedures of CPL section 240.90(3), should be utilized. Due to the fee limitations set in the statute, get a detailed written fee

agreement from the proposed expert and then request that the Court agree to compensate the expert per the agreement. If this is done "on the record," insure that it is *sealed* to preclude the prosecutor from simply ordering a transcript to carry out his/her pretrial espionage.

B. MOTIONS TO FIND OUT ABOUT THE CHARGES.

1. *Bills of Particular.*

Think about what it is that you want more specific information on and why. Then tailor your motion to the language of CPL section 200.95(1)(a), *i.e.*, the "defendant's conduct encompassed by the charge." For example, in a Burglary 3rd Degree case [PL section 140.20], is the ***conduct*** complained of alleging that your client "knowingly enters" or "remains unlawfully" in the building?

2. *Misdemeanors and Violations.*

CPL section 100.45(4), makes the law regarding Bills of Particular in CPL section 200.95, applicable.

3. *Motions to Dismiss Defective Pleading for Failure to State an Offense.*

If after careful reading of the charging document, you cannot figure out what conduct your client engaged in (or perhaps omitted to do) that is now subjecting him/her to the application of the Penal Law, CPL section 170.35 [misdemeanors] and section 210.25 [indictments], provide the basis for dismissal. Even if you are unsuccessful, the prosecutor's response will usually help you glean more information. Get a transcript of the prosecutor's *oral* response so you can easily keep them in check at trial.

C. MOTIONS TO CONCEAL THINGS AS A MATTER OF LAW.

1. *Motions to Suppress.*

Article 710, CPL, must obviously be mastered by the Defense Advocate. Be generous in your

application to invoke the procedures to lawfully conceal evidence as a result of improper, illegal or unconstitutional government conduct. Pay attention to *standing* requirements, as well as the *procedural* requirements of CPL section 710.60, *i.e.*, "sworn allegations of fact." *See, People v. Alexander*, 88 AD2d 749 (4th Dept. 1982)[affidavit contained no "sworn facts," only conclusory allegations."][17] While it is significantly beyond the reach of this article, the *scope* of a suppression motion also requires considerable cerebration. A brief, but not exhaustive checklist of areas meriting counsel's concern, are set forth below:

a. ***How*** did the Accused come into contact with the police?

- ' Was it a valid *Terry* stop?
- ' Was there an arrest?
- ' Was there an arrest warrant?

b. ***Where*** did the police capture your client?

- ' Was s/he at home?
  - x If so, any *Payton* [445 U.S. 573 (1980)] issues?
- ' Does s/he have a legitimate expectation of privacy there, *i.e.*, "standing?"
- ' Do any of the statutory ***presumptions*** apply?
  - x cars: PL section 220.25(1);
  - x "open view in a room:" PL section 220.25(2).

c. ***Who*** all was involved in the "bust?"

- ' Tie in with Discovery requests.

d. ***What*** all was seized (not just contraband)?

[17]Unless you are interested in being a defendant in a malpractice action, pay particular attention to the teaching of *People v. Mendoza*, 82 NY2d 415 (1993), regarding the specificity necessary in suppression motions.

' Where is it now?

e. Was there a ***search warrant***?[18]

' If so, who issued the warrant?

- Why was it issued?[19]
- When was it issued?
- Was a **"**no knock**"** provision included?[20]
  - If so, was there a factual basis for such?
- Where are the supporting affidavits?[21]
- What *specific* items were targeted in the warrant?[22]
- When was it executed?[23]
- When was it ***returned***?

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[18]*See* CPL ' 690.05.

[19]*See* CPL ' 690.10, and was there **"**probable cause?**"**

[20]See CPL ' 690.50(2)(b).

[21]*See* CPL ' 690.35.

[22]*See* CPL ' 690.15.

[23]*See* CPL ' 690.30.

- Where is the inventory and paperwork for the return?[24]
- Where is the **"**receipt**"** for the seized property?[25]

' If no warrant, what is the basis for **"**probable cause?**"**

- If police claim **"**consent,**"** is there a signed consent form?
  - x If not, what is factual basis for claim?

- If **"**plain view,**"** is it physically possible?

f. Was anyone injured or any property damaged while **"**executing**"** the search?

' If so, were photographs taken? [If not, do it yourself, NOW!].

' Was medical treatment necessary?

- ***Who*** was treated?
- ***What*** were the injuries?
- ***Where*** were they treated at?
- ***When*** were they treated in relation to the time of injury?
- ***How*** were the injuries sustained?

g. Was an informant involved?

