THE FORTY-FIVE MINUTE CRIMINAL LAWYER

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1999

Introduction:

I am asked today to provide some practical suggestions on how lawyers might prepare the defence from the first telephone call to trial. Too general a task? Probably, but I will do the best I can. Our aim will be a sort of variation on the Dale Carnegie theme: how to win clients and influence judges and prosecutors.

Meeting the Client: Be Interested, Stay Interested

A common complaint against criminal trial lawyers is that, at bottom, they tend to show little empathy for their clients. We are said to show more concern for ourselves, and our fee, than for the person who, after all, stands accused of a crime and faces the daunting power and authority of the police and prosecution. It may be true: the longer the lawyer toils away at this business, the greater the possibility that the lawyer will be insensitive to the particular plight of the individual charged. The reason is that while clients come and go the lawyer's daily experience remains relatively the same. And the more experience the lawyer acquires the less intimidating, the more routine, is the entire trial process. It is not arrogance or indifference which sets in, but the appearance of them. Hence, my first suggestion: be interested, stay interested. No matter how familiar the accused or the offences charged, try to know the client. Really. Know who that person is. Someone once said that every human being has a thousand faces. Every human being is special and unique. What's special about your client? Only when you know this should you concern yourself in detail with the manner and timing of the

payment of fees. Build trust with the client. When you do, how and when you will be paid will be a natural part of the relationship.

How does one build the trust? Surprisingly, most individuals, unique as they are, have very similar needs, especially when they come to lawyers for help. They need to feel, for example, that their lawyer is eager to take their case. They need to believe that their lawyer is prepared to defend the case fearlessly. You will satisfy this need not only by knowing the client but by "seeing" the case, at least initially, from the client's perspective, not yours.

Knowing the client, building the trust, involves small steps, none costly. Treat the client like a treasured member of your family. Greet him personally when he arrives at the office rather than dispatching a staff member to fetch him from the waiting room. If someone told you that your mother or father had just arrived in your waiting room, would you send a staff member to get them and bring them to you? Once in your office, remember that the desk itself is a barrier. Remove all barriers metaphorically, if not literally. Ask the question, and mean it: How can I help you?

In this way, the first meeting is always friendly, non-threatening. Some lawyers, not wanting to waste time ("Time is money"), use the first meeting to immediately challenge the client's story, looking for weaknesses in it, trying to

determine what the defence strategy might ultimately be. Patience, I say. There will be plenty of time for critical inquisition later. The first meeting requires more understanding, more listening, more learning.

I am not suggesting here that there can be no discussion whatsoever of fees during the first meeting. But if they are discussed at all, the discussion should occur at or near the end of the meeting. And it should be premised on the client's need to know the business arrangements, because obviously a major concern of every client is the cost of the service provided. The client wants, needs and deserves to have this information. And that should be the spirit in which it is given. Never, ever, should the premise be that the lawyer does not trust the client and therefore needs certain commitments from the client "up front" or the lawyer will show him the door.

Meeting the Client's Witnesses: Be Patient, Be Supportive

So far as practicable, you should try to provide the same sort of empathy and support to the witnesses who may be called in support of your client. They too feel vulnerable when they deal with lawyers. Who doesn't? But witnesses feel more than usually threatened. Except for the fear of punishment that the accused alone may face, witnesses consider that they are very nearly in the same position as the accused. They are unfamiliar with and usually frightened of the trial process, so they are reluctant to be involved. They need to be made to feel

that the lawyer has taken into account *their interest* as well as those of the accused. They must come to see that the lawyer representing the accused is competent to handle the trial and to present them before the court without causing them humiliation or terror.

To these witnesses, the lawyer should always speak of the accused respectfully even if the lawyer's personal assessment of the accused or of the merits of her case is otherwise. Witnesses tend to reflect the same attitude towards the accused as that of the accused's counsel. It is often beneficial to tell witnesses how their evidence fits into the defence evidence generally. Only in this way will they understand their significance to the process and outcome. They should also be advised to respect opposing counsel and to avoid evasive tactics. They should be courteous to all court personnel and respectful of the justice system. They should also be admonished that they are not advocates, but facilitators, advancing a piece of the narrative.

The importance of the preparation of witnesses cannot be overstated. Most cases, in fact, turn on the performance of the witnesses. But there is no foolproof formula or method to prepare witnesses for trial. They come to us in all types and fashions, and many are, to say the least, a challenge. Some communicate easily and well, others only grudgingly and in monosyllabic grunts. Patience and preparation are all.

