FOR THE DEFENCE

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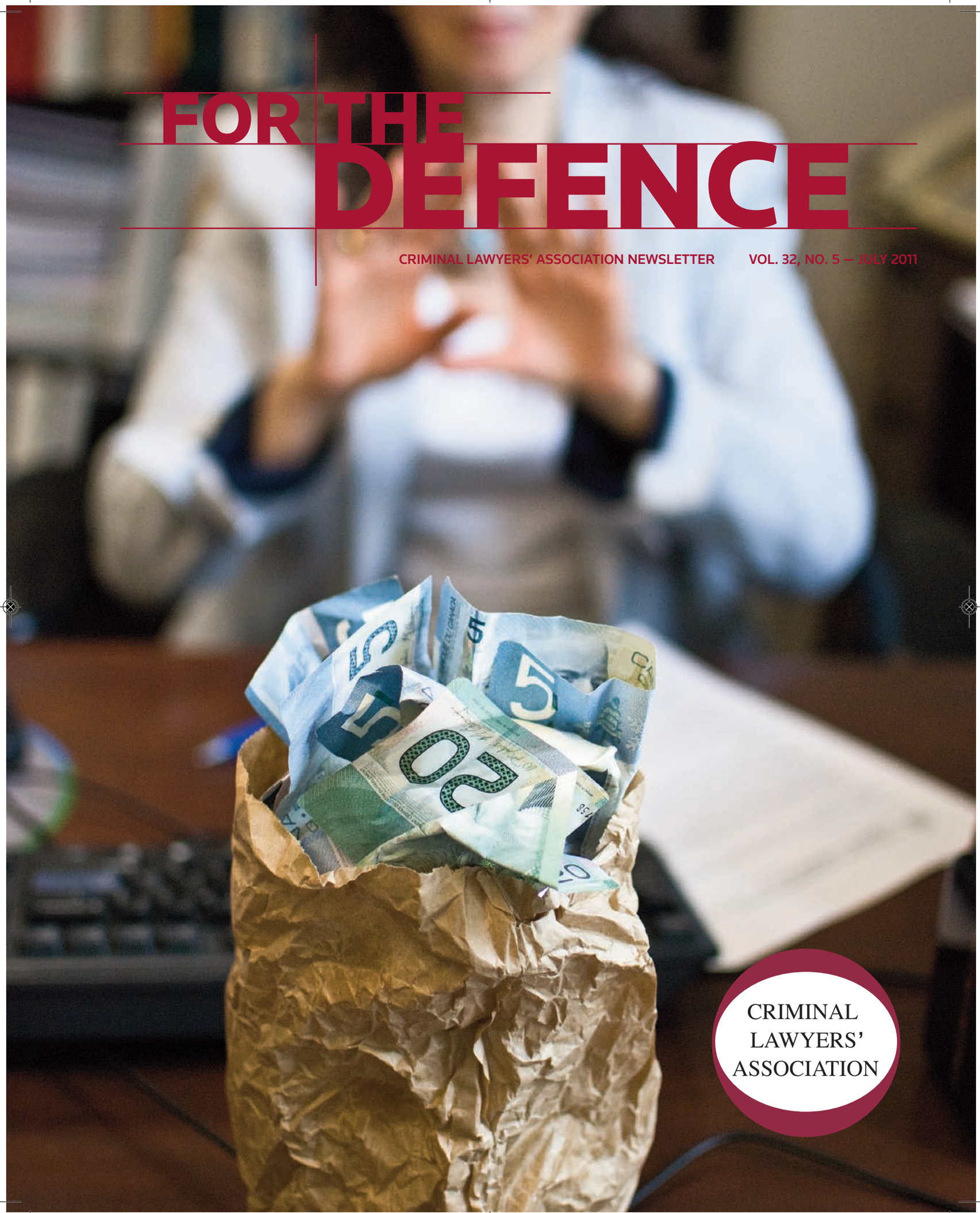

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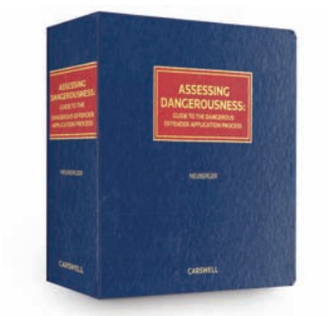

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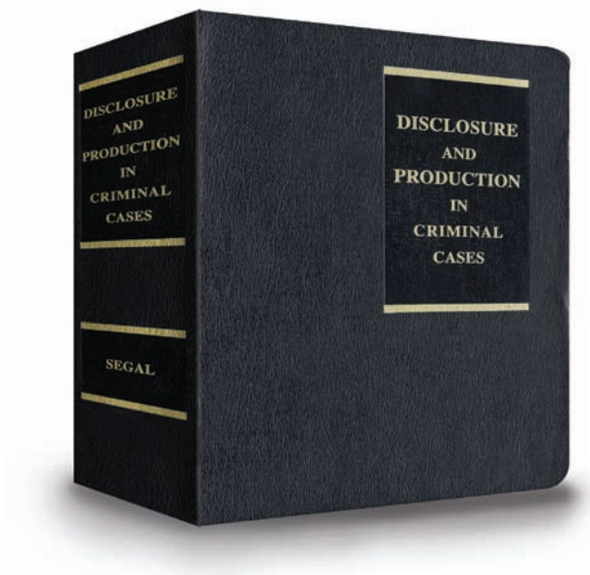

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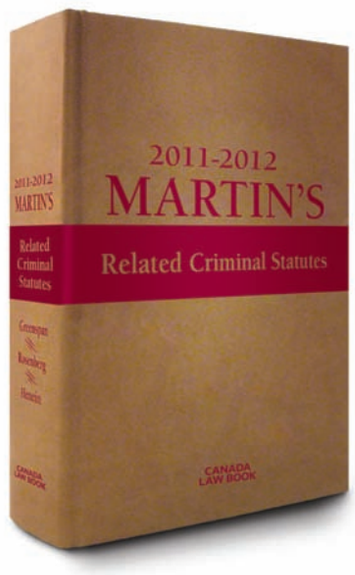

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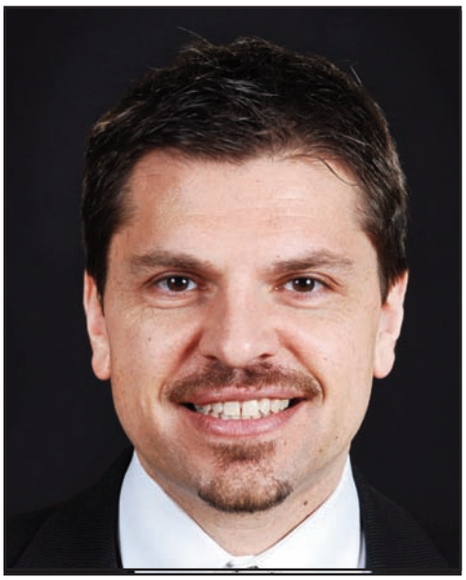
PRESIDENT'S MESSAGE



Paul Burstein

More than a decade ago, I had the privilege of being involved in some of the early litigation revolving around the solicitor-client privilege issues arising from the discovery of the videotapes in the notorious *Bernardo* case.[1] In the course of researching the nature and scope of a lawyer's duty of confidentiality, I was struck by the dearth of Canadian jurisprudence on the topic. As Professor Adam Dodek has recently observed, it is only within the past decade that Canadian legal scholars have begun to seek out answers to some of the most vexing ethical issues facing lawyers.[2]

While the litigation in the *Murray* case helped define some of the tough ethical issues involved in the defence of criminal cases, very little had been written on the nature and scope of a *prosecutor's* ethical responsibilities. Indeed, in Canada, there seems to still be some debate about whether or not provincial rules of professional conduct apply to lawyers engaged in the prosecution of the federal criminal law. At first glance, one might reasonably have thought that this issue was fully and finally resolved by the Supreme Court of Canada's 2002 decision in *Krieger*.[3] On the other hand, a survey of the number of subsequent discipline proceedings for professional misconduct by prosecuting lawyers would lead one to doubt whether provincial law societies subscribe to the Supreme Court Reports.

The apparent reluctance in Canada to subject unethical prosecutorial behaviour to discipline proceedings parallels the ongoing debate south of the border over whether state ethical rules apply to federal prosecutors. The U.S. Department of Justice has held differing opinions through different administrations. The Thornburgh Memo (authored by former Attorney General Richard Thornburgh in June 1989) had declared that state ethics rules were not binding upon federal prosecutors and that any compliance with such rules by federal prosecutors was strictly voluntary. However, when Janet Reno became Attorney General in 1993, the Justice Department backed away from the Thornburgh position and promulgated rules that eventually evolved into 28 U.S.C. § 530B, which provides that:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

Despite this clear legislative statement that federal prosecutors must adhere to rules of professional conduct, American federal prosecutors have continued to engage in unethical behaviour: behaviour that not only serves to sometimes convict the innocent, but also to free the guilty. A recent *USA TODAY* investigation documented 201 cases since 1997 in which federal courts found that prosecutors had violated laws or ethics rules. Each was so serious that judges overturned convictions, threw out charges, or rebuked the prosecutors. *USA TODAY* found that in at least 48 of those cases, the defendants had been convicted but, because of the prosecutorial misconduct, received much shorter sentences than they would have otherwise been entitled. There was no indication that *any* of those errant prosecutors faced discipline proceedings from their local state bar associations.

In an effort to focus the American public on the impunity with which some prosecutors seem to breach their ethical and professional obligations, a writer for the *Huffington Post* launched a nationwide website encouraging people to vote for the year's worst prosecutor.[4] Here are just three of the top ten candidates for 2010:

> Kenny Hulshof:
>
> Turned a "tough on crime" record as a prosecutor into three terms in Congress, a GOP nomination for governor of Missouri, and nearly became president of the University of Missouri. Now works in a white shoe law firm as a D.C. lobbyist. The problem is, his "tough on crime" record includes at least two wrongful murder convictions due in large part to his failure to turn over exculpatory evidence. In both cases, Hulshof was excoriated by the judges who pronounced the wrongly convicted men innocent. In 2008, a reporter uncovered five other cases in which there is considerable evidence that Hulshof engaged in prosecutorial misconduct.
>
> Delores Carr:
>
> The district attorney in Santa Clara County (California) who ran for the office in 2006 on a platform of ending what she called a "win at all costs" mentality that

continued on page 64

EDITOR'S NOTEBOOK

Practicing criminal law can sometimes feel like walking through a minefield of ethical issues: should I take on a client charged with a notoriously gruesome offence? Can I give a copy of the disclosure to my demanding client? Can I assist a client who wants to plead guilty just to "get out of jail"? Should I assist my client who wants to be found "not criminally responsible on account of a mental disorder" in respect of a relatively minor charge? How far can I go in preparing the client to testify? How far can I go in cross-examining a vulnerable complainant? Can I investigate the identity of a confidential informant? Should I agree to receive information that I cannot share with my client? Can I hold on to real evidence that will exculpate my client at trial?

On a good day, we are able to spot the landmines and avoid them. Other days (which can quickly turn into "terrible, horrible, no good, very bad days"), the landmine explodes in our face. When an ethical issue blows up, it can be extremely stressful and messy.

The *Rules of Professional Conduct* provide the framework for answering most of our ethical dilemmas. We are told that we should not take a case "without honestly feeling competent to handle it" (rule 2.01). We are told to "raise fearlessly every issue, advance every argument and ask every question, however distasteful" that we think might help the client (rule 4.01(1)). We are also told that we are to be "candid and honest" with our clients (rule 2.02) and the Court (rule 4.01(1)). We cannot knowingly let our clients do anything we consider to be "dishonest or dishonourable" (rule 4.01(2)(b)). We cannot knowingly deceive the Court by relying on false evidence or misstating the law (rule 4.01(2)(e)). We are permitted to engage in plea negotiations if the client is "voluntarily prepared to admit the necessary factual and mental elements of the offence charged" and "voluntarily instructs" you to enter into plea negotiations (rule 4.01(9)). We are permitted to interview witnesses but must not "subvert or suppress any evidence or procure the witness to stay out of the way" (rule 4.03(1)).

But how do we know whether a distasteful line of questioning will help our client? How do we know if the client is acting honestly or dishonestly, honourably, or dishonourably? How do we know if the testimony our client plans to give is "false or misleading evidence"? How do we know if the client's agreement to admit the necessary elements of an offence is truly "voluntary"? Where is the line between preparing a witness and "subverting or suppressing evidence"? What if our candour and honesty with our clients cause them to change their view of what happened? These are the landmines that threaten to turn a good day into a bad day in a hurry.

