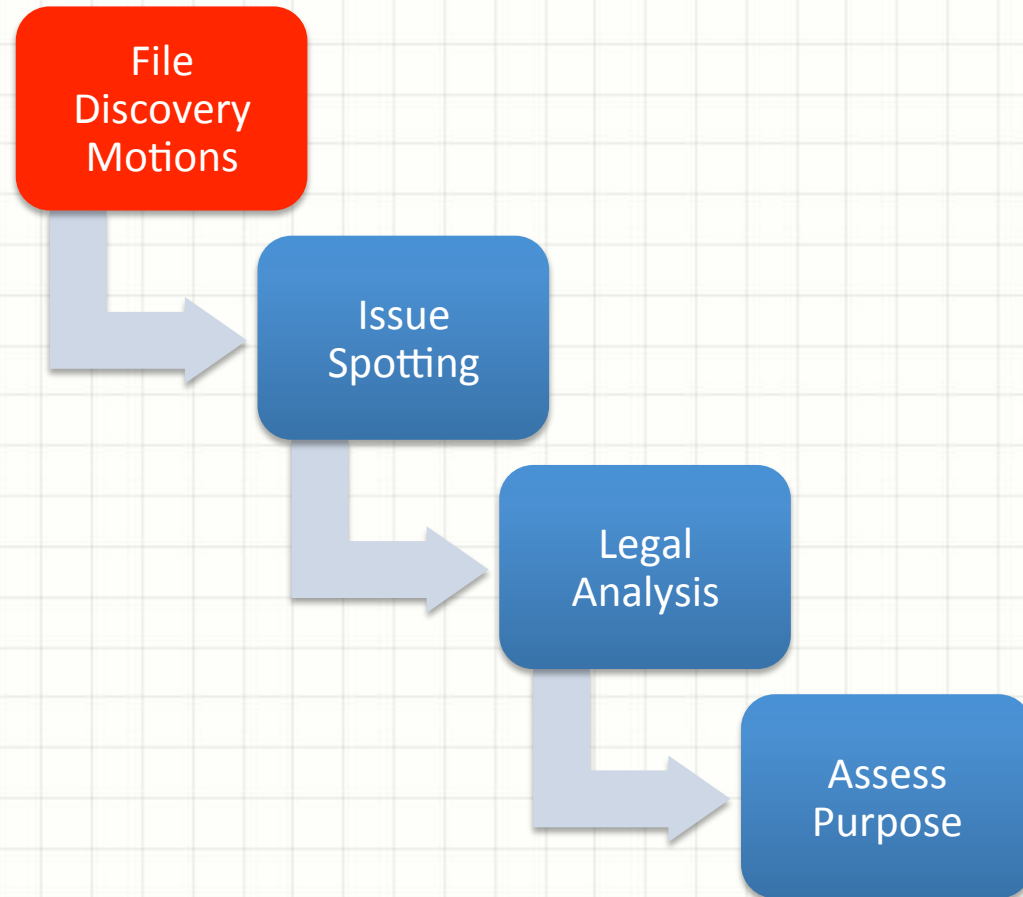




PRETRIAL MOTIONS PRACTICE: STRATEGIC POSITIONING FOR TRIAL AND PRESERVING ERROR

Marlo Cadeddu
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Pretrial Motions Process



Discovery Motions


- Certain requests “trigger” government’s duty to respond
 - Rule 16
 - Jencks Act (18 U.S.C. § 3500)/FRCP 26.2 Material
 - *Brady* Material
 - Notice of Rule 404(b)
- File discovery motions even when open file discovery offered

Rule 16 – Statements of Defendant

- Upon Δ request, gov't must disclose:
 - Relevant oral statement of Δ to known agent before/after arrest and intended to be used at trial
 - Note **relevancy** and **knowledge** requirements
 - Intent to “use” by gov't, not necessarily introduce
 - Relevant written/recorded statement of Δ that is in gov't custody/control
 - **Relevancy** requirement
 - Can include statements to local police officers/other agencies
 - Statements in other cases
 - Prison tapes
 - Any written record of substance of oral statement given by Δ in interrogation by known agent
 - Does not include oral statements to others in front of agent
 - Δ's grand jury testimony related to offense charged

