

### **Criminal Defense Motions Practice (Back to the Basics):**

**What is a Motion and why do I file Motions? What type of motions do I need to file? What types of Motions are acceptable and which ones are going to get me laughed out of court?**

A Motion is simply a request by a party for an action to occur or to prevent an action from occurring. Motions are filed because we are attempting to control an issue or to gain a favorable tactical advantage in a case, or sometimes to simply achieve a more balanced playing field for our client.

The types of Motions you may file are virtually limitless. They are as endless as is your individual creativity. Here are some examples:

- Requesting funds for an arson expert
- Requesting that an investigator be appointed to aid me in the preparation of my client's defense
- Requesting that certain evidence not be allowed to be used against my client, i.e. alleged illegal substances thought to be controlled substances
- Requesting the preservation of evidence, e.g. a pair of panties which contain an alleged semen stain
- Simply requesting fairness for my client during the course of his jury trial.

Motions should be used with a view towards accomplishing your ultimate mission: providing

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a vigorous and ethical defense for your criminally accused client. We should never use a Motion as a tool to show off our intelligence, or to advance an unethical or untenable position. Motions are designed to gain either a small win or ultimate “victory”.

Having said that, there are certain types of Motions that should be filed on an almost routine basis, as there is potential for receiving a favorable bit of information or advantage.

**What about filing the “cookie cutter variety” Standard Motion?**

Standard Motions are motions that provide just enough information to result in a hearing on the issue at hand. They nearly always contain so little information that even if the trial judge wanted to peruse it before the hearing he would be hard pressed to understand why you are entitled to the relief you seek. Do you desire a standard cookie cutter decision by the trial judge, or perhaps later by an appellate court? Of course you do not.

We use Motions to test our strategy, then temper it with our research and strengthen our client’s defense. The best Motions require us to think about our case, our strategies, or our case research and trial preparations. They pique the curiosity of an interested jurist and scare the hell out of a prosecutor who just wants the case to go away with a plea. A good Motion makes us question the feasibility of our position. As a practical matter, standard Motions are good to acquire a very basic idea about the process of filing motions. They are also good starting points for ideas.

The ideas for your Motions do not have to have their birth in your mind. Good lawyers create, great lawyers steal. Standard Motions should inspire you to make even better Motions, to

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fix the problems inherent in them. They should make you insatiable to pinion your adversary into a position that threatens his case or at the very least causes him to feel less than confident.

**What if my Motion makes the Judge angry?**

If you are even remotely concerned as to whether the Judge will become angry at you for filing a well thought out, creative Motion, designed to aid your client in his defense, you are in the wrong business. Sometimes by playing hard, but fair, we are faced with Judges who become ill tempered and/or less than cordial. However, the respect that you can gain for you and your client is immeasurable if you have a well thought out and well reasoned game plan. Some Judges will grant your Motions (sometimes begrudgingly) simply because it is the correct thing to do and because you offer a better solution to the problem at hand than your adversary. It is simple fact that Judges do not want to be reversed, nor do they want to seem that they were anything, but fair during the process of a criminal case.

**What type of Motions do I need to file?**

To ascertain the answer to this question, simply ask yourself the following:

- Why do I think I need to file this Motion or a particular Motion?
- What are the most strongly contested issues in the case?
- What is the objective for filing this Motion?
- What is the potential gain vs. potential risk of filing this type of Motion?
- Is the Motion being made in a timely fashion, or do I need leave of court to file it?

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This is a very elementary list of questions to ask your self, but the process is really about brainstorming. Ask yourself about all the pros and cons of what it is you are trying to accomplish. Next, look for some standard motions on the subject of inquiry and try to glean from them some case law which might serve as a starting point. This is but the tip of the iceberg. Now, you can start to flesh out your ideas and look toward refining the research into a more unique Motion to accomplish your limited or broader range goals.

**Now that I have a Motion I am proud of, what do I do?**

Your next tasks are to schedule a hearing, line-up your witnesses, serve them with a subpoena, and prepare your client for the hearing. It is a good idea to prepare some cross exam questions for likely State's witnesses on the known contested issues. In addition, you have to assess whether or not an expert is needed to advance your theory of the case or to dispute facts and opinions that may be advanced by your adversary.

To be Continued...