' If so, did the snitch provide probable cause based on **"**prior dealings,**"** or were they present during the crime?

' Are there any conflicts of interest involving the snitch?

h. Did the client make any statements[26] at all?[27]

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[24]*See* CPL ' 690.50(5).

[25]*See* CPL ' 690.50(4).

' If so, how many were taken?

- ***Where*** were they taken at?
- ***Who*** all was present during the interrogation / rights warning process?
- ***How*** were the rights advisement(s) recorded?
- ***How*** were the statement(s) recorded?
    - x Were any portions *un*recorded?
    - x What was left out and why?

- ***Where*** are the police "notes" regarding such statements?
- Was the client "in custody" [by any definition] during any of this?

' If no statements were obtained, did anyone try to get a statement, and if so, what were the results?
    - x If the police did not try to obtain a statement from the client, why not?

i. Were any ***electronic*** or telephonic devices involved?

' Were the statutory procedures complied with?

- CPL Articles 700 and 705;
- CPL Articles 710.20(2) and (7).

j. Is any evidence "fruit of the poisonous tree?"

k. Are there any ***identification*** procedures involved?

' If not, why not?

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[26]This should include oral, written, tape-recorded, video-recorded, stenographically recorded or any other means of recording such.

[27]Do not rely on the absence of a prosecution CPL ' 710.30 "notice." Move to "preclude" any such "unnoticed" statements per CPL ' 710.30(3).

' If so, how many totally?

- ***Who*** conducted such?
- ***Who*** all participated in such?
- ***What*** were the results of each procedure?

' Was a **"**show up**"** involved?

- ***Why*** was this used?
- ***Where*** did it occur?
- ***What*** specifically was done?
- ***Who*** all was involved in this process?
- ***What*** was said to the witness(es)?

' Were photographs involved?

- ***Where*** did they come from?
- ***Where*** are they now?
- ***What*** was said to the witness(es)?

' Did the client ever ask for an attorney?

' Did the ID procedure occur pre- or post-arraignment?

l. ***Pre-Indictment Suppression Motions:*** [CPL section 710.50(1)] for felony cases, this motion can be made *before* the case is submitted for presentment to the Grand Jury. If successful, the evidence is kept from the Grand Jury.

2. ***Motions to Quash:*** A rare defense motion, unless perhaps client records are involved. *E.g.*, if a client**'**s medical records are subpoenaed in a rape case or mental health records, if a mental state or condition may be at issue. This motion must be made ***before*** the return date of the subpoena. CPLR section 2304; Brunswick Hospital Ctr. v. Haynes, 52 NY2d 333 (1981).

' If a client**'**s ***bank records*** are involved, assert the federal *Right to Financial Privacy Act*, 12 U.S. Code section 3401 *et seq.*, [RFPA] remedies.[28]

[28]Be careful here. There is no specific right to have financial records **"**suppressed**"** under the

3. ***Motions to Strike Scandalous or Prejudicial Matter:*** CPLR section 3024(b). While not encompassed *per se* in the CPL, since the court has the power to *dismiss* charges entirely, this greater authority must necessarily include the lesser power to strike portions of a charge. People v. Cirillo, 100 Misc2d 527, at 531 (Sup. Ct., Bronx Co. 1979).

D. MOTIONS FROM "HELL."

This is a generic category of motions that will torment you incessantly, both because of the vast amount of work required and because you will soon be asking yourself, "why am I doing this?" The issues are generally more bizarre than any law school examination and legal authority more scarce than time for a bar examination question. So, what are we talking about?

1. ***Motions to Dismiss - Penal Law Section is Facially Unconstitutional.***

While rare, there are still some sections of the penal law that give rise to some serious constitutional issues, *e.g.*, vagueness, overbreadth, etc.. *See, e.g.*, Criminal Possession of Computer Regulated Material, PL section 156.35; Unlawful Use of Secret Scientific Material, PL section 165.07; Fraudulent Accosting,

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RFPA's provisions - only the Motion to Quash. *But see, U.S. v.88 Designated Accounts*, 740 F.Supp 842, at 851 (S.D. FL 1990):

> [The] Court has the authority to suppress evidence obtained in willful violation of a statute or as a result of other governmental misconduct . . . ." (Citations omitted).

There is a right to suppress under *New York* law, to wit: CPL ' 710.20(a), as the "unlawful or improper acquisition of evidence. . . ." where the unlawfulness is the violation of the RFPA.