Rule 16 – Prior Record, Exams or Tests, Expert Reports

- Upon Δ request, gov't must:
 - Disclose Δ's prior record that is in gov't custody or control
 - Permit inspection/copying of documents/objects (includes data)
 - If material to defense;
 - Gov't intends to use in case-in-chief; or
 - Item belongs to Δ
 - Must be in possession of gov't or agency so closely aligned as to be part of prosecution team
 - Permit inspection/copying of physical or mental exams or tests
 - If material to defense; or
 - Gov't intends to use in case-in-chief
 - Provide written summary of expert testimony



Rule 16 – requests to consider in appropriate case

- Fingerprint and handwriting exemplars
- Drug dog records
- Photographic lineups and related records
- Voice analysis records
- Polygraph records
- Similar activities by persons not the Δ



Jencks Act (18 USC § 3500)/FRCP 26.2

Witness Statements

- Disclosure of relevant portions of written witness statements after direct examination
- Not just at trial; request Jencks at:
 - Detention hearing
 - Suppression hearing
 - Sentencing hearing
- Request:
 - Early production of Jencks to avoid delay
 - Agent notes

Brady - Exculpatory Material

- Seek favorable information whether or not admissible if reasonably likely to lead to discovery of admissible evidence
- Request information:
 - Tending to show allegations not true
 - Tending to impeach government witness (oral or written info)
 - Conviction/arrests
 - Promises or inducements to witness/friends/family
 - Known but uncharged criminal conduct
 - Inconsistencies in statements
 - Polygraphs administered
 - Information relating to conditions affecting veracity, memory, perception, mental illness
 - Drug/alcohol use that could affect veracity, perception, memory
 - Acts tending to show not truthful
 - Negative exculpatory – witness statements where Δ not mentioned

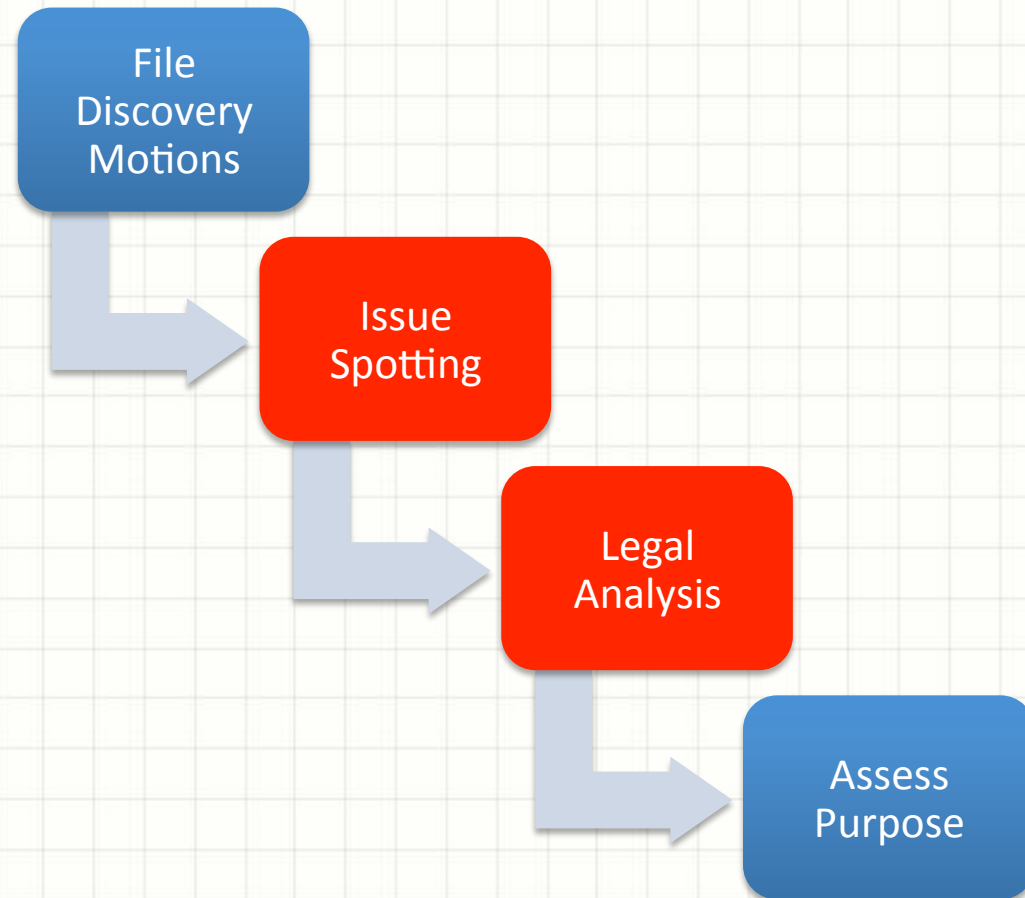
Notice of FRE 404(b)(2) – Bad acts evidence

