PREPARATION FOR CRIMINAL TRIAL

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Philip Strickland SC – p.strickland@mauricebyers.com

1.5 points in SUBSTANTIVE LAW/ETHICS STRAND – 1.15pm-2.30pm

This Paper provides a basic guide to preparation of a criminal trial. It is primarily geared towards preparing a criminal trial from the perspective of the accused, but has some application to preparation for a criminal trial for the Prosecution. It deals only incidentally with the substantive law and advocacy. Please email me or speak to me about any comments you have on this Paper, or any errors appearing in it.

The key themes of this Paper are:

(1) Do as much preparation of the trial as soon as you possibly can. Front load the preparation. (I assume that you are briefed with the trial at an early stage of criminal proceedings);
(2) Develop a clear logical way of organising your Brief;
(3) Prepare your witnesses (especially the accused) early and intensively. A witness should be as well prepared as you are.

I accept there are resources issues which are often overlooked in text books on subjects, which constrain what preparation can be done. Resources should not constrain one aspect which is preparing the accused if accused is to give evidence.

Prima facie, preparation is tedious. Adopt Buddhist approach to washing the dishes – tell yourself it is enjoyable or valuable in itself. And it is.

PART 1: JURISDICTION/POWER OF THE COURT

The first issue in preparing a trial is to determine whether the Court before which the accused is tried has jurisdiction or power to hear the trial. The following issues may be relevant:

- Are there time limits within which to institute proceedings? Is the institution of proceedings statute barred? (Example: summary matters)

- Is there a statutory provision which provides that there is a precondition for the institution of proceedings such as consent by a Minister or relevant official?[1]

- Is there some fact, matter or event which prevents the accused from being found guilty?

  Example 1: The person has already been tried for the same or substantially the same offence
  Example 2: Section 11.5(4) of the Criminal Code provides that a person cannot be found guilty of conspiracy if all the other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal.[2]

- Is the accused immune from prosecution?

  Example: police officers acting in execution of duty

  Fingelton's case;

- Does the charge found jurisdiction?

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1 For example in Commonwealth conspiracy cases proceedings for an offence of conspiracy must not be commenced without the consent of the DPP: section 11.5(8) of the *Criminal Code*. There are many similar provisions

2 11.5(4)(a) of the *Criminal Code.*

PART 2: STAY OF PROSECUTION

A related issue is whether an application should be made for a permanent or temporary stay of proceedings if you consider that such an application is warranted because the accused cannot obtain a fair trial either ever or for a particular period of time. The Court has the power to make such an order: Jago v District Court 168 CLR 23.

Relevant factors include:

- Has there been a gross delay in charging the accused or a gross delay between the offence or a gross delay from the time of the offence?
- Have crucial documents been lost or crucial witnesses died?
- Has there been particularly prejudicial publicity – normally only grounds for temporary not permanent stay?
- Has the Crown refused to provide necessary particulars of the charge? Stanton v Abernathy.

PART 3: OTHER INTERLOCUTORY MATTERS

Consider trial by Judge Alone

Shifting venue of proceedings

Separate trials with other accused/ Separate counts

Basha voir dire

PART 4: ORGANISING THE BRIEF

At the beginning of your preparation of the case, organise your brief effectively and efficiently so that during the trial or any pre-trial application, you can easily and immediately access the documents you need. It is a bad look before a Judge or jury to be fishing around trying to locate documents. I prefer to have hard copies of the brief, but more computer savvy barristers often have the brief on a lap top computer. What follows below may have relevance for both hard and soft copies of the brief.

There is no correct way to organise a brief. I have organised a brief as follows, which corresponds roughly to the order of the trial.

Liberally, use dividers to divide different categories of documents. Don't use full lever arch folders.

Volume 1: Crown Case and Opening

Section 1: (a) Indictment/CAN; (b) Particulars Request and Answer

Section 2: Chronology and/or Summaries of Crown case

Section 3: List of objections to Evidence and Submissions on same – (I assume this can be done before Crown Opening)

Section 4: Opening Address

Section 5: Crown Witnesses in alphabetical order or if you know it in order in which they called.