Witness preparation, difficult as it may be, is the first important step to changing the level of your success at trial. Sometimes the best way to learn how to do something is to consider or examine the opposite, that is, how not to do it. Let me give you an example.

In the mid-to late 80's, I had the privilege of representing over 100 burlesque attendants. The sheer number of persons charged with these offences in my community was part of a mighty effort by the City of Windsor to “clean up” and destroy the burlesque industry. The strategy of the local authorities was to charge as many performers as possible and use the legal system to take them and the owners of the parlours down, because it was the owners who usually paid the performers’ legal fees. The intention, of course, was to demonstrate to the owners that the (legal) cost of the business was too high.

Wrong. The publicity, the “free advertising,” generated by the media’s disclosure of the charges stretched all the way to Michigan and resulted in a massive influx of well-to-do American male patrons bearing U.S. currency, and more. Suddenly business was good, very good indeed. In this climate, in this highly charged atmosphere, I had a visit from one of the burlesque dancers charged with the offences of nudity in a public place and indecent theatrical performance. My job was to prepare her for trial. (Someone, after all, has to do this dirty work.)

I asked her to tell me about her job. She described how for each performance she would carry with her a little "stage". You carry a stage? "Yes," she said. "When a patron asks me to dance, I place my stage in front of him and I perform on it. It's about the size of a hat box, about 8 inches high." You perform on a stage the size of a hatbox? "Yes," she said. "I perform. I move. Slowly. And as I do this, I take off my clothes. Except my heels, of course, they stay on, always." In my office, she sits as she tells me her story. But even in the chair she is a formidable presence, and when she stands she is sleek and tall, rising over six feet, and it's then that I imagine her balancing, moving, on the hat box as on the head of a pin.

When I ask her to describe the music she performs to, she tells me that her favourite song is by Whitney Houston, "You Give Good Love." This is the song that played when she danced for the undercover police officer. And when it ended and she stood over him naked but for the heels, he looked up at her, smiled approvingly, and said: "You're under arrest."

Now dance, of course, is a particularly compelling form of artistic expression. Anyone who has witnessed on the stage the flowing figures of Karen Kain and Rudolph Nureyev knows this. So I asked the dancer seated across the desk from me to give some thought to how *she expresses herself* in dance. When she moved, what was it precisely she was seeking to do or to evoke? I had in

mind, as you might have guessed, the beginnings of an argument in relation to s.2 of the ***Charter;*** the freedom of dance as a constitutionally protected mode of expression. I would ask her the question at trial, and any response remotely like "moving rhythmically to the music so as to interpret the music through dance" would hit the mark.

The initial consultation now long over, the trial preparation complete at last, we headed for court comfortable in our position that on the hatbox stage her true intent was, in effect, to re-interpret Whitney Houston and to give creative expression through dance to the song. "Freedom of expression", indeed.

The examination in-chief began uneventfully, and then built toward a crescendo:

> Q. When you perform what is your favourite song?
> A. [without hesitation] "You Give Good Love" by Whitney Houston.
> Q. When that song plays, how do you respond?
> A. [softly, and with a smile] I dance, I love to dance.
> Q. When you dance upon your stage to the music of this song, what is it precisely that you are seeking to do?

Here, now, she pauses. Not for a moment only, but for what seems like a very long time. I ask again: What is it that you seek to do? And with that came her instant answer: "Mostly, I try not to fall off the box."

Over the years, I have learned much from witnesses such as the burlesque dancer. I have learned most, I suppose, to enjoy, to relish, the human comedy in which we are privileged to participate and earn a handsome living. People who don't try cases never get to experience a moment such as the one provided by the dancer of burlesque. These are rich and beautiful moments, really, although I admit they may not seem so at the time. But here I am sharing it with you today as part of my lived experience as a lawyer. And what I know now is that my sleek and shining client, the dancer, did not place the same importance upon my constitutional argument as I had.

We want our witnesses to be poised and confident and to possess great nimbleness of mind. The best way to approximate this ideal state, once all the facts have been gathered, assimilated, and represented in your trial brief, is to subject all potential witnesses, including experts, to an interview process no less rigourous than that of a cross-examination by a skilful prosecutor. The exercise will pay dividends because it familiarizes the witness with an important part of the trial experience and demystifies the process of cross-examination, calming the witness's fears.

