# The Lost Art of Preliminary Hearings

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# Practices applicable to all hearings

# Preparation

**prep·a·ra·tion -** ˌprepəˈrāSH(ə)n/

The action or process of making ready or being made ready for use or consideration. “The preparation of a draft contract"

synonyms: devising, putting together, drawing up, construction, composition, production, getting ready, development More

plural noun: preparations "she continued her preparations for the party

synonyms: arrangements, planning, plans, preparatory measures

# Preparation

Know your goals

Know the burdens

Anticipate the legal issues

Prepare – Investigate, subpoena, talk to witnesses, review maps

Review the law

Create a timeline of events, including arrest, Miranda, questioning

# Preparation, cont'd

Prepare your cross, set up the files

List discovery you may be entitled to under CPL 245

Disclose any discovery that may be required (photos or video?)

Subpoena records – video, 911, booking photo, medical or ambulance records showing client's injuries, other

Get map and aerial photos

Review Google maps, drive the route, look at the house, look at photos

Know north, south, east, west on location, streets, use this information when questioning witnesses. Officers often respond with directional answers (NSEW)

# Preparation, cont'd

Subpoena witnesses – (Does law permit you to subpoena police or civilian witnesses in this particular hearing) – maybe those who are prosecution witnesses

Foundation witnesses for videos or 911, other police officers

# Don’t forget important things
# Digital recorded evidence?  A player?

# PRELIMINARY HEARINGS

# WHAT IS A PRELIMINARY HEARING

The official answer:

Pursuant to CPL 180.10(2), a preliminary hearing is a “prompt” hearing following arraignment on a felony complaint “upon the issue of whether there is sufficient evidence to warrant the court in holding him for action of a grand jury, but he may waive such right.”

# What is a Preliminary Hearing?

"In a very real sense, as scholars and practitioners agree, since the prosecutor must present proof of every element of the crime claimed to have been committed, no matter how skeletally, the preliminary hearing conceptually and pragmatically may serve as a virtual minitrial of the prima facie case (see Amsterdam, Segal & Miller, *Trial Manual for the Defense of Criminal Cases* [3d ed., 1974], § 139 et seq.)." *People v. Hodge*, 53 N.Y.2d 313, 318, 423 N.E.2d 1060, 1063 (1981)

# Held for Action of the Grand Jury

"The phrase 'held for action of a grand jury' is not defined in a formal sense in the Criminal Procedure Law. An order of a local criminal court holding a defendant for grand jury action, however, 'presupposes that a felony complaint has been filed, [the] defendant has been arraigned on the complaint and following a preliminary hearing (unless waived by the defendant), the local criminal court has found reasonable cause to believe the defendant committed a felony (see, CPL 180.10, 180.30, 180.70)' (*People v. D'Amico*, 76 N.Y.2d 877, 879, 561 N.Y.S.2d 411, 562 N.E.2d 488 [1990] )."

Concurring opinion, Judge McGuire in *People v. Ashe*, 74 A.D.3d 503, 507, 901 N.Y.S.2d 843 aff'd, 15 N.Y.3d 909, 939 N.E.2d 140 (2010).

# The Unofficial Answer

A preliminary hearing can be something that wins the case. From a defense perspective, it is a treasure trove. A preliminary hearing may be an opportunity to:

A. Explore a theory or several theories of the case;

B. Lock witnesses into versions of events before they have been fully prepared to testify;

C. Lock witnesses into “I don’t know” and “I don’t recall” answers;

D. Give lying witnesses an idea of what lies ahead if they continue to lie;

E. Give the prosecutor a sense of what lies ahead if they continue to prosecute a bad case or a case based on a lying witness;

F. Give the client a sense of how the case may play out at trial and whether the plea offer, if any, if still available, is a good one;

# Unofficial Answer, cont'd

G. Give the client a sense of how you handle court, enhance (or possibly destroy) the client's confidence in you;

H. Give the prosecutor the opportunity to vet the case and see whether the top count, or even all of the charges, should be prosecuted;

I. Get discovery you are entitled to pursuant to statute and case law

J. Maybe you win – no reasonable cause on some charges or all can result in dismissal, lower bail, or vacatur of the order of protection (not common).