In relation to each Crown witness whom you will cross-examine:

(a) Your Cross-examination Notes – which may include reference to relevant pages of committal or other trial transcript;

(b) The witness' statement(s);

(c) List of documents you wish to tender through witness or show witness in order you wish to show them

(d) Actual documents you wish to tender through witness or you wish to show witness in cross-examination in order you wish to show them – Note Sections 43-45 of Evidence Act

Volume 2: Defence Case

Section 6: Accused.

Sub-divide this section as follows:

(a) Your Evidence in Chief Notes – which may include reference to relevant pages of other trials where accused has given evidence;

(b) The statement of the accused;

(c) List of Crown Exhibits you wish accused to give evidence about and documents you wish to tender through accused in the order in which you wish to show the accused;

(d) Documents you wish to tender through accused.

Section 7: Defence witnesses (sub-divide as per section 6)

Volume 3: Closing Address; Jury Directions and Authorities

Section 8: Final Address

Subdivide this section:

(a) Your final version of Closing Address;

(b) List of Exhibits to be used in Final Address;

(c) Your notes on Final Address

Section 9: Sub-divide this Section:

(a) Notes/Submissions on Directions you wish Trial Judge to give;

(b) Copy of relevant section of Bench book

Volume 4: Exhibits

Section 10: Trial Exhibits

Section 11: MFIs

Volume 5: Transcripts

Section 12: Committal transcript

Section 13: Trial Transcript

Volume 6: Legal authorities and miscellaneous

Section 13: Authorities on Objections

Section 14: Authorities on Trial Directions

Section 15: Correspondence

PART 5: "ANALYSING THE CASE" and "THEORY OF THE CASE"

It is essential **in every case** early on to:

(a) identify the elements or ingredients of the offence;

(b) analyse the admissible Crown evidence which supports each element[3];

(c) ascertain which Facts are in dispute - (will the accused make any admissions (formal or otherwise) to any element or any critical factual matter?);

(d) identify the strengths and weaknesses of the Crown case bearing in mind the problems and issues concerning the admissibility of evidence

(e) identify the strengths and weaknesses of the defence case bearing in mind problems and issues concerning the admissibility of evidence.

Always bear in mind the "lessons" from the Lindy Chamberlain case (the "blood in the car") and Alan Dershowitz, Reversal of Fortune case (read the book), do not necessarily accept any asserted fact in your opponent's case. This is particularly so with Expert evidence. Break each proposition or opinion down into component parts and test them – using your own experts if necessary.

I suggest trying to adopt the practice in an appropriate case of drafting a final address before the committal or any major interlocutory application. The benefit of preparing a detailed draft final address early is as follows:

a. It is a convenient summary of the Crown brief;
b. It forces you to come to grips early on with the strengths and the weaknesses of the Crown case and the defence case;
c. Developing key themes early on. As to importance of "themes" in jury trial – see Mauet and McCrimmon*, Fundamentals of Trial Techniques* page 11

   Example: Assault case – accused came as peacemaker

[3] In a case involving aggravated break and enter that went to a superior court, everyone in the trial court missed the fact that there was no evidence of any "breaking"

d. In a trial that has a long life-span and/or has a large number of folders, it is an efficient practice because it will minimise the time required in re-reading the brief. When you return to it, you will focus only on those parts of the brief that are essential;
e. It will prepare you well for most or all interlocutory applications;
f. It will be useful for your opening address
g. Useful in final address

When you have done that exercise, send a copy to your solicitor for his or her input. A part of your brief should be reserved as a final address folder which could include all points you think may ultimately go into your final address including any draft copies of your final address.

Example: Tax conspiracy case

American trial lawyers are big on "the theory of the case". With one caveat, I find this a useful concept. A theory of the case has been described as a "logical persuasive story of what really happened".[4] That is true for the prosecution side. For the accused, it may be better described as a logical persuasive story of what may reasonably have happened i.e. a story reasonably consistent with innocence.

The caveat is that when acting for the accused, there is danger in articulating a theory of the case before jury, there is a danger of using language which shifts the burden of proof. Always emphasise to a jury that the Crown bears the burden of proof BRD. Bearing that pitfall in mind, in many cases, it is either necessary or advisable to put a "positive story" consistent with innocence to the jury rather than simply relying on the deficiencies in the Crown case.