- Crime, wrong, act admissible to show:
 - Motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, lack of accident
 - Duty of prosecutor to disclose triggered by Δ request:
 - Gov't must provide “reasonable notice” of general nature of evidence intends to offer at trial
 - Notice prior to trial or during if pretrial notice excused for good cause

Discovery Motions – things to remember

- Reciprocal discovery – FRCP 16(b)(1)
- Continuing duty to supplement – Rule 16(c)
- Reverse Jencks – FRCP 26.2
 - Avoid email communications back and forth with testifying experts, investigator
 - Reports of witness interviews of investigator if s/he testifies must be disclosed
- Avoid general requests
 - Courts have held general, non-specific requests no better than no request at all. *US v. Chaney*, 730 F.2d 1334, 1341 (10th Cir. 1984)

Pretrial Motions Process





Issue Spotting/Legal Analysis: Categories of Pre-trial Motions

- Evidence-related
- Charge-related
- Defendant-related
- Jury-related
- Defense-related
- Other

Evidence-Related Pretrial Motions

- Motion for FRCP 15 depositions
- Motion for FRCP 17 subpoenas
- Motion for bill of particulars
- Motions to suppress
 - Suggestive identification
 - Evidence obtained in search
 - Statement(s) of defendant
- Motion for pre-trial disclosure of coconspirator statements gov't intends to use at trial under FRE 801(d)(2)E) for *James* hearing
- Motion to reveal electronic surveillance – important post-Snowden
- Motion to reveal identity of informant
- Motion to dismiss for *Brady* violation (must have made *Brady* request)
- *Kastigar* motion
- Motions in limine

Charge-Related Pretrial Motions

- Motions to dismiss
 - Constitutionality of charging statute
 - Vagueness
 - Overbreadth
 - Double jeopardy
 - Violation of Petite Policy
 - Statute of limitations
 - Failure to state an offense
 - Duplicity (multiple offenses charged in single count)
 - Multiplicity (single crime divided into multiple counts)
 - Speedy trial violation
 - Pre-accusatory delay – need actual prejudice from delay
- Motion to sever counts (improper joinder of counts) FRCP 8(a)

Defendant-Related Pretrial Motions

- Motion to sever Δs (improper joinder of Δs) FRCP 8(b)
- Motion to sever Δs or counts for prejudicial joinder FRCP 14
- Motion to sever under *Bruton* – gov't admission of nontestifying codefendant's confession implicating Δ
- Motion to dismiss
 - Selective prosecution
 - Vindictive prosecution
- Motion for change of venue - inconvenience