The question trial lawyers are likely asked most by potential witnesses is "What am I going to be asked?" The best response is to take the witness through the most likely cross-examination, a process with an additional benefit for the

lawyer too. Inevitably, your own cross-examination of your witness will sharpen you to attend to weaknesses or gaps in your own defence plan and to make the necessary adjustments now rather than in the middle of the trial.

It is unethical, of course, to tailor the evidence of witnesses or to attempt to "correct" their evidence by advising them of other evidence you consider to be preferable. But it is not unethical, and in fact should be part of your proper preparation of witnesses, to fully test them on every aspect of their evidence, so that neither you nor they are taken by surprise at trial. The objective is to assist the witnesses to order and clarify their evidence, still being careful not to alter or distort their recollections to suit your own predilections.

Those who come before the courts to testify are generally unfamiliar with and in fact intimidated by the court experience. They tend to have no or limited awareness of the importance of the impressions they are capable of making upon a judge or jury. They must be advised that even the best witness, the most exemplary person, can make a poor impression if he is unresponsive, argumentative, or unwilling to make reasonable concessions during cross-examination. No witnesses should ever be glib, arrogant, disrespectful or slovenly. Proper preparation of witnesses requires time and persistence. In the current climate, when lawyers are stretched to the limit and compelled to work within the

inexcusable restraints of the legal aid tariffs, too few lawyers are willing to make the commitment. In that event, everyone loses.

Discovering the Opponent's Case: Be Thorough, Be Relentless

Uncovering all the facts requires more than meetings with your own client and the client's witnesses. Complete disclosure is paramount, although the issue of what can or should be disclosed in any given case is by no means uncontroversial.

The right of the accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence. One important source of information, of course, is that information in the possession of the Crown. The term "in the possession of the Crown" is now understood to include all information in the possession or knowledge of the police. In 1991, Justice Sopinka, writing for a unanimous court in R *v. Stinchcombe*[1], *reviewed* the general principles governing the duty of the Crown to make disclosure to the defence, especially in the context of indictable offences. He concluded that the Crown's general obligation is to disclose all relevant information, even if the Crown does not propose to adduce it at trial. His Lordship also noted, however, that the Crown's obligation is not

[1] *R. v. Stinchcombe* [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1.

absolute. It is subject to the Crown's discretion, a discretion extending both to the withholding of information and to the timing of disclosure.[2]

Stinchcombe thus appears to stand for the proposition that the Crown has an obligation, before the accused is called upon to elect a mode of trial or to plead[3], to disclose to the defence all information, unless the information:

> 1. Is privileged, as, for example, in the case of informers whose identity the Crown is obliged to protect;
> 2. is clearly irrelevant, the point being that the Crown ought to err On the side of inclusion; or
> 3. Would, if disclosed, impede completion of an investigation.[4]

When an issue arises with respect to the exercise of the Crown's discretion, defence counsel should seek the intervention of the trial Judge at the earliest opportunity. "Failure to do so by counsel for the defence," said Sopinka J., "will be an important factor in determining on appeal whether a new trial should be ordered."[5] The general principles enunciated in *Stinchcombe*[6] were then elaborated upon in the January 1993 report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolutions chaired by the Honourable G. Arthur Martin, Q.C.

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[2] *Stinchcombe*, supra at p. 11.
[3] Ibid. at p.14.
[4] Ibid. at p.11.
[5] Ibid. at p.13.
[6] Supra note 1

According to the Advisory Committee, the trial Judge reviewing the Crown's disclosure decision should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence.[7]

All witnesses for the prosecution and the defence are potential sources of information and may prove valuable to defence counsel. It has long been settled that there is no property in a witness and that a witness may be interviewed by both sides.

Of course, a lawyer wants to avoid the possibility of unwittingly becoming a witness and should therefore ideally have all witnesses interviewed by someone else, preferably an independent private investigator who may be called in the event that the witness later gives evidence inconsistent with any statement earlier provided. The importance of preserving in some independent fashion the previous oral and written statements of witnesses is highlighted by the various uses that may be made of previous statements under sections 9, 10, and 11 of the *Canada Evidence Act*[8].

[7] See also *R. v. Egger* (1993), 21 C.R. (4th) 186 (S.C.C.) at 190.
[8] *Canada Evidence Act*, R.S.C. 1985, c. E-9.

If it is not possible to use an investigator, provide at the very least to have a third party present, particularly when interviewing witnesses who are expected to testify for the prosecution. In this situation, you should be forthright with the witness, indicating that you represent the accused and that the witness need not speak to you if she or he chooses not to. Tell the witness that, in fact, neither side has ownership or property rights to the witnesses and that they are free to speak to whomever they choose.

