

Criminal Pretrial Advocacy

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CRIMINAL PRETRIAL ADVOCACY



By

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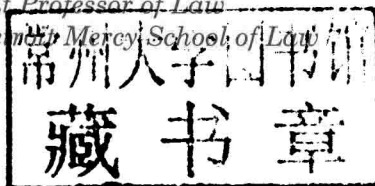
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To Molly, Alexandra, and Grace – yet again.

P.J.H.

To Lisa, the love of my life, who makes everything else possible.

L.F.

*To my parents, Durstan and Ruth McDonald, whose love and
guidance have always supported me.*

K.M.H.

PREFACE

We wrote this book and created the accompanying case files to try to fill a gap in the materials available for skills curriculum at law schools. Most schools offer courses in pretrial advocacy, but the focus of these classes (and accompanying class materials) is on civil cases, having students undertake the steps in a typical torts or contracts action. This usually involves drafting a complaint, conducting the different steps in the discovery process – such as document requests, interrogatories, and depositions – and drafting and arguing a motion for summary disposition.

For those who have practiced criminal law, the pretrial process in a prosecution could not be more different from a civil case. Depositions are not allowed in many states, the government generally has gathered the physical evidence and documents before (or shortly after) the charges are filed, and issues related to searches and interrogations are of paramount importance. Quite simply, many of the issues that arise in the pretrial phase of a criminal case require the development of knowledge and skills that is distinct from what is presented in the typical civil pretrial advocacy course.

Like a civil case, the pretrial phase of a criminal case is crucial to the ultimate outcome of the proceeding. Estimates vary across jurisdictions and by type of case, but it is generally accepted that the vast majority of criminal cases are resolved through a plea bargain without ever going to trial. That makes the pretrial process even more important. And here again, the difference from a civil case could not be more stark – issues related to negotiating a plea agreement and dealing with sentencing do not arise in the civil arena. Thus, we created these materials to help train students who will focus on criminal cases, a practice area that employs a large number of law graduates, including many who have just passed the bar exam and need training before they represent actual clients in prosecutions.

This book provides a framework for students to develop oral advocacy and writing skills in the context of the pretrial phase of a criminal case. This book explains the various stages of pretrial criminal advocacy. In addition, instructors are provided with two detailed case files, involving drug offenses and mortgage fraud, allowing students to address a range of issues as both prosecutors and defense counsel. Students can have the opportunity to: draft the foundational charging documents in a criminal case; consider issues related to appointment of counsel, pretrial detention, and discovery; and prepare preliminary motions on issues that frequently arise in criminal cases, including motions to dismiss counts of an indict-

ment, to suppress evidence, and to quash subpoenas. Students simulate the pretrial process by presenting arguments to the court relating to these issues as well as conducting evidentiary hearings where appropriate. Finally, because most criminal prosecutions are resolved short of trial, the cases are constructed to allow students to negotiate a plea bargain and argue contested sentencing issues.

The case files are designed to give the students options in how to proceed, much like a practicing attorney will have to make decisions regarding the best course to pursue. For example, there are a range of charges that can be filed, facts that could lead to the pretrial detention of one or more defendants, and questions about the conduct of the police in the investigation that could support a motion to suppress evidence. The casebook furnishes students with the basic legal doctrines related to the different phases of a criminal case so that those who have not previously studied criminal procedure can master the basic principles. This material provides a basis to pursue more advanced legal research on a particular topic that arises in a case. Finally, the case files can lead to negotiations for a plea bargaining and issues related to the appropriate sentence.

We are hopeful that instructors will find these materials provide all that is necessary to conduct a successful course in criminal pretrial advocacy. It is possible to supplement the course with materials from a local jurisdiction, and the cases have not been placed in a specific location so that these materials can be easily integrated into the course.

In the course of drafting the book and putting together the case files, we received the generous assistance of a number of people. At Wayne State University, Ms. Olive A. Hyman was instrumental in helping to organize the case files. At the University of Detroit Mercy, Mr. Jeff Johnson provided administrative and technical support. And, finally, at both schools and the University of Michigan, the students who took our Criminal Pretrial Advocacy and Federal Prosecution and Defense classes provided us with valuable feedback on the content of both the casebook and the case files.