We have put together a collection of articles in this edition that will hopefully help you identify issues before the landmine explodes and give you some guidance on what to do if a landmine is about to explode or has already exploded in one of your cases. Susan Chapman's article looks at how far defence counsel can go in terms of investigating the identity of a confidential informant. Neil McCartney's article analyzes the ethical issues surrounding plea bargaining and guilty pleas. Anita Szigeti and Jill Presser have written an excellent article on the ethical issues surrounding NCR findings. Apple Newton-Smith's article explores the boundary between properly preparing your client to testify and improperly creating a story for your client to tell. John Norris and Anil Kapoor have both written articles touching on *ex parte* proceedings in criminal law. Jonathan Shime's article looks at what to do with "the smoking gun" that a client unfortunately leaves at your office in the post *R. v. Murray* era. Daniel Bernstein and Danielle Gallo tackle the thorny issue of what use can be made of criminal disclosure in other proceedings. Enzo Rondinelli's sets out how to effectively and ethically deal with claims of ineffective assistance of trial counsel on appeals. And in the event you cannot find the answers to your ethical dilemma in one of the articles, Phil Downes has written a piece on resources, other than the colleague down the hall or on the other end of the phone, that are available to help you navigate through the minefield of criminal law.

Breese Davies and Seth Weinstein

The *Murray* Case: 11 Years Later[1]

by Jonathan Shime

On June 13, 2011, eleven years will have passed since Mr. Justice Gravely of the Superior Court of Justice acquitted lawyer Ken Murray of the charge of attempt to obstruct justice for retaining incriminating videotaped evidence that he acquired while defending Paul Bernardo.[2]

While Justice Gravely provided important guidance for counsel on how to handle inculpatory evidence in order to avoid any suggestion of impropriety, there still remains some uncertainty on the issue. In this article, I hope to provide some guidance to the reader on how lawyers ought to deal with such evidence based on the *Murray* case and the legal commentary which has arisen as a result of that decision. To accomplish that goal, this article will examine: 1) the factual background of the *Murray* case; 2) the Law Society of Upper Canada's attempted response to the *Murray* case; 3) the rules promulgated by the Law Society of Alberta and the American Bar Association on the handling of evidence relevant to a crime or offence; and 4) current challenges faced by counsel, including: (i) the temporary possession of incriminating evidence for testing purposes; (ii) the handling of documentary evidence; and (iii) dilemmas resulting from new technologies.

1) The Factual Background of the *Murray* Case

In February 1993, Ken Murray was retained to represent Paul Bernardo who was charged with, *inter alia*, the murder of two young women, Leslie Mahaffy and Kristen French.

The police had conducted a lengthy search of the Bernardo residence. What the police failed to find were several videotapes that Bernardo and his wife, Karla Homolka, had made depicting

the sexual assaults of French and Mahaffy, as well as sexual assaults on Homolka's younger sister Tammy and another woman known as Jane Doe.

On May 6, 1993, on written instructions from Bernardo, Mr. Murray attended at the Bernardo home, found the videotapes hidden behind a pot light and removed them from the house. Mr. Murray viewed the tapes and retained them for 17 months. He intended to use them in his cross-examination of the Crown's star witness, Homolka, who had made a deal with the Crown to plead guilty to two counts of manslaughter for a 12-year sentence, largely on the basis that she claimed to be an abused wife who had been coerced into criminal activity by Bernardo. Mr. Murray hoped to convince the jury, using the videotapes, that it had been Homolka who had murdered French and Mahaffy, not Bernardo.

On the eve of trial, Bernardo instructed Mr. Murray that he was not to use the tapes at trial as their use would contradict his new (and untruthful) position that he had no contact with either victim. Mr. Murray, recognizing that his client was instructing him to engage in unethical conduct, retained eminent defence counsel Austin M. Cooper, the dean of the criminal bar in Ontario, to advise him. Mr. Cooper contacted the Law Society to seek guidance on how he and Mr. Murray should handle this precarious situation. A special panel of the Law Society was convened and recommended that Murray withdraw as counsel of record for Bernardo and turn the tapes over in a sealed package to the trial judge, Associate Chief Justice Lesage (as he then was). Mr. Bernardo was to be made aware of the advice given by the Law Society.

On September 12, 1994, Mr. Cooper, accompanied by Mr. Murray, attended before Justice Lesage and, as directed by the Law Society, offered the videotapes in a sealed package to the Court. Justice Lesage did not accept the package and ultimately decided that the tapes should be given instead to Bernardo's new counsel who then viewed the tapes and held them for twelve days. On September 22, 1994, counsel turned them over to the police. The tapes became an exhibit at the trial, and were relied on by both the Crown and defence. Counsel used the videotapes to vigorously cross-examine Homolka to demonstrate that she was not an abused, coerced wife as she claimed, but rather a person who enjoyed sexually assaulting the victims and to suggest that she was the actual killer of Mahaffy and French. Ultimately, however, a jury convicted Mr. Bernardo of both murders.

Several years later, Mr. Murray was charged with attempting to obstruct justice for retaining the videotapes for 17 months and not turning them over to the authorities. The defence position was that Murray was legally entitled to retain the tapes to use at trial in his client's defence, as his new counsel had done. In acquitting Murray, Justice Gravely noted that it was understandable that Murray would have believed that he could keep the videotapes to use at trial because there was no clear guidance on what lawyers who come into possession of incriminating evidence ought to do. He held that lawyers in this position have three "legally justifiable" options:

> i) Immediately turn over the evidence to the prosecution, either directly or anonymously;
>
> ii) Deposit the evidence with the trial judge; or
>
> iii) Disclose the existence of the evidence to the prosecution and prepare to do battle to retain the evidence.

2) The Law Society of Upper Canada's Attempted Response to *Murray*

In the wake of the *Murray* decision, the Law Society of Upper Canada convened a Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence ('Special Committee'). The Special Committee was tasked with drafting a rule that would provide clear guidance to counsel. In the spring of 2002, the Special Committee presented Convocation with a proposed rule.[3] Notwithstanding the significant time and effort that went into drafting the rule, there was a spirited debate at Convocation and the rule was never adopted. As a result, there remains no guidance on the issue from the Law Society of Upper Canada.

3) The Relevant Rules of the Law Society of Alberta and the American Bar Association

(a) The Law Society of Alberta

Alberta is the only jurisdiction in Canada that has a rule on the topic. Rule 20 of the Law Society of Alberta's *Code of Professional Conduct* states:

> A lawyer must not counsel or participate in:
>
> a) the obtaining of evidence or information by illegal means;
>
> b) the falsification of evidence;
>
> c) the destruction of property having potential evidentiary value or the alteration of property so as to affect its evidentiary value; or
>
> d) the concealment of property having potential evidentiary value in a criminal proceedings.
>
> *Commentary*
>
> . . .
>
> Paragraph (d) applies to criminal matters due to the danger of obstruction of justice if evidence in a criminal matter is withheld. While a lawyer has no obligation to disclose the mere existence of such evidence, it would be unethical to

accept possession of it and then conceal or destroy it. The lawyer must therefore advise someone wishing to deliver potential evidence that, if possession is accepted by the lawyer, it will be necessary to turn the evidence over to appropriate authorities (unless it consists of communications or documents that are privileged). When surrendering criminal evidence, however, a lawyer must protect confidentiality attaching to the circumstances in which the material was acquired, which may require that the lawyer act anonymously or through a third party.

There is no equivalent obligation of disclosure with respect to evidence in a civil proceeding in light of the extensive discovery process provided by the *Rules of Court*. However, it is improper to block disclosure of documents or other evidence duly requested pursuant to rules of production or practice.[4]

Of course, the Alberta rules are not applicable in Ontario and, as such, provide little guidance to Ontario counsel. Moreover, in its report to Convocation, the Special Committee opined that the Alberta rule is too broad as it would capture any evidence of value provided by a client to his/her counsel, regardless of whether the item was inculpatory or exculpatory. The Special Committee was concerned that this could have the detrimental affect of discouraging clients from seeking legal advice and representation out of concern that *any* evidence they produce of evidentiary value would have to be produced by counsel to the court or prosecution. Concern was also expressed that such a rule potentially turns lawyers into evidence collecting agents of the state.

(b) The American Bar Association

Defence counsel in the United States are guided by the American Bar Associations (ABA) Criminal Justice Standards, specifically standard 4-4.6 on Physical Evidence, which reads:

> (a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).
>
> (b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.[5]

Mr. Cooper relied heavily on the ABA standards in defending Murray. However, Justice Gravely did not adopt the ABA's position in his judgment and it is, of course, not binding in Ontario. Moreover, the Special Committee criticized the ABA standards for being too narrow because they permit defence counsel to receive and retain property whenever they intended to use the item in any way as part of defence counsel's representation of the client. This could permit defence counsel to retain property for an extended time (as Murray did) without any independent review of the effect of doing so on the administration of justice. Accordingly, the ABA standards are of little assistance, if any, to counsel in Ontario.

As a result, counsel in Canadian jurisdictions other than Alberta are left with little guidance beyond the *Murray* decision. Interestingly, notwithstanding the lack of guidance, in the eleven years since Justice Gravely's decision, there have been no reported cases in Canada dealing with the issues raised in the *Murray* case. Nor have there been any reported cases of a lawyer being charged with attempt to obstruct justice for concealing incriminating evidence. However, that does not mean that all of the questions on the issue have been resolved. While the Gravely decision provides important guidance, there are still several areas of uncertainty for counsel.

4) Current challenges

(a) The Temporary Possession of Evidence for Testing

One of the unresolved issues is whether defence counsel would be entitled to possess inculpatory evidence for a limited period of time to conduct testing on the item. This issue was not squarely addressed by Justice Gravely, nor is it covered by the Alberta rules. The ABA Standards specifically permit counsel to possess the evidence for a reasonable period of time for several reasons, including where the lawyer intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client. Interestingly, the draft LSUC rule also permitted temporary possession of property relevant to a crime of offence if:

> . . .[T]he lawyer reasonably believes it is the interests of justice that the property be examined or tested before it is disclosed or delivered to the crown or law enforcement authorities, and the property may be examined or tested without altering or destroying its essential characteristics.[6]

Given that the concern for the administration of justice, and counsel, is the concealment of evidence, it would appear that maintaining evidence for a short and reasonable period of time for testing purposes, and then producing the item to the police or Crown, would likely defeat any suggestion of an attempt to obstruct justice.

This approach is supported by Professor Renke of the Faculty of Law, University of Alberta, who was of the view (post-*Murray*) that:

> . . .[A]n accused, and his or her counsel should have the right to examine and test the evidence that may be used against the accused, so long as the defence is reasonably diligent in pursuing this right. To deny the accused this right would be to impair his or her right to make full answer and defence.[7]

Given that the concern for the administration of justice, and counsel,

is the *concealment* of evidence, it would appear that maintaining evidence for a short and reasonable period of time for testing purposes, and then producing the item to the police or Crown, would likely defeat any suggestion of an attempt to obstruct justice.

(b) "Real" Evidence and Documentary Evidence

Post *Murray*, there is a unified view that any "real" evidence' in the hands of counsel (e.g. guns, knives, video, or audiotape of the crime itself, etc. . .) would be subject to the rules set out by Justice Gravely. As a general rule, counsel should not accept incriminating real evidence from their clients as it is almost certainly producible to the Crown or court. If a client is insistent, then counsel should advise their client, with a witness present, that if the client produces the evidence to the counsel, then he or she might be obligated to turn it over to the prosecution. Counsel should advise the client to take the evidence away, and that it must be kept safely and not destroyed as that would also constitute a crime. If for some reason, counsel does come into possession of such real evidence, it would almost certainly have to be turned over to the police or court. Counsel can try to protect the client, and client confidentiality, by turning that evidence over anonymously through another lawyer.

As a general rule, counsel should not accept incriminating 'real evidence' from their clients as it is almost certainly producible to the Crown or court.