K. All of the above and more.

# Subpoenas and PHs

"Since the hearing provides an occasion for appraising witnesses and others who are likely to participate in the ultimate trial, at least as often as not attentive and sensitive counsel gain knowledge and insight that will be of invaluable assistance in the preparation and presentation of the client's defense. **Moreover, judicious exercise may be made of the power of subpoena, which, in the discretion of the court, is available at a preliminary hearing** (emphasis added)(see CPL 180.60, subd. 7; Amsterdam, Segal & Miller *Trial Manual for the Defense of Criminal Cases*, op. cit., § 142)…

# Subpoenas, cont'd

Its use to call to the stand witnesses whom the People have not elected to summon may present the only way in which a recalcitrant though material witness can be interrogated (*Myers v. Commonwealth*, 363 Mass. 843, 298 N.E.2d 819). This may turn out to be a fortunate perpetuation of critical testimony of witnesses who later may not be available for trial (cf. *People v. Simmons*, 36 N.Y.2d 126, 131, 365 N.Y.S.2d 812, 325 N.E.2d 139). Most important, early resort to that time-tested tool for testing truth, cross-examination, in the end may make the difference between conviction and exoneration. (See, generally, Bailey & Rothblatt, *Successful Techniques for Criminal Trials*, § 25.)"

*People v. Hodge*, 53 N.Y.2d 313, 319, 423 N.E.2d 1060, 1063 (1981).

# THE RULES – CPL 180.30

**II. THE RULES**

**CPL 180.30 – Waiver of the hearing**

Pursuant to CPL 180.30 a defendant may waive a preliminary hearing. If the defendant waives the hearing, the court must either (1) hold the defendant for action of the grand jury, or (2) make inquiry to determine whether the felony complaint should be dismissed and a local court accusatory instrument be filed.

If the case is held for action of the grand jury pursuant to CPL 180.30(1) the case is referred to the "the superior court" overseeing the grand jury. The case is considered pending in local court until all of the documents relating to the case are "received by the superior court."

# Practice Tip, waiver

*Practice tip*: *If there is one piece of advice you take away from this training, this is it:* ***DO NOT GIVE UP ANY RIGHTS, EVER, UNLESS YOU GET SOMETHING IN EXCHANGE, OR THERE IS A GOOD STRATEGIC REASON FOR DOING IT.***

*If you do not get anything in exchange for giving up the hearing, why give up something that can provide such a benefit to the defense? (See above.)*

# Reasons to waive a PH

A. A plea offer that will not be available after indictment – but be aware, nearly every prosecutor in Monroe County must get several levels of approval on plea offers, so you should **see if the prosecutor has had approval before waiving a hearing and put the offer and the fact there has been approval on the record prior to waiving the case**; instead, adjourn to set. MAKE SURE IT IS AN OFFER, AND NOT JUST A POSSIBILITY. Put it on the record, and note the only reason you are waiving is based on the offer. If the prosecutor later reneges, ask for the hearing back or the client to be released.

# Reasons to waive, cont'd

B. The real possibility of a plea offer that will not be available after indictment (But see A)

C. What about getting discovery? While in the past full discovery might have been an inducement in waiving a PH that was easy for the prosecutor to win, under CPL 245, the new discovery statute, you should be getting discovery anyway. That must not be a bargaining chip.

# CPL 245 (New discovery statute)

CPL 245.25(1) requires discovery be provided at least three calendar days before a pre-indictment plea expires.

CPL 245.25(1) also states that a guilty plea offer may not be conditioned on a waiver of discovery (though defense may waive).

CPL 245.25(1) also permits the court to sanction if it learns of discovery violation under this section.