PL section 165.30. **NOTE:** CPLR section 1012(b), requires that the New York Attorney General be notified where the constitutionality of a state statute is at issue. While this section states that the "court shall notify" the AG, as a matter of practice and pleading, just serve them a copy of your Motion, to insure compliance. If such a Motion is your "case," you do not want to procedurally default because the AG's office was not properly notified.

2. *Motions to Dismiss - Penal Law Section is Applied Unconstitutionally.*

Fertile ground in drug cases. For example, a back-seat passenger in a car is charged with possession of controlled substances found in the glove compartment, per the automobile "presumption." PL section 220.25(1) ["knowing possession"]. If thereafter, based on the "packaging" [50 "dime" bags], this passenger is then charged with possession with intent to sell, you have a classic "inference upon an inference" argument. People v. Dumas, 156 Misc2d 1025 (Sup. Ct., Kings Co. 1992). *Compare*, People v. Versaggi, 83 NY2d 123 (1994), with David Tunick, *People v. Versaggi: A Conviction for a Computer Crime That Was Not Committed,* 33 Crim. L. Bull. 543 (Nov.-Dec. 1997).

3. *Change of Venue Motions.*

These are made to the Appellate Division per CPL section 230.20(2). *See* People v. Brensic, 136 AD2d 169 (2nd Dept. 1988), where one such motion was actually granted!

E. HISTORICAL MOTIONS.

This category of motions deals with events other than "search and seizure" type motions, *e.g.*, things that have occurred in the past that now have some bearing on the proceedings. Some of the more obvious ones are:

1. Dismissal for exceeding the Statute of Limitations. CPL section 30.10.

2. Dismissal for CPL section 30.30 violations.

3. Dismissal for lack of jurisdiction over the ***offense***.

   a. Multi-state crime, CPL section 20.30.
   b. Geographical jurisdiction:

      ' County, CPL section 20.40;
      ' Cities, Towns and Villages, CPL section 20.40.

4. Dismissal as prosecution is barred by ***former*** jeopardy, CPL section 40.20 [*see also*, CPL section 210.20(1)(e)]; *Matter of Northrup v. Relin*, 194 AD2d 228 (4th Dept. 1994).[29]

5. Dismissal as prosecution is barred by ***double*** jeopardy, CPL section 40.40.

6. Dismissal as prosecution is barred by defendant's ***immunity***:

   a. Non-grand jury immunity, CPL section 50.20(3);
   b. Grand Jury immunity, CP: section 190.40(2).

7. Dismissal as a result of Grand Jury defects:

   a. Procedural problems, CPL section 190.25.
   b. Incompetent or inadmissible evidence used, CPL section 190.30
   c. Failure to provide Accused right to appear and testify, CPL section 190.50(5).

      ' Per CPL section 190.50(5)(c), this motion must be made within five [5] days of arraignment.

8. Preclusion of Inaudible Tape/Video recordings. *People v. Lubow*, 29 NY2d 58 (1971).

F. MOTIONS TO MAKE EVERYONE PLAY BY YOUR RULES.

[29]*Northrup*, a case the author handled was done by way of an Article 78, CPLR, action, as a means to expedite a final resolution, after the Trial Judge indicated a strong preference *not* to have to deal with child, sexual abuse allegations. The 4th Department granted relief.

1. ***Severance*** of:

   a. Offenses, CPL section 200.20(3);
   b. Defendants, CPL section 200.40(1).

2. ***Sequestration*** of witnesses and potential witnesses.

3. ***"In Limine"*** motions - *i.e.*, to preclude unduly prejudicial evidence ***or*** conduct at trial, *e.g.*, **"**Sandoval**"** motions.

   - Peskin, *Innovative Pre-Trial Motions in Criminal Defense*, 1 Am. J. Trial Advoc. 35, at 64 (1977);
   - Annot. 63 A.L.R.3d 311.

   Peskin, *supra*, suggests the following as ***objectives*** of such motions:

   - Isolation of prejudicial evidence (or conduct);
   - Maximizing discovery in sensitive areas;
   - Force prosecution to elect certain strategies;
   - Preserve record for appeal;
   - Induce more favorable plea offers.

G. SEX, TOYS, and TELEVISION.

1. Motion *in limine* to utilize *Complainant's*[30] **"**Sexual Conduct:**"**

   a. Sex cases, CPL section 60.42;
   b. Non-sex cases, CPL section 60.43.