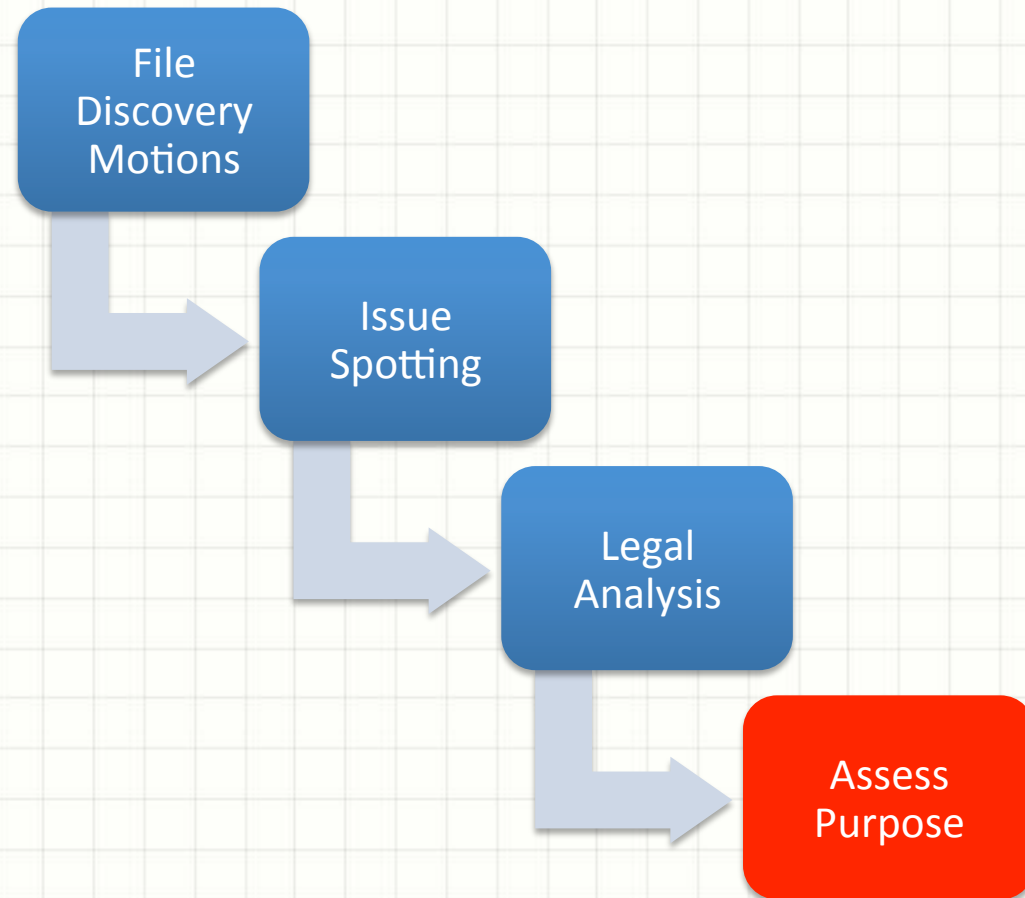
Jury-related Pretrial Motions

- Motion for change of venue – prejudice/publicity
- Motion for attorney-conducted voir dire
- Motion for a jury questionnaire

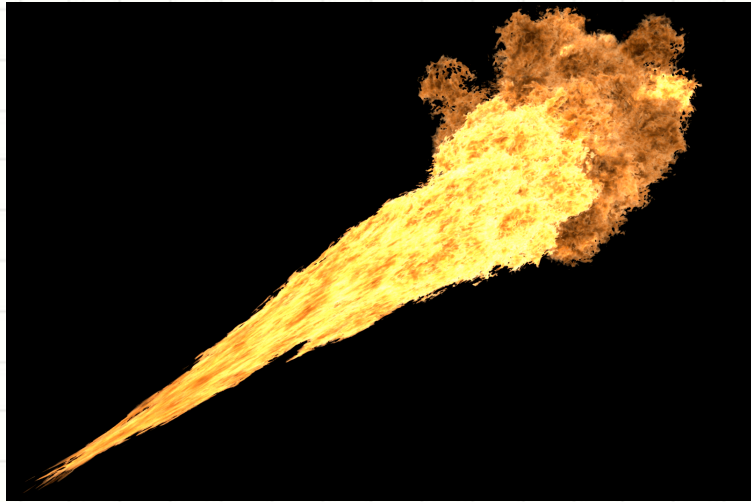
Other Pretrial Motions/Submissions

- Motion to compel performance of a plea bargain
- Prosecutorial misconduct-related motions (grand jury, disclosure of evidence, interference with witnesses, etc.)
- Trial Memorandum
 - Theory of the defense (later will request theory of defense charge but should be previewed in Memo)

Pretrial Motions Process



Criminal Motions Practice – What are you?