[4] Thomas E Mauet and Les MacCrimmon, Fundamentals of Trial Techniques (LBC Information Services 2001) page 9

Example 1:

Sexual Assault case: why has the complainant lied where there is strong evidence as to her motive to lie . "The accused cannot prove why the complainant lied, but here are some plausible reasons why she may have done so……"

Example 2:

Conspiracy to import illegal drugs: Lawfully intercepted telephone calls Explaining. (a) First 10 tapes – did not know about drugs in the container; (b) suspected there were illegal drugs in container, but did not know – considered withdrawing; (c) withdraw from the importation.

Develop your theory of the case as early as you can. You will refine it as the case goes on. The developing theory of the case will guide what investigations you will undertake, and what approach (if any) to take at the committal hearing.

PART 6: PRE TRIAL INVESTIGATIONS

5.1 General

Barristers and solicitors must be willing to investigate the cases personally. That includes drafting particulars; subpoenas; gathering up documentary evidence; interviewing witnesses, interviewing and getting to know the accused. If necessary, hire a Private Investigator; speak to experts if relevant; do your own research on the internet or in libraries.

This comment applies only to accused: In relation to everything written below, always bear in mind tactical considerations. In undertaking investigations, you may tip Crown off to gaps in their case. You may unearth facts fatal to your case, which then come to the attention of the Crown. You may ruin your best weapon – surprise.

5.2 Particulars

Particulars are under utilised by trial lawyers for the accused. They can be particularly useful in:

a. Understanding precisely the ambit of the Crown case;
b. Boxing the Crown into a particular set of facts.

There may be good reasons not to ask for Particulars if you think that framing the request will tip the Crown off to a gap in its case or to a key point in your own case, which the Crown may overlook.

Kirk v Industrial Relations Commission (2010) HCA 1 is a leading case on the importance of particulars and the requirement of the prosecution to provide to the defence particulars of a charge. Although that case was decided in the context of the particulars rules of the Industrial Relations Commission, it has a wider application to criminal trials generally.

The statement by Dixon J in Johnson v Miller (1937) 59 CLR 467 at 489-490 is still particularly relevant.

"A defendant [has the right] to be appraised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must have before it the means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence."

Bearing in mind the above statement of principle, you can be inventive in framing a request for particulars.

Example:
Where your client is charged with fraud or dishonesty, and an essential factual basis of that allegation is that the accused fabricated, forged or concocted particular documents, ask the Crown the precise basis upon which it is alleged that the accused fabricated, falsified or concocted the document.

5.3 Subpoenas

As a lawyer you must be familiar with the Rules of the particular Court which empowers the issuing of subpoenas: District Court Rules Part 53.

Be persistent in following through on the subpoena. There is often a failure to comply with subpoenas. One reason is that the issuing party does not follow through.

See District Court Rules Part 53 rule 10 2(h) – Court can make directions to a third party or a party to comply with subpoena.

Some practical pointers relating to subpoenas:

- Ensure that the subpoena is returnable well before the hearing because it may be essential to issue further subpoenas after you have perused the documents;

- Carefully draft the subpoena to ensure that it is not too wide or oppressive which risks it being struck out;
  Example: Generally, do not ask for "All originals and copies of …."

- In a case where there are many documents, it may be prudent to identify exactly the documents you seek under the subpoena. There is nothing stopping you attaching 'identifying documents to the subpoena'
  Example:
  If one of the documents in the Crown brief ("document X") refers to documents A and B (which do not form part of the Crown brief), refer in the subpoena to the documents as referred to in document X and if necessary attach document X to the subpoena

- To ensure that documents are actually produced under subpoena, ask your Solicitor to fax a copy of the subpoena to the OIC or the addressee of the subpoena;

- You are also required to serve a copy of that subpoena on the other side;

- Where documents are not produced under subpoena or you have reason to believe that the production will be or has been inadequate, the Court has the discretion to swear in the person producing the documents for the purpose of cross-examining him about the failure to produce documents: *Trade Practices Commission v Arnotts Limited* (No 2) (1989) 21 FCR 306; ICAP (2009) NSWSC 306; Dorajay [2005] FCA 588. BRING THESE CASES TO COURT IN SUBPOENA MATTERS.