However, there is less clarity with respect to documentary evidence. Interestingly, both the defence counsel and Crown counsel on the *Murray* case (Austin Cooper and Ian Scott, respectively) have written on that specific issue.[8]

Cooper queried what counsel would be ethically bound to do if a client charged with fraud or tax evasion showed up at his lawyer's office with 50 boxes of documents. Obviously, there would be some risk that within those boxes, the lawyer would find a document or documents that inculpate the client. Should the lawyer refuse to accept the boxes? If the lawyer kept the boxes and did find inculpatory documents, would he or she be obligated to turn those documents over to the Crown or court? If the principles in *Murray* apply to documents, counsel may very well be obliged to turn the documents over, or at least notify the authorities of their existence. Cooper left open the question of whether documentary evidence would be subject to the same rules as real evidence.[9]

Scott has no such uncertainty; he is strongly of the view that there is no distinction between real evidence and documentary evidence. He stated that documents "fall into this same prohibited category once they are determined to be relevant to a material allegation of a criminal offence"[10] on the basis that "concealment of incriminating documents, like the concealment of any incriminating evidence, has the potential to infect all aspects of the criminal justice system if the documents are to be removed from the zone of discoverability."[11] Scott did, however, identify some differences between real evidence and documentary evidence that may immunize the lawyer from criminal liability. They are:

> i) Documents created *within the solicitor-client relationship* (e.g. notes of a discussion between the client and counsel wherein, for example, the client confesses, a client's recitation of the relevant events for his lawyer's benefit, expert reports, etc. . .) are protected by solicitor-client privilege and do not have to be produced. (p. 170)
>
> ii) Documents created by the client *prior to* the solicitor-client relationship (e.g. a sketch of the planned bank robbery, kidnapping plans, a debt list, a diary in which the client confessed) would be producible. Accordingly, the lawyer should not accept the document from the client and should further advise the client that suppression or destruction of the document may be a crime in itself. (p. 171)

If for some reason, counsel does come into possession of such 'real' evidence, it would almost certainly have to be turned over to the police or court. Counsel can try to protect the client, and client confidentiality, by turning that evidence over anonymously through another lawyer.

> iii) Copies versus original documents. It is only when a document(s) are held by the lawyer for the purpose of frustrating access to by law enforcement that liability may attach to the lawyer's conduct. So, for example, when the client produces copies of documents, and maintains the originals, there can be no inference that the lawyer was frustrating the investigation, assuming the lawyer has properly advised the client not to destroy or tamper with the originals. By making copies, the lawyer has the benefit of reviewing the documents, without risking criminal liability. Moreover, when multiple copies of the documents exist in locations that are accessible to the police (e.g. banking

> or accounting documents that could also be accessed at the respective banking and or accounting institution), then the lawyer's possession of the document should not be see as frustrating police access. (p. 171-172)
>
> Scott concluded that:
>
> If the document makes it more probable than not that a crime was committed, was created outside of the solicitor-client relationship, has a singularity to it, and is in the custody of a lawyer for the purpose of frustrating access by law enforcement officials, it may act as a foundation for a charge of obstructing the course of justice.[12]

Given Scott's strong views on the matter, and the lack of clear guidance from the *Murray* decision or the LSUC on the handling of inculpatory *documentary* evidence, counsel faced with such a dilemma would be well advised to do exactly as suggested by Cooper; promptly consult with a senior lawyer(s) in confidence for independent advice and take careful notes of that discussion and the advice proffered. In cases of significance, the counsel should also consider placing the issue before the Law Society as Murray did. This *bona fide* resort to the advice of other counsel or the Law Society may protect lawyers from the risk of being criticized, or even worse, charged.[13]

(c) New Technologies

Since Justice Gravely's decision in 2000, the world has evolved. New technologies such as texting and tweeting have become widespread and are commonly used methods of communication. The products of these technologies (text messages, emails, tweets) are now making their way into police investigations and the courts. These technologies may very well raise new and important questions.

To illustrate this point, here are several examples:

> i) A client comes into counsel's office and indicates that he is worried he may be investigated for criminal harassment. He produces his Blackberry containing a series of text messages he sent to the complainant that, in counsel's view, would make out the offence of criminal harassment. The client is of the view that the text messages assist his case and offers the Blackberry to counsel to be used in the defence.
>
> ii) A client is facing charges of sexual assault and tenders to counsel a private video on his cellphone in which he is having sexual relations with the complainant, who appears to be unconscious.
>
> iii) A client retains counsel in defence of a charge of utter forged document. Before any disclosure is received, the client sends an email to counsel, which states, "Please find attached a few things you may need for my case," and attaches several scanned documents. The lawyer opens the attachments and reviews the documents. Within minutes of reviewing them, the client sends a second email, which states, "As my lawyer, I want you to know the truth. The documents I sent you earlier were forged by me." The emails and forged documents are now on the lawyer's computer.

What should counsel do in these circumstances?

The first two examples are analagous to the Murray situation; the client is proposing that the lawyer take possession of real evidence that would incriminate the client. Accordingly, the best course of action would be for counsel to tell the client that he cannot receive the items and that the client should preserve the evidence in a safe place, as destroying or tampering with the evidence would be a crime. If the counsel decides (for some reason) to take possession of the text messages and/or cell phone video, he should advise the client that he will almost certainly be obligated to produce it to the Crown or court, which could very well result in the conviction of the client. If the counsel does receive these items of evidence, and fails to disclose them, he or she will be in some criminal jeopardy. And in light of the *Murray* case, counsel would be hard pressed to justify the retention of the evidence on the basis that he or she did not appreciate what the ethical and legal obligations were.

The third example is the most challenging. As a starting point, the two emails themselves are protected by solicitor-client privilege and are not producible. The key question is what should be done with the copies of forged documents. Those documents were scanned by the client and are not originals. Accordingly, counsel should advise the client that the client must retain the originals and not tamper with or destroy them. And, being that these are copies, with the originals safely stored on counsel's advice and accessible to law enforcement, defence counsel could legitimately take the position (as per Scott) that maintaining the copies does not amount to concealment. Accordingly, counsel could leave the emails and attachments on the computer. Deleting them may give rise to unwelcome inferences.

Conclusion

While the Murray case has provided important guidance on how counsel should approach the possession of inculpatory evidence, there remain uncertainties. To be safe, when faced with such a dilemma, the lawyer should consult senior counsel and detailed notes should be taken of the advice given and the steps taken. That is the best way for counsel to ensure that in the future an article such as this will not be written about them.

NOTES:

[1] The author wishes to thank Austin M. Cooper, counsel to Cooper & Sandler LLP and Megan Schwartzentruber, an associate with the firm, for their review of and contributions to this article.

[2] *R. v. Murray*, 2000 CarswellOnt

1953, 34 C.R. (5th) 290 (Ont. S.C.J.)

[3] The full text of the proposed rule is in the Special Committee's report dated March 21, 2002 and can be found online : http://www.lsuc.on.ca/media/convmar02_physicalevidence.pdf

[4] Rule 20, Chapter 10, Law Society of Alberta, *Code of Professional Conduct*, (Calgary: Law Society of Alberta, 1995); found online at http://www.lawsociety.ab.ca/files/regulations/Code.pdf.

[5] Standard 4-4.6 on Physical Evidence, *ABA Standards for Criminal Justice: Prosecution and Defence Function,* 3d ed., (American Bar Association, 1993), found online at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html.

[6] Proposed Rule 4.01(11)(d) of the Law Society of Upper Canada's *Rules of Professional* Conduct, as quoted in *Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence – Report to Convocation* (Toronto: Law Society of Upper Canada, 2002).

[7] Wayne N Renke, "Real Evidence, Disclosure and the Plight of Counsel", (2003) 47 *Criminal Law Quarterly* at p. 198.

[8] Austin M. Q.C Cooper, "The Ken Murray Case: Defence Counsel's Dilemma" (2003) 47 *Criminal Law Quarterly*, p.141-156 and Scott, Ian D., "Can Documents Smoke? The *R. v. Murray* Decision and Documents Characterized as Evidence of Crime" (2003) 47 *Criminal Law Quarterly*, p. 157-174.

[9] Cooper, *ibid.* at p. 155.

[10] Scott, *supra* note 8 at pp. 161-162.

[11] *Ibid,* at p. 169.

[12] *Ibid.* at p. 174.

[13] Cooper, *supra* note 8 at pp. 155-156.

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Take It or Take It: the Guilty Plea, What They'll Give You for It, and the Ethical Quandaries Attached

by Neil McCartney

Photo courtesy of Neil McCartney.

. . . at the examination before plea . . . without the prompting the culprit was used to, his confession was nonsense. The judge questioned him and found out that although the suspect was trying to follow instructions he simply could not remember what he did, whom he killed, how or why. The judge sighed wearily and motioned him out of the courtroom and crooked his fingers at the constable. "Now look here Mike," he said, "you shouldn't do a thing like that. If that poor fellow had been just a little smarter you might have got him hanged."

- John Steinbeck, *East of Eden*

Like you, reader, I have no personal experience with the sordid business of the "guilty plea" (though I have heard of its existence). My clients, like yours, are invariably acquitted after trials so gripping they would make Matlock swoon in his seersucker.

Or, at least, that's the impression created by the way we tell our war-stories. But the sad and secret truth may be that we are all instructed to hoist the white flag from time to time (or even a few times a day), and, though we don't often reflect on the fact, this can sometimes result in an ethical stew-pot for the lawyer. (The sadder truth is that I have obviously ticked off somebody at the CLA, or so I infer from being given this topic, which amounts to an opportunity to establish my reputation as "that guilty-plea guy").

This ethics element is painfully evident in recent high profile cases like *R. v. Kumar*, *R. v. Hannemaayer,* and most recently *R. v. Brant, infra,* which show that when an accused is made to choose between 90 days in jail for criminal negligence, and a murder prosecution, the question of whether he actually did the crime may be the last thing on his mind. But is his lawyer entitled to rank it that way?

I'm sure you've all seen and read (or skimmed) articles on the guilty plea before, so I'm going to skip the part where I emphasize the vital importance of remembering to tell the judge your client's age and occupation, and proceed to the legal principles and the ethical angle. And there, too, we can move fast through the basics: if you have people plead guilty solely because i) it's easier; ii) it's faster; iii) you don't like being around them (see ii); or iv) block fees are back—well, all that is very unethical and you must not do it.

Basics aside, we're all at risk — even in very serious cases — of becoming complacent in this most commonplace of exercises in the criminal lawyer's daily work. So to combat that tendency toward "auto-pilot" in guilty plea proceedings, let's look at some interesting cases of guilty pleas gone wrong (or said, by the convicted, to have gone wrong), together with appellate comment thereon. We'll do this for the same reason we read the discipline pages in the *Gazette*: to make sure we're not in there (figuratively speaking – and, for some, literally).

The foundation stone of these sad tales is the Supreme Court's decision in *Adgey v. R.* (1973), 1973 CarswellOnt 250F, 1973 CarswellOnt 39, [1975] 2 S.C.R. 426 (S.C.C.). The accused pled guilty (and, on two counts, "guilty, I guess") to various fraud and property offences, and when called upon by the Court for comment, he made remarks that approached the line of denying his guilt on some of the charges. The level of duty-counsel's involvement appeared to have been very limited (see Laskin J.'s (as he then was) dissent, with its solicitude for lawyers' feelings, stating that the judge's plea inquiry can be done "in a manner that does not give the impression that counsel is either being bypassed or that his qualification is challenged" — he adds the sobering reminder that a guilty plea means the right to silence is at an end). The appeal presented the question of whether the judge should have struck Mr. Adgey's pleas as not valid. Dickson J. (as he then was), for a 3:2 majority, draws the boundaries of the proper guilty plea, by setting out a non-exhaustive list of "valid grounds" to set a plea aside: some are obvious — the accused never intended to admit an element of the offence, or never actually intended to plead guilty; and some less so — the accused "misapprehended the effect of the guilty plea" (for instance, by being unaware of a mandatory minimum sentence).

The Ontario Court of Appeal weighed in on the topic on the truly bizarre facts of *R. v. T. (R.)*, 1992 CarswellOnt 117, 10 O.R. (3d) 514, 17 C.R. (4th) 247 (Ont. C.A.) (they declined to re-visit the guilty pleas of the head of a commune who had drunkenly performed various ad-hoc surgeries on a disciple, including an amputation), adding that the Court retains a discretion to admit fresh evidence on appeal of a guilty plea, which, if it shows that a miscarriage of justice occurred, will permit the setting aside of the plea.

These cases preceded s. 606(1.1) of the *Criminal Code*, the "plea inquiry" section (enacted in 2002), which specifies that the Court must be satisfied that a guilty plea (i) is "voluntary" (i.e., untainted by, for instance, threats or promises or improper pressure, of which more below), (ii) is an admission of the offence's essential elements, (iii) is made in the knowledge of its "nature and consequences," (iv) and in the knowledge that joint submissions aren't binding on the Court. But, as with the common-law rule, the Court need not explicitly make these inquiries every time for the plea to be valid; it need only be "satisfied." (And no "conditional" or "equivocal" pleas will be accepted, like "guilty on condition that Crown proves cause of death," *R. v. Lucas*, 1983 CarswellOnt 1234, 9 C.C.C. (3d) 71 (Ont. C.A.), leave to appeal refused 1984 CarswellOnt 1279 (S.C.C.).)