To the indefatigable among us, sources of information potentially valuable for trial are almost limitless. My own experience has been that many people are quite willing to share information they have without even being required to do so by subpoena. For example, people who work in weather stations are usually most willing to provide oral and written information about particular weather and road conditions, wind velocity, and so on, whenever they are asked. They can also provide precise times for sunrise and sunset, useful information when visibility conditions are relevant.

Municipal offices, too, are often willing to provide information about such things as traffic lights, traffic conditions, accidents, occurrences or related data, road conditions and road repair. Coroners and forensic pathologists are also usually cooperative in disclosing, upon request, information about investigations and autopsies. If they fail to respond to a request by the defence lawyer alone, they

will provide the information when the request is made with the consent of the prosecutor. The same may generally be said for ambulance services, fire departments, and accident reconstruction services.

Section 12 of the *Canada Evidence Act*[9] permits counsel to question any witness about previous convictions, and if the witness denies the fact of a previous conviction or refuses to answer, this section permits counsel to prove the conviction. The criminal record of any potential witness, if not supplied by the prosecution as part of its disclosure, can generally be obtained by a *duces tecum* subpoena to the custodian of the records of any local police department, R.C.M.P. office or Ontario Provincial Police office. Usually all that is required to obtain the criminal record is the proper spelling of the witness's name and a date of birth or approximate age.

Applying for Particulars:

Section 587 of the *Criminal Code*[10] gives the trial Court authority to order the Crown to furnish particulars where it is satisfied that particulars are necessary for an accused to receive a fair trial. Where a particular is delivered pursuant to section 587, a copy of the particular is given without charge to the accused or her counsel and it is entered in the record and the trial proceeds in all respects as if the information or indictment has been amended to conform with the particular. While

the matters described in subsection 587(1) (a) to (g) may be the subject of an order for particulars, these are not exhaustive of what might be ordered. Thus, the true function of particulars is to give further information to the accused of that which the prosecution intends to prove against her so that she may have a fair trial.

Inspecting Places and Things:

It is often helpful to view the place where an offence is alleged to have occurred or to inspect items of real evidence that may be entered into evidence. In preparation for a murder trial, not too long ago, the defence lawyer had a videotape prepared from inside the house in which the killing took place. The victim had feared for her life for several months prior to her death. She had boarded up all the windows with plywood and drawn all the drapes.

The accused insisted that she had asked him "to watch out for her" whenever he was in the neighbourhood to protect her in case anyone was around. The accused testified that one night he saw broken glass in the driveway and knocked on the door to satisfy himself that she was safe. When no one answered he opened the door, closed it behind him and entered. Suddenly, he said, he was set upon and clubbed. In the utter blackness of the room, he could see neither the assailant nor the instrument with which he was being clubbed. Later, the police found a baseball bat stained at the large end with the accused's blood and lying

[9] *Canada Evidence Act*, R.S.C. 1985, c. E-9.

under the kitchen table. The police found the victim, too, in the kitchen. She lay dead on the floor with multiple stab wounds.

The defence produced a videotape of the interior of the house at precisely the same time of day as the alleged offence. The purpose was to show that the boarded-up windows and the drawn curtains had cast the entire residence into complete and utter darkness. In the blind chaos of that setting, the accused said, he stumbled away from the attack, groped blindly in a drawer, felt the handle of what proved to be a knife, and then turned the weapon upon his attacker believing the assailant to be a person who might have harmed or wished to harm the deceased. As the videotape played, the Judge watched intently, then blurted in full range of the jury, "Well you can't see anything." Precisely . Nor could the accused have seen anything. Only an inspection of the place and time of the alleged crime could have led to the decision to attempt to demonstrate for the jury the conditions or circumstances within which the alleged offence was committed.

Section 652 of the *Criminal Code*[11] provides that a judge may, where it appears to be in the interest of justice, at any time after the jury has been sworn and before it gives its verdict, direct the jury to have a view of any place, thing or person, and shall give directions respecting the manner in which, and the persons by whom, the place, thing or person shall be shown to the jury. By virtue of

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[10] *Criminal Code of Canada*, R.S.C. 1985, c. C-46..

section 572, this section is also applicable to non-jury cases and a Provincial Court Judge has the power to order the taking of a view.[12]

The Trial Brief: Be Orderly, Be Complete

After requesting and receiving full disclosure, you should begin to prepare a trial brief. It should be a mirror in small of the overall trial plan: unified and coherent. Its organization should be simple, free of all irrelevancies, although the following materials are always relevant and should be there in an orderly arrangement:

1. a certified copy of the information;
2. an identification and analysis of each of the issues;
3. a list of witnesses with summaries of their evidence followed by their signed statements;
4. copies of all essential documents;
5. the applicable law, including, where appropriate, the law relating to questions of admissibility of evidence.