CPL 245.20(1)(a)(i) requires that be “as soon as practicable” but not later than 20 days after arraignment on the felony complaint if a defendant is in custody.

If the prosecutor has reports and documents for the hearing beyond *Rosario*, seems that is “as soon as is practicable.”

# Reasons to waive, cont'd

D. In the rare case with a frail witness, a strategic decision not to go forward because the sole or important witness may not be available for trial and the transcript might be offered by the prosecution – EXTREMELY RARE – do not use this as an excuse not to do a hearing.

If you waive a hearing, make sure you place on the record all of the details of the plea offer your client will receive, or other benefits to be provided, in exchange for the waiver (unless it's a strategic decision with a frail witness, a contract or something else you do not want the prosecutor and/or public to know).

# REASONS NOT TO WAIVE

# Reasons not to waive

A. You're tired

B. It's a Friday and everyone's going out

C. Anything that has not gained a benefit for your client in exchange for the waiver

# CPL 180.40

**CPL 180.40** – dreams of days past – returning the case to local court after waiver or hearing

CPL 180.40 permits a prosecutor to apply to have a case returned to local court  before the case is presented to the grand jury.  This used to be a common practice; presently, it does not exist in Monroe County.

# CPL 180.50 Reduction of charges

Whether or not there has been a hearing, the local court may **upon consent of the prosecutor** make inquiry to determine whether there should be a charge other than a felony, and if so, whether the felony should be reduced. This happens when defendants agree to plead to misdemeanors or violations in local criminal court, but it is rare, if it has ever happened, that the type of inquiry described in the statute occurs without a pre-arranged plea.

# CPL 180.60 – Proceedings

This is it – “Proceedings upon felony complaint; the hearing; conduct thereof.”

The statutory requirements for the hearing are set forth in CPL 180.60. The important ones are:

(2) The defendant may as a matter of right be present at such hearing.

A defendant has the right to be present at a hearing, but does the defendant also have the right to waive his/her appearance? The Second Department addressed this issue (but found harmless error) in *People v. Allman,* 133 AD2d 638 stating, “We also agree with the defendant's contention that he should have been permitted to waive his appearance at the preliminary hearing.” *People v. Allman*, 133 A.D.2d 638, 639, 519 N.Y.S.2d 747, 748 (N.Y. App. Div. 1987).

# Practice tip – Waiving client's presence

Practice tip – There are times we waive a client's appearance at the hearing.

Identification case - Often a good idea to try to persuade your client not to be in the courtroom during the witness's testimony. This is sometimes a hard sell. But if you are going to be asking the witness to describe particular features of the perpetrator, you don't want the witness looking at your client and describing them. Sometimes that explanation works. Some clients still insist on being present and rarely, but occasionally clients are not identified. But it really is best to have a client absent himself/herself during the hearing.

# Practice tip – ID  case

Get a good look at your client

# Questions in ID

Height, weight, facial hair, hair color, skin tone, scars, eyes, etc.

Unusual features?  Scars?  Tattoos?

Include questions on unusual features in the cross on description without calling attention

Anything unusual about his face?

Nose?

Mouth?

Lighting – how much, where, weapon focus, etc.

Witness will be less prepared than for trial

# Waiver of client's presence

An issue that arises during the hearing is whether the client's choice to be absent during the hearing means that the prosecutor does not have to prove that the person described by the witness is the defendant. In preparing these materials I could not find any legal support for that proposition.

It is important to note that even if a client waives their appearance for an identifying witness, they can be present for the other witnesses.

# Practice tip – no peeking

**If you are about to do a hearing (or waive one), ask the prosecutor if the witnesses are in the courtroom. Inexperienced prosecutors may have them waiting in the courtroom. When the defendant comes out to do a colloquy on waiving their right to be present, the witnesses have the opportunity to view under the most suggestive of circumstances. So ask that the witnesses be removed from the courtroom to a location away from the door before your client is brought out.**

# 180.60(3)

(3) “The Court must read to the defendant the felony complaint and any supporting depositions unless the defendant waives such reading.”