Though *Adgey* makes clear that there's no exhaustive list of situations in which a guilty plea is invalid, the principles can be, and often are, boiled down to a three-category test for validity: was the plea voluntary, informed, and unequivocal?

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down to a three-category test for validity: was the plea voluntary, informed, and unequivocal?

Under the first heading, *R. v. Rajaeefard*, 1996 CarswellOnt 73, 27 O.R. (3d) 323, 46 C.R. (4th) 111 (Ont. C.A.), gives us some idea of the kinds of improper pressure that will result in a plea being set aside as not voluntary. The unrepresented recent-immigrant accused appeared on his trial date for a summary-conviction domestic assault, with a student from a law-school clinic, who had undertaken to help him seek an adjournment, but no more. The trial judge directed "counsel" to meet with him in the hallway, without the accused, for what was effectively an impromptu pre-trial conference, where the judge indicated it would be probation if he pled guilty, but 10-15 days jail if found guilty after trial (notably, the possibility of an acquittal seems not to have been mentioned); also, there would be no adjournment and the trial would now proceed. The accused's guilty plea was set aside, the Court of Appeal holding that in these unusual circumstances, "the trial judge's conduct improperly pressured the appellant" and his "plea of guilty was not freely and voluntarily given."

R. v. Hann makes clear that merely having taken potent medication on the day the guilty plea was entered, will not invalidate the plea, in the absence of evidence that the accused was rendered "unable to make an informed decision as to his pleas or unable to understand the proceedings."

Similarly, in *R. v. Djekic*, 2000 CarswellOnt 2891, 35 C.R. (5th) 346, [2000] O.J. No. 3041 (Ont. C.A.), involving an allegation of welfare fraud, the accused (who had been maintaining her innocence) arrived alone with her infant at a hastily scheduled pre-trial conference date, and was informed that she was about to be arrested for obstructing justice by interfering with a witness; but, this new charge would not be laid if she pled guilty in line with the pre-trial proposal just arrived at (a year in jail, whereas two years would be sought after trial), and she could remain out of custody pending sentencing at a later date. The tipping point, in the Court of Appeal's view, came when the judge politely admonished the obviously distraught accused in Court, to make up her mind as there was a busy docket pending, and she was lucky not to have been arrested already. The plea was found not voluntary, and the matter was sent back for trial.

Under the "informed" category, *R. v. Armstrong*, 1997 CarswellOnt 46, [1997] O.J. No. 45 (Ont. C.A.) is an example of an accused "misapprehending the effect" of a guilty plea, in this case through the erroneous advice of trial counsel, that she was likely to receive a discharge upon pleading guilty to the charge (which was in fact an offence not eligible in law for a discharge). She received 30 days in jail instead. The Court of Appeal concluded that the pleas were predicated on "a significant misunderstanding of the consequences. . .as a direct result of the erroneous advice," quashed the conviction, and ordered a new trial.

As to the woozy accused, *R. v. Hann*, 1997 CarswellOnt 4921, [1997] O.J. No. 5157 (Ont. C.A.) makes clear that merely having taken potent medication on the day the guilty plea was entered, will not invalidate the plea, in the absence of evidence that the accused was rendered "unable to make an informed decision as to his pleas or unable to understand the proceedings." The same idea goes for the mentally ill accused, per *R. v. W. (M.A.)* (2008), 2008 CarswellOnt 4060, 237 C.C.C. (3d) 560 (Ont. C.A.): he or she only needs to have been able to make "an active and conscious choice, for reasons he considered appropriate," and the law does not strictly require that there was a "careful, reasoned weighing of options."

Hill J. touched upon the point that, while how to plead is one of those core decisions that belong ultimately to the client alone, a lawyer, after reviewing fact and law with the client, must only participate in a guilty plea proceeding "where guilt is clearly acknowledged by the client" (paragraph 39 - citing a number of the LSUC Rules of Professional Conduct and their commentaries, particularly 4.01(1) and (8); the 1993 Martin Commission; and more, all of which do indeed avow the existence of this ethical requirement.

We then come to the encylopedic *magnum opus* on the subject, which, as usual, was penned by Hill J. in *R. v. Moser*, 2002 CarswellOnt 487, [2002] O.J. No. 552 (Ont. S.C.J.). Accused of a knifepoint abduction, Mr. Moser pled guilty to assault with a weapon and his

counsel made the customary acknowledgments of fact, but on subsequently becoming the subject of dangerous offender proceedings (as the Crown had promised prior to plea), he found he was sure he never had a knife, and applied to set the plea aside. Suspicious of the applicant's motives, Hill J. upheld his plea as "voluntary, unequivocal, and informed." In doing so, he touched upon the point that, while how to plead is one of those core decisions that belong ultimately to the client alone, a lawyer, after reviewing fact and law with the client, must only participate in a guilty plea proceeding "where guilt is clearly acknowledged by the client" (paragraph 39, citing a number of the LSUC *Rules of Professional Conduct* and their commentaries, particularly 4.01(1) and (8); the 1993 Martin Commission; and more, all of which do indeed avow the existence of this ethical requirement).

This brings us to the topical, and far more subtle, question of the "pressure" that can come with a plea-bargain proposal, or, as the aforesaid Commission prefers (and I agree, since "plea bargain" smacks infelicitously of commerce), "resolution discussions." It occurs daily in our courts that accused people stuck in jail without bail are offered their liberty, now or soon, in exchange for a guilty plea. Any such prisoner is always free to decline on the grounds that he is not actually guilty — but of course that will mean several (or many) more months in custody pending a trial, at which he may or may not prevail. But if he just declares himself guilty, he's out. At the far end, some see these offers as a form of extortion (and I leave it to our prosecutors to write their own article on the ethical paradox of an offer that's so generous as to be unfair). Does this pressure differ from "improper" pressure (as in the cases above) in kind or only in degree? The tendency is to describe the former as just the natural and unavoidable pressure arising from involvement with the criminal justice system, but it's hard to see exactly where the breaking-off point is.

Enter *R. v. Kumar*, 2011 CarswellOnt 785, [2011] O.J. No. 618 (Ont. C.A.), which, though more a fresh evidence case in the context of the Charles Smith scandal, is also the latest word (together with the brief endorsement in *R. v. Brant,* 2011 ONCA 362, 2011 CarswellOnt 3005 (Ont. C.A.)) on setting aside a guilty plea. After the unexpected death of his infant son, Mr. Kumar was charged with second-degree murder, based on Dr. Smith's opinion (now exposed as worthless) that "shaken baby syndrome" was indicated. As a recent immigrant with poor English, facing not only the possibility of a life sentence, but also of deportation, and desperate to keep his family together, Kumar succumbed to what the Court of Appeal called "a powerful inducement" "held out by the justice system:" an offer of criminal negligence causing death, with a 90-day sentence. In light of the compelling fresh evidence arising from the review of Smith's work, the Court had no difficulty finding this an appropriate case to set aside the plea "to avoid a miscarriage of justice." The same went for Mr. Brant, who'd pled guilty to aggravated assault on the same kind of Smith-based shaken-baby allegations, and got six months.

(So, people admit to crimes they didn't commit when faced with powerful inducements. Got it. Now, if only we could get them to hold that thought the next time the "Mr. Big" sting turns up — see *R. v. Osmar,* 2007 CarswellOnt 339, [2007] O.J. No. 244, 44 C.R. (6th) 276 (Ont. C.A.), leave to appeal refused 2007 CarswellOnt 4187, 2007 CarswellOnt 4188 (S.C.C.) — but I digress.)

The question of how trial counsel handled Mr. Kumar's "terrible dilemma" (the Court's term) is not much gone into; all we hear is that, on being acquainted with the impossibility of effectively challenging Smith's opinion, Kumar decided to accept the proposal, and gave written instructions accordingly (presumably including an acknowledgment of guilt). Notably, nobody (other than, of course, Dr. Smith) is chastised for what was, to put it bluntly, a fraud on the trial court, the Court of Appeal taking the view that the "false" guilty plea was understandable in the circumstances, and not to be held against Kumar or his counsel (and I emphasize that in none of *Kumar, Hanemaayer,* or *Brant*, is it suggested that trial counsel actually proceeded at the time in the absence of the accused's acknowledgment of guilt).

R. v. Hanemaayer, 2008 CarswellOnt 4698, [2008] O.J. No. 3087 (Ont. C.A.) stems from another notorious body of fresh evidence: the unattributed crimes of Paul Bernardo. Facing grave allegations of a knifepoint break-and-enter attack on a 15-year-old girl, founded on the absolute certainty expressed by the girl's mother (who saw the attacker) about his identity, Mr. Hanemaayer pled guilty mid-trial on a Crown offer to avoid penitentiary (a very likely destination, otherwise). It was subsequently learned that Bernardo was the perpetrator. The Court of Appeal acknowledged that Hanemaayer's plea was "voluntary, unequivocal and informed," and was indeed his own decision, not counsel's. But again, the "terrible dilemma," once looked at in the light of the fresh evidence, was sufficient to warrant setting the plea aside.

What seems unlikely in these three cases, is that the pleas would ever have been set aside if the dramatic fresh evidence had not exploded the cases against the accused (even to the point where the Crown throws in the towel). The "terrible dilemma"/"powerful inducement" on its own, unsupported by an overwhelming defence, is not enough to invalidate a guilty plea. The innocent offender who has been overcome by the "inducement," but whose situation lacks a decisive scandal in the case against him, is probably out of luck.

So what of the poor lawyers of such litigants, who face a "terrible dilemma"

of their own? They must either flirt with a breach of the ethical duty discussed by Justice Hill, above, not to plead anyone guilty who does not acknowledge guilt, or expose the client to the risk (sometimes near certainty) of a life-destroying outcome. (One need only think of William Mullins-Johnson, who got no 90-day offer, and his 12 years in prison for a non-crime, to grasp the scope of that risk). The only other alternative — an unpalatable one — is to abandon the client to his fate and get off the record, as we are told we must do, where the client maintains his innocence to you, but is pleading guilty anyway. The seventeenth-century jurist John Selden observed, "a [guilty] man may plead not guilty, and yet tell no lie" – but the reverse is not true, and the lawyer who pleads the innocent guilty, however good the reasons, has acted unethically. (Interestingly, this is not the case in the U.S., where the "Alford" plea goes one step beyond the *nolo contendere* / "no contest" plea, and allows precisely that: a guilty plea while openly maintaining innocence. The mind boggles at the ramifications of that development, and I leave it for a real academic.) Perhaps this has to do with our system's much-vaunted preference for guilty people going free, over innocent people going un-free (the latter being ten times worse than the former, in one leading view).

Query whether the doctrine of "wilful blindness" applies to a lawyer in these circumstances. If the client has consistently and reasonably maintained his innocence to you, but then changes his answer in the face of the offer he can't refuse and you head into Court to plead guilty, mightn't you be in the same state of mind as the offenders in those wilful blindness cases: you decline to draw the natural conclusions, or make the natural inquiries, because you don't want to know what follows? How stringent is our ethical requirement in this regard? Dare I ask, on what "standard" do we judge the matter? The commentary to LSUC Rule 4.01(1) speaks of being "convinced" that the client's admissions to you "are true and voluntary." (Or might it be that, in the face of a strong Crown case, you never believed your client's denials in the first place, and his new position rings of truth, in which case, ironically, there's no dilemma.)

These judgments are of some comfort on this score. It was open to the Court of Appeal in *Kumar* and *Brant*, to add a stern word about counsel's duty in regard to the guilty plea, and about how the bar's rigorous adherence to the ethical rule might have helped form a bulwark against the havoc that a single man's incompetence was able to wreak upon the system. They could have said, faced with Mr. Kumar's situation, the right route for counsel was to advise that the case must be defended, come what may, and that the offer, in view of the accused's innocence, simply could not be countenanced, however appealing.

But they didn't say that. And what does it mean that they didn't say that? One thing it may mean, reader, is that you are trusted. You are trusted to make the call. The Ontario Court of Appeal, at least, confides that you and your fellows at the bar are out there applying ethical requirements to your daily practices, in an honest way — and this mess was not on you.