The trial brief should be intelligently tabbed and indexed for quick and easy access. It is the ultimate blueprint for your program of action.

Formal Retainer Agreements: Be Prudent, Be Defensive

Earlier, I noted that in the initial consultations with clients, discussion of the retainer should be deferred until you have begun to establish a relationship of trust with them. But as I also noted, the subject of the retainer is critical to clients

[11] *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

and ought to be handled directly and decisively. I strongly recommend, in every case, the execution of a formal written agreement in simple and direct language, eschewing legalese. The agreement should make clear the lawyer's fee for the services rendered. If the fee is expressed in writing, the risk of dispute later is greatly minimized. But a written retainer, containing an unambiguous fee structure, is not *per se* dispositive of what an assessment officer will assess if the issue of fees ever becomes contentious. The written retainer is one important factor among many that the assessment officer may consider in exercising his discretion. Other factors include:

a) the time involved;
b) the skill applied;
c) the result obtained;
d) the importance of the result to the client; and
e) the client's ability to pay.

The onus is on the lawyer to prove the retainer, so an agreement duly signed and witnessed by the client is a solid piece of evidence to support the retainer agreement, though (again) not the sole determinative factor in assessing the quantum of the lawyer's account.[13]

You may wish to consider, pursuant to sections 16 and 17 of the *Solicitors Act*[14], setting a fee for a fixed amount or even for a specific hourly rate and have

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[12] *R. v. Prentice*, [1965] 4 C.C.C. 118 (B.C.C.A.) at p.120
[13] *Goring v. Nash* (1990), 45 C.P.C. (2d) 139 (B.C. Master) at p.143.
[14] *Solicitors Act*, R.S.O. 1990, c. S.15.

that amount approved *in advance* by an assessment officer. Section 16 provides that a solicitor may make an agreement in writing with the client respecting the amount and manner of payment for the whole or part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which the solicitor would otherwise be entitled to be remunerated.

Agreements between counsel and clients assessed in advance of the work performed are best entered into where the trial is likely to be difficult, lengthy, and costly. When you decide to apply for an assessment in advance under the *Solicitors Act*[15], I recommend that you send the client for independent legal counsel on the agreement to be assessed. The client is also entitled to proper notice of the assessment hearing. Some counsel also prepare and have the client sign a waiver agreement declaring that the client waives the necessity of independent legal advice and notice of the hearing. A case helpful in canvassing and resolving these issues is *Re: Greenspan, Rosenberg & Buxbaum*[16].

[15] *Solicitors Act*, R.S.O. 1990, c. S.15.

[16] *Greenspan, Rosenbuerg & Buxbaum* (1987), 17 C.P.C. (2d) 213 (Ont.H.C.J.).

You should also know that you may accept from client's security for the amount to become due to you. Section 32 of the *Solicitors Act*[17] provides as follows:

> 32. A solicitor may accept from his or her client, and a client may give to the client's solicitor, security for the amount to become due to the solicitor for business to be transacted by him or her and for interest thereon, but so that the interest is not to commence until the amount due is ascertained by agreement or by assessment.

In this context, too, I suggest that you ask the client to take independent legal advice before consummating any security arrangement respecting fees and/or disbursements.[18]

Creating a Defence Plan: Be Ready

The defence plan will take shape over time, beginning with the very first consultation with the client. Although the particular nuances of each case will shape the development of the plan, the following factors are always relevant:

1. Identification of the witnesses in the Crown's case;
2. Topics or areas of cross-examination to be pursued with each prosecution witness;
3. Compilation of a list of defence witnesses;
4. Preparation of the evidence-in-chief of all defence witnesses;
5. Determination of the order in which the defence witnesses are to be called; identification of the strengths and weaknesses of the accused's case.

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[17] *Solicitors Act*, R.S.O. 1990, c. S.15.

[18] Rule 9 of the Professional Conduct Handbook deals generally with the issue of fees and disbursements. Rule 5 deals with conflict of interest between client and solicitor. Arguably security to protect a lawyer's fee involves a classic conflict between the protection of the fee and the protection of the client's financial interests. See Commentary 7 of Rule 5.