- In cases where you have reason to believe that a witness or witnesses are dishonest, unreliable or are ill disposed towards your client, issue a subpoena to the Commissioner of Police seeking records of *"1 Criminal antecedents of person X and 2. All COPS records relating to any complaint made by person X or any complaint made against person X."*

- If it is argued by party to whom subpoena issued that there is no legitimate forensic purpose in the production of such documents, rely on *Grey v Regina (2001) 184 ALR 593;* R v *Beattie (1996) 40 NSWLR 155;* DPP Guidelines. Any document that is relevant to honesty or reliability of key witness should be disclosed to accused by Crown, or can be used by accused to cross-examine Crown witness.

Be aware of the dangers of issuing subpoenas. Sometimes documents produced under a subpoena will 'fill a gap' in the Crown case. This is particularly so in Local Court matters where the Police Prosecutors are sometimes unprepared.

Example:
An accused is charged with recklessly causing grievous bodily harm. The evidence served by the Crown relating to grievous bodily harm is very thin. A subpoena to the victim's treating or specialist doctor is probably unwise because it may provide the Crown with superior evidence of the complainant's injury.

5.4 Speaking to Witnesses.

Crown Witnesses

There is no property in a witness. Note Bar Rule 49. So there is no legal bar in speaking to a Crown witness before he/she gives evidence. It is a matter of courtesy to alert the Crown of the fact that you will be speaking to witnesses. The Crown should not inquire of those witnesses the questions that were asked by the accused's lawyers.

Generally speaking, it is unwise to speak to some Crown witnesses before they give evidence – example….complainants in cases involving allegations of sexual assault cases or violence. There is a danger in talking to any witness because (a) they will be better prepared for any questions you in the witness box; and (b) they may tell the Crown about those talks.

However there is a wide range of Crown witnesses that can and often should be spoken to because they will inform you of matters outside their statement of evidence and you may get a feeling for what kind of witness they will be. It may also be witness in providing other lines of enquiry – other witnesses, documents etc. This is particularly so with expert witnesses for the Crown.

Do your best to establish a rapport with that witness. It may sometimes be case that speaking to them means that they will not need to be a witness. Make sure they know who you are acting for. Inform them of trial procedure. However, do not avoid asking difficult questions – not being taken by surprise at trial is one of the reasons you should talk to Crown witnesses.

If you are counsel, you should not conference a witness by yourself. [This is one of the reasons why it is inadvisable to take direct access briefs in contested hearings] Your Solicitor or paralegal should take notes (preferably on a computer which can be instantly printed out). It is a good idea for the witness to sign a statement or your solicitor's notes. If you intend to adopt that course, ask the witness permission to do so. Explain reasons – certainty in understanding his position, delay until trial, lapsed memory.

5.5 Preparing for Experts

Golden rule: Do not be intimidated by experts. Remember some people think lawyers are experts on the law.

First, check (a) to ensure that Crown's expert report complies with requirements of Section 79 of the Evidence Act and *Makita v Sprowles* (2001) 52 NSWLR 705 (b) it is served within time required by relevant rules and within a reasonable time for you to meet that report

If an objection to an expert report is unsuccessful or for a sound tactical reason, request Crown to supply a further Expert's report to clarify original report. If refused, consider seeking directions from court. (This is particularly useful in jurisdictions where Tribunals are not bound by rules of evidence, which is not within realm of criminal trials).

It is sometimes a good idea to speak to Crown expert before they give evidence if (a) their report is unclear; or (b) you and your own expert do not understand it. The disadvantage is that you lose the advantage of surprise. If you do meet, follow rules about taking notes of witnesses.

Formally request and, if necessary, subpoena (a) instructions given to expert; (b) all documents provided to expert; (c) all working papers or draft reports prepared by expert; (d) all documents including articles etc, referred to by expert.

Early on, you should, if necessary, consult your own Expert to meet Crown's expert report. Get the best expert you can. Start developing a list of Experts in different areas in case you run into the same case again (and for other colleagues)

An expert's opinion (which needs to be challenged) is almost always based upon certain assumptions or factual foundations. Closely examine each and every one of those assumptions/factual foundations.