And if that's not enough, remember this strong motivation to get the guilty plea right: your very presence, as competent counsel, will usually virtually eliminate the accused's prospects of doing anything about the plea once it's concluded. The authorities all agree that when an accused pleads guilty and is represented by counsel when he does so, he will face a huge onus if he wishes to revisit the matter by way of appeal (*R. v. Eastmond,* 2001 CarswellOnt 3911, [2001] O.J. No. 4353 (Ont. C.A.) Whether you like it or not, you are the stamp of legitimacy on the process, and it will be assumed you did your work well.

Now is the part where I proclaim the helpful conclusion: "there's no easy answer to all this." And indeed there isn't. But what you can do is be aware — of these issues, of the pitfalls encountered by those who've gone before you, of the basic "voluntary, informed, and unequivocal" requirements — and thereby avoid the trap of ethical sluggishness that any of us can fall into in plea proceedings.

And finally, bear in mind the noteworthy pronouncement of Justice Ewaschuk in his far-famed manual: "Dissatisfaction with sentence is not a proper ground on which to permit a withdrawal of a guilty plea."

If only it were otherwise.

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FURTHER READING:

Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent" (2010) 56 Crim LQ 116.

Candace McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform," (2005) 50 Crim LQ 67.

Joseph Diluca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005) 50 Crim LQ 14.

Ethical Issues in Preparing Your Client to Testify

by Apple Newton-Smith

The Rules of Professional

Conduct that come into play in preparing your client to testify are simple. You must be competent. You must be honest with the Court and candid with your client. You must raise every issue and argument that you believe will assist your client's case. However, when you factor in the reality of criminal defence work, where many of our clients are unsophisticated, inarticulate, and afraid, the application of these rules can often feel uncomfortably less simple.

The good advocate, or to borrow from the terminology found in the Rules, the honourable, resolute, fair, and fearless advocate, is the one who advances the best possible defence for his client. The good advocate also knows that his client needs help understanding the parameters of the law, and how best to present himself and his story. There can be little doubt that simply throwing your client on the stand to "tell his story" is bad advocacy and that preparation is essential. And yet tension can arise out of that obligation to thoroughly prepare and to assist the client in putting forward his best defence: the tension between coaching and coaxing. Lawyers can find themselves wondering where the line is between telling your client *how* to answer questions and *what* to answer.

Control the narrative.
Do not concoct it.

Preparing your client to testify is a process that begins with the first meeting and constantly evolves from there. You can go a long way towards avoiding ethical issues in preparing your client to testify by being careful and professional, which is to say, ethical.

Begin at the beginning and control the narrative. Do not concoct it.

Stage One – Introductions and the first interview

Client walks into your office. You introduce yourself. The rules of polite conversation might suggest that you then say something along the lines of "And what brings you here today?" or maybe "How can I help you?" Don't. For many clients that is simply an invitation to unleash upon you their "story." A story that has few parameters and is oftentimes told in ignorance of the law, the defences allowed by law and the Crown's case. Instead, start off with your client much in the way that you will eventually be telling them to respond to the Crown's questions in their examination in chief. Minus of course the eye-rolling, tone, teeth-sucking, and anger management, which you can save for later.

Controlling the narrative means arming yourself with as much information as possible about the Crown's case before you begin to actively engage with the defence case.

After you introduce yourself tell your client that you would like to begin by asking them a few simple questions, that you kindly ask at this juncture that they stick to the questions and answer them as simply as possible, and that later there will be lots of time for the "whole story." Tell them that, at this stage, it is important for you to get some preliminary details from them and to explain your role and limitations. This is a good time to explain the basics of Rule 4.01(1) of the Rules of Professional Conduct. That you are there to fearlessly raise every issue and advance every argument that assists their case, but that you may not rely on any evidence or defence that you know to be false. And importantly, if they as your client admit the necessary factual and mental elements of the offence to you, then you, as their lawyer, are not able to pursue any defence inconsistent with that "confession." Putting this on the table at the outset helps to define your relationship and avoid ethically difficult situations later.

A good way to get the initial information from you client is to first ask if they have brought any paperwork with them. Official documents are helpful. They tell you things you want to know at stage one, like what your client is charged with, and perhaps even what your client is alleged to have done. They don't tell you things that you don't want to know.

You don't want to know what your client *thinks* he is charged with; you want to know what he *is* charged with. Not just because it is generally helpful to have accurate information about the charges but because what he thinks he's charged with often comes with a torrent of unnecessary and unhelpful "information"; information that may set you up for later "ethical issues." Find out what he is charged with, and if you can, what he is alleged to have done. The question to ask here, if the papers cannot help you, is "what are the police saying that you have done, and please, answer my question carefully, I'm not asking you *what* happened, I'm asking you what they *say* happened." As you see, this is a slowly evolving process and you are taking control of it.

Controlling the narrative means arming yourself with as much information as possible about the Crown's case before you begin to actively engage with the defence case. You do not want to be given information by your client that will put up ethical hurdles to the "best defence." Sometimes clients say the darndest things, sometimes they even lie, and sometimes those lies are not helpful, quite the opposite. The best way to avoid being lied to by your client, and even worse, catching them in the lie is to inform them of the case to meet before they start providing you with information. You are trying to avoid the client telling you a story that he thinks helps him but does not help and is not what actually happened. This situation can pull even the most conscientious lawyer uncomfortably close to the line between properly preparing a client to testify and coaxing him to tell a particular story.

Exceptions to the Rule: Alibis and Witnesses

Alibis and witnesses are two exceptions to this rule. Gathering information about potential alibis and witness at the outset is essential to avoiding ethical issues later. While it is generally not a good idea to hear your client's version of events prior to knowing the case to meet, it is unquestionably a bad idea to hear about an alibi on the eve of your client's testimony. Setting aside the legal problems with late disclosure of an alibi (adverse inferences to be drawn[1], little weight to be given, finding that is false and therefore positive evidence of guilty[2]), having an alibi disclosed as you are in the throws of last minute preparation is an invitation for ethical problems.

Ask your client at the first meeting if he has an alibi. But ask carefully. Do not ask in a way that suggests to your client that he *needs* an alibi. Take a few minutes to explain, before you get the answer, about the law surrounding alibis and about how sometimes not remembering where you were at a certain day and time is sometimes the best evidence that you weren't doing anything wrong. Explain to him, politely, that you will investigate the alibi and look for corroborating evidence before you present it to the Crown. There is no need to don a cheap suit and bad moustache and play the cop routine here, but make it clear that it is not in everyone's interest for an alibi to explode midtrial into perjury charges.

Alibis need to be investigated and tested thoroughly before they are dis-

closed, and the sooner they are disclosed the better. If your investigation of a client's "alibi" leads you to conclude it is false, that is it. You may not advance that alibi you know to be false. According to Rule 4.01(2)(b), counsel may not "knowingly assist or permit the client to do anything that the lawyer considers to be dishonest." In other words you cannot advance an alibi that is false, or at least not one that you *know* to be so. This does not otherwise hamper your ability to "fearlessly" pursue the best available defence for your client. You will of course explain to your client why you are not advancing the alibi and the repercussions of advancing an alibi that is proved to be false. This may cause the client to terminate your relationship in search of, shall we say, "greener" pastures.

If a client discloses an alibi on the eve of trial this creates a mess of ethical issues. Advancing an alibi at such a late date at best will leave you with an alibi of little weight and at worse can end in adverse inferences and even perjury charges. If you believe that effective representation is an ethical as well as a professional obligation, which you should, allowing an alibi to be disclosed late in the game is unethical.

Effective and ethical representation involves not leading your client like a lamb to the slaughter. As counsel we have an ethical obligation to fearlessly pursue every issue and defence that we believe helps our client's case, and we may rely on any evidence that we do not *know* to be false (Rule 4.01(1), see commentary). But if you are advancing an alibi on your client's behalf you should not just *not know* it to be false, you should be confidant that it will stand up to scrutiny.

The same general principles apply to defence witnesses. Take some time at the first meeting to briefly canvass the question of defence witnesses. Are there people who witnessed the incident? Get their contact information, make sure they aren't going to disappear on you. This way you are not faced with last-minute disclosure of witnesses that either reek of concoction or leave you unable to effectively

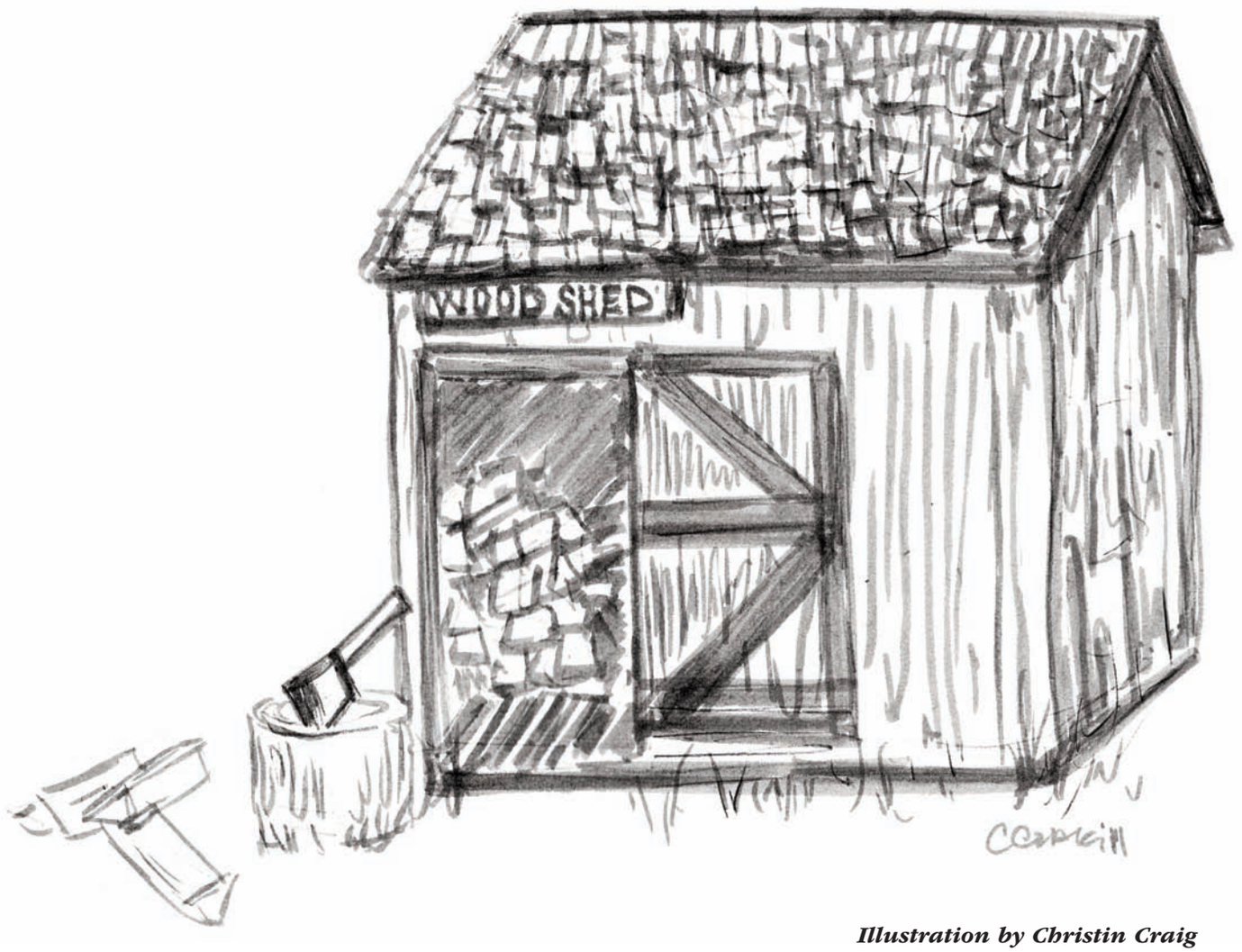

Illustration by Christin Craig

prepare, both of which are ethically troublesome situations. Asking about witnesses at the outset generally avoids these problems.

Stage Two – Disclosure Review

If you have effectively controlled the narrative in stage one you can approach stage two, the disclosure review, with a, relatively, open mind. Read the disclosure. It's unethical not to. It's also stupid and lazy and ought to get you disbarred.

Once you have read the disclosure with an open mind you can ask yourself what are the potential defences that obviously present themselves, and do they require the client's input and/or testimony. If you have effectively controlled the narrative, and you need to cross-examine witnesses but not call a defence, your cross-examinations will not be hampered by some unfortunate disclosures your client may have offered.