Before the victory, before the euphoria, comes the plan and the work of the plan. Assume for a moment that, like a few lawyers I know, you are inclined sometimes to a cynical view of things and that in this frame of mind you persuade yourself that some judges actually reason backwards, determining which side they think should win, then rationalizing their decision by emphasizing those portions of the evidence which accord with their conclusions. Now I am proud to say that I am no cynic, but I know people who are and they insist that the situation I have just described actually occurs occasionally. Even if it does, all the more reason to have a plan. Even before the trial starts, know what you want to say to the judge or jury at the end. If, for example, your defence of John Smith at a criminal trial is alibi, your closing comments to a jury might be:

> John Smith did not commit this robbery. He does not say that a robbery did not take place because clearly a robbery occurred. His defence is that he did not commit this robbery. Moreover, he could not have committed it. He was in another city on the date and at the time that this robbery was committed. Therefore, you should acquit him.

Knowing that these are the words you are going to speak at the end of the trial, the plan must be that every question you ask will tell the story of the alibi. So to each witness in cross-examination you may put questions such as these:

> Q: You did not see John Smith at the bank on July 10?
>
> (Note: In this method you do not have to embellish the question, making it longer and more awkward, by preceding the substance of it with worthless fluff such as "I would like to suggest to you that" or "What would you say if I suggested to you that..." All fluff Avoid the fluff.)

A: It was him.

Q: It could not have been him because he was in Kitchener on that date and at that time?

A: I thought it was him.

Q: If he was in Kitchener on that date and at that time he could not have been the person you saw at the bank?

A: Yes, I guess that would be true.

Having a plan of cross-examination is nothing other than having a plan about and knowing where you are going in the trial. Even allowing for unforeseen circumstances and the inevitable ebb and flow of the trial process, you should be able to ask questions that permit you to argue at the end of the case the narrative your client wishes to tell, a narrative which, if believed, will lead any judge or jury to decide in his or her favour. Thus, to the difficult question "What to ask?" the answer is: only those questions which contain facets of or elicit responses compatible with your theory of the case.

Finding and Instructing Experts: Be Smart, Be Educated

The reception of expert testimony is an exception to the general rule prohibiting evidence as to the opinion of any witness. The opinion of a specialist may be admissible provided that the expert's testimony is:

1. relevant;
2. not inadmissible on policy grounds;
3. necessary in assisting the court;

4. not rendered inadmissible by any other exclusionary rule; and
5. delivered by a properly qualified expert.[19]

In R *v. Mohan,*[20] the Supreme Court of Canada rendered a judgment having a chilling effect on the use of expert testimony. While the test for admissibility of expert evidence prior to *Mohan* was whether the evidence was relevant and helpful[21], the Supreme Court of Canada has now ruled that the evidence proffered must not be merely "helpful" but "necessary," in determining whether or not expert evidence should be received[22]. The evidence, in other words, must be necessary in the sense that it provide information which is likely to be outside the experience and knowledge of a Judge or Jury."[23]

The Supreme Court of Canada now apparently fears that expert evidence has the potential to overwhelm the trier of fact, particularly when the trier of fact is a Jury, and that it should be carefully scrutinized to determine, first, its relevance and, second, whether even if relevant it may be excluded if its probative value is overborne by its prejudicial effect.[24]

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[19] Mr. Justice John Sopinka, The Use of Experts, The Expert: A Practitioner's Guide, Vol. 1 at 1-2 (Toronto: Carswell, 1995).
[20] *R. v. Mohan*, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402.
[21] See, for example, R. v. Doe (1986), 31 C.C.C. (3d) 353 (Ont.Dist.Ct.).
[22] Mohan, supra note 20 at 413.
[23] Ibid.
[24] Mohan, supra note 20 at 411.

Even before the Supreme Court released its decision in *Mohan,* Madame Justice Beverley McLachlin had expressed publicly her disapproval over what she perceived to be the extravagant overuse of expert witnesses by trial counsel. In this context, the point of view expressed in *Mohan* is really not surprising.

Still, despite the Supreme Court's newly expressed diffidence regarding experts, the plain fact is that in many criminal law cases experts are essential to the defence. For that reason, I suggest that you presume in every case one or more expert witnesses will have to be located and retained, then, when circumstances permit, rule the expert(s) out. Experts' names and specialization's are easily gleaned from reported cases. So also are the names of the lawyers who conducted the trials. It is an easy matter to contact the lawyers to see if they are willing to share, for whatever the fee, transcripts of their experts' evidence or copies of their experts' reports.

