

TOP TIPS IN TEN MINUTES

Do's and Don'ts for Pretrial Motions—A Judge's View

Hon. Timothy M. Kenny

Plea? Or trial? Before you advise your client about the strengths of the case, use these tips to handle filing all of the necessary pretrial motions in a criminal case.

TIP
1

Know your judge

Before you file your motion, make sure you are familiar with your judge's background and reputation and tailor your motion accordingly. Is the judge a former prosecutor or criminal defense attorney? Is the judge an experienced member of the bench or someone unfamiliar with criminal law? A judge who is new to criminal law will appreciate having the basic legal principles laid out with supporting authority, but an experienced jurist prefers a motion that gets right to the specific issue and controlling cases on point.

It is also a good idea to find out whether the judge relies heavily on oral argument or makes decisions based on the written motions and briefs.

If you are not familiar with the judge who is handling your case, talk to experienced practitioners who have appeared there.

TIP
2

Understand the burden of proof in your motion

Research the law and clearly state the relevant burden of proof for your motion, including citations to authority. If the burden is on the defendant, show how you have met it. If the burden is on the prosecutor, set forth the facts that show that the prosecution failed to meet its burden. Here are some examples:

- Motion to quash: the defense has the burden to show an abuse of discretion.
- *Walker* hearing (confession suppression motion): the prosecution must show voluntariness by a preponderance of the evidence.
- *Wade* hearing (lineup/showup suppression motion): (1) If an attorney was present at the lineup or showup, the defense has the burden of proving by clear and convincing evidence that it was impermissibly suggestive. (2) If no attorney was present, the prosecution has the burden of proving by a preponderance of the evidence that the identification was not impermissibly suggestive.

**TIP
3****Be candid with the court**

During oral argument, you may be stumped by a question. Don't guess or try to bluff your way through the argument. If you guess incorrectly, you erode your credibility with the court.

If you don't know the answer to the judge's question, admit it and ask for the opportunity to submit a supplemental brief. Keep in mind that if you are asked a question during oral argument, the judge may not know the answer either. Many lawyers—like able politicians—answer the question they want to answer, rather than the one the judge asked. If you do that and the judge catches you and makes another attempt at asking the same question, you probably need to answer or admit you don't know the answer the second time.

**TIP
4****Listen, listen, listen**

Judges find it irritating when attorneys do not listen carefully to the questions posed by the court. Be certain you understand the question asked and then answer it directly and completely.

It is also important to listen carefully to your opponent's arguments. You will be more effective if you can directly rebut opposing counsel's positions.

Don't be annoyed when the judge asks questions or makes comments. Welcome the insight these questions and comments offer into the judge's thought process. Based on the questions or comments, you can better craft persuasive arguments. It's not going to advance your cause if you argue something the judge already accepts or isn't bothered by.

**TIP
5****Be honest and accurate**

For your credibility in the present case, as well as future cases, it is critically important to be accurate when stating the facts of the case and the applicable law. You want to be known as an attorney the court can view as reliable and honorable. Distinguish adverse cases, but acknowledge them to the court.

**TIP
6****Focus on quality, not quantity, in your brief and oral argument**

Remember that your brief in support of the motion is not supposed to be a law review article. Keep your points and issues focused. Cite one or two cases if they are directly on point. Avoid string citations.

TIP
7

File timely adjournment requests for motions

Adjournment requests should be made as far in advance as possible. An 11th-hour adjournment requires the judge to duplicate efforts by having to re-read the motion and brief.

More on this topic

- 2009 Criminal Practice & Procedure Update (2009 ICLE Seminar)
- Basic Criminal Practice, Bruce A. Barton, ch 20 in *Michigan Basic Practice Handbook* (ICLE)
- Argue a Motion Effectively, Thomas H. Blaske (ICLE How-To Kit)



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