Get your expert(s) to comment on those assumptions/foundations.

When cross-examining an expert and preparing your expert as a witness, make sure you use every day language - jury speak, not expert speak. Get rid of jargon/technical terms. If they are unavoidable, prepare and tender a Glossary of terms.

When preparing your expert, make sure they are not arrogant and try to make them likeable (very hard for some professions)

5.6 Views

Views of the scene or the alleged offence or some other relevant place before the trial are often invaluable. You will be in a better position to lead evidence or cross-examine witnesses about what happened at that scene. You will be better able to convey to jurors or the Judge the layout of the scene. You will be able to better experience what the accused or a witness experienced. A view can also demonstrate that what a witness (or the accused) says about a particular matter is true/untrue or highly likely/unlikely.

In undertaking a view, consider recording or filming that view because:

a. It can be tendered as evidence if necessary – if you are intending to take that course, do not take the film yourself;
b. It may persuade a Judge as to the benefits of the jury having a proper view if that is in your client's interests.

5.7 Private Investigators

5.8 Searching for Documents – trying to establish certain hard or impossible-to-dispute facts

- Internet – Google
- Looking for contemporary record of what happened – CCTV footage, text messages, Mobile phone records; Emails; Texts

Example: Date rape case – value of CCTV footage of pubs and office

PART 6: COMMITTALS

Deciding whether to have an 'oral committal' and if so, what witnesses to cross-examine and what questions to ask those witnesses is one of the tactically trickiest areas in trial preparation.

The real disadvantage of having an oral committal is that you are obliged to show your hand to the Crown. That is particularly so when you are required to make written submissions to satisfy a Magistrate under sections 91 and/or 93 of the Criminal Procedure Act whether it there are substantial or special reasons in the interests of justice why the Magistrate should direct a witness to attend for cross-examination.

Notwithstanding the disadvantages outlined above, in my experience, oral committals or limited oral committals are invaluable, particularly in the following circumstances:

- Testing a Crown expert;
- Where the statement of a key Crown witness is short, vague, ambiguous, internally inconsistent or inconsistent with other testimony;

Before the oral committal, issue relevant subpoenas.

At the committal, it is almost never wise to 'put your case' or call the accused.

It is also unwise to make submissions that your client not be committed for trial unless you believe that there is a good prospect of that application being successful. Remember that even if your client is not committed at trial, the DPP has the power to issue an ex officio indictment.

PART 7: THE TRIAL: PREPARING OBJECTIONS TO EVIDENCE

Prepare a section in your brief about objections. It is often useful to write out your objections and prepare some short written submissions to hand up to the Judge.

It is almost always useful to try and deal with the objections of your opponent before the jury is empanelled. Often it is good to have objections dealt with at pre-trial procedure; See Part 53 Rule 11 of District Court Rules

It is generally very bad for the accused to continually object to the Crown evidence. The jury is obviously asking the question "what does the accused have to hide?" The best trial is where you object as little as possible or not at all. Therefore go through each statement on the brief and prepare a list of objections, the basis for those objections and if necessary a few sentences as to why it is inadmissible. Hand that document, if required, up to the Judge.

PART 8: OPENING ADDRESS

Accused can do opening both after Crown opening address and again if accused is calling evidence at opening of your Case; Criminal Procedure Act s 159(3)
The importance of an Opening Address: – Defining the issues. Developing key themes/messages. Creating good initial impression
See Mauet and McCrimmon Fundamentals of Trial Techniques page 43
However, note the limitations on an accused's opening – Criminal Procedure Act s 159(2) and R v MM (2004) 145 A Crim R 148
Be careful of American texts on this topic

PART 9: PREPARING FOR EXHIBITS AT TRIAL.

Some American trial lawyers call this part of preparation – "preparing a visual strategy for your case" .
Recommended: Talk by Mark Ierace SC – Aspects of War Crime Trials 26/10/05. Bar Library DVD Disc 102 on how he presented case for prosecution in ICTY

Key questions:

1. What visual aids should you use in the trial?
2. When should I use them?
3. How should I present them?

What visual aids?

For the Crown, Flow Charts, Flip Charts, photographs, DVDs, CD ROMs can be very important in helping to explain complex or difficult to comprehend facts to a jury or a Judge.