Experts also frequently advertise their services; their brochure materials should be retained and filed and copies of their curricula vitae requested. They should always be asked to indicate the number of times and levels of court before which they have previously testified. University faculty members, particularly in the pure sciences, augment their salaries by performing consulting services. Virtually every medium to large-sized Canadian university boasts experts in one or more subject areas relevant to criminal law: firearms, breathalyzers,

climatology, psychology and psychiatry, medicine, and so on. Legal publications, particularly journals and periodicals published in the United States, as well as organizations such as the Technical Advisory Service for Attorneys (T.A.S.A., with headquarters in Blue Bell, Pennsylvania) are also invaluable information sources on experts.

Once the expert has been located, scrutinized, and retained, the specific purpose for which her expert opinion is sought ought to be clearly identified. I do not necessarily recommend a letter of instruction for the expert witness, but if a letter is written, it must be written in such a fashion that if it or a copy of it were ever to surface at trial, the lawyer would not be embarrassed by its content or tone. Because legal terms such as proof "beyond a reasonable doubt" or "on the balance of probabilities" are easily misconstrued by non-legal scholars, the instructing letter should seek to make clear in non-legal language the meanings of the legal terms, distinguishing, for example, between "probability" and "possibility," and admonishing the expert to bear in mind the distinction in offering her opinion. If the expert's opinion is ultimately judged useful to the defence plan, then she should be prepared for trial and particularly for the experience of cross-examination in the same rigorous fashion as other defence witnesses.

First, obtain a written authorization from your client to disclose all relevant information to the expert, and then give as much information to the expert as

possible. Ask the expert to indicate if anything is missing from or deficient in the materials which is necessary for the opinion to be rendered.

Second, use the expert to help you prepare for the cross-examination of any experts to be called on behalf of the prosecution. Ask the expert to identify the appropriate issues she or he thinks will reveal evidence helpful to the defence. Ask the expert to provide you with articles, books, or other materials to help you understand the issues or to confront the prosecution's experts. When formulating questions for cross-examination of the prosecution's expert, review them with and ask for the assistance of your own expert.

Developing the Trial Persona: Be Positive, Be Respectful

The best disposition for battle is a positive one. My colleague, Harvey Strosberg, says: Trial is war, and the weak go to the wall. I say: Preparation and presentation, and now it's time to get it done. A positive attitude is essential. If you are or feel defeated in your own mind before the case is truly over, then it truly is over. Recently, I was involved in what for me was a rare experience: a civil trial. Until then, my experience was exclusively in the criminal courts. Luckily, I had the assistance of a bright young lawyer as co-counsel. At one point in the trial the evidence was not going well for our side. My talented but less experienced co-counsel was perceptive enough to sense it and began to think that all would soon be lost. When I tried to reassure her, she said "Well, if I were a

betting person, I'd wager one hundred dollars against the possibility of us recovering any damages. I said: "I'd take that bet in a heartbeat." I should point out that I too had my doubts about the merits of our case from time to time as the trial process ebbed and flowed. They all have this rhythm. But I also knew that a positive attitude is often the difference between winning and losing.

As it turned out, in our case we were awarded the entire amount of the damages requested and also our costs on the solicitor/client scale. And I have no doubt now in retrospect that one reason for our success is that, despite the occasional twinges of doubt and uncertainty, we stayed with our trial program and never allowed ourselves to be governed by anything other than purposeful positive energy.

Respect

Aretha Franklin spoke for all lawyers and judges when she said:

> What you want…. Baby I got it
> What you need….. You know I got it
> All I'm asking for... is a little respect.

A little respect seems as if it should be easy to provide. But anyone who has spent time in the Ontario Court of Justice knows that sometimes even a little respect is difficult to find. And if we are all honest with ourselves we will admit that our profession could use a huge dose of professional courtesy and civility

from all the interested shareholders: lawyers, judges, litigants, witnesses, everyone.

Witnesses should therefore be prepared not just based on **what** they will say but also on **how** they will say it. You should explain to each witness the roles of the various people in court. Once the witness understands that it is opposing counsel's responsibility to ask questions, the witness will have a better understanding of why it is essential to respond without impatience, without rancour, without hostility.