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SUMMARY OF CONTENTS

PREFACE	V
ABOUT THE AUTHORS	VII
TABLE OF CASES	XVII

PART 1. PRELIMINARY PROCEEDINGS

Chapter 1. Complaint and Arrest	3
A. Contents of a Criminal Complaint	3
B. Arrest Warrants	4
C. The Decision to File Charges	6
Chapter 2. Initial Appearance and Appointment of Counsel	13
A. Initial Appearance	13
B. Appointment of Counsel	14
Chapter 3. Speedy Trial Act	19
A. Basic Requirements of the Speedy Trial Act	19
B. Delay Related to the Defendant(s)	20
C. Other Delays	21
Chapter 4. Pretrial Detention and Bail	27
A. Pretrial Detention	27
B. Release on Bail	30

PART 2. PREPARING THE CASE FOR TRIAL

Chapter 5. Preliminary Hearing	35
A. Procedures	35
B. Benefits of a Preliminary Hearing	37
C. The Bindover decision	38
Chapter 6. The Grand Jury Indictment	41
A. Historical Background	41
B. Investigatory Power	41
C. Challenging Grand Jury Subpoenas	44
D. The Charging Authority	46
E. Requirements for a Valid Indictment	48
F. Use of Grand Jury Subpoenas After Indictment	53
G. Arraignment	54

Chapter 7. Discovery and Pretrial Conference	63
A. The Scope of Criminal Discovery	63
B. Rule 16 Discovery	64
C. Rule 15 Depositions	66
D. Rule 17(c) Trial Subpoenas	67
E. <i>Brady</i> Material	68
F. Jencks Act (Rule 26.2)	71
G. Witness Immunity	73
H. Pretrial Conference	75
Chapter 8. Notice of Defenses	83

PART 3. PRETRIAL MOTIONS

Chapter 9. Pretrial Motions and Evidentiary Hearings	87
A. Rule 12 Procedures	87
B. Motion and Memorandum of Law	88
C. Conducting an Evidentiary Hearing	94
Chapter 10. Challenging the Charges	105
A. Jurisdiction and Failure to State an Offense	105
B. Venue	106
C. Bill of Particulars	108
D. Joinder of Offenses and Defendants	109
Chapter 11. Motions to Suppress Evidence for Violations of the Fourth Amendment	117
A. Searches Pursuant to a Warrant	117
B. Warrantless Searches and Seizures	119
C. Limits on Claims for Fourth Amendment Violations	126
Chapter 12. Motions to Suppress Statements and Eyewitness Identifications	129
A. Fifth Amendment <i>Miranda</i> Requirements	129
B. The Sixth Amendment Requirements	133
C. Eyewitness Identifications	134
Chapter 13. Evidentiary Motions	137
A. Motions in Limine	137
B. Types of Evidentiary Motions	138

PART 4. PLEA AGREEMENT AND SENTENCING

Chapter 14. Plea Agreement	145
A. Types of Guilty Pleas	146
B. Contents of Plea Agreements	147
C. Withdrawal of Guilty Pleas	150

Chapter 15. Sentencing	163
A. The Section 3553(a) Factors	163
B. The Sentencing Guidelines	165
C. The Presentence Investigation Report and Sentencing Hearing	167
D. Probation and Supervised Release Violations.....	168
INDEX.....	171

TABLE OF CONTENTS

PREFACE	V
ABOUT THE AUTHORS	VII
TABLE OF CASES	XVII

PART 1. PRELIMINARY PROCEEDINGS

Chapter 1. Complaint and Arrest	3
A. Contents of a Criminal Complaint	3
B. Arrest Warrants	4
1. Probable Cause	4
2. Content and Execution of a Warrant	5
C. The Decision to File Charges	6
Chapter 2. Initial Appearance and Appointment of Counsel	13
A. Initial Appearance	13
B. Appointment of Counsel	14
Chapter 3. Speedy Trial Act	19
A. Basic Requirements of the Speedy Trial Act	19
B. Delay Related to the Defendant(s)	20
C. Other Delays	21
Chapter 4. Pretrial Detention and Bail	27
A. Pretrial Detention	27
B. Release on Bail	30

PART 2. PREPARING THE CASE FOR TRIAL

Chapter 5. Preliminary Hearing	35
A. Procedures	35
B. Benefits of a Preliminary Hearing	37
C. The Bindover decision	38
Chapter 6. The Grand Jury Indictment	41
A. Historical Background	41
B. Investigatory Power	41
C. Challenging Grand Jury Subpoenas	44
D. The Charging Authority	46
E. Requirements for a Valid Indictment	48
1. Duplicity and Multiplicity	49
2. Notice Requirement	50

