Winning Before The Jury Is Sworn

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I.
WHAT'S THE BIG DEAL ABOUT MOTIONS?

Successful criminal defense lawyers need a lot of skills. Up-front investigation will win more cases for you than anything else you do over the course of your career, but investigation is hard work and takes a lot of time. Knowing how to cross examine witnesses and how to make an effective opening statement are essential, but these skills are hard to acquire and take years of practice and hours upon hours of work to execute. Picking a good jury is huge, but even the most active trial lawyers resolve only a tiny fraction of their cases with jury trials. The beauty of motions is that – in contrast with the other essential skills – they are relatively easy to create and file, and they accomplish a disproportionate amount of good work. Nothing provides the criminal defense lawyer with a bigger bang for her buck than pretrial motions.

I know (but do not understand) that not every lawyer shares my enthusiasm for motions. I hope this paper convinces skeptics of both the value of motions, and how easy they are to deploy. The next section of this paper contains and discusses "a few good motions" I have filed in recent years. That is followed by a section that will give you some of the law that pertains to pretrial motions in Texas. Finally there is section listing the documents discussed in this paper that will be made available electronically to all participants of this course.

II.
A FEW GOOD MOTIONS

A.
GETTING (AND HANGING ON TO) A FAIR FEE

The first "motion" is not a motion at all, but rather an employment agreement. The Texas Disciplinary Rules of Professional Conduct do not absolutely require contracts for criminal lawyers,[1]
but a simple written document can clarify money matters up front, thereby preventing unpleasant misunderstandings later. You should have a written agreement in every paid case – and something similar even where you are appointed – that sets out what you will

[1] Rule 1.04(c) advises that, "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation." [emphasis supplied]

and will not do. Mine is typically a plainly written, three-page letter that does the following:

- I provide my cell phone number, office number, and email address and let the client know I can be easily contacted if questions arise;

- I explain as carefully and concretely as I can the amount of money that is to be paid, when it will be due, and what services this money will compensate me for;

- It contains some of the relevant factors that the bar allows us to consider when setting a reasonable fee, pursuant to Rule 1.04(b);

- It explains in detail that, although I, the lawyer, can get a lot of materials in discovery, I cannot then or ever give copies to the client or his family due to the rigid (and ridiculous) strictures of article 39.14. This is a very non-intuitive rule, and it is hard for many people to understand why the lawyer can have copies of discovery, but they cannot. I started including this language a couple of years ago and have not had anyone demand copies of the discovery since then.

- It contains the required notice that: "The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas Attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar's Office of General Counsel will provide you with information about how to file a complaint. Please call 1-800-932-1900 toll-free for more information."

1. Employment Agreement

B.
THE FIRST THING ALMOST EVERYBODY WANTS IS TO GET OUT OF JAIL

The first thing we know is that our clients want out of jail. You want it almost as much. Your chances of a successful resolution of the case are enhanced immeasurably when your client can spend some time before trial building his resume by working or going to school. And it is enormously helpful for the jury to see your client walking freely around the courtroom and the courthouse, then getting on the elevator at the end of the day. How could someone the judge trusts with a bond be dangerous? Also, it makes my job so much easier when I can schedule and meet my client in my office and not the jail.

Do not file a *motion* to reduce bail. Appellate courts have no jurisdiction to consider an interlocutory appeal of a pretrial motion to reduce bond. *Ragston v. State*, 424 S.W.3d 49, 52 (Tex. Crim. App. 2014). That means if the trial court denies your motion to reduce bond, no matter how illegally high the bond remains, and no matter how meritorious your motion is, you have no appellate remedy. Instead of a motion to reduce bond, file a pretrial application for writ of habeas corpus. If the trial court denies relief, you can take an immediate interlocutory appeal.

2. Application For Writ Of Habeas Corpus Seeking Bail Reduction

While it is important to get your client out of jail, you don't want to do harm to your case in the process. I never let my client testify at a bond reduction hearing. Nor is it necessary. The rules of evidence do not apply. Do like the prosecutors: introduce hearsay, which is admissible because the rules don't apply to "bail proceedings other than hearings to deny, revoke, or increase bail." TEX. R. EVID. 101(e)(3)(c). I will get affidavits from my clients's parents or employers about their inability to make bond in the amount set, and their financial assets. I get an inmate declaration from the client if I can't get affidavits from others.

3. Inmate's Declaration

It is becoming more and more common for prosecutors to file protective orders in family violence cases that, among other things, ban a person from his or her home for some significant period of time in the aftermath of an alleged incidence of family violence. Although these can be difficult to win, there are challenges that can be made.

