

**CRIMINAL PRACTICE: INTEGRATING MOTIONS AND THEORY OF  
DEFENSE**

# ***Hey Judge, Am I Movin' You Yet?***

## **PITCHING YOUR CASE FROM START TO FINISH**

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**motion**, *n.* **1**, the act, process or state of changing place; action, as opposed to rest; **2**, a gesture; **3**, impulse or desire; as, they did it of their own *motion*; **4**, to make a movement or gesture full of meaning; to guide or invite by a gesture; as, to *motion* someone forward.

THE WINSTON SIMPLIFIED DICTIONARY 359 (primary edition, Lewis, ed., 1929).

### **Pre-Trial Motions & The Theory of Defense**

The way that a criminal defense lawyer fights against a prosecution is the **theory of defense**. The theory of defense can be a trial strategy, a plea negotiation approach, or some other plan of attack. Pre-trial motions ask the judge to make an order prior to the trial or disposition of the case. The motions that the defense lawyer makes during the pending of the prosecution should be integrated, fully, with the theory of defense. In other words, pre-trial battles should be chosen carefully, and they should be honed to fit the theory of defense.

The theory of defense for trial or disposition is not an elusive concept: it flows from the discussions with the client, and the investigation. It exists, and is present, from the very start of the prosecution. The defense lawyer must find it, liberate it, and breathe life into it during the pre-trial process. The earlier that this is done, the better. The theory of defense should not be crafted when the pre-trial process is over. The time when the lawyer is preparing to go to trial and write the opening statement is too late to craft a trial strategy. The night before a guilty plea hearing is too late to put together a sentencing recommendation. Lawyers should take advantage of the opportunity to build and polish the theory of defense during the pre-trial months. Getting the defense in fighting shape for trial or a guilty plea hearing is accomplished

with many tools, including thorough witness preparation and client interviews. It is also accomplished with motions.

Motions provide limitless ways to strengthen the theory of defense and to fight the prosecutor and the court with the defense's case long before the actual trial or guilty plea. Motions allow defense lawyers to test theories, float trial balloons, take a dry run at witnesses, set up witnesses for eventual impeachment, set the court up for favorable evidentiary rulings at trial, and do anything else that the lawyer wants to achieve. The decision of how many of these goals to pursue through motions flows from the theory of defense: the savvy lawyer is really trying the case from the time the charging papers are filed, and the trial or plea is simply the end of this process.

Defense lawyers should resist the temptation to file every motion conceivable simply because a case looks bad and the lawyer figures to make the case a big pain for the prosecutor in the hope of getting the best deal. Defense lawyers should make a pain of themselves, but they should also focus the pain. Motions that are integrated with a consistent theory of defense create that focus, and put the prosecutor and court in the constant position of reacting to the defense's case. And *that* is where the defense lawyer wants to be: in control and landing blows, not just swinging away without direction. Motions are serious things; they should not be filed when there really is not an issue to litigate. Long-term credibility with judges and prosecutors suffers when motions are filed indiscriminately in every case, and that credibility gap will hurt the client when there really are serious pre-trial issues to litigate.

### **Motion Defined & Re-Defined**

The law refers to motions and motion practice as formal requests, respectfully made, for an order affecting the pre-trial status of the case at bar. (see sec. 971.30, Wis. Stats.: "Motion means an application for an order.") Ugh. This definition drains all the fun and creativity from the thought of filing a motion.

The more effective approach is re-define motion in litigation practice to more closely follow the definition of motion from The Winston Dictionary quoted at the start of this article: Action; To guide or invite; A gesture; Change; To Move Forward. These are the words and phrases that the lawyers should use when spotting an issue, deciding to file a motion, and arguing the issue at a hearing. The Winston definition presents motion as a persuasive thing: something capable of bringing someone forward, of changing someone's mind, and criminal defense lawyers know that *changing* the judge's mind can sometimes be the task at hand in pre-trial motions. Judges can choose to play it safe, and playing it safe is agreeing with the prosecution. Playing it safe is not agreeing with the defense lawyer in a criminal case. Though the burden of proof usually resides with the prosecution at motion hearings, let's just accept this premise: It's the *defense lawyer's burden*, so get to it and change the judge's mind. Move the judge.

The techniques that effective lawyers employ at jury trials also work at motion hearings: hard investigation, serious preparation, and persuasive litigation. This outline provides no easy tricks for changing judges' minds. It just is not that easy. But changing the way a defense lawyer thinks about a motion is the first step to accomplishing defense goals through motions and integrating motions with the theory of defense. A motion involves a legal issue, but it is not the issue itself. The motion is the lawyer's pitch, and like all good pitches, it has to look and sound good in order to work. What looks and sounds good to juries will also work on judges, who are human, after all. The human story within the legal issue, the cunning cross examination, and the passionate summation will move the judge. A concise recitation of the relevant case law will not. A practical demonstration in a suppression hearing of why the cops can't do what they did do to search your client will move the judge. A detached invocation of the Fourth Amendment and the prosecution's burden of proof will not. The lawyer who prepares to persuade the judge as if the judge were a real person, or a *juror*, will win more motions.

