Building the Foundation for a Strong Case
Phoenix, AZ 2015

Aggressive Motions Practice

Motions - generally

- Your only mode of communication with the court pre-trial
- Are there deadlines under your state's rules?
  - For example, in Colorado, there is an actual stated deadline under Crim.P. 12(3) that motions must be filed within 21 days after arraignment
- Taking the high road
- Think of the Courts
  - Number your motions
  - Respond in writing when at all possible
  - Think of what the court has and doesn't have and provide it. *Be a suck up!*

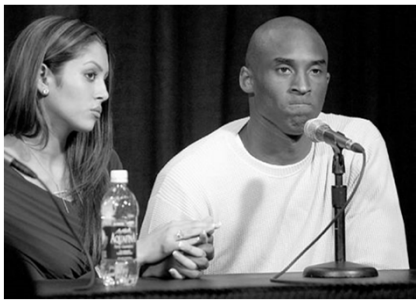
Aggressive Motions practice

- What are you doing to protect your victim?
- What is the standard philosophy you hold for motions?
  - Is motions practice a shield?
  - Is motions practice a sword?
- Do you demand discovery from the defense?
- Do you hold the defense to the deadlines and requirements of motions practice?

Six Motions to File in Every Case…

- Motion for Protective Order – protect victim's information
- Motion for Discovery
- Motion to Comply with Other Acts/Rape Shield for Defense
- Motion to Introduce Other Acts Evidence/Res Gestae
- Motion for Protective Order – photographs
- Motion to Protect Medical Privilege

Who is this guy?



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Offensive motions

- Motion for discovery
  - Many states provide "discretionary disclosures" to the prosecution.
    - Fed. Rules of Crim. P. 16 allows for reciprocal discovery (i.e., if the defense obtains discover, they must also allow discovery)
    - Some states allow more than others
    - Some states require a Court to rule on discovery issues
  - Is there a requirement for the defense to disclose the "nature of the defense?"
  - Ask for a list of possible defense witnesses
    - Make sure defense provides the same that you provide (address, phone number, email)
  - Is there a requirement for the defense to disclose affirmative defenses?
  - Is the defense required to disclose alibi? (FRCrP 12.1)

Offensive motions cont.

- Don't forget the counter punch
  - Rebuttal
    - After the defense discloses its witnesses or defenses, do you have an affirmative obligation to disclose additional witnesses or experts?
  - Do you need to disclose specifics?
    - For example, some states don't require the prosecution to designate its case-in-chief witnesses apart from rebuttal witnesses
    - Also, some states will allow use of an expert to rebut assertions of defense expert without additional endorsements.
  - Example: No internet connection when I ski….

Other offensive motions

- "Good for the Goose" motions
- Motion to comply with notice of other acts evidence
  - FRE 404(b) requires, "on request by a defendant in a criminal case, the prosecution must provide reasonable notice of the general nature of any such [other acts] evidence that the prosecutor intends to offer at trial and do so before trial or during trial if the court, for good cause, excuses lack of pretrial notice."

Other offenses motions cont.

- More on other acts evidence
  - Look to the committee notes on the use of 404(b)
  - Notice requirement in criminal cases is intended to reduce surprise and promote early resolution issue on admissibility.
  - Integral part of 404(b) analysis is always whether the evidence survives a 403 analysis

Other offensive motions cont.

- Motion to comply with requirements of "rape shield" statutes
  - Requirement of written motion?
  - Requirement of filing items under seal?
- Motion to comply with appearance of lab tech
  - "Any party may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the witness and other party at least 10 days before the date of such criminal trial." Colo.Rev.Stat. 16-3-309(5)
  - Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) – approval of "notice and demand" statutes.

Other offensive motions cont.

- Notice by Prosecution
  - Introduction of other acts evidence
  - Introduction of res gestae evidence
    - Not required but look at the benefits
  - Expert witnesses
    - Including statement of anticipated evidence
- Request for protective orders pursuant to Fed.R.Crim.P. 16(d)(I)
  - Protecting victim/witness information
  - Especially important in pro se cases

Child Hearsay and closed circuit testimony

Child Hearsay

- These rules vary from state to state….
- Motion to introduce out-of-court statement made by a child
  - May apply to any sex offense
  - May apply to child abuse
  - May apply to homicide (children under 13)
  - May apply to domestic violence cases
- Hearing outside presence of jury

Child Hearsay cont.

- Generally, court must find that time, content, and circumstances of statement provide sufficient safeguards of reliability AND
  - The child either testifies OR
  - The child is unavailable and there is corroborative evidence
- Watch out for challenged under Crawford v. Washington, 541 U.S. 36 (2004)
- Usually requires notice
- Usually requires limiting instruction

Crawford and Child Hearsay

- *Crawford* isn't an issue when:
  - The statement is non-testimonial
  - The child testifies at the trial
- Who is your reporting party? It may still be testimonial if the statement is made in anticipation of future litigation
  - Also People v. Vigil, 104 P.3d 258 (Colo.App.2004); People v. Warner, 14 Cal.Rptr.3d 419 (Cal.App.2004)(use of multidisciplinary agency still testimonial)
- May be very fact specific

Child Hearsay

- Does the witness have to be a "child" at the time of trial.
- Child hearsay is often a "last chance catch-all" rule for admissibility.
  - Are you going to provide notice of your intent to introduce under other theories before resorting to the child hearsay exception?