2. Motions to ***Preclude*** the use of **"**Anatomical Dolls,**"** CPL section 60.44.

   - Demand a hearing to establish foundation for being **"**anatomically correct,**"** and to preserve record for objections.

3. Motion to Preclude Utilization of **"**Closed Circuit Television**"** Testimony under CPL Article 65.

[30]From a psychological standpoint, never refer to a complainant as a **"**victim.**"** You are impliedly conceding that a crime has been committed - something that your client may dispute.

' This is a "preemptive strike" motion. *See* CPL section 60.20.

H. "IT JUST AIN'T FAIR" MOTIONS.

- Dismissal in the Interests of Justice, CPL sections 210.21(1)(i) and 210.40.

I. "THE CONSTABLE BLUNDERED" OR TECHNICAL SUPPRESSION MOTIONS.

These motions are based upon failures to comply with New York's statutory schemes pertaining to arrests, searches and seizures.

1. Defective Arrests based upon Arrest Warrants:

   a. Mandatory contents of warrant, CPL section 120.10(2).
   b. Improperly ***executed****:*

      - Failure to inform Defendant of warrant, CPL section 120.80(2);
      - Failure to notify of "authority and purpose" for entry, CPL section 120.80(4)

2. Defective Arrests *without* Arrest Warrants:

   a. When and where authorized, CPL section 140.10.
   b. ***Procedure:***

      ' Failure to inform of "authority and purpose" and of "reason for such arrest," CPL section 140.15(2);
      ' Failure to notify of "authority and purpose" for ***entry***, CPL section 140.15(4), and CPL section 120.80(4) and (5).

3. ***Juvenile Arrests*** - failure to "immediately" notify parent or legal guardian of arrest and location of detention facility.

4. Defective Search Warrants, CPL Article 690.

   a. What and Who are subject to search, CPL section 690.15.
   b. Not ***timely*** executed, *i.e,* "stale," CPL section 690.30.
   c. Mandatory contents of ***application***, CPL section 690.35(2).
   d. Mandatory contents of ***warrant***, CPL section 690.45.

e. Improper execution, CPL section 690.50.

J. "I LOVE NEW YORK" SUPPRESSION MOTIONS.

Fortunately, at least for now, the New York Constitution and Civil Rights Law give those criminally accused expanded legal rights, not or no longer available under the federal constitution. Thus, a little more cerebration may be necessary, not to mention research, if you cannot champion liberty via the U.S. Constitution. Generally speaking, the following areas of the New York "Bill of Rights" should not be overlooked in the motion process:

1. Art. I, section 6: Self-incrimination; right to counsel; confrontation.

2. Art. I, section 8: Freedom of speech, especially in obscenity cases;

3. Art. I, section 12: Search and Seizure.

Finally, NY Civil Rights Law section 12, grants an express right to "present a defense." *People v. Hudy*, 73 NY2d 40 (1988).

K. LET FAMILY COURT DO THE WORK.

If the client is a "juvenile offender" [CPL section 1.20(42)], never pass up the opportunity for making a Motion to Remove the matter from Criminal Court to Family Court.

1. "In the interests of justice," required, CPL section 210.43(1)(a).

2. Consent of District Attorney required for certain offenses, CPL section 210.43(1)(b).

3. ***Procedure***: CPL Article 725:

   a. Utilize motion procedure for dismissal of Indictment, CPL section 210.45(1) and (2), per CPL section 210.43(3).
   b. A hearing is authorized, CPL section 210.43(4).

L. MOTIONS AT TRIAL - Never Give Up!

1. Dismissal based on inadequate prosecution opening statement, CPL section 260.30(3)[Jury trials only]; *People v. Kurtz*, 51 NY 2d 380 (1980).

2. Challenging the jury panel, CPL section 270.10.
3. Dismissal for *Batson* violations.

4. Taking a trip to view the scene, CPL section 270.50.

5. Compelling immunity for ***defense witnesses*** or alternatively, dismissal for denial of due process. Where a crucial defense witness will plead "the Fifth," move to have him/her immunized ***after*** you have made a written request for the prosecutor to grant such and it is denied. *See generally*, *Matt v. LaRocca*, 71 NY2d 154 (1987); *People v. Shapiro*, 50 NY2d 747 (1980); *People v. Ballard*, 167 AD2d 895 (4th Dept. 1990).

6. Motion to Compel the use of the written, jury questionnaire, CPL section 270.15.

M. "MISTRIAL" MOTIONS.

1. For prejudice, "when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom." CPL section 280.10(1).

   - **TEST:** Must be prejudicial ***and*** deprive a "fair trial."