4. **Motion To Modify Order For Emergency Protection**

C.
USING THE GRAND JURY AS IT WAS MEANT TO BE USED

Although meant as a buffer between the king and the citizen when they were established centuries ago, today grand juries are much more often used as tools of the prosecution than protectors of the people. It does not necessarily have to be so, however. Occasionally the right case presents itself in which we can insist that the grand jury do what it was created to do, namely prevent the prosecution of innocent persons. How about a motion that forces, or at least persuades, the prosecutor to present exculpatory evidence to the grand jury, and thereby prevents a meritless prosecution and a costly trial.

5. Motion To Order The State To Present All Exculpatory Evidence In Its

Possession To The Bexar County Grand Jury

D.
THE MICHAEL MORTON ACT, ETC.

I used to file at least 15 separate written pretrial motions in every case I handled, making me arguably the biggest menace to trees of any lawyer of my generation. After the Michael Morton Act radically expanded our entitlement to discovery and the way in which we seek it, I also changed my motion practice. Now, instead of filing separate motions that ask for singular relief, like a witness list, I file one large motion that includes every discovery request I can think of, as well as requests for other relief, such as a court reporter, a pretrial hearing, and a motion in limine, among other things. A sample of this motion is attached.

6. Defendant's Motion For Discovery And Other Relief

Although this motion, and the Michael Morton Act will get you a lot of the relief you need in a criminal case, you will still need more, including requests for notice of extraneous misconduct, motions to suppress evidence, and motions to set aside charging instruments — all of which are discussed in this paper.

7. Motion To Inspect The Prosecution Files Of The Deceased In Possession Of The Bexar County District Attorney's Office

The defense must frequently deal with extraneous misconduct our clients are accused of, and section E of this paper discusses a motion strategy for doing so. Occasionally you will encounter a so-called "victim" who also has misconduct in his past, and when that goes to a "pertinent trait," it is admissible before the fact-finder. *See* TEX. R. EVID. 404(a)(3)(A). If I have reason to believe a complainant has had a "pertinent" prosecution, I invoke Rule 404(a)(3)(A), *Brady*, and the Michael Morton Act to request that the Judge order the prosecution to let me inspect their files.

E.
DEALING WITH EXTRANEOUS MISCONDUCT

Two things are true about extraneous misconduct. First, arguably nothing is more damaging to a defendant. Second, good lawyers can often keep it out. We have to develop a strategy for identifying as soon as possible all the extraneous misconduct the state will try to use against us, keeping out as much as we can, and dealing effectively with the rest. These three documents will help.

8. Request For Notice Of Intent To Offer Extraneous Conduct Under Rule 404(b) And Evidence Of Conviction Under Rule 609(f) And Evidence Of An Extraneous Crime Or Bad Act Under Articles 37.07

9. Motion in Limine

10. Defendant's Objections To Evidence Pursuant To Rule 103(a)(1)

F.
SUPPRESSING THE BAD STUFF

I am a big believer in simple, general motions to suppress that are just specific enough to get an evidentiary hearing, but not so overly informative as to tip the prosecutors off to exactly where I am going so that they might take their witnesses to the woodshed. Sometimes, though, a moderate amount of specificity is called for, as the following three motions demonstrate:

11. Motion To Suppress Evidence

12. Motion To Suppress Written Or Oral Statements Of Defendant

13. Defendant's Objections To Admissibility Of Videotape Of Joe Smith On January 17, 2017

G.
SETTING ASIDE (QUASHING) CHARGING INSTRUMENTS

There is a lot of Texas law governing what an indictment or information must contain to be valid, and well-informed lawyers can wreak havoc on a prosecution by challenging those charging instruments that are deficient. Such challenges have to be made in writing, and before the date trial commences, or they are waived. The possibilities are almost unlimited. I try hard to think of an arguable motion to set aside in every case I have. Here are just a few I have used in the past.

14. Motion To Set Aside The Indictment (manslaughter)

15. Motion To Set Aside The Information (shoplifting)

16. Motion To Set Aside The Indictment (thc)

H.
DEALING WITH EXPERTS

It is hard to try a criminal case these days in which the state does not rely on at least one expert. As with extraneous misconduct, effective criminal defense lawyers have to develop a strategy for dealing with experts. Here are a few of the documents I file with that in mind.

17. HIPAA Order

18. Letter Retaining Expert

19. Response To State's Request To Disclose Defense Experts

20. Defendant's Ex Parte Motion To Provide Funds For Assistance From An Expert On Domestic Violence

21. Defendant's Ex Parte Motion For Access To Mental Health Expert While A Prisoner In The Comal County Jail

I.
A COUPLE OF NUCLEAR OPTIONS

I call these "nuclear options" because they are more extreme than other remedies suggested elsewhere in this paper. That said, sometimes extreme problems call for extreme solutions.