Feeding your client a story is unethical. Giving your client a general framework that encourages your client to stay within the bounds of reason is not.

Stage Three – The Post Disclosure Interview

Now is the time to begin to explore your client's narrative. Remain in control. You speak first. It is important to remember the following commentary to Rule 4.01(1):

> Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence which, by reason of the admission, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attach the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

As a result of this rule, any "admission" made by the client could significantly limit your ability to present a defence or even attack the evidence for the prosecution.

Give your client your general assessment of the Crown's case and the potential defences that arise on the evidence. Your client is less likely to feed you a story you find ethically hard to swallow if you give them this general framework. But again, caution is the order of the day. While you want to control the narrative, you do not want to be concocting it. Feeding your client a story is unethical. Giving your client a general framework that encourages your client to stay within the bounds of reason is not.

Here is a "war story" by way of example. Your client is charged with assault. The complainant says that your client, completely unprovoked, punched him in the head 25 times and then tried to strangle him before throwing him to the ground. You see a statement from a witness who sees something to suggest that the complainant started the fight, and was also an active participant in it. The client has some injuries that suggest that he was likely punched in the face, but the injuries do not corroborate the extent of the beating. You've had the initial interview, controlled the narrative and know that your client was charged with assault and wants to "fight the charges." The disclosure suggests that there may well be a self-defence or consensual fight defence. If you carefully explain this to your client prior to his telling you "what happened" you are less likely to have your client tell you a stupid story about how he did nothing because he's afraid to tell you that he hit the guy.

While there is nothing wrong with expressing your opinion to your client, indeed Rule 2.02(1) obliges the lawyer to be honest and candid with her clients, it is clearly unethical to concoct a story for your client. But when you find yourself in a situation where you suspect your client of lying, and what you suspect to be the truth is actually a defence, it can be rather uncomfortable. You don't want to feel as though you are telling your client what to say, but you also do not want to do nothing as you fear your client is lying her way into a conviction. If you control the narrative from the outset you are far less likely to find yourself in this grey area where you fear you may be concocting the narrative.

Stage Four: Meeting the Crown's Case

It is essential in preparing your client to testify that he know what's out there. There is nothing unethical whatsoever in letting your client know the case that he has to meet, and the challenges that he is likely to face from the prosecution. Indeed it is quite the opposite. In *R. v. B. (M.)*, 2009 CarswellOnt 3678, [2009] O.J. No. 2653, 68 C.R. (6th) 55 (Ont. C.A.) the Ontario Court of Appeal found defence counsel at trial to have been incompetent in failing to have properly reviewed his

Your client is not your friend. Challenge him. Put the crown's case to him, confront him, expose the problems in his evidence to him in the "comfort" of your office.

client's statements with him prior to his testimony.

Preparing your client to testify involves leading him through examinations in chief and having him cross examined, preferably by another lawyer. You will want to talk to your client about how he presents himself, his demeanour, what he wears, who he should look at and so forth. You will also want to help him with how to answer questions. What you do not want is to get uncomfortably close to the line between telling him how to answer and telling him what to say. If you lay it all out for your client you can prepare him to testify in a way that leaves you on the comfortable side of the line between coaching and coaxing. Letting your client know the case he has to meet will prevent you from wandering over that line.

Your client is not your friend. Challenge him. Put the Crown's case to him, confront him, expose the problems in his evidence to him in the "comfort" of your office. That way you allow *him* to do the rethinking about what he's saying: you are showing him how to answer questions and not telling him what to say. This kind of good preparation avoids ethical uneasiness.

Conclusion

Preparation is not unethical; ineffective representation is. Prepare your client to testify. Do not prepare the evidence. Begin at the first interview and establish the framework for avoiding ethical issues later on.

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NOTES:

[1] *R. v. Noble*, 1997 CarswellBC 711, 1997 CarswellBC 710, 6 C.R. (5th) 1, [1997] 6 W.W.R. 1, 114 C.C.C. (3d) 385 (S.C.C.); *R. v. Cleghorn*, 1995 CarswellOnt 126, 1995 CarswellOnt 802, 41 C.R. (4th) 282, 100 C.C.C. (3d) 393 (S.C.C.); *R. v. Chambers*, 1990 CarswellBC 217, 1990 CarswellBC 761, [1990] 6 W.W.R. 554, 59 C.C.C. (3d) 321, 80 C.R. (3d) 235, 49 B.C.L.R. (2d) 299 (S.C.C.); *R. v. P. (M.B.)*, 1994 CarswellOnt 1153, 1994 CarswellOnt 65 , 29 C.R. (4th) 209, 89 C.C.C. (3d) 289 (S.C.C.); *R. v. Hill*, 1995 CarswellOnt 127, 41 C.R. (4th) 299, 102 C.C.C. (3d) 469 (Ont. C.A.)

[2] *R. v. Ranger*, 2003 CarswellOnt 3396, [2003] O.J. No. 3479, 14 C.R. (6th) 324 (Ont. C.A.)

Informer Privilege: An Ethical Dilemma for Defence Counsel?

by Susan Chapman and Jennifer Micallef

Over the past decade confidential informant privilege has been given near absolute status by the Supreme Court of Canada.[1] In *Leipert*[2] the Court confirmed that the identity of police informers and information which might assist in identifying them is privileged. That privilege overrides the general duty of the Crown to disclose all relevant information as required by *R. v. Stinchcombe*[3]. Thus, informer privilege compels the Crown and the police to withhold information concerning the identity of a true confidential informant, subject to the innocence at stake exception. But what, if any, legal or ethical obligations does the privilege bestow on defence counsel? Is there anything wrong with defence counsel possessing information concerning the identity of a confidential informant? Does defence counsel's ethical obligations turn on the mere fact that they have come into pos-

session of such information or on the methods used to obtain it? Alternatively, is it the *use* that is made of identifying information, rather than its mere harvesting, that raises ethical concerns for defence counsel?

Defence counsel must be the fierce advocate of the client, a role that is entirely inconsistent with being an agent of the state. Yet recently, in *R v. Barros,*[4] a majority of the Court of Appeal for Alberta appears to have criminalized any defence investigation into the identity of a confidential informant. In broad language, the majority decision concludes that:

> Since one of the purposes of the informer privilege is to encourage other informers to report crime, undermining the privilege by attempting to identify an informer *prima facie* amounts to obstruction, absent a reasonable justification or excuse. It does so in two ways: it necessarily intimidates the actual informer, and it discourages potential informers and witnesses. The "investigative steps" themselves could, as alleged, amount to an attempt to obstruct justice.[5]

The decision has been appealed by Mr. Barros to the Supreme Court of Canada on the basis of the strong dissent of Justice Berger[6] and is currently under reserve. Until the decision is released and definitive guidance is provided, it is important to be aware of what ethical obligations defence counsel do have and those that might be imposed depending upon which opinion the highest court ultimately favours. At this time it is easier to identify the ethical issues than it is to resolve them.

Informer Privilege

Confidential informant privilege prevents the Crown and the police from being forced (inside court and out) to disclose the identity of a confidential informant.[7] The purpose of the privilege is to provide some protection to informers and to encourage citizens to come forward when they have information about illegal activity.[8] The Supreme Court has explained the significance of informant privilege being a class privilege as follows:

> In a class privilege what is important is not so much the content of the particular communication as it is the protection of the type of relationship. Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation.[9]

Accordingly, informant privilege does not simply exist at the insistence of the Crown without first establishing that the requisite relationship exists. Once informer privilege is established it is absolute and subject only to the "innocence at stake" exception. The test for the exception is a stringent one that requires an evidentiary basis. Given the current state of the law of disclosure, the ability to investigate the identity of the alleged informant, or the circumstances around which the information was provided to police, is the only way in which the defence can logically be expected to meet the innocence at stake exception. Further, a defence investigation into the identity of an alleged confidential informant is required if the police claim of privilege is ever to be effectively challenged.

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The C.I

Who is a Confidential Informant?

Not all citizens who provide information to police are confidential informants entitled to the protection of informer privilege. Indeed, the conferring of such status ought to be rare. In *R. v. Basi* the Court explained that the requisite relationship required in order to establish the privilege only arises, "...where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospec-

tive informer in exchange for useful information that would otherwise be difficult or impossible to obtain."[10] In relation to the vast majority of people that provide information to the police, these pre-conditions are either not met or are not valid. Thus, before the relationship can be properly found to fall into the category of informant privilege it must be established that confidential informant status has been properly conferred. As the Supreme Court of Canada held in *Basi:* "the judge must be satisfied, on a balance of probabilities, that the individual concerned is indeed a confidential informant."[11]

In general terms, the distinction between and informer and an agent is that an informer furnishes information to the police and an agent acts on the direction of the police and goes "into the field" to participate in the illegal transaction in some way.[12] The identity of the informer is protected by the privilege and is not disclosable subject to the innocence at stake exception. The identity of an agent, however, must be disclosed. The line between agents and informers is not always a bright one.[13] For example, in *R. v. McCormack* defence investigation revealed that in the high profile prosecution of a police officer, the investigating professional standards officer had wrongly conferred informant status on an number of individuals that were not entitled to that status and admitted that he did so as an "investigative technique."[14]

An informer furnishes information to the police and an agent acts on the direction of the police ...

It seems clear that looking to Crown disclosure alone for an evidentiary basis to challenge the assertion of informant privilege will generally be a fruitless task. Evidence independent of the police investigation will be required to establish that informant status has been improperly claimed in any particular case and/or that the privilege must make way for the innocence of the accused. Accordingly, defence counsel has an important role to play in bringing the true state of affairs to light.

Barros

But in *Barros*, the Alberta Court of Appeal has thrown a serious wrench into the otherwise clear and singular duty defence counsel owes to the client. The issue before the court in *Barros*, on a Crown appeal from a directed verdict on one count of obstruct justice and an acquittal on two counts of extortion, was "whether the respondent's attempts to identify a confidential police informer, and his subsequent use of the information he discovered, are criminal in nature."[15] Ultimately, the majority of the Court found that such conduct could well amount to a criminal offence and ordered a new trial on all counts. An understanding of the facts of the case is crucial to discerning precisely where Mr. Barros was said to have crossed the line in conducting a private investigation on behalf of the defence. Yet a discussion of the facts of the case is problematic due to the significant discrepancies between the factual findings of the experienced trial judge who acquitted Barros[16] and the evidentiary underpinnings of the Court of Appeal majority reversing that decision.[17]

What we do know is this: Ross Barros is a retired 25-year veteran of the Edmonton Police Service and a former Senior Investigator in the Drug Unit. He left the force and became a licensed private investigator. He was retained by defence counsel in a drugs and weapons prosecution to conduct an investigation into the identity of the alleged informant who was used to obtain the search warrant of the accused's home. Barros used a number of investigative techniques in order to identify who amongst the accused's associates he thought to be the informer. He attended a meeting of the associates at which he requested their cell phone numbers, he compared those cell phone numbers to telephone calls with the investigating officer as revealed in disclosure and he compared the criminal records of the various associates to that of the informer.

At one point Barros believed that he had learned the identity of the confidential informant. At a subsequent meeting with the investigating officer Barros disclosed his discovery. As a result, he was charged with obstruct justice, particularized as "taking investigative steps to identify a confidential police source for the purpose of interfering with criminal proceedings against I.Q." As well, he was charged with two counts of extortion, one said to relate to an alleged attempt to get the police to terminate the prosecution in light of his discovery of the identity of the confidential informant and the other count concerning his efforts to obtain the cell phone records of the associates.

At Barros' trial on the obstruct charges, the investigating officer in the drug prosecution agreed in cross-examination that "if [Barros] had information that he knew who my source (sic) was, I would appreciate that he would come forward and tell me, yes" and further that he did not see attempting to and/or identifying a confidential source as a crime. At trial the case turned primarily upon the investigating officer's "impression" that during his conversation with his former colleague, Barros wanted the charges dropped in exchange for his not revealing the identity of the informant. The trial Judge directed a verdict of acquittal on the obstruct justice charge. She found that:

> The doing of a lawful act, here identifying a police informant, does not in itself constitute an obstruction of justice; at the most, it might constitute preparation for an attempt to obstruct justice if the information concerning the police informant is used in a way which tends to obstruct the administration of justice. Without

more, the mere taking of investigative steps to determine the identity of an informant cannot result in an injustice or an affront to the system of justice.

The majority of the Court of Appeal disagreed and concluded that identifying a police informer is not "a lawful act". The majority could not conceive of an appropriate purpose for conducting such a defence investigation and determined that "since one of the purposes of the informer privilege is to encourage other informers to report crime, undermining the privilege by attempting to identify an informer *prima facie* amounts to obstruction, absent a reasonable justification or excuse".

