

Preliminary Hearings- Practice Notes and Issue Spotting- ADC

I. Preparation- Like for a mini-Trial

Get all information possible ahead of time.

Investigate if possible. Speak to witnesses.

Get all paperwork you can.

Go to the scene if at all possible. Take photos. Use them at the PH.

Get control of the witness and the proceeding.

Theories and themes of defense, if you have any at this point.

[All the usual trial prep stuff]

II. Pros and cons of doing the hearing at all. [Default to having the PH]

A. Pros-

i. Information gathering. Get Rosario, investigative leads.

ii. Control the narrative or media. Slap a label on this case.

Ex.- Was a “vicious assault”, now it’s possibly “self-defense”.

iii. Show client you are going to fight.

iv. Even if it’s bad, you get ALL of it out and contain it.

Ex. “You say he hit you five times.”

Talk about each one.

Details.

Then- No more- that’s it.

v. Deposition mode.

Open ended questions. Get it all out. Then close the door.

Room to room in an unfamiliar house. Very important for later

GJ, hearing or trial testimony that evolves.

vi. Cross mode- lock in the good stuff with leading questions.

vii. DA may decide case is not strong. Witness may crumble.

B. Cons-

i. DA becomes comfortable they have a good case.

ii. Witnesses are more prepared for later.

iii. Transcript of testimony *could* be used later. **But see:** People v.

Austin, 13 A.D.3d 1196, 4th Dept 2004- If Court restricts cross

“because it’s a PH”, make it clear on record that’s what’s happening, so you can argue later that it cannot be used at a trial.

iv. Bail could potentially go up, depending on new information.

III. If you are doing the PH, you must consider what the goal of the PH is.

A. **Are you going to win?** Maybe. Probably not. And if you do, client can still be indicted.

B. **Information gathering.** Then it’s mainly a chaptered deposition.

C. **Suppression issue-** Prep your cross carefully.

Preliminary Hearings- Practice Notes and Issue Spotting- ADC

D. Sufficiency of an element- Ex. Value/level of injury

No matter your goal, employ your very best active listening, especially of civilian witnesses. DA has not had time to prep. No one knows what these witnesses will say. Spoke to police once. Story not straight yet. Follow them wherever they will go. Or, bring them there if you can.

IV. The Art of the Preliminary Hearing

Knowing when to go from deposition mode to cross mode.

We are hunting. Begin broadly, narrow it down to something you want, and then nail it down. Make sure it can't be altered, and it's clear on the record. Then move on to the next topic and begin again.

If you are only getting damaging information, that's OK. Quarantine it.

Make sure it can't get any worse. [*House analogy- room to room search*]

"I don't know" "I don't recall" are generally fine. Not the worst answers.

Use later on at trial when they suddenly do know or do recall, to impeach.

IV. Don't rule out the possibility of calling witnesses under CPL 180.60(7).

Very Very Rare! And even more rarely allowed. But worth considering.

It's in the discretion of the Court, but the act of trying to call a witness, even if denied, sends a clear message to everyone that you are on this case and you have something.

If you have been able to investigate and a witness is relevant and helpful, and the Judge allows it, there is nothing better than subpoenaing them, calling them and locking them in under oath if you can get there.

If someone wants to recant a prior statement, no downside to calling them. It creates a 5th amendment mess and sends the message to the DA that this case is a problem.

Many misdemeanor deals have been cut on the spot in such cases.

V. CPL 180.60(9)- Consider moving to close the courtroom, especially now

It's hard to dispute that if these hearings are made digitally public somehow that anyone can retain videos or audio of testimony and evidence at these hearings far beyond how they are normally publicized. The DA may appreciate closing the courtroom in some cases, and witnesses may even be more willing to speak if they know this is not going out to the whole world.

That can obviously cut both ways, but the more serious the case, the more concerned I am about uncontrolled release of video/audio testimony from a PH

Preliminary Hearings- Practice Notes and Issue Spotting- ADC

being out there in the world, and potentially impacting the right to an impartial jury later on. Especially in cases getting significant press attention.

VI. YOU ARE THE STENO- Protect your client's record.

Control who is talking best you can.

Make your questions sharp and clear.

Don't talk over witnesses.

You need a clean record.

Even if it is recorded by skype, and there's a steno on line, they are not in the room. If there is any confusion, you are leaving your record's fate in the hands of a transcriptionist/steno to sort out what was said later. Give them the cleanest record you can.

Object on that basis if other parties create a problem.

VII. What can the Judge do here? Read CPL 180.50 closely.

[Not closely followed in Justice Courts with non-lawyer Judges, but the below things do happen from time to time- you need to have control of the procedure in your terrain, because no one else will]

A. Argue sufficiency, come with a written motion if it has teeth. Judge can dismiss or reduce prior to a hearing on this ground. Sets the tone for your defense here.

B. Judge can reduce to misdemeanor after the hearing.

Main favorable outcome is often an argument that they have not shown reasonable cause for a felony (bear in mind they can show ANY felony, not just the one charged) and the charge should be no more than a misdemeanor.

Ex.: Grand Larceny 4th- didn't show value competently.

Injury level- Physical injury vs. Serious physical injury

They have to prove it by non-hearsay evidence, even if the burden is very low. It's not about whether they WILL be able to prove it later. It's whether they can prove it now. Even if they "win", the DA may realize they have an issue.

C. Judge can dismiss the felony complaint!!!

It happens. Can still be presented to GJ.

If this happens, send a letter to the DA demanding notice if case goes to GJ. GJ notice not required if no charge is pending.

Preliminary Hearings- Practice Notes and Issue Spotting- ADC

GENERAL RULE- DO YOUR PH AND MAKE IT LAST AS LONG AS YOU CAN UNLESS THERE IS SOME REAL REASON NOT TO.

VIII. Typical DA Objections

A. “Outside the scope of my direct”- As we know, all four Departments and the COA have ruled that in criminal matters we are not limited to the scope of the direct exam. We are limited only by relevance.

B. “This isn’t a trial, this is just a PH.”- This is actually a hearing at which the Court has to make a determination of reasonable cause to believe a felony occurred, and this is the person who did it. This results in 45 days of detention pending GJ presentment. We have a right to cross, test credibility and the Court should be inclined to allow us to do that before someone’s liberty is restricted. 6th and 14th Amend, **Gerstein v. Pugh** = these hearings are a Constitutional event. *But see above, if the Court restricts cross on this ground, there is a good argument transcript cannot be used later.*

C. “Not relevant to the charge”- The state is allowed to prove ANY felony, not just the one charged. As long as you are asking about a fact relevant to any such determination you should be allowed to inquire and get a response.

D. “This is not a suppression hearing”- The DA is not wrong about this one. If you approach it like a suppression hearing you will get restricted every time. You have to construct reasons why you should be allowed to inquire, such as:

If they talked about it, we get to ask about it. “They opened the door.”
So, consider not objecting much during direct, unless it’s vitally important.

Link your question to an element of the charge or a possible defense:

Actual possession- How/where was the object found or retrieved?

Presumptions- [Like auto] are they properly applied in this case?

Credibility/reliability- should matter to the trier of fact.

Statements/confessions- Circumstances of reliability and voluntariness go to whether this court should believe it.

Completing the narrative- The court has heard that before, right?

And anything else you can come up with on your facts.