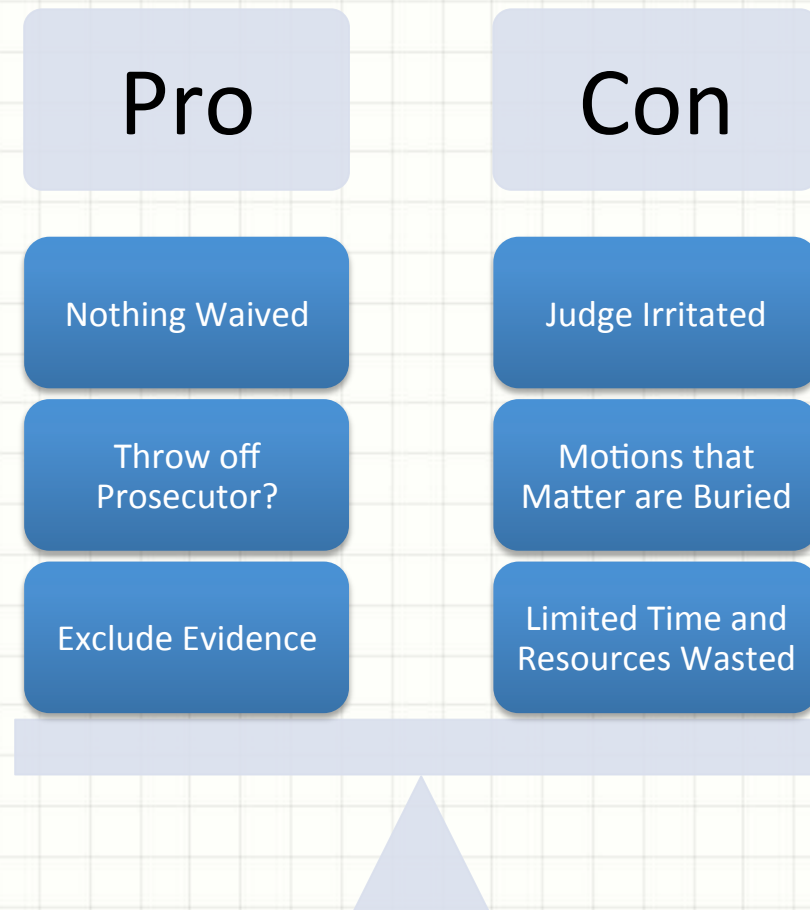


Flamethrower?

or Sniper?



