Criminal Pretrial Advocacy

Peter J. Henning
Leonid Feller
Karen McDonald Henning

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CRIMINAL PRETRIAL ADVOCACY

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By

Peter J. Henning
Professor of Law
Wayne State University Law School

Leonid Feller
Partner, Kirkland and Ellis LLP
Lecturer, University of Michigan Law School

Karen McDonald Henning
Assistant Professor of Law
University of Detroit Mercy School of Law

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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 indictment, 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.

PETER J. HENNING

LEONID FELLER

KAREN MCDONALD HENNING

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Detroit, Michigan

About the Authors

Peter J. Henning is a Professor of Law at Wayne State University Law School. He was a law clerk to Chief Judge Murray M. Schwartz of the United States District Court for the District of Delaware, a Senior Attorney in the Enforcement Division of the U.S. Securities & Exchange Commission, and a Trial Attorney in the Criminal Division of the U.S. Department of Justice, assigned to the Fraud Section.

Leonid Feller is a partner with Kirkland & Ellis LLP, and a Lecturer at the University of Michigan Law School. He was a law clerk to Judge David A. Nelson of the United States Court of Appeals for the Sixth Circuit, and an Assistant United States Attorney for the Eastern District of Michigan.

Karen McDonald Henning is an Assistant Professor of Law at the University of Detroit Mercy School of Law. She was a law clerk to Judge Collins J. Seitz of the United States Court of Appeals for the Third Circuit, an associate at Skadden, Arps, Slate, Meagher & Flom, and an Assistant Corporation Counsel in the Appellate Division of the District of Columbia Office of the Corporation Counsel (now the Office of the Attorney General).

SUMMARY OF CONTENTS

TABLE OF CONTENTS

PART 1

PRELIMINARY PROCEEDINGS