The lawyer who approaches a motion hearing as if the jurist were a juror prepares the investigation and witnesses better, and more aggressively, than if preparing for a routine evidentiary hearing. Also, this lawyer concentrates more on all of the great strategies inherent in hotly contested litigation. This lawyer works at controlling the courtroom, as if it were a trial. This lawyer makes stipulations so that bad evidence about the client does not come in, and all of the testimony presented is about the defense lawyer's issue. Motion hearings are great forums for this. This lawyer subpoenas the physical evidence into the court for the motion hearing. If a police officer testifies that a marijuana pipe in the client's pocket felt like a weapon during the pat-down, this lawyer has the 2-inch pipe right there in court, for the judge to look at and compare with the size of the large gun in the officer's holster. This lawyer prepares, ahead of time, a good closing argument to the judge, one that blends the law with the facts of the case, anticipates the prosecutor's responses, and addresses the judge's concerns. This lawyer structures direct exams and cross exams carefully, peppered with persuasive shifts in the order of questions and tight wording. This lawyer is ready to impeach inconsistent testimony from police officers in a style that shows the judge that lying will not be tolerated or ignored. This lawyer's pre-hearing investigation turns up a witness that nobody but the defense was prepared for. All of these great things that defense lawyers do at jury trials work just as well at motion hearings. They move jurors at trials, and they will move judges at motion hearings.

## **Choosing the Motion's Goal: Stratagems**

In a case where the defense's theory is that the client is wrongly accused, the motion to exclude testimony is focused on supporting the defense at trial. In a case where the police find drugs on the client but the defense's theory is that seizure was bad, the motion to suppress evidence *is* the trial. In a case where the prosecution overcharges the client, the motion to dismiss sets up a fairer trial or plea. These are just a few examples of how the goal of a motion flows from and supports the theory of defense. Different motions accomplish different things. Setting the goal for a motion is essential. Is this a motion that is a winner? Is this a motion that is dispositive of the case? Is this a motion that sets up witnesses for their trial testimony? Does this motion try out a potential theory of defense? Is this a motion that sets up the court to make favorable rulings at trial? Defense lawyers must ask these questions and recognize the purpose of their motions. Knowing what to accomplish with a motion, and then going out and getting that job done, is a purely strategic mission. The **stratagems**, or plans for gaining some advantage for the defense, take on many forms. A few are listed below.

### ***I'm Not Just Standing Here Trying To Look Good, This Is For Real.***

This is the approach when the issue is solid, the client is being violated, and the lawyer files a motion with the intention of winning it. The witnesses are prepared, the lawyer is worked up, and the prosecutor and court had better be ready. The trick here is to find some device for letting the judge know that this is not just another routine evidentiary hearing: this is for real. The device can take any form: a passionate closing argument to the court, a killer cross that impeaches a cop and shows that the prosecution is stretching the truth, an expert witness. Anything can be the device, but the device must serve the purpose of slapping the court with something that cannot be blown off, of letting the court know that it will be very difficult not to take this motion seriously. A jolt. The courts hear so many motions every day, but this motion is different – the lawyer is telling the court: “Hey, I’ll bet you haven’t seen this today, now pay attention.”

### ***Squirreling***

This is the approach where the defense lawyer puts something away during a motion hearing, an acorn, which can be pulled up later and used. The acorn is something that will come back and bite the prosecution later, or help the defense's case. The key here is to get it on the record. The acorn is not always testimony of a witness: it can also be part of the judge's ruling on the motion issue, or a clarification of the prosecutor's intentions regarding evidence at a later trial. When the defense lawyer needs it, the transcript containing the acorn is there to be used: “Hey judge, remember when you previously ruled at the motion hearing that the prosecution was allowed to introduce the prior act evidence because it was relevant to the issue of identification? The defense stipulates to identification.” No more prior act evidence.

### ***The Colombo Approach, Or, Go And Be Curious***

Defense lawyers often get accused of filing motions just for discovery purposes. The Colombo approach is similar to that, but more sophisticated. The defense lawyer who uses this approach is trying to find out specific information and the motion hearing is the way to get that information. The desired information could be what the detective said to the client during the arrest, or what the client said to the complaining witness before the police arrived. The desired information could be anything, really, depending on the case, but the trick is to get it out at the motion hearing. Now, if properly employed, the real beauty of this approach is that no one knows what the defense lawyer is doing, just like the TV detective. Watch out and prepare for relevancy objections. Be ready to show the judge why this information is important, or better yet, set it up so that the judge also wants to know the desired information. Sometimes the approach works best when a witness feels comfortable answering the lawyer's questions, so nobody objects when the lawyer strays down a different path for a question or two, then gets back on track. Colombo's best attribute was that he was never threatening – the murder suspect never saw him coming.

### ***No One Knows This Case Better Than Me***

This is more about sending a message than anything else. The lawyer really has the case prepared inside out, and wants to demonstrate that to the prosecutor, or the judge, or both. Maybe the prosecutor gives a good deal after seeing the depth of preparation that the defense lawyer has accomplished. Of course, the closer to the trial date that the motion hearing is, the more effective this stratagem will be. Alternatively, the defense lawyer may choose to forego this stratagem so that the prosecutor underestimates the defense case until the trial is already in progress.