22. Pretrial Application For Writ Of Habeas Corpus

23. Motion To Recuse The Trial Judge

J.
WHEN THINGS FALL APART

As hard as you have tried to resolve your case with either a plea bargain or a trial that satisfies you and your client, sometimes those efforts fail and you need additional solutions, in the form of sentencing relief, a motion for a new trial, or an appeal. Here are a few of the outside-the-box approaches I have used when I was unwilling to watch my client be dragged off to the dungeon without a fight.

24. Defendant's Motion For Modification Of Conditions Of Community Supervision

25. Motion To Reconsider Sentence

26. Motion For New Trial

27. Motion For Free Statement Of Facts On Appeal

K.
GET ME OUT OF HERE

Although I always like to reduce my motions to writing whenever possible, some motions can also be made orally. A few have to be in writing, and a few more have to be written and sworn to. One of these is a motion for continuance. Case law is unforgiving. If you want a continuance, you have to present a written, sworn motion stating the basis of your request, and if you do not, you will lose on appeal. Period. *Blackshear v. State*, 385 S.W.3d 589 (Tex. Crim. App. 2012).

Sometimes unforseen facts pop up in the middle of a trial that require you to seek a continuance. You may not have time to return to your office to type and print out the motion. I carry in my briefcase what I call a "shell" motion for continuance that contains blanks that can be filled out on the spot, ready to be signed, notarized, and filed on very short notice.

28. (Shell) Motion For Continuance

III.
SOME LAW PERTAINING TO PRETRIAL MOTIONS

A. In General

1. Article 28.01 of the Texas Code of Criminal Procedure permits the trial court to set pre-trial hearings before the trial on the merits. The following matters may be determined:

a. Arraignment and appointment of counsel;

b. Pleadings of defendant;

c. Special pleas;

d. Exceptions to the charging instrument;

e. Motions for continuance;

f. Motions to suppress evidence;

g. Motions for change of venue;

h. Discovery;

i. Entrapment;

j. Motion for appointment of interpreter

2. "The trial court has discretion to 'set any criminal case for a pre-trial hearing before it is set for trial upon its merits.' The purpose of the pre-trial hearing is to enable the judge to dispose of certain matters prior to trial and thus avoid delays during the trial." *Johnson v. Texas,* 803 S.W.2d 272, 283 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991).

B. Time Limitations

1. *Seven Days If Hearing Set*

a. "When a criminal case is set for such pretrial hearing, any such preliminary matters not raised or filed seven days before the hearing will not thereafter be allowed to be raised or filed, except by permission of the court for good cause shown; provided that the defendant shall have sufficient notice of such hearing to allow him not less than 10 days in which to raise or file such preliminary matters." TEX. CODE CRIM. PROC. ANN. art. 28.01 § 2.

b. Notice is sufficient if it is by announcement by the court in open court in the presence of the defendant or counsel; if it is by personal service upon the defendant or counsel; or, if it is deposited in the mail to either the defendant or counsel at least six days prior to the hearing. TEX. CODE CRIM. PROC. ANN. art. 28.01 § 3.

c. Failure to comply with the seven day rule can have devastating consequences. In *Postell v. State*, 693 S.W. 2d 462 (Tex. Crim. App. 1985), the trial

court ordered defendant to elect who would assess punishment during the pre-trial hearing. Defendant objected to being forced to elect before voir dire, and, after his objection was overruled, he elected the court. Punishment was assessed at life imprisonment. The court of criminal appeals held that where a pre-trial hearing is held in accordance with article 28.01, the defendant may be required to file all his pleadings and motions, including his election to have the jury assess the punishment. *Id*. at 463-64.

d. Failure to comply with the time limits for filing other pre-trial motions set out in article 28.01 § 2 does not waive the defendant's right to a hearing on his motion for change of venue, because such matters are of constitutional dimension. *Faulder v. State*, 745 S.W. 2d 327, 338 (Tex. Crim. App. 1987). Such a hearing may be held after the jury is empaneled, and before the defendant enters his plea to the indictment. *Foster v. State*, 779 S.W. 2d 845, 854 (Tex. Crim. App. 1989).

2. *At Least Ten Days Are Allowed*

a. Article 28.01 permits the court to require that all motions be filed within seven days of any pre-trial hearing. The other side of the coin are articles 27.11 and 27.12.

b. TEX. CODE CRIM. PROC. ANN. art. 27.11 allows the defendant "ten entire days, exclusive of all fractions of a day after his arrest . . . to file written pleadings." *See Oliver v. State*, 646 S.W. 2d 242, 244 (Tex. Crim. App. 1983).

c. TEX. CODE CRIM. PROC. ANN. art. 27.12 allows the defendant ten full days to file written pleadings after service of indictment, where he is entitled to be served with an indictment. *See Johnson v. State*, 567 S.W. 2d 214, 216 (Tex. Crim. App. 1978).