The majority decision in *Barros* appears to threaten the relationship of trust that exists between defence counsel and the accused by imposing on defence counsel duties that flow out of a privileged relationship he or she is not even a party to.

With respect to the second count in the indictment, the alleged extortion, the Court of Appeal majority found that because Barros had prior knowledge that charges would often be stayed in the event that the identity of a confidential informant was discovered, he must have been attempting to extort a stay of the charges by revealing that he had uncovered the identity of the confidential informant. Contrary to the findings of the trial judge, the Court of Appeal found that Barros arranged a meeting with the investigating officer "for the purpose of telling him that he had discovered" the identity of the informer, his expectation being that the Crown would withdraw the charges.[18] The majority of the appellate court also found that "attempting to identify the informer *prima facie* amounts to obstruction, absent a reasonable justification or excuse" and that "the investigative steps themselves could, as alleged, amount to an attempt to obstruct justice."[19]

In a strong dissent Justice Berger characterized the majority opinion of the Court as gutting the already narrow exception to the revelation of the identity of an informer (cases of innocence at stake) by transforming an evidentiary rule into a substantive crime. The dissent recognizes that there is a fundamental difference between an attempt to ascertain the identity of the informer and an intent to reveal it. Further, Justice Berger expresses his concern that the majority judgment constrains the judicial process by foreclosing a legitimate investigation by defence counsel or his agent to ascertain whether the alleged informer is an agent of the state, a material witness or, indeed, a fictional source fabricated for illegal purposes.[20]

Defence Counsel's Duties are to the Client

In the famous words of British barrister, Lord Henry Brougham, "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."[21] There are, of course, some residual duties of an advocate to the administration of justice as reflected by the Rules of Professional Conduct.[22] However, the majority decision in *Barros* appears to threaten the relationship of trust that exists between defence counsel and the accused by imposing on defence counsel duties that flow out of a privileged relationship he or she is not even a party to. The Alberta Court of Appeal has essentially invented a new duty on defence counsel to protect the identity of alleged confidential informers. Not only is such a position wholly inconsistent with a defence lawyer's fundamental duty to represent their client, it is simply an unmanageable task.

Analysis

How can defence counsel continue to zealously advocate while avoiding criminal charges in the context of confidential informants? Where is the line drawn between a legitimate investigation and extortion? Are defence lawyers expected to keep this information from their clients?

Despite the majority judgment in *R. v. Barros*, it is very unlikely that the Supreme Court will adopt the conclusion that defence counsel are not entitled to investigate the identity of a confidential informant *per se*. To do so would amount to a serious encroachment on the role of defence counsel and completely undermine the ability to make full answer and defence. That such an investigation is the responsibility of defence counsel is clear from case law. Indeed, it was argued and relied upon by the Attorney General of British Columbia in its written argument to the Supreme Court in *R. v. Basi*.[23]

At the other end of the spectrum, it is likely that the Supreme Court will expressly state that to threaten to reveal the identity of the confidential informant to force the withdrawal of charges is unethical and likely illegal.[24] In between these two extremes there exists an array of investigative techniques that can be used to determine whether in fact there is a true confidential informant and/or whether innocence is at stake. Clearly the issue is one that counsel must discuss with their client. The client may well have knowledge that assists in determining whether there is an informant, who that informant likely is and whether their information could be considered reliable or fabricated. Beyond that it is not clear what investigative techniques can be properly used to learn about the confidential informant.

Those steps taken by the investigator that result in direct interaction with the associates of the accused need to be approached very cautiously. It is having direct contact with potential candidates that puts defence counsel or her

agent at the greatest risk of being accused of intimidating or scaring witnesses. Obviously there should be no direct or indirect threats of revelation. But can a request for cell phone numbers be made? Can the associates be asked directly whether they are or are not informants? In relation to these difficult issues it is impossible to be definitive at this time.

An informant should be expressly told by the police that they cannot guarantee that their identity will not be learned through the judicial process, including a defence investigation into their identity. This will likely come as no surprise to an informant and provides them with information that they are entitled to in order to make an informed decision as to whether to cooperate with the police or not. The Alberta Court of Appeal has invented a law that imposes a duty on counsel to protect the identity of informers which is not only impractical for defence counsel but impossible to enforce on an unrepresented accused. The invented law undermines the duty of zealous representation and makes defence counsel complicit in the State's prosecution against their client. A defence investigation into the identity and circumstances of an informer is valid and even required. It is the manner in which that investigation is conducted and the use to which that information can be put that requires the further guidance of the highest court.

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NOTES:

[1] *R. v. Leipert*, 1997 CarswellBC 101, 1997 CarswellBC 102, [1997] 1 S.C.R. 281, 4 C.R. (5th) 259, [1997] 3 W.W.R. 457 (S.C.C.); *R. v. Scott*, 1990 CarswellOnt 65, 1990 CarswellOnt 1012, [1990] 3 S.C.R. 979, 2 C.R. (4th) 153 (S.C.C.); *Re Application to proceed in camera* (2007), 2007 CarswellBC 2418, 2007 CarswellBC 2419, [2007] 3 S.C.R. 253, [2008] 1 W.W.R. 223, 51 C.R. (6th) 262, 73 B.C.L.R. (4th) 34 (S.C.C.).

[2] *R. v. Leipert, ibid* at para. 20.

[3] (1991), 1991 CarswellAlta 559, 1991 CarswellAlta 192, [1991] 3 S.C.R. 326, [1992] 1 W.W.R. 97, 83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277 (S.C.C.)

[4] *R. v. Barros*, 2010 CarswellAlta 643, 25 Alta. L.R. (5th) 326, 75 C.R. (6th) 257, [2010] 10 W.W.R. 36 (Alta. C.A.).

[5] *Ibid* at para. 68.

[6] The appeal was argued on January 25, 2011 and is currently under reserve. A number of interveners took part in the hearing including the Public Prosecution Service of Canada, the Attorney General of Ontario, Crime Stoppers, the Edmonton Police Service, the Criminal Lawyers Association of Ontario and the Canadian Civil Liberties Association of Ontario.

[7] *R. v. Y. (X.)*, 2011 ONCA 259 (Ont. C.A.) at para. 15.

[8] *Application to proceed in camera, Re*, 2007 SCC 43, 2007 CarswellBC 2418, 2007 CarswellBC 2419, [2007] 3 S.C.R. 253, [2008] 1 W.W.R. 223, 51 C.R. (6th) 262, 73 B.C.L.R. (4th) 34 (S.C.C.) at para. 28.

[9] *R. v. National Post*, 2010 CarswellOnt 2776, 2010 CarswellOnt 2777, [2010] 1 S.C.R. 477, 74 C.R. (6th) 1 (S.C.C.) at para. 42.

[10] *R. v. Basi*, 2009 CarswellBC 3869, 2009 CarswellBC 3870, [2009] 3 S.C.R. 389, 70 C.R. (6th) 18 (S.C.C.) at paras. 36-37.

[11] *R. v. Basi*, ibid at para 39.

[12] *R. v. B. (G.)*, 2000 CarswellOnt 2750, 146 C.C.C. (3d) 465 (Ont. C.A.) at para. 10, leave to appeal refused 2001 CarswellOnt 874, 2001 CarswellOnt 875 (S.C.C.)

[13] *The Law of Privilege in Canada*, looseleaf (Canada Law Book: Aurora, ON, 2006) at p. 2-32.3

[14] *R. v. McCormack*, 2009 CarswellOnt 8622, [2009] O.J. No. 5803 (Ont. S.C.J.) at para 8.

[15] *Barros* supra note , at para. 1

[16] R. v. Ross Barros, Reasons, Court of Queens Bench, Madam Justice Veit, December 21, 2007. The dissent of Berger J.A. contains a succinct statement of the facts that appears to more closely track the findings of the trial judge.

[17] A considerable part of the Crown's appeal to the Alberta Court of Appeal was a dispute with inferences drawn by the trial judge. On appeal to the Supreme Court of Canada Barros's counsel argued that the Court of Appeal majority showed no defence to the trial judge's findings of fact and indeed changed the facts to accord with their desired outcome.

[18] Barros invited another detective to witness the meeting.

[19] *R. v. Barros*, 2010 CarswellAlta 643, [2010] A.J. No. 387, 25 Alta. L.R. (5th) 326, 75 C.R. (6th) 257, [2010] 10 W.W.R. 36 (Alta. C.A.) at para. 68.

[20] *R. v. Barros*, *supra* note 4 at para 129 -131.

[21] As quoted in *R. v. Neil* (2002), 2002 CarswellAlta 1301, 2002 CarswellAlta 1302, [2002] 3 S.C.R. 631, 6 Alta. L.R. (4th) 1, 6 C.R. (6th) 1, [2003] 2 W.W.R. 591 (S.C.C.) at para. 12.

[22] Rules of Professional Conduct, Law Society of Upper Canada, http://www.lsuc.on.ca/with.aspx?id=671.

[23] In Justice Berger's dissent in *Barros* at para. 121, he quotes from the Crown Appellant's factum in *R. v. Basi*, 2009 CarswellBC 3869, 2009 CarswellBC 3870, [2009] 3 S.C.R. 389, 70 C.R. (6th) 18 (S.C.C.) where, at paragraph 51, it is acknowledged that the accused and his counsel are under no duty to protect and enforce the informer privilege and indeed will seek to discover and exploit that information, including informant information, in order to obtain an acquittal.

[24] But even in this scenario their exists uncertainty as to what the defence should or should not do in light of *Barros*. In *Barros* the investigating officer testified that he would expect a private investigator to disclose to him the fact that the identity of the confidential informant has been discovered. However, when Barros did so without putting forward any *quid pro quo* the Court of Appeal insisted that one be inferred.

The Responsible Approach to the Issue of Criminal Responsibility

by Anita Szigeti and Jill Presser

INTRODUCTION

Mentally disordered accused are often among the most vulnerable and most marginalized people in our society. They are, for complex socioeconomic reasons that are beyond the purview of this paper, often without financial or human resources or supports in the community. They may present as challenging clients for whom there are no easy solutions in the criminal justice or mental health systems. For these reasons, representing those with mental health issues enhances counsel's responsibility to adhere to the highest standards of professional and ethical conduct. When we represent the mentally ill, we undertake to assist those who need our help the most and who may be least able to ensure that we do our best job for them.

Issues surrounding the "defence" of not criminally responsible by reason of mental disorder ["NCR"] and whether and when to advance it give rise to

many challenging ethical issues. In this short paper, we will highlight some of the ethical issues that arise in relation to: (i) taking the client's instructions about whether to pursue a verdict of NCR, (ii) advising the client with respect to whether to pursue a verdict of NCR, and (iii) NCR assessments. Counsel defending mentally disordered accused must take care to turn their mind to these issues.

AN OVERVIEW OF THE NCR VERDICT

The test for a finding that an accused was not criminally responsible is set out in s. 16 of the *Criminal Code* as follows:

> **16 (1) Defence of mental disorder** – No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
>
> **(2) Presumption** – Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
>
> **(3) Burden of Proof** – The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

The NCR verdict is further explained in s. 672.34 of the *Criminal Code*:

> **672.34 Verdict of not criminally responsible on account of mental disorder** – Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering from mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), the jury or the judge shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder.

The trier of fact must thus determine that the accused committed the *actus reus* of the offence charged before s/he can be found NCR. The NCR verdict operates as an exemption from criminal responsibility on the basis of absence of *mens rea*.[1] The accused is absolved from criminal responsibility because, as a result of mental disorder, s/he is incapable of appreciating the nature and quality of his act or that the act is wrong. The presence of mental disorder at the time of commission of the index offence without evidence of the other elements of the test under s.16 is not sufficient to result in an NCR verdict. Counsel and the Courts must be vigilant to ensure that no NCR verdict is based on anything less than evidence of all elements of the test under s. 16, proven on a balance of probabilities.[2]

While the defence may pursue a finding of NCR at any stage of the proceedings, the Crown may only pursue that verdict in two circumstances: (1) after the trier of fact has concluded that the accused was otherwise guilty of the offence; and (2) where the accused's own evidence puts his/her metal capacity for *mens rea* into issue.[3] When the Court may raise the NCR issue of its own motion is a more complicated matter. However, following *Swain*, it makes sense that the Court would be bound by the same restrictions as the Crown. The jurisprudence remains equivocal on the point.[4] It should be noted that while the Court may order an NCR assessment at any stage of the proceeding, on its own motion, pursuant to section 672.21, as discussed below, ordering an assessment is not necessarily the same thing as "raising the NCR issue."