2. Physical impossibility, CPL section 280.10(3); *e.g.*, jury reduced below "quorum," illness of counsel or judge, etc..

3. ***Jeopardy:*** When does it attach? Normally, not upon ***defense*** motion for mistrial. *Napoli v. Supreme Court*, 40 AD2d 159 (1st Dept. 1972), *aff'd* 33 NY2d 980. However, it ***may*** attach if based upon prosecutorial misconduct calculated to provoke a defense motion for mistrial. *U.S. v. Jorn*, 400 U.S. 470 (1971).

N. TRIAL ORDER OF DISMISSAL [TOD], CPL ARTICLE 290.

1. ***Timing:*** Motion for TOD made either at:

   a. Conclusion of People's case, or
   b. Conclusion of all evidence. CPL section 290.10(1).

2. ***Contents*** must address:

   a. Each count of the Indictment, CPL section 290.10(1); or
   b. Each charge in an Information, CPL section 290.10(1), and section 360.40.

3. If the Court **"**reserve[s] decision**"** until after the jury verdict, to preserve the issue, ***renew*** your request because the **"**court ***shall*** proceed to determine the motion. . . .**"** CPL section 290.10(1).

O. MOTION TO SET ASIDE VERDICT.

1. ***Timing:*** may be made at **"**any time ***after*** rendition of a verdict of guilty and ***before*** sentence,**"** CPL section 330.30.

2. ***Grounds*** for motion:

   a. Any ground requiring reversal or modification by an appellate court, CPL section 330.30(1).
   b. Juror misconduct or improper conduct in relation to a juror, CPL section 330.30(2).
   c. Newly discovered evidence. CPL section 330.30(3).

3. ***Procedure:*** *see* CPL section 330.40.

P. MOTION FOR *PRE-SENTENCE* HEARING.

1. ***Timing:*** before sentence pronouncement.

2. ***Purpose:*** Make a record to:

   a. Resolve factual discrepancies in the Presentence Report[31] **"**or other information the Court has received,**"** or
   b. **"**assist the Court in its consideration of any matter relevant to the sentence to be pronounced.**"**

3. ***Procedure:*** *see* CPL section 400.10(3).

4. Determining the amount of a ***fine***, CPL section 400.30.

[31]This is particularly important if ***restitution*** is an issue.

a. ***Notice***: **"**not less than ten (10) days,**"** CPL section 400.30(1).
b. Burden and standard of proof: on the ***People*** by a ***preponderance*** of the evidence, CPL section 400.30(4).

Q. POST-JUDGMENT MOTIONS.

1. Motion for ***Resentencing*** for inability to pay fine, restitution or preparation, CPL section 420.10(5), and section 420.30.

2. Motion to Vacate Judgement, CPL section 440.10.

' ***Procedure:*** CPL section 440.30.

3. Motion to Set Aside Sentence, CPL section 440.20.

' ***Procedure:*** CPL section 440.30.

III. CONCLUSION AND BENEDICTION.

Clients will always complain, especially in criminal proceedings. However, the mental exercise in formulating, researching and drafting applicable motions graphically demonstrates to the client, the Court and opposing counsel that you intend to be the **"***magister litis*.**"**[32] Cerebration is the key ingredient to making motions move - to get the Court to do something helpful for your trial strategy or post-trial issues. Even if the Court ultimately denies the motion that is **"**key**"** to your game plan, the process should have provided you with additional information which will be used for trial preparation, *e.g.*, a suppression hearing. The power of semantics should not be overlooked in the criminal motion process as words must create the image that you want to Court to see. Thinking about what you want the Court to see and do for you and utilizing the various motions discussed herein, or creating new ones necessary for your goals, will elevate the

[32]*See* fn. 4, *supra*.

attorney from a mere "word processing" motion "practice," to an effective advocate.

For those still skeptical, "proof" that necessity is the mother of motions and that cerebration will lead to an appropriate solution, the reader is urged to study the attached motions, reprinted from the *National Association of Criminal Defense Lawyers* magazine, "The Champion." The first, "Motion to ***Shuffle Chairs***," graphically creates a moving picture of the fecal flicking defendant and why counsel wants "relief." The second, is a prosecution reply and cross-motion seeking a novel form of relief, "The Court is requested to wash Defense Counsel's mouth out with soap. . . ." Obviously, the Defense Counsel's original motion got the prosecutor's attention ***and*** succeeded in getting the desired relief. Cerebration pays off. Go forth and Move!