We usually waive this. But there could be an occasion where you would want this done. It’s probably only something you would want to try under a bizarre and extreme circumstance.

# 180.60(6) Defendant testifying

Do everything you can to keep this from happening.

If your client managed to invoke his/her right to counsel, why give a statement now?

Prepare your client for the question s/he will be asked as to whether the defense has any proof, and explain to your client that s/he should not testify.

# 180.60(6) – Reasons client should not testify

You do not have all the evidence in the case

Whatever they say can be used against them later at trial

Even small inconsistencies or failures to recall can be damaging later.

The judge is likely to hold the defendant in custody, so the testimony will only be an opportunity for the prosecutor to get to know and prepare for the defense before trial.

If a statement has been offered, the client's version has already been presented.

This is not the trial of the case, and they can testify at trial.

# 180.60(7)

(7) “Upon request of the defendant, the court may, as a matter of discretion, permit him to call and examine other witnesses or to produce other evidence in his behalf.”

Although the Court may permit this, it is highly unlikely you would be doing anything here except helping the prosecutor prepare for their case. Do not do this.

# 180.60(8)

**“Upon such a hearing, only non-hearsay evidence is admissible to demonstrate reasonable cause to believe that the defendant committed a felony; except that (certain evidence listed in CPL 190.30[2] and [3] may be admissible)”**

**Watch the hearsay. Depositions may include some information under the statute, but redact the rest. And with redactions, have they proven both identity and the crime?**

# Depositions

Move to redact inadmissible information.

If the deposition identifies the defendant, it is not a hearsay exception under the statute

A

# Watch for whether the defendant is identified

Did they identify the defendant?

If the prosecutor did not establish the defendant was the person who committed the crime, do you cross?  Depends –

One witness or more?

Any other way they will be proving?

Will you be opening up the opportunity for a re-direct where the prosecutor can now establish the defendant was the person who committed the crime?

# 180.60(8)

**Reasonable cause**

CPL 70.10(2) – "Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay."

**A felony**

Can be any felony

**Evidence admissible**

# 180.60(10)

(10) “Such hearing should be completed at one session. In the interest of justice, however, it may be adjourned by the court but, in the absence of a showing of good cause therefore, no such adjournment may be for more than one day.”

# 180.70 – Disposition of complaint after hearing

(1) Subdivision 1 states that if there is reasonable cause found (except as in subdivision 3), the court must order the defendant be held for the action of the grand jury of the appropriate superior court, and the paperwork must be transmitted. **Until transmitted, the action is deemed to be still pending in the local criminal court.**

*Practice tip: If the proof came in poorly for the prosecution, consider making an application for the client's release or reduction of bail to the hearing judge after the hearing. The court has jurisdiction prior to the transmittal of the papers.*

# 180.70

(2) If there is not reasonable cause to believe the defendant committed a felony, but there is reasonable cause to believe s/he committed a misdemeanor or violation, the court may reduce the charge to a non-felony using the procedures set forth in CPL 180.50(3).

(3) If the court finds reasonable cause to believe the defendant committed a felony and a non-felony, the court may reduce to a non-felony if it is satisfied the reduction is in the interest of justice and **if the prosecutor consents.** This does not apply to armed felonies or A felonies.

(4) If there is not reasonable cause to believe the defendant committed any offense, the court must dismiss the felony complaint and discharge the defendant from custody **if he is in custody**, or if he is at liberty on bail, it must exonerate the bail. (Note – again, the statute does not apply these procedures only to individuals in custody.)

# Dismissal

Move to dismiss the charges (which should result in sealing);

Move to vacate any orders of protections;

If bail was posted, move to have bail returned.