Example: Charts in Tax conspiracy; Photos in Workcover prosecutions

For the accused, do not just rely on Exhibits the Crown proposes to tender. Tender or use your own Flow Charts, Flip Charts, photographs, DVDs, CD ROMs.

They need to be:

- Relevant
- Visually interesting/arresting
- Simple
- Of sufficient size so jury can see them
- Not distracting to jury

- Uncluttered
- Accurate – inaccurate summaries, Charts etc.. will undermine your credibility
- If you intend to tender them, admissible. Where in doubt, consider showing to the Crown first.

When and how should you present them?

If you intend to tender the visual aid, consider through which witness you intend to tender them.

If you want tender a diagram of a place or location, it is often best to draw something up neatly and accurately beforehand, and ask witness to mark things on the pre-prepared diagram. Have extra copies if witness makes a mistake.

Plan your visual presentation in court before jury in court. If playing DVD, make sure DVD player/DVD is working. Can everyone see it? Where will accused sit? [generally not next to jury]

It is sometimes a good idea to show exhibits to the Crown before you propose to tender them

Example: Waterstreet and the dying deposition

If your defence Exhibits are voluminous, arrange in bundle, paginate and show to Crown beforehand.

Not showing exhibits to Crown beforehand has dangers – (a) delay if Crown seeks adjournment; (b) perception of discourtesy or 'unfair play'; (c) Disrupting flow of defence case

PART 10: PREPARING CROSS-EXAMINATION OF WITNESSES

In relation to key witnesses prepare a cross-examination folder. In particular have in that folder all documents that you are likely to either tender or show to the witness.

Where a witness is important and it is necessary to damage his/her credibility:

- Obtain all previous statements by witness and previous evidence given in transcript – Make notes on key inconsistencies in Cross-Examination Notes
- Only go for big inconsistencies – Justice Hidden
- Find out all you can about the witness –
- see subpoenas and COPS records; PIs; interview other witnesses; Search internet
- In cross-examination, make it appear that you know everything about that witness – may facilitate key concessions. E.g. Refer to Volumes with Witness X on spine; cite key facts about witness

Example: Mal wound case – At committal witness believed that accused's lawyers had tapped his phone and made useful concessions.

It is important to be familiar with sections 43, 44 and 45 of the *Evidence Act*. I commend a Paper written by Dina Yehia SC published on 27 October 2010 on the Public Defender's excellent website: *"The Use of Documents in Cross-Examination and Examination in Chief in Criminal Trials".*

Although there are no golden rules, I have difficulty with the approach of advocates who write out all their questions in full. In my opinion, it is impossible to anticipate all the answers a witness can give and therefore writing out all your questions in full is bound to end in grief if for no other reason you cannot actually listen to the answer

Often it involves not carefully listening to the witness' answer.

I would recommend a tip that Brett Walker SC gave when he said that in relation to critical questions, it is helpful to write those questions out and carefully listen to the answer. If the witness does not answer that particular question try and repeat it verbatim.

PART 10: PREPARING THE ACCUSED AND OTHER WITNESSES

10.1 Accused's appearance and conduct in Court

Assume that at least one member of the jury will always watch the accused at all times in court. It is essential that you prepare accused to present himself/herself properly in court. Appearance and clothes are important.

Dress and appear conservatively because some members of the jury will be conservative. Think about how people react to politicians and celebrities. Appearances matter (too much)

Therefore, neat clothes - not necessarily suit.

For men, haircut, remove facial jewellery is possible (my bias). Remove facial hair. But beware any radical differences between photographs to be tendered and appearance in court.

Conduct in court. Not reacting to Crown witnesses' evidence. No sneering, laughing. No throwing fruit.

<u>Do not stare at jury</u>. (that includes Counsel)

Talk to accused about how they are to give instructions during trial.

10.2 Should the accused give evidence?

It is beyond this Paper to discuss the $64 question whether an accused should give evidence. It is a matter that must be discussed with the accused. I agree with the comment made by Leonie Flannery in her helpful Paper published on the Public Defender's website *"Matters to consider when preparing and conducting sexual assault trials"* where she said in answer to her rhetorical question: "Should the accused give evidence?"