3. Including Essential Elements	51
4. Amending the Information or Indictment	52
F. Use of Grand Jury Subpoenas After Indictment	53
G. Arraignment	54
Chapter 7. Discovery and Pretrial Conference	63
A. The Scope of Criminal Discovery	63
B. Rule 16 Discovery	64
C. Rule 15 Depositions	66
D. Rule 17(c) Trial Subpoenas	67
E. <i>Brady</i> Material	68
1. Favorable or Exculpatory	69
2. Suppression	69
3. Material	69
4. Department of Justice Guidance	70
F. Jencks Act (Rule 26.2)	71
G. Witness Immunity	73
H. Pretrial Conference	75
Chapter 8. Notice of Defenses	83

PART 3. PRETRIAL MOTIONS

Chapter 9. Pretrial Motions and Evidentiary Hearings	87
A. Rule 12 Procedures	87
B. Motion and Memorandum of Law	88
1. Structure of Motion	89
a. Caption and Title	89
b. Grounds for Relief	89
c. Request for Relief	90
d. Signature Block, Proposed Order and Certificate of Service	90
2. Structure of Memoranda of Law	90
a. Caption and Title	91
b. Introduction	91
c. Statement of Facts	91
d. Argument	92
e. Conclusion	92
f. Signature Block, Certificate of Service and Certificate of Compliance	93
3. Brief Writing Tips	93
C. Conducting an Evidentiary Hearing	94
1. Preparing for an Evidentiary Hearing	95
2. The Direct Examination	95
a. The Substance of a Direct Examination	96
b. Structuring a Direct Examination	96
c. The Form of Direct Examination Questions	99
3. The Cross-Examination	99

a. The Substance of a Cross-Examination	100
b. Structuring a Cross-Examination	100
c. The Form of Cross-Examination Questions	101
Chapter 10. Challenging the Charges	105
A. Jurisdiction and Failure to State an Offense	105
B. Venue	106
C. Bill of Particulars	108
D. Joinder of Offenses and Defendants	109
1. Joinder of Offenses	109
2. Joinder of Defendants	112
Chapter 11. Motions to Suppress Evidence for Violations of the Fourth Amendment	117
A. Searches Pursuant to a Warrant	117
1. Probable Cause	118
2. Rule 41 Requirements	118
B. Warrantless Searches and Seizures	119
1. Search or Seizure Requirement	119
a. Searches	120
b. Seizures	121
2. Exceptions to the Warrant Requirement	121
a. Search Incident to Arrest	121
b. Protective Sweep	122
c. Exigent Circumstances	122
d. Plain View/Perception	123
e. Vehicle Searches	123
f. Inventory or Booking Exception	123
g. "Stop and Frisk"	124
h. Administrative and Special Needs	125
3. Consent to Search	125
C. Limits on Claims for Fourth Amendment Violations	126
1. Who May File Motions to Suppress	126
2. Fruit of an Illegal Search	126
Chapter 12. Motions to Suppress Statements and Eyewitness Identifications	129
A. Fifth Amendment <i>Miranda</i> Requirements	129
1. Custody and Interrogation	130
a. Custody	130
b. Interrogation	131
2. Content of the Warnings	131
3. Waiver and Invocation of <i>Miranda</i> Rights	131
4. Fruit of the Poisonous Tree	132
5. Exceptions to <i>Miranda</i>	132
B. The Sixth Amendment Requirements	133
1. Interrogation	133
2. Waiver	134

3. Fruit of the Poisonous Tree	134
C. Eyewitness Identifications.....	134
1. Due Process Requirements	135
2. The Sixth Amendment Right to Counsel	135
Chapter 13. Evidentiary Motions.....	137
A. Motions in Limine	137
B. Types of Evidentiary Motions	138
1. Privileges	138
2. Character Evidence and Prior Convictions or Bad Acts	139
3. Unfair Prejudice	141

PART 4. PLEA AGREEMENT AND SENTENCING

Chapter 14. Plea Agreement	145
A. Types of Guilty Pleas.....	146
B. Contents of Plea Agreements.....	147
C. Withdrawal of Guilty Pleas.....	150
Chapter 15. Sentencing	163
A. The Section 3553(a) Factors	163
B. The Sentencing Guidelines	165
C. The Presentence Investigation Report and Sentencing Hearing	167
D. Probation and Supervised Release Violations.....	168
INDEX.....	171

PART 1

PRELIMINARY PROCEEDINGS

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