Just as it is important for counsel to know in advance as much as possible about the court before which counsel will appear, it is equally important for counsel to prepare witnesses by arming them with the same information. It is, however, bad preparation not to alert potential witnesses to the disadvantage of attempting to create an unjustified rapport between themselves and the court. Witnesses should be told the proper title of the presiding judge. They should know that if they are sitting in the courtroom prior to the case being called they should be attentive, and observe all protocol. The favorable impression you obviously hope to create with the witness may actually get created long before the witness takes the stand.

Witnesses should be advised that whenever possible they should refer to opposing counsel and other witnesses by name. Every witness should be reminded that most people are predisposed to accept the opinions of those they like and to reject those put forward by those they do not like. An adequately prepared witness is one who is at once courteous and reasonable. The witness should create the impression that he or she is simply telling a narrative, or part of one, and telling it to someone whom he cares for and respects.

A witness completely unfamiliar with the courtroom setting should visit that setting before the trial, thereby demystifying the aura of the place. Many witnesses who appear in our courts are like ships lost at sea. Familiarity breaks down irrational or exaggerated fears.

Be Humble?

Some of you may know my brother Edward. Where I come from, he is a well-known and respected lawyer in the field of employment and labour law. He is also presently a Bencher with the Law Society of Upper Canada. In my opinion, his greatest asset is his humility or at least what everyone perceives as humility. I have never met anyone who has spoken with Edward for more than 10 minutes who does not later tell me what a wonderful self-effacing person he is. To be truthful, this praise, even though it has been directed to a family member and my best friend has begun to be a little irksome. Frankly, I think much of his success

in law is as a result of his humility. Because he is humble, everyone seems to want to do things to help him. As I say, it's irksome.

Now contrast that picture with this one. Opposing lawyers, no doubt sensing in me, well, a paucity of humility, seem to want to beat me up, at least figuratively. I envy my brother. It has been said that the first essential of genius is humility. If that is so, then there is no genius in pomposity. I, for one, intend to work on my humility. And I know that many of you believe I have much to be humble about.

Following a Particular Strategy: Be Imaginative

The best courtroom presentations are those that are creative and lively. In the dry spaces of the law, counsel seems to sometimes check their imaginations at the door. Once the trial is underway, often a most effective and persuasive argument is developed by the use of visual aids, a simple technique too frequently ignored by trial lawyers. Graphic designers or artists can help in the preparation of items to be used at trial as exhibits to convey a message or theme. The defence theme can be portrayed graphically by diagrams, photographs, graphs or other kinds of demonstrative evidence. Once accepted in a criminal trial, the demonstrative evidence often remains within clear view of the trier of fact until the very moment the decision is made.

In a recent environmental law case, the prosecution of a corporate defendant turned on the issue of whether or not the company was liable for an ambient particulate fallout. The prosecutor produced photographs of the particulate matter but magnified many times over so as to highlight the distinctive characteristics of iron oxide particulate. Then the prosecutor produced photographs of similar particulate matter found at the defendant's place of business in an effort to demonstrate that the corporation was indeed the most likely source of the particulate matter.

The Crown's photographic evidence was countered by a defence expert who produced a different series of enlarged, colour photographs showing magnified iron oxide particulate remarkably similar to the matter presented in the prosecution's photographs. The defence photographs were reproductions of those bound in a well-known text outlining various types of fallout from industrial complexes. The defence expert agreed with the opinion offered by the textbook writer that there was nothing particularly unique about iron oxide particulate, and that in fact the type of particulate represented in the Crown's photographs often took on the "well known appearance" depicted in the textbook. He went on to say that the particulate demonstrated in the Crown's photographs could have come from any of a number of different industries, many of which happened to have been in the same geographic area as the corporate defendant. The prosecutor's strategy was nicely checkmated.

The term "demonstrative evidence" normally connotes such things as schedules, sketches, models, photographs, x-rays, videotape, film, charts, models, and maps, the relevance and usefulness of which, I repeat, are too frequently overlooked at trial. Use these things as creative tools to assist the court in visualizing and grasping the issues, or the science surrounding the issues, all the while transforming an otherwise staid courtroom into an animated, informed classroom.

Conclusion:

The nineteenth century poet and essayist Matthew Arnold once wrote: “Use your gifts faithfully, and they shall be enlarged; practice what you know and you shall attain to higher knowledge.” In the end, if we are to be true to ourselves and to this noble profession, we need only strive to fulfill this dictum. I know that the modest advice I have offered here is not going to re-fashion or re-shape anyone. Nor would I presume to do so. But if any bit of it helps, if any part of it can be enlisted to enlarge your gifts as advocates, then I too will have succeeded and enlarged my own gifts.