# 180.70 – What if no hearing?

Source of controversy –

It is our contention the judges are doing it wrong. If a defendant has been released, the statute does not bar a preliminary hearing. In fact, Article 180 does not provide for a situation in which the Court "waives the case to the grand jury." The options are specific, and that is not one of them. For an excellent discussion on procedures following a preliminary hearing, see *People v. Cleghorn*, 190 Misc. 2d 421 (Tompkins County, 2001).

# If the witnesses don’t show

Do not agree to adjournment;

Ask for client’s release;

If  no good cause shown, court should not adjourn

# WARNING

**Be aware – even if you win the preliminary hearing the prosecution can still indict the case.**

# 180.80 – Release upon failure of timely disposition

A defendant has the right to a preliminary hearing within 144 hours of his/her detention on the felony complaint. If the felony complaint has not been disposed of or a hearing has not commenced, the client is entitled to be released on the charge. Although the statute mentions 120 hours excluding week-ends, generally the prosecution has 144 hours due to the way time is calculated. (Are there any situations when the limit is truly 120 hours?)

# Time calculation

Especially important to monitor in Town Courts. Clerks and Town Court judges do get this wrong, and schedule hearings for beyond the 144 hours when a hearing must be commenced.

If the hearing has not commenced, and your client is not being held on any other charges, our client gets a "get out of jail free" card. You can apply to your judge or the Part I County Court judge for your client's release. But first check your math. Be aware that a client may have been in custody on the felony complaint hours before s/he was booked into the jail. Note that the 144 hours commences at the time of the defendant's **arrest** (not his/her subsequent arraignment).

DO NOT TIP THE PROSECUTOR THAT THE TIME IS OFF FOR THE PH

# Exceptions

Subdivision 1 – No release if the “failure to dispose of the felony complaint or to commence a hearing was due to the defendant’s request, action or condition, or occurred with his consent.”

Subdivision 2 - Defendant does not have to be released if the prosecutor files a written certification that an indictment has been voted, or if the grand jury or prosecutor’s information has been filed by the grand jury.

Subdivision 3 - Extension of the period if the prosecution has shown “good cause” why the defendant should not be released and defines “good cause”. This exception is often used when the complainant or defendant is in the hospital as a result of the incident, though courts have, on occasion, conducted PHs in hospitals.

# 180.70

Dismissal at a preliminary hearing is a termination in favor of the accused. (See CPL 160.50.) If a case is terminated in favor of a defendant, a defendant is entitled to be released on charges and have the record sealed under most circumstances. Although there is a Rochester City Court decision about sealing records (see *People v. Hogan*, 5 Misc. 3d 151 [Rochester City Court, 2004]) this writer, who sought sealing in the *Hogan* case, disagrees with that decision. A defendant is entitled to have an order of protection vacated. So if the prosecution does not go forward with a preliminary hearing, many of us request dismissal, release of bail, sealing and vacatur of the order of protection. Some courts have agreed with this perspective. Others, including several judges in City Court, generally do not.

# Before the hearing

Investigation – maps, recordings, witnesses

Can subpoena

View location – Google maps

Check the internet, CHRS, PACER (Witnesses are unprepared, best time to go after them)

Criminal record checks on witnesses, social media review.

If a house or building, know the layout.  If you cannot view, view online

If a street, know lanes, directions, cross streets

# Some judges think new discovery statute is inapplicable to PHs. Shame on them.

1. The statute applies to felony complaints;

2. *Rosario* has not been overruled;

3. If a court has denied discovery without a motion for protective order, consider that a de facto protective order. Do a two day motion appealing the decision under CPL 245.70(6). Consider asking the court to keep the PH open. But even if they don't, do the order and get the discovery.

# What is your strategy

**If you think you can win:**

Why do you think that? Judges generally do not find for the defense.

Be realistic

If you think you can win based on lack of evidence, lack of witnesses, don't fill in the blanks.