3. *Other Deadlines*

a. Some motions must be filed at least "before the date on which the trial on the merits commences," unless the trial court orders compliance with article 28.01. *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 1.14 (b)(objections to defects in charging instruments.

C. Presence Of The Defendant

1. "The defendant must be present at the arraignment and his presence is required during any pre-trial proceeding." TEX. CODE CRIM. PROC. ANN. art. 28.01 § 1.

2. The trial court erred in holding a hearing on a motion to dismiss on speedy trial grounds in the absence of the defendant and his appointed lawyer. *Riggall v. State*, 590 S.W. 2d 460, 461-62 (Tex. Crim. App. 1979).

3. An *in camera* meeting between the court and the lawyers, but from which appellant was excluded, to discuss a strategy for dealing with a telephone call made to a venireperson was not a pretrial proceeding governed by article 28.01. As such, appellant's presence was not required. *Lawton v. State*, 913 S.W. 2d 542, 549-550 (Tex. Crim. App. 1995), *cert. denied*, 519 U.S. 826 (1996).

4. A discussion between counsel advising the court that the state had agreed to some discovery motions and to suppress an oral statement was not a "proceeding" and therefore did not require appellant's presence. Nor was appellant's presence required at a private meeting between the state and defense counsel where the defense agreed to waive a suppression argument. *Moreno v. State*, 2005 WL 708424 *1 (Tex. App.--San Antonio 2005, pet. ref'd.)(not designated for publication).

D. When Mandatory And When Permissive

1. As a general rule, the court is not required to conduct pre-trial hearings. *Moore v. State*, 700 S.W. 2d 193, 205 (Tex. Crim. App. 1985). "Article 28.01 . . . is not a mandatory statute, but is one directed to the court's discretion." *Calloway v. State*, 743 S.W. 2d 645, 649 (Tex. Crim. App. 1988).

2. In at least three instances, however, Rule 104(c) of the Texas Rules of Evidence requires hearings outside of the hearing of the jury:

a. Hearings on the admissibility of confessions;

b. Hearings on preliminary matters "when the interests of justice require;" and,

c. Hearings "when an accused is a witness, if he so requests."

3. "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." TEX. R. EVID. 103(c).

E. Argument

1. "The counsel of the defendant has the right to open and conclude the argument upon all pleadings of the defendant presented for the decision of the judge." TEX. CODE CRIM. PROC. ANN. Art. 28.02.

F. Don't File Groundless, False, Harassing, Or Delaying Motions

1. Attorneys must sign all pleadings they file. TEX. CODE CRIM. PROC. ANN. art. 1.052(a). That signature constitutes the attorney's certificate that he has read the pleading and that to the best of his "knowledge, information, and belief formed after reasonable inquiry [the pleading] is not groundless and brought in bad faith or groundless and brought for harassment, unnecessary delay, or other improper purpose." TEX. CODE CRIM. PROC. ANN. art. 1.052(b).

2. Lawyers filing fictitious pleadings for improper purposes or who knowingly make groundless and false statements in pleadings to obtain a delay or to harass "shall be held guilty of contempt." TEX. CODE CRIM. PROC. ANN. art. 1.052(d).

3. "If a pleading, motion, or other paper is signed in violation of this article, the court, on motion or on its own initiative, after notice and hearing, shall impose an appropriate sanction, which may include an order to pay to the other party or parties to the prosecution or to the general fund of the county in which the pleading, motion, or other paper was filed the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney's fees." Tex. Code Crim. Proc. Ann. art. 1.052(e).

4. "A court shall presume that a pleading, motion, or other paper is filed in good faith. Sanctions under this article may not be imposed except for good cause stated in the sanction order." TEX. CODE CRIM. PROC. ANN. art. 1.052(f).

5. "In this article, 'groundless' means without basis in law or fact and not warranted by a good faith argument for the extension, modification, or reversal of existing law." TEX. CODE CRIM. PROC. ANN. art. 1.052(h).

IV.
A LIST OF SAMPLE DOCUMENTS AVAILABLE ELECTRONICALLY

1. Employment Agreement

2. Application For Writ Of Habeas Corpus Seeking Bail Reduction

3. **Inmate's Declaration**

4. **Motion To Modify Order For Emergency Protection**

5. **Motion To Order The State To Present All Exculpatory Evidence In Its Possession To The Bexar County Grand Jury**

6. **Defendant's Motion For Discovery And Other Relief**

7. **Motion To Inspect The Prosecution Files Of The Deceased In Possession Of The Bexar County District Attorney's Office**

8. **Request For Notice Of Intent To Offer Extraneous Conduct Under Rule 404(b) And Evidence Of Conviction Under Rule 609(f) And Evidence Of An Extraneous Crime Or Bad Act Under Articles 37.07**

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19. **Response To State's Request To Disclose Defense Experts**

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Expert On DNA

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