Flamethrower Approach

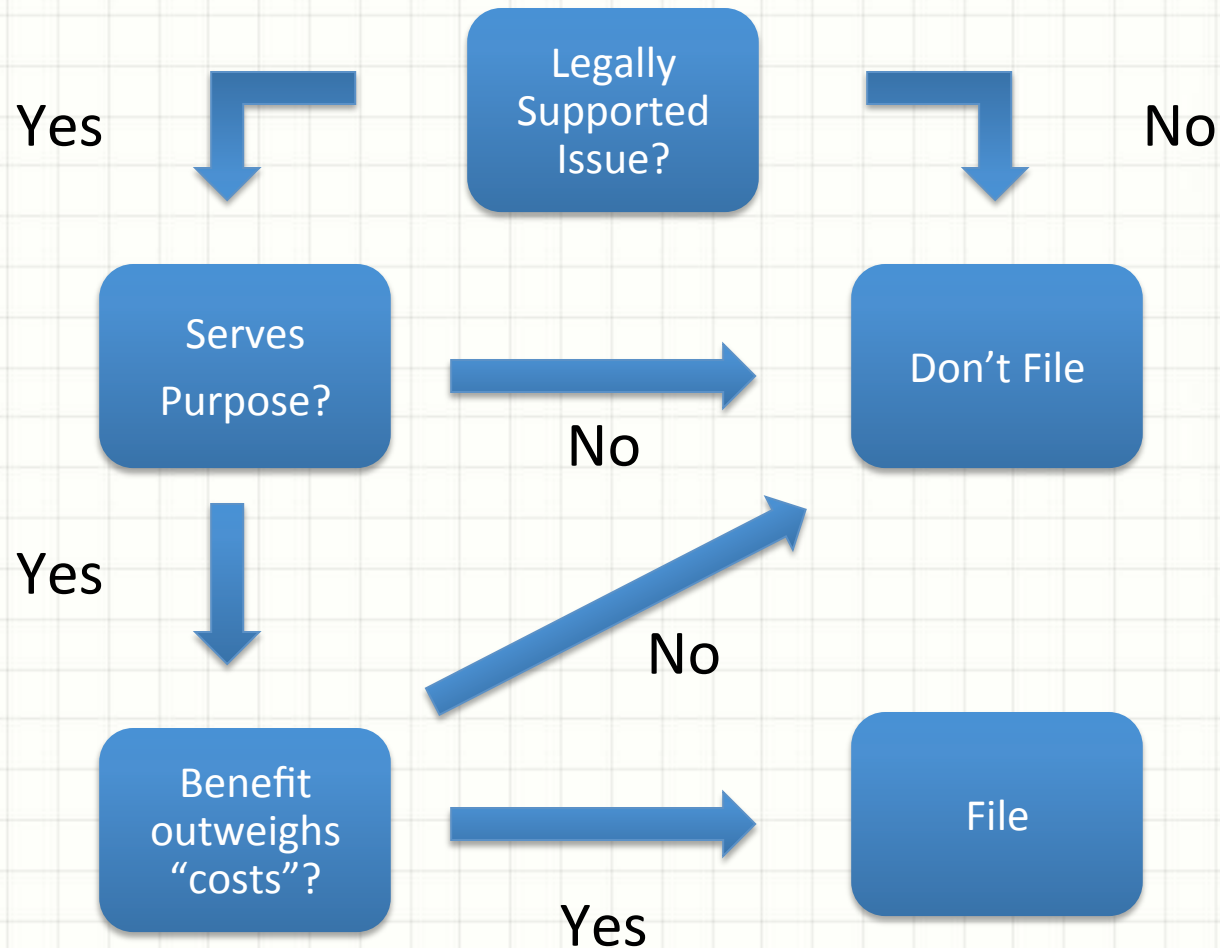




Purposes of Pretrial Motions

- Win the requested relief
- Preserve an appellate issue that might have real value on appeal
- Force government to respond thus obtaining new info
- Educate judge

Assess Purpose – the Pretrial Motion Decision Tree



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- Motion For Rule 15 Depositions
 - Motion For Subpoenas
 - Defendants' Joint Motion And Memorandum To Strike Prejudicial Surplusage
 - Motion To Change Venue
 - Motion To Declare CIPA Unconstitutional
 - Motion Attorney Conducted Voir Dire
 - Motion for Bill Of Particulars
 - Kastigar Motion
 - Defendants' Joint Motion For Disclosure Of Grand And Petit Jury Data And Incorporated Memorandum
 - Defendants' Joint Motion To Suppress Evidence
 - Motion For Disclosure Of Warrantless And/Or Illegal Electronic Or Other Surveillance
 - Joint Motion And Memorandum To Dismiss Certain Counts Of The Indictment
 - Joint Sealed Motion And Memorandum To Suppress Evidence Obtained Or Derived From FISA Surveillance Including Atty-client Privileged Communications And To Conduct An Evidentiary Hearing To Determine Extent To Which The Govt's Violation Of Dfts' Atty-client Privilege Has Tainted The Prosecution
 - Dfts' Joint Motion And Memorandum To Compel Production Of FISA Applications, Orders, And Related Documents
 - Motion For Discovery Defendants' Joint Motion And Memorandum In Support Of Discovery Of USAID, Dept. Of State And Dept. Of Treasury Documents Pursuant To Rule 16 Of The Federal Rules Of Criminal Procedure
 - Motion For Juror Questionnaire
 - Motion In Limine Defendants' Joint Request For James Hearing, Motion In Limine To Exclude Alleged Co-conspirator Statements Not Meeting The Requirements Of Fed.R.Evid. 801(d)(2)(e)
 - Joint Motion To Present Summary Of Indictment To Jury, In Lieu Of Indictment Itself
 - Motion To Exclude Government's Experts
 - Defendants' Joint Motion In Limine To Exclude Evidence From Trial
 - Motion In Limine And Memorandum In Limine Regarding Issues Arising Under The Religious Freedom Restoration Act And The First Amendment, And Request For Evidentiary Hearing As Necessary
 - Motion To Continue Trial Setting Or, In The Alternative, To Dismiss, Based On The Government's Refusal To Provide The Defendants Access To Their Own Statements
 - Trial Brief
 - Defs' Motion To Prohibit The Government From Introducing Or Relying Upon Any Intercepted Conversations From Lines To Which The Defendants Do Not Have Access And For A Continuance
 - Motion In Limine To Exclude Evidence Of The Indictments And Convictions Of Third-parties From Trial
 - Joint Motion To Limit The Government To One Designated Agent At Trial

Summary

- Systematic, strategic approach to pretrial motions practice
- All pretrial motions should be fact-based and specific – NO FORM MOTIONS
- Consider whether to use the flamethrower or sniper approach



QUESTIONS?