Child Hearsay cont.

- Statements spontaneous?
- Was child still upset or in pain from the abuse?
- Was the language used appropriate?
- Does child have a bias or motive for lying?
- Could any other event between the time of the abuse and the statement account for the contents of the statement?
- Did more than one person hear the statement?
- What is the general character of the child?
  - Source of list: People v. District Court, 776 P.2d 1083 (Colo.1989)

Child Hearsay cont.

- Standard of proof: Usually preponderance
- Unavailable?
  - Can be statutory due to age of child
  - Can be medical or emotional
- Even if the child testifies, the hearsay statements ARE admissible. See People v. Williams, 899 P.2d 306 (Colo.App.1995)

Child Hearsay cont.

- What is "corroborative evidence"
  - Direct or circumstantial
  - Independent and supplementary
  - Examples:
    - Testimony from another eyewitness
    - Statements of other children present when the act was committed
    - Medical or scientific evidence showing assault
    - Expert opinion evidence that child has PTSD consistent with the event
    - Evidence of other similar acts by perpetrator
    - Defendant's confession to the crime
  - Source: People v. Bowers, 801 P.2d 511 (Colo.1990)

Closed Circuit Testimony

- Does your state have specific rules governing this kind of evidence?
- Know who it applies to?
- What about "Skype?"
- Who is going to be present?
- How do you ensure due process and confrontation rights?
- What about the lack of bonding between the child and your jury?

Closed Circuit Testimony cont.

- Often the test is the Court must find that while in the physical presentence of the defendant, this close contact would result in the witness suffering serious emotional distress or trauma such that the witness would not be able to communicate

Close Circuit Testimony cont.

- Watch for time notice requirements
- Very important to strictly follow statutory procedures

Other common defense motions

Other common defense motions

- Bill of Particulars
- Motions for discovery
  - Subpoenas Duces Tecum
- Motions regarding competency of witnesses
- Motions to suppress
- Motion to introduce witness's prior history (rape shield)
- Motion for *Shreck* Hearing or other challenges to experts

Bill of Particulars

- Governed by Fed.R.Crim.P. 7(f)
  - Must be filed within 14 days of arraignment
  - Usually within court's discretion. See for example Balltrip v. People, 401 P.2d 259 (Colo.1965)
- Not to be used as discovery
  - Used to define the offense
  - Not to disclose in detail the evidence upon which the prosecution will rely.

Bill of Particulars cont.

- Sex Assault cases
  - Erickson v. People, 951 P.2d 919 (Colo.1998)
    - "unreasonable to require exactitude from any victim, child or adult, in crimes involving repeated instances of abuse occurring over a prolonged period of time."
  - Often the court can use a unanimity instruction in lieu of a Bill of Particulars. See for example People v. Quintano, 81 P.3d 1091 (Colo.App.2003)

Motion for Discovery

- Watch these closely for items too broad for Crim.P. 16
- File timely objections
  - "The People will comply with the requirement of Crim.P. 16"
- Watch out for the blanket motions requesting every book or piece of paper ever held by a witness
- Know who reports to you and who doesn't (see DSS/DHS records section)

Motion for Discovery: Records

- Crim.P.17(c)
  - Allows for the issuance of a subpoena duces tecum
  - Production of: books, papers, documents, photographs, or other objects designated
  - Produce at trial OR produce at a time before trial for inspection
- Huge area of abuse by defense counsel
- Know the rules
- Does the prosecution have standing to object?
  - WHO CARES!! Object to protect your victim!

Motion for Discovery: Records cont.

- Crim.P. 17(c)
  - Requires service upon the witness
  - Usually requires immediate service upon the opposing party as well
  - Not to be used for general discovery or as a defense "search warrant."
- People v. Spykstra, 234 P.3d 662 (Colo.2010)
  - Held the People have standing to object as it is a party to the case
  - Held that the defense must meet threshold test (no fishing expeditions)

Motion for Discovery: Records cont.

- People v. Spykstra
  - Defendant must prove the following test in order to have a SDT issue:
    - Reasonable likelihood the materials exist (needs specific factual basis)
    - Material is evidentiary and relevant
    - Materials are not otherwise procurable in advance of trial
    - Party can't prepare for trial without the materials
    - Application is made in good faith and not a general fishing expedition.
  - Citing to United States v. Nixon, 418 U.S. 683, 699-700. 94 S.Ct. 3090 (1974)

Motion for Discovery: Records cont.

- DSS/DHS records
  - Can the prosecution get the records of dependency and neglect (including reports of child abuse)
  - What do you do with them once you get them?
    - It is often a violation of law to disclose these records directly
  - Protective Orders under Crim.P. 16(c)(I)
  - Demand an in camera review
- Typical motion to quash from the agency's attorney, but don't rely on them to file something to block the defense from getting the motion!

Motion for Discovery: Records cont.