### ***Stiletting***

Getting someone really mad, so that the anger comes out later. The target of this stratagem is a prosecution witness whom the defense wants to look like a jerk at the jury trial. At the motion hearing, the witness is attacked hard, and personally, leaving the witness mad. Then at the trial, the lawyer pursues a kinder, gentler approach with the witness, and the jury is left wondering why the witness is so hostile and evasive towards the lawyer. This approach can work with all types of witnesses, including experts, police officers, and lay witnesses. Another way to do this is a good cop/bad cop take when two defense lawyers are trying a case. The mean lawyer crosses the prosecution's witness at the motion hearing, and the nice lawyer unexpectedly does the cross at the trial. This can throw the witness off, and shake the prosecution's preparation of that witness' trial testimony.

### ***If We Go, You Had Better Watch Yourself***

This approach is meant to send a message to the prosecutor: watch what you say and do when we go to trial. Often, this takes the form of a motion in limine asking the judge to restrict the prosecutor from commenting about certain things during argument or introducing testimony on certain subjects. Perhaps the judge will deny the defense lawyer's motion or simply take it under advisement. But if the motion is thorough, the message will be sent: I'm watching you, and now you know it. This stratagem is similar to the No One Knows This Case Better Than Me approach: it has an intimidating effect.

***I'm Glad We're Doing This Now, Because This Doesn't Sound As Good As I Thought It Would***

Did you ever think your theory of defense sounded great, but when you presented the case, it came out bad? Test-drive the theory first at a motion hearing if possible. Witnesses don't always testify like the lawyer anticipates, physical evidence looks different than the way the reports describe, things change. Maybe the defense theory was simply planned poorly. In any event, if the lawyer learns that the defense case needs adjusting, or needs to be scrapped completely, the best place to learn that is prior to trial.

***I May Lose This Hearing, But Wait Until You Hear This Stuff Later***

Similar to squirreling, this stratagem sets up information for use later, usually at a sentencing hearing. The difference is, this approach is not quite as stealthy as squirreling. The lawyer using this approach is obviously barging down paths that don't really involve the motion hearing issue, and the information that comes out is not a little acorn, it is a lot of stuff. For example, in a drunk driving case, the defense may challenge the defendant's arrest following field sobriety tests. The issue goes to hearing, and the arresting officer testifies about what the client said and did on the evening of the arrest. The defense lawyer may include in the cross examination all kinds of questions that solicit favorable information: the client was alone in the car, the bad driving was really not so bad, the client complied with all requests from the officer, the client apologized to the officer, the client had a valid license. Now, if the judge rules against the defense on the arrest issue, the motion hearing transcript can be quoted to the judge at a sentencing hearing. "Remember Judge, the arresting officer personally testified about all of these nice things about my client. That's why the defense's sentencing recommendation is reasonable."

***Memo To The Other Side: Please Do Your Job Better***

All lawyers get sloppy sometimes, and the defense lawyer's job is to clean up the mess when the prosecutor gets sloppy. Motions to dismiss, amend, or clarify the complaint so that the charge is appropriate and correct are valid and worthwhile, even if they do not ultimately change the potential penalties or make the charges go away. This stratagem shows the prosecutor that the defense lawyer is on top of things, and it

shows the judge that the defense lawyer is sharp and prepared. That may pay off later, when the judge decides other issues in the case.

### ***We're All Dressed Appropriately, We Might As Well Be Working***

This stratagem is more an attitude to cop or a response to make if prosecutors, cops, or court personnel give the defense lawyer a hard time for pushing the motion to a hearing. This can occur when people do not want to sit through another session of listening to a defense lawyer drone on about such technicalities as Constitutional rights. The defense lawyer's response to everyone's grief about having a hearing is to throw it right back: Everyone is here, why wouldn't we go to a hearing? Of course we're having a hearing, I filed a motion, didn't I? We're all lawyers and judges and cops and bailiffs and clerks and reporters aren't we? Why not do our jobs? Where else would we be, what other purpose do we have as professionals, if we moan about a motion hearing being conducted in a court of law? Of course, following the practice of only litigating good motions will also help prevent negative reactions to a hearing.

### **Embrace The Motion & Have Fun**

Motions are good. When they are fully integrated into the defense theory, planned well, and litigated persuasively, motions are powerful defense weapons. Powerful defense weapons work at whittling down the prosecution and getting favorable rulings from the court. Powerful defense weapons make things better for the client. The pre-trial motion is truly the criminal defense lawyer's trade tool. In the criminal practice, defense lawyers *own* pre-trial motions. They are ours. No other lawyers, no other people, are defending the Constitution and ensuring the integrity of a justice system that limits the power of the government as consistently and frequently as criminal defense lawyers. The device used in that endeavor is often a pre-trial motion. Winning a ruling or achieving a goal with a motion rewards the diligent lawyer and helps the client. It is fun. The approach to integrating motions and the stratagems noted above are but a modest rendering of the endless possibilities that exist in motion practice. The only real limits are the defense lawyer's intellect and imagination.

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