PRE-TRIAL RULES AND DURING TRIAL RULES

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I. Pretrial Motions

A. Motion for Discovery

1. Crim. R. 16 provides for the purpose and scope of discovery and for what is to be normally provided.

2. The "trigger" for defense counsel to be provided discovery is the filing of a "…written demand for discovery" pursuant to Crim. R. 16(B). Crim. R. 16, and particularly Crim. R. 16(B), is very specific as to what is to be provided.

3. Crim. R. 16(J) provides that each party is to provide the other with a witness list.

4. Crim. R. 16(K) provides that expert reports shall be given to opposing counsel, together with a "summary of qualifications" of each expert, no later than 21 days prior to trial. This period may be modified by the court, for good cause shown, as long as no party is thereby prejudiced.

5. Crim. R. 16(L) sets forth the rules relating to regulation of discovery. If a party claims the adverse party has failed to comply with Crim. R. 16, such party may bring the claim to the court's "attention." This would normally be done through a pretrial motion.

6. A discovery demand should, pursuant to Crim. R. 16(A), be made no later than 21 days after arraignment or seven days before trial, whichever is earlier. A motion to compel discovery should be made no later than seven days before trial, or three days after the opposing party provides discovery, whichever is later.

7. Good practice dictates that a written discovery demand should be made as soon as possible after arraignment and that before filing a motion to compel discovery, counsel should attempt to resolve the matter informally with opposing counsel. The motion should be specific as to what has not been provided and as to efforts made to resolve the issue informally. There needs to be a clear record, possibly with an evidentiary hearing, so that the record is fully protected in the event of a possible appeal.

B. Motion in Limine

1. A motion in limine is a preliminary motion seeking to exclude or prevent opposing counsel from introducing improper information at trial, such as potentially harmful (but irrelevant or unduly prejudicial) evidence about the defendant's background.

2. The motion should be clear as to what is sought to be precluded, and a solid record (through hearing or otherwise) needs to be made.

3. A pretrial ruling on a motion in limine is preliminary only. This means that even though the trial court may have made a pretrial ruling that certain information may not be presented before the finder of fact, such a ruling is not necessarily final. For example, if certain evidence is excluded before trial, but not party who was able to obtain such a favorable ruling before trial "opens the door" in some fashion, the court will then be entitled to reverse its original ruling.

C. Motion to Suppress

1. Most suppression motions are based on alleged violations of state and federal constitutional rights. However, in certain cases, such as driving under the influence prosecutions, evidence may be subject to exclusion if proper test protocol was not followed.

2. A suppression motion should state the basis of the alleged violation with particularity, so that the motion is not subject to summary dismissal without such a hearing.

3. If a constitutional violation is alleged, the prosecution has the initial burden to present evidence.

D. Motion for Severance

1. Crim. R. 8(A) and (B) set forth, respectively, the rules relating to joinder of offenses and joinder of defendants.

2. Crim. R. 14 sets forth the procedure for a party seeking relief from prejudicial joinder of offenses or defendants.

3. Concerning severance of defendants, the Crim. R. 1 states in part:

> …In ruling upon a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1) any

statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

E. Motion for Jury View

1. If it would assist the trier of facts in its deliberations, a jury view may be requested prior to trial.

2. A jury view should be sought well prior to trial in order to allow time for arranging a bus or other transportation for the jury to the scene to be viewed.

3. Normally, the parties and (ultimately) the court determine what the jury should be shown, such as an alleged crime scene. Typically, a bailiff or court employee points out, without comment, certain areas for the jury to note.

II. Trial Preparation

A. Conference with the Court and Counsel

1. Particularly if counsel has not tried a case to the particular trial court before, it is advisable to meet with the court and opposing counsel to discuss the court's preferences as to trial procedure.

2. Counsel should be aware of how the court prefers counsel to make objections, for example, whether counsel should simply object, or whether counsel may make a short statement of the basis, such as hearsay or relevance.

3. Some judges prefer most objections to be argued at sidebar.

4. The court's rules of practice need to be followed by counsel whenever possible.

B. Specific Practices

1. Counsel should always have the Rules of Evidence and the Rules of Criminal Procedure at the trial table. It is advisable to always review the Rules prior to a trial to be able to "pull the trigger" quickly on objections and to anticipate possible evidentiary issues and arguments.

2. It is also advisable to make a checklist of the stages of trial and necessary actions, such as the need to make a motion for acquittal at the close of the prosecution's case and at the close of all evidence.

3. Attention has to be paid to the client's attire and behavior, and the behavior of the client's family and friends, both inside and outside the courtroom.

III. Basic Objections

1. Most objections fall into a limited number of areas. Basic objections include:

a. Relevance (factual);
b. Relevance (factually relevant, but more prejudicial than prohibitive);
c. Hearsay;
d. Lack of foundation;
e. Lack of authentication;
f. The question calls for speculation;
g. Improper opinion (for example, the opinion is one which could only be stated by an expert);
h. Leading (on direct examination);
i. Counsel is not letting the witness finish an answer;
j. The witness is not responsive (not answering the question);
k. Counsel is badgering the witness;
l. There has not been established a foundation for the witness to testify as an expert and express an expert opinion; and
m. Lack of personal knowledge.

IV. Specific Rules of Evidence

A. Evid. R. 401

1. This is the basic rule of evidence, which states:

> "Relevant" evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

B. Evid. R. 402

1. Relevant evidence is generally admissible. Irrelevant evidence is inadmissible.

C. Evid. R. 403

1. This Rule states that relevant evidence may be excluded on grounds of prejudice, confusion or undue delay.

D. Evid. R. 404

1. This Rule sets forth the specific circumstances in which character evidence is admissible and when evidence of "…other crimes, wrongs or acts" is admissible.

E. Evid. R. 608 and 609

1. Evid. R. 608 specifies how the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, and when specific instances of conduct may be introduced.

F. Evid. R. 609

1. This Rule describes how and when the credibility of a witness may be impeached by evidence of conviction of a crime.

G. Evid. R. 611

1. Evid. R. 611(A) gives the trial court discretion to exercise "reasonable control" over the mode and order of asking questions and presenting evidence.

2. Evid. R. 611(B) makes it clear that cross-examination is permitted "…on all relevant matters and matters affecting credibility."

3. Evid. R. 611(C) allows leading questions on cross-examination, and also on direct examination, when "…necessary to develop the witness' testimony."

H. Evid. R. 616

1. Evid. R. 616 (A), (B) and (C), respectively, allow for impeachment for "bias," "sensory or mental defect" and "specific contradiction."

I. Evid. R. 702 through 705

1. These Rules relate to testimony by expert witnesses.

2. In trial preparation, it should always be kept in mind whether the expert is qualified and whether a proper foundation has been presented for the purported expert testimony.

J. Evid. R. 801 through 807

1. These are the Rules relating to hearsay, statements which are not hearsay, and exceptions to the hearsay Rules.

2. When read in their entirety, the exceptions and determination of those statements which are not hearsay are all logical and generally based on sensible considerations.

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