"With the abolition of the dock statement an accused person who does not give evidence in a sexual assault case faces the real risk that the jury's verdict will reflect what they consider the unfairness of the complainant being subjected to cross-examination.

It would only be where the high point of the case for the accused is at the close of the Crown case and the accused has acquitted himself/herself well in the ERISP that you would consider not calling the accused."

Different circumstances apply to different types of trials, but I agree with that as a general proposition for many types of trials.

10.3 Getting to know the accused

It is very important to get to know the accused. One American trial lawyer has written[5]:

"Get to know them [the client] in their own element, away from your firm. Spend time with them at their office or plant. Go to dinner at their homes. Meet their spouses and children. Take them to a ball park. Pick up the phone just to stay in touch."

Particularly when you are adducing evidence in the defence case, you must spend the time getting to know the personal circumstances and character of the accused, and those who will be giving evidence on his behalf. That should be done by speaking to the accused, and to those who are close to him (spouse, parents, children, close friends). It is necessary for a number of reasons:

[5] David Berg, "The Trial Lawyer. What it takes to Win" (American Bar Association)

- It will help in deciding whether to call the accused;
- To develop a rapport with the accused – that can be very beneficial when you examine him in chief. A jury can sometimes know if you have a good or bad rapport with the client;
- It will be necessary in deciding what witnesses to call in the defence case – character witnesses, corroborating witnesses;
- It will help in preparing him for cross-examining;
- Understanding the circumstances in which the acts or omissions alleged to constitute the offence were committed.

Example 1: The assault in Hyde Park – "I didn't do that one"
Example 2: Gym instructor

10.4 Preparing the accused as a witness

Critical NSW Bar Rules are Rules 43, 44 and 46. Be familiar with them.

Preparing the accused to give evidence is probably the most important task of a trial lawyer. First, the accused should prepare a detailed statement – proof of evidence. Assuming the accused is able to read and write with reasonable facility, it is very useful to require the accused to write his/her own statement about the facts leading up to and including the alleged offence. This should often include a detailed personal history. Help the accused by preparing subject headings and assist them with the layout and format and structure. However, initially get accused to draft his own statement so it can be in his/her own words because (a) the accused's knows the story and you don't; (b) it will give it an air of authenticity.

You can then tidy up the statement as a proof. Where documents are relevant to the accused's case attach those documents to the accused's statement. Any important words should be in direct speech not in the third person. When the first

draft of that statement is complete, make sure the accused reads it and re-reads it and then signs it.

This statement should be done well before the trial because you will often find that matters arise that require corroboration or further investigation. By doing this exercise, you should minimise the possibility of obtaining last minute instructions at the trial, when it is often too late to find corroborating evidence or when you have already cross-examined key Crown witnesses.

Secondly, you should do a mock or trial cross-examination of the accused. Your draft final address may be of great assistance. Of course you cannot tell an accused what to say. However, you are entitled to remind the accused of all of the Crown evidence. If the accused gives answers that are palpable nonsense, it is your duty to say that it is unlikely a jury would believe that evidence – Bar Rules 43 and 44.

Sometimes the accused will ask you what he or she should say on a particular matter. Resist giving an answer to that question.

PART 11: FINAL ADDRESS

See above

PART 12: DIRECTIONS TO JURY

Once you have completed your final address you are normally worn out. However, you must then listen to his Honour's summing up. This is an area, in my experience, where a number of advocates come a cropper in the CCA because they fail to ask for the relevant re-directions. The omission to ask those re-directions then becomes a problem under Rule 4 of the Appeal Rules if there is an appeal on the Judge's directions.

Some hints to prepare for re-directions:

- Copy out the relevant parts of the Judge's trial book which is available at the Public Defender's Website.
- Bring a copy of Glissan's loose-leaf service Trial Directions.
- There will be certain critical directions you will want the Judge to give. I suggest you actually write them out especially in relation to Sheppard directions.
- The Judge will be grateful to you for your assistance if you give him a copy of the actual words he should use. If you have a transcript, give reference to the evidence in relation to those directions.
- Ask for your suggested written directions to be marked or tendered (for appeal purposes)
- Bring copy of relevant authorities if you anticipate a legal barney about a particular direction you are seeking