PREPARING FOR HEARING OR TRIAL: A guide to preventing self-destruction at the bar table

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THE BIG SECRET

The following precautions will help you to avoid (most) egg-on-face situations:

- 1. Read the brief! All of it. Even the boring bits.
- 2. See step 1 above
- 3. Repeat steps 1 and 2 above
- **4. Get instructions.** But not too early. Repeat steps 1, 2 and 3 above.



THE FACTS

THE FACTS GIVEN TO YOU

You've read the book – Now watch the movie

- Watch the ERISP
- Watch the walk-through recording
- Watch the search warrant recording
- Watch the surveillance recordings
- Watch the video of identification witnesses making the identification
- Listen to the telephone intercepts and surveillance device recordings

THE FACTS GIVEN TO YOU

Compare everything to the transcripts

Defence lawyers: Has the client seen/heard the recorded evidence?

Prosecution lawyers: Has the complainant/witness seen the JIRT interview and/or CCTV recording? More importantly, should they?

Look at the exhibits and determine what, if anything, is missing.

Draft your bible (aka your chronology)

Re-organise the brief so that **YOU** understand it.

THE FACTS DISCOVERED BY YOU

1. Channel your inner social media stalker – People are stupid...



THE FACTS DISCOVERED BY YOU

- **2. Go visit.** Attend the scene, drive the route, take your own photographs/video, use Google Earth. Try to emulate the circumstances of the alleged offence as best as possible.
- 2. Confer with Crown witnesses (should they oblige).
- **3. Expert witnesses.** Do you need your own? Better experts? Different experts?
- 4. Defence lawyers: Confer with witnesses whom your client suggests will help.

THE LAW

KNOW THE LAW!

1. Know the substantive law.

2. Know the rules of evidence.

3. Know the rules of practice and procedure.



KNOW THE LAW!



KNOW THE LAW!



THE CASE THEORY

THE CASE THEORY

The most important forensic issue in criminal litigation is your case theory.

Develop your case theory, <u>back to front</u>. Order of operations:

- 1. Know the facts, inculpatory/exculpatory evidence, and issues.
- **2. Develop closing address.** What is it that you want to say to the jury? This will illuminate a path for your trial preparation and conduct.
- **3. Develop a case theory**: Do more than simply put the Crown to its burden of proof. Design a plausible alternative theory that the Crown cannot exclude.

THE KISS PRINCIPLE

Keep It Simple, Stupid!

Ensure that your case is (i) simple, (ii) plausible, and (iii) audience appropriate.

Avoid presenting a convoluted conspiracy theory that only makes sense to your client.

Your case theory should accommodate the admissible evidence and your client's instructions.

Direct your focus to the important fact/s in issue. Weakening one point is more valuable than trying to contest every point.

WHAT TO AVOID



"A **Chewbacca defense** is the name given to a legal strategy in which the aim of the argument seems to be to deliberately confuse the jury rather than actually refute the case of the other side. The concept's name comes from an episode of the animated series South Park, "Chef Aid", which premiered on October 7, 1998."

TIPS FOR DEFENCE LAWYERS

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"And I got this scuff in a nasty jostle with an overzealous public defender."

THE CLIENT – A NECESSARY EVIL



"Why shouldn't I be able to plead insanity?
I hired YOU to defend me, didn't I?!"

THE CLIENT – A NECESSARY EVIL

Regardless of whether your client is charged with a driving offence or with murder, he/she is the most dangerous person you will ever meet...

Be cautious accepting what he/she says on face value.

You are retained in your capacity as a lawyer. It is your professional obligation to satisfactorily perform that function.

It is ok to be empathetic. Do not be sympathetic. Or plainly pathetic...

PREPARE YOUR CLIENT FOR TRIAL

Your client's appearance and demeanour during hearing and trial is crucial. Ensure that your client is:

- Well dressed.
- Neatly groomed.
- Has tattoos and piercings hidden (if possible).
- Poker face. Neutral demeanour at all times.

PREPARING WITNESS TO GIVE EVIDENCE

Prosecution lawyers: Prioritise and conference witnesses appropriately. Explain everything. Be honest. Rehearse.

Defence lawyers: Rigorously prepare your client to give evidence at the trial but avoid calling him/her if at all possible. If not; pray.

When conferencing witnesses ensure that your case theory is at the forefront of your collective minds.

Confess and avoid. Take the opportunity to explain contentious factual issues during examination-inchief.

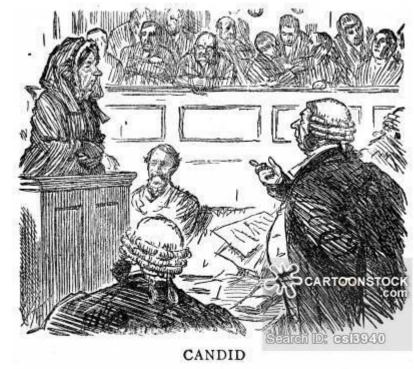
PREPARING WITNESS FOR CROSS-EXAMINATION

Consider the question posed.

Answer the question posed. If in doubt, request clarification.

Short, direct answers. Attempts to qualify answer can often complicate matters further.

Confess and avoid. Frankness will mitigate the risk of contradiction.



Counsel. "Why are you so very precise in your statement? Are you afraid of telling an untruth?"

Witness (promptly). "No, sir!"

PREPARING WITNESS FOR CROSS-EXAMINATION



"And it should be noted that when the prosecution called my client a liar, at no time did my client's pants start on fire."

REQUISITIONS AND SUBPOENAS

Prosecution lawyers: You are duty bound to put all relevant evidence before the court.

Defence lawyers: Exercise caution when issuing subpoenas. Production of unfavourable material by third parties can undermine your case theory.



Mike gets his very first subpoena

TRIAL TIPS

GENERAL TIPS FOR ADVOCATES

A short trial is a good trial.

Be courteous.

Your opening address should tell a story.

Your closing address should put forward an argument.

'The pub test' - use lay English, not Legalese.

Avoid trying to be funny: You're not.

Objecting: don't. Just because you can doesn't mean that you should.

DEFENCE ADVOCATES: WHAT TO AVOID



We find the Defendant guilty, the lawyers tedious, and you arrogant.

DEFENCE ADVOCATES: WHAT TO AVOID

Cross-examination. Be warned, every time you ask a question you imperil your client. If necessary:

- Cross-examine in sorrow rather than in anger.
- Juries are more prepared to believe someone is mistaken than they are to believe they are lying
- Juries are rarely prepared to believe that EVERYONE is lying.
- Sometimes the question IS more important than the answer.

Calling witnesses. Don't. Unless you have to and it accords with your case theory.

Running an alibi. Avoid at all costs. Your client's mother and/or best mate are not reliable witnesses.

JURY PREFENCES

Juries like advocates who:

- Appear to know what he/she is doing,
- Gets to the point,
- Makes logical sense,
- Who presents a case theory and sticks to it.

Juries dislike advocates who:

- Are boring,
- Pointlessly cross-examine,
- Are conceited,
- Present as ideologues,
- Make bad/inappropriate jokes,
- Are discourteous,
- Are disorganised.

