

LESA Trial Strategy: An Introduction to this Module

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Criminal Advocacy – Trial Strategy

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A criminal trial is a complex and intricate endeavor, engaging a myriad of procedural rules, evidence and substantive law. The criminal law practitioner is expected to have a solid understanding of the interplay of legislation and common-law principles, within the rubric of constitutional (*Charter*) law, within a backdrop of a process which engages fundamental principles of *Justice*. The stakes are high². In each and every case there is the potential for a finding of “guilt”, and with it the stigma of a criminal record and possibly, the loss of liberty³ arising from a conviction.

Although the respective roles of the Crown and Defence are different,⁴ they are interdependent insofar as the nature of their work within the adversarial system is interrelated⁵. The Crown’s case

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² See David M. Paciocco, “Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof” (March 2001) 80 Can Bar Rev 433-455, where Professor Paciocco, as he then was, undertook an analysis of the “qualified truth”, established through an approach to evidence and procedure within the criminal trial process under a “rationalist tradition”. Paciocco pointed out that a “qualified truth”, as a means to legal conviction, is acceptable, whereas the same standard is unacceptable where innocence is at stake. See also Department of Justice Canada, “FPT Heads of Prosecutions Committee Report on the Working Group on the Prevention of Miscarriages of Justice”, online at: <http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/toc-tdm.html>, which provides an excellent analysis of factors within the Canadian criminal justice system, leading to miscarriages of justice. The factors include: tunnel vision (the single mind and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one’s conduct in response to the information); mistaken eyewitness identification and testimony (erroneous and mistaken identification by eye witnesses occur, resulting in the conviction of those who are innocent. Where the case for the Crown depends on the accuracy of eyewitness identification, the judge must caution the jury. (*R.v.Tebo* (2003) 175 C.C.C. (3d) 116, (Ont. CA)); false confessions; in-custody informers; forensic evidence and use of experts.

³ Subject to a hearing under Part XXIII of the *Criminal Code*.

⁴ The office of the Crown Attorney has, as its main function, the prosecution of, and supervision over, indictable and summary conviction offences. The Crown Attorney is to administer justice at a local level and in so doing acts as agent for the Attorney General. The role of the Crown Attorney has been discussed at length within a number of cases, since the well-known description of the role, cited in *Boucher v. R.*, [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263, at pp. 23-24 [S.C.R.]:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and justness of judicial proceedings.

See also: The Honourable Marc Rosenberg, “The Attorney General and the Prosecution Function on the Twenty First Century” Queen’s L.J. Vol. 43(2) (2009) 813.

The difficult role and obligations of Defence Counsel has also been considered at length. The role of Defence is to be fearless, and to adduce admissible evidence which is strictly relevant to his own case and assists his client. *R.v.Miller and others* (1952), 36 Cr. App.R.169. See, for example: G. Arthur Martin, “The Role and Responsibility of the Defence Advocate” (1970) 12 Crim L.Q. 376. See also L. Stryker, *Art of Advocacy*, 2nd. Ed. (1963).

⁵ More recently, there has been recognition of the interrelated relationship between Crown and Defence, and the importance of civility to maintaining trial fairness. See Michael Code, “Counsel’s Duty of Civility: An Essential Component of

is both *necessary*, as it is *predictable*.⁶ It is structured toward discharging the legal onus of proof, rebutting the presumption of innocence. The work of Defence, is less predictable and is complicated by a nuanced consideration of how to effectively challenge and test the Crown's case within a strategy which may or may not call for the formal presentation of evidence. One fact is clear: to be effective, both Crown and Defence must not only have a strong understanding of what the issues of proof are within the Crown's case, but also an appreciation of when and how a defence case may potentially unfold. Each, within their respective roles and obligations must also be *prepared* to implement a trial strategy and respond to issues which arise in the case as it unfolds.

While it may be trite to suggest that a good trial strategy requires *preparation*, what is less understood is what "preparation" actually entails. To be effective, preparing for the criminal trial requires not only an adherence to organization and efficiency but, more importantly, an understanding of the process of *how* to prepare a trial strategy coupled with an appreciation of *what* needs to be addressed within the overall process involved.

The purpose of this module is to teach you how to structure your trial preparation in a particular manner, utilizing a systematic focus which will improve how you analyze the case, identify the issues and address your response to the issues, all while mapping out a plan for implementing a strategy. There is a caveat to this process, however. The format and suggestions offered are designed to enhance the individual style of your trial preparation. The skills you acquire as you gain increased litigation experience will doubtless improve this into a litigation paradigm within which you can build and refine your approach further.

1. Analysis of the Crown's Case

The decision to prosecute a criminal trial is continuous, requiring the prosecutor to engage in an ongoing assessment of two factors: whether there is a reasonable likelihood of a conviction and whether it remains in the public interest to continue the prosecution.⁷ Although a detailed consideration of Crown discretion regarding analysis of these two factors is beyond the scope of this paper, it is important to appreciate that the manner in which the Crown prepares and runs the case forms the starting point for the strategic preparation of how the Defence will be conducted.

Fair Trials and an Effective Justice System", online at:

<http://www.canadiancriminallaw.com/Faculty%20of%20Law/comm/Counsels%Duty%20of%20Civility.pdf>.

⁶ Owing to the rules of evidence, and procedure, and the constitutionalized obligations upon Crown compelling disclosure under *R.v.Stinchcombe* [1991] 3 SCR 326.

⁷ As Agents of the Attorney General, these decisions may further be guided by a number of resources, including case-law, legislation and reference to Crown Attorney Practice Manuals.