**If you think you will lose (more likely)**

Get as much information as you can, in as much detail as you can. The prosecution has not prepared enough, and they don't know the witnesses. Judge might say it's not a deposition. True. But they must prove reasonable cause, and if the witness is not credible due to inability to provide details or due to inconsistencies, that undermines reasonable cause. Argue that.

# Protect the record

Note why it is important when judge shuts you down.

If the prosecutor tries to use the transcript in the future they will argue the defense had a full and fair opportunity to cross. So keep asking questions on topics and get shut down by the judge. Then argue right to confront and cross as protected by the NY and US Constitutions were denied.

# Preparing for the PH

1. Look up law, jury instructions
2. Discovery – statutory rights – Upon request

(If DA doesn't provide, put on a show)

3. Ask for *Brady*
4. Most important – TALK TO YOUR CLIENT - Sometimes strange things are true, and often no harm in asking questions that support their theory of the defense if it is a legal theory.

# Questioning witnesses

Start with *Rosario* including body cam

Make sure you get an answer

If they muck it up, clear it up

Picture the transcript at trial

Watch your language –

NOT “When you saw my client” - “When you saw the suspect”

NOT “On the date this happened” - “On the date you say this happened”

# Questioning continued

Establish your “I don’t knows”

Commitment to times, dates, distances

Know the terms that are going to be used by witnesses

Get all the details of layout of house, street, location

Who was there – how far from each person, name each person there

What did each person do?

Do this with all witnesses – they will contradict each other

Set up the contradictions

# Inconsistencies

To impeach or not to – strategy decision

1. If you impeach, based on something in the paperwork, are you tipping the prosecutor to something they will cure before grand jury?

2. Will it make a difference to your judge?

3. If it is not in the paperwork, but based on evidence you know and the prosecutor does not, set up the case for trial.

4. Listen to the witnesses. If there are inconsistencies, don't tip them but highlight them. One witness, the sky was blue, the other, the sky was yellow. "So it was not blue that day, correct?"

# Details

Step by step, inch by inch.

From each witness

Example – DWI case.  Drive the route with an investigator.  Number of lanes, stop signs, stop lights, etc.

Distances –

At what point did you start.  For how long follow.  In first block there was traffic light, no ticket for failure.  Two way street.  No ticket for driving into oncoming, weaving etc.

Second block.

Inch by inch.

# Don’t just ask about what is there, but what is not

Think about the case.

What would you expect to see that is not there?

What are the details that are omitted?

Probe the details with each witness.  Establish inconsistencies between them without tipping them.

# If it is a case you are not comfortable with:

1. Expert issues – consult an expert before the hearing. Review articles and journals.

2. Sex cases – If you are not comfortable using the language in court, get comfortable. Say it. A lot. Before court.

3. If it is a case out of your experience and you cannot get up to speed, ask to recuse and that other counsel be assigned or that your client retain other counsel. It's not fair to your client to do anything else.

# Sum or not?

At the end of the hearing, if the proof came in poorly for the prosecution or the proven charges are less serious:

1. Ask to approach and for release or lower bail;

2. Then make your arguments – did they prove your client was the perpetrator? Did they sufficiently prove a felony?

3. Do you cite cases? If it is an issue the prosecutor is unfamiliar with and may never learn, you may wish to save for trial.

# Preliminary Hearings Can Win Your Cases

Back in the day, we did many of these hearings. The witnesses were unprepared, the prosecutors were unfamiliar with the cases, and we were able to get massive amounts of information about the case early on.

Do not give up this opportunity. Make the most of it.

# REMOTE ISSUES

1. If there is more hearsay allowed, object as violation of state and federal right to confront and cross when liberty interest is at state;

2. How will you address documents?

3. Talk to client in advance about not talking during hearing – can you mute them? Get them to agree to not testify;

4. I always ask if more questions for witness before ending cross– get confidential, private line;

5. How to cross or refresh with documents? You should not have to give away your documents if prosecutor is unaware of them and it might allow witness to tailor if they get in advance;

6. Is witness in room with others who may influence testimony?