Although referred to as a "defence" in s. 16, NCR is not a true defence. It does not result in an acquittal. While the NCR accused is exempted from criminal liability (in the sense that s/he will not be sentenced for the act committed), s/he is not free to walk away after being found NCR. Instead, the NCR accused goes from being under the jurisdiction of the criminal courts to being under the jurisdiction of the provincial review board. Under Part XX.1 of the *Code*, the review board will determine the appropriate disposition for the NCR accused. Most often this means that the client is on his/her way to a psychiatric facility rather than jail.[5] Typically, the NCR accused is not released directly into the community.

Unlike a sentence of imprisonment, which is finite and offers the promise of early release on parole, the NCR verdict often results in involuntary detention in restrictive conditions for an unknown and potentially indefinite period.

There will almost always be at least a period of initial assessment requiring detention within a psychiatric facility. Most often lengthy periods of inpatient treatment will precede any discharge to the community even while the accused continues under the Board's jurisdiction. The accused cannot receive an absolute discharge from the Board until s/he no longer poses a significant threat to the safety of the public.[6] Unlike a sentence of imprisonment, which is finite and offers the promise of early release on parole, the NCR verdict often results in involuntary detention in restrictive conditions for an unknown and potentially indefinite period. Many NCR accused, particularly those whose mental conditions are resistant to treatment or not amenable

to improvement and those who refuse treatment, remain detained in psychiatric hospital for periods much longer than any custodial sentence for their index offence would ever have been.

For these reasons, defence counsel must not think of NCR as we think of other "defences." We must not allow ourselves to think of NCR as necessarily a good thing for our clients. Rather, in keeping with the terminology employed in s. 672.34, we suggest that NCR be referred to and thought of as a "verdict" not a "defence." As we will discuss further below, in some cases, an NCR verdict is entirely appropriate and a good outcome for the client. However, in our view, in the vast majority of cases, an NCR verdict would result in severe restrictions to the client's liberty over an extended period of time and CLIENTS SHOULD BE ADVISED AGAINST IT.

We must not allow ourselves to think of NCR as necessarily a good thing for our clients.

ETHICAL ISSUES THAT ARISE AROUND THE NCR VERDICT

(i) Taking the Client's Instructions

It is of the utmost importance for defence counsel to remember that the decision as to whether to pursue an NCR verdict belongs to the client. This is true notwithstanding that the client is mentally disordered, notwithstanding defence counsel's disagreement with the client's instruction, and notwithstanding defence counsel's view that the instruction given is not in the client's best interests.[7] It is not the job of defence counsel to act in the client's best interests but rather to advocate the client's position according to his/her instructions.[8]

As counsel to the accused, it is our job to give voice to the concerns and objectives of the accused with a view to minimizing the impact of his/her brush with the justice system on his/her life and liberty. To that end, defence counsel must advise the client fully as to all options, their likely consequences and potential pros and cons of each option. The fact that the client suffers from a mental disorder or cognitive limitation may mean that counsel has a heightened obligation to ensure that advice is provided in ways that are understood by, and useful to, the client. Advising mentally disordered clients may take more time and/or more explanation than other clients. We must actively try to facilitate and maximize our clients' ability to instruct us meaningfully.

It is extremely important for counsel representing mentally disordered clients to practice defensively. Discussions with the client where advice is provided about the NCR verdict should ideally be documented[9] and/or witnessed by an associate or colleague. Instructions with respect to whether to pursue an NCR verdict must be in writing, setting out as much information as possible about the advice given, any rights waived and the instruction given, signed by the client[10] and dated.

(ii) Advice to the Client With Respect to the NCR verdict

The consequences of an NCR verdict must be fully and carefully explained to the client. The client who may have the s.16 verdict available to him/her must be made to understand that, if successful, the verdict will not result in acquittal. Instead, the NCR verdict will bring him/her within the jurisdiction of the review board until s/he no longer represents a significant risk to the safety of the public. The client must understand that while under the Board's jurisdiction s/he may be subject to detention in a psychiatric hospital not only initially but indeed that the individual may be returned to hospital and detained again for lengthy periods at a time even after an initial or subsequent discharge to the community. Counsel must advise the client that detention in psychiatric facility will be for an unknown and unknowable period of time, potentially longer than any sentence s/he would face upon conviction in criminal court. And counsel must advise that detention in psychiatric hospital may be in very secure conditions with few or no privileges and severe restrictions on liberty. Counsel must also advise the client that s/he may be transferred to various hospitals around the province based on the Board's determination of his/her security classification.

Counsel must advise the client that detention in psychiatric facility will be for an unknown and unknowable period of time, potentially longer than any sentence s/he would face upon conviction in criminal court.

Whether counsel recommends that the client pursue an NCR verdict will usually depend on a number of factors, including the seriousness of the charge, potential consequences following conviction and the type of mental disorder involved. In our view, an NCR outcome should only be sought for the most serious of index offences, including murder and very very serious sexual assaults or other offences where, upon conviction, the accused would likely face very lengthy incarceration in penitentiary. Accused facing less serious charges are likely to find that being found NCR will lead to a longer period of deprivation of liberty than would conviction followed by jail, conditional sentence, or suspended sentence and probation.

The NCR route is more advisable for the client suffering from a major mental disorder of a psychotic or mood disorder type (such as schizophrenia or bipolar affective disorder) than it is for the client suffering from a personality disorder only (such as psychopathic personality disorder or antisocial personality disorder). This is because major mental disorders are frequently amenable to improvement with treatment. Often previously undiagnosed and untreated individuals who have killed family members, or committed other serious offences, respond to treatment in a robust fashion. With treatment, those with major mental disorders often gain insight very quickly, enjoy rapid steady improvement and are released from the jurisdiction of the review board much before they would have been released from a sentence of life imprisonment. Personality disorders, by way of contrast, are believed by many psychiatrists to be untreatable or virtually untreatable. So the NCR accused who suffers only from a personality disorder may never improve to the point where s/he no longer poses a significant threat to the safety of the public. The purely personality disordered NCR accused may never improve to the point where s/he can be absolutely discharged by the review board.

Counsel should be wary of advising pursuit of the NCR verdict for clients who have lengthy criminal records (even if for minor offences) and/or a long history of diagnosis with major mental disorder and an equally long history of non-compliance with treatment. Clients who have repeatedly come into contact with the criminal justice system will often have difficulty

convincing the review board that they do not pose a significant risk to the safety of the public. On the other hand, counsel should also consider that clients who are likely to come into contact with the criminal justice system frequently in the future (as they have done in the past) may be well served by pursuing the NCR verdict and entering the treatment stream.

Clients with a history of treatment non-compliance are likely to continue to have periods of non-compliance and relapse. This will result in initial detention in hospital for lengthy periods because the non-compliant and deteriorating NCR accused will not enjoy the improvement required to convince the review board that s/he can be safely released into the community. Ultimately, when released on a conditional discharge, the non-compliant and decompensating NCR accused will frequently be returned to hospital and have difficulty achieving an absolute discharge. These are clients for whom the NCR verdict should not be pursued or should be pursued with extreme caution. The client who is amenable to treatment and willing to comply is a better candidate for oversight by the review board.

Mentally disordered clients who are opposed to treatment with psychiatric medications or resolved to be self-determining are poor candidates for the NCR verdict.

In advising mentally disordered clients as to the benefits and disadvantages of the NCR route, counsel should be aware that the public protection/treatment model enshrined in Part XX.1 of the *Criminal Code* is essentially offensive to some people. Some people find that the model patronizes them and turns them into objects in their own lives and treatment – objects of other people's wisdom and knowledge about what's best for them and objects of institutional rules and deprivations. Mentally disordered clients who are opposed to treatment with psychiatric medications or resolved to be self-determining are poor candidates for the NCR verdict.

Counsel's advice with respect to whether to pursue an NCR outcome must be thoughtful and careful. It must weigh and balance the effects on the client's liberty and well-being that would likely result from conviction and sentence as compared to NCR and hospitalization. In most cases, we suggest, the NCR verdict would result in greater deprivation of liberty for a longer periods than criminal conviction and should be advised against.

(iii) Assessments

Psychiatric assessments of the client may, of course, be obtained privately or by court order. Where counsel retains a psychiatrist to assess the client, counsel may choose the assessing psychiatrist and the report will be privileged. Thus private assessments give the defence more options. A helpful report may find its way into court whereas an unhelpful report may remain in counsel's file, cloaked by solicitor-client privilege. Moreover, a privately retained assessing psychiatrist can not be compelled to testify against the client.

As helpful as private assessments are, they are not always available. Private assessments must be funded by the defence, whether privately or by legal aid. The cost of private assessments often proves prohibitive and defence counsel must consider the risks and benefits associated with seeking a court ordered assessment.

Under s. 672.11 of the *Criminal Code*, a court with jurisdiction over the offence may order an assessment where it has reasonable grounds to believe that the assessment is necessary to determine, *inter alia*, whether the accused is unfit to stand trial or whether s/he was NCR at the time of the commission of the offence.

The court and the accused may seek a court ordered assessment at any stage of proceedings (s. 672.12(1)) but the Crown may only seek a court ordered assessment for NCR in two circumstances: (1) if the accused has put his/her mental capacity for criminal intent into issue or (2) if the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible on account of mental disorder (s.672.12(3)(a) and (b)). Under s. 672.12(2), there are similar limitations on the Crown's ability to seek a court ordered assessment of fitness to stand trial.

Defence counsel must be alert to the risk that where a fitness assessment has been ordered by the court, assessing psychiatrists will often return a report offering their unsolicited opinion regarding the availability of the NCR verdict. This can be an especially vexing problem where the Crown is determined to seek a finding under s. 16 over the objections of the accused. Where it is the prosecution seeking the court ordered assessment, the test for NCR and fitness assessments are different and require that different evidence be adduced in support of the application for the order. Counsel must therefore be vigilant to ensure that the court order for assessment goes as ordered: either for a fitness assessment or for an NCR assessment or both, depending on the order of the court. Where it is only fitness that is to be assessed, counsel may even consider confirming the limitations of the order with the psychiatrist to ensure that there is no inclusion of extraneous information (such as NCR assessment).

A court ordered assessment report must be filed with the court and provided to both Crown and defence (s. 672.2). So, unlike private assessments which enjoy the protections of solicitor-client privilege, court-ordered assessments are not privileged.

Counsel must expect that any court ordered assessment report may well be used against the client and entered in evidence. However, statements made by accused persons undergoing court ordered assessments do enjoy some protection from admissibility. These are considered "protected statements"[11] because, with some notable exceptions, they are not admissible against the accused:

> **s.672.21(2) Protected statements not admissible against accused** - No protected statements or reference to a protected statement made by an accused is admissible in evidence, without the consent of the accused, in any proceedings before a court, tribunal, body or person with jurisdiction to compel the production of evidence.
>
> **(3) Exceptions** – Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of
>
> . . .
>
> (e) determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;
>
> (f) challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously; or
>
> (g) establishing the perjury of an accused who is charged with perjury in respect of a statement made in any proceeding.

We cannot channel that concern into substituting our opinion of what is in the best interest of the client for informed meaningful instructions from the client.

In *R. v. G. (B.)*[12], the Supreme Court of Canada held that s. 672.21(3)(f) must be interpreted in a manner consistent with s.7 of the *Charter* and the common law. So, for example, statements made in the course of an assessment that are otherwise inadmissible under the *Charter* or a common law rule of evidence do not become admissible by operation of s. 672.21(3)(f).

Defence counsel must carefully weigh the advantages of having a psychiatric assessment with the risks associated with court ordered assessments and conduct the case accordingly. Once an assessment order is made, the client will want to know whether or not s/he should co-operate with the assessment. The client should be advised that s/he can not be compelled to talk to the Crown psychiatrist but that if s/he chooses not to participate in the assessment, the trier of fact may draw an adverse inference against the accused.[13] Generally speaking, an assessment with the input of the client is going to prove more helpful than risking an adverse inference being drawn from the silence of the accused. However, the client should also be advised that everything s/he says while detained in a psychiatric facility for purposes of assessment, whether to the psychiatrist, nursing staff or co-patients, is going to be charted in his or her hospital records and may be disclosed in the course of the proceedings. Again, when an assessment has been ordered over the objection of the accused, the accused may request that the interview by the assessing psychiatrist be videotaped. Given the prevalence of the particular delusion of being under constant surveillance