- Medical Records or Psychological Records of victim or witness
  - Can you think of a reason **not** to object?
  - Aggressively advocate for the victim/witness
  - Colorado case: People v. Sisneros, 55 P.3d 797 (Colo.2002)
    - "The psychologist-patient privilege shields more than just communication between psychologist and patient. Once it attaches, the psychologist-patient privilege protects testimonial disclosures as well as pretrial discovery of files or records derived or created in the course of the treatment."

Motion for Discovery: Records cont.

- Medical Records or Psychological Records of victim or witnesses
  - What does Sisneros allow us to do:
    - No in camera review unless there is a valid waiver of privilege.
    - The Court should never accept these documents under seal. Without a waiver of privilege, the court should not review the records.
    - Watch out what a wavier really means
- NOT EVERY STATE HAS SUCH PROTECTIONS OF CONFIDENTIAL RECORDS

Motion for Discovery: Records cont.

- SDT to Sexual Assault or Domestic Violence Advocates
  - Look for statutory privilege as a shield to the production of these records
  - Need to make sure they are:
    - Often need to be private (community based) advocates
    - Often the agency needs to meet the training levels
  - Many of these agencies do not have attorneys on staff and some may not know what to do when they are served

Motion for Discovery: Records cont.

- School Records
  - Watch both the State law and Federal law ("FERPA"). Federal Educational Rights Privacy Act. 20 U.C.S. § 1232; 34 CFR Part 99
  - Where the heck do I look in the statutes? Ex. "A school district shall not release the education records of a student to any person, agency, or organization without the prior written consent of the parent or legal guardian of the student except as otherwise permitted [by FERPA]."

Motion for Discovery: Records cont.

- School records cont.
  - Look to People v. Wittrein, 221 P.3d 1076 (Colo.2009)
    - Prior to a SDT being issued, Defendant must articulate a specific need for the information
    - Court must balance the need versus privacy interest
      - Nature of the information sought
      - Relationship between information and issue in dispute
      - Harm that may result from disclosure
  - FERPA additionally requires:
    - Notice to student or parents
    - Rights to view and joint between student and parent, HOWEVER, when student turns 18 years old or post high school, rights transfer solely to student

Motion for Discovery: Records cont.

- Waiver of privilege
  - "Waiver is a form of consent to disclosure which must be justified by an evidentiary showing of an express or implied waiver." Turner, 109 P.3d 639 (Colo.2005)
    - Who has the burden? Is it on the defense or prosecution?
    - Is there a need to demonstrate a knowing waiver either in words or conduct? Sisneros, 55 P.3d 797 (Colo.2002)
    - Often must show the victim has injected her physical or mental condition into the case as the basis of a claim or an affirmative defense. Wittrein, 221 P.3d 1076 (Colo.2009)
    - Does the victim have to disclose the substance of the communication with the privileged party or just they had consulted with a privileged party? People v. Silva, 782 P.2d 846 (Colo.App. 1989)

Motions to Suppress

- In major cases, always file a response
  - Should the court review recorded interviews with transcripts prior to the hearing?
  - Does the Court have the search warrant or other documents the defense is wanting to suppress
  - You don't need to advocate your position, but put the relevant case law in the response
- Fight against boilerplate motions to suppress
  - People v. Licea, 918 P.2d 1109 (Colo.1996); Cummings v. People, 785 P.2d 920, 923 (Colo.1990), People v. Dailey, 639 P.2d 1069 (Colo.1982), and People v. Jensen, 713 P.2d 907, 912 n.8 (Colo.1986)

Motion to Suppress cont.

Model Rule of Professional Conduct 3.1 (ABA)

- "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."

Motion to Introduce Witness's Prior History (rape shield)

- Statutory procedure which can be used to our advantage
- Example of model rape shield:
  - Addresses specific instances or prior or subsequent sexual conduct, opinion evidence of that conduct, and reputation evidence of that conduct
  - Presumed irrelevant EXCEPT:
    - When done with the defendant;
    - Specific instances to show source or origin of semen, pregnancy, disease, or any similar evidence to show that the acts were not committed by the defendant.

Motion to Introduce Witness's Prior History (rape shield) cont.

- Procedure:
  - Usually requires written motion prior to trial
  - Offer of proof of the relevancy and materiality of evidence of specific conduct, opinion evidence, reputation evidence, or history of false reporting
  - Often requires sworn affidavit

Motion to Introduce Witness's Prior History (rape shield) cont.

- Is it required that all motions must be under seal?
- Is it required that all transcripts and tapes must be under seal?
- Is it required that only items admitted at trial can be unsealed?
- Request a protective order regarding disclosure of this rape shield material and access of the materials to defendant directly

Motion for basis of expert opinion (FRE 702)

- Becoming more popular
- It appears the Courts have a difficult time understanding what its role is and whether it needs to grant a hearing.
- This is very state dependent on the role of the Court as gatekeeper for expected expert testimony.

What Will Your Expert Need to Do for the Hearing?

- Submit a current CV
- Be prepared to discuss qualifications, experience and understanding of the research
- Be prepared to discuss their report or the topics identified in the Rule 16 summary you submitted on their behalf
- Have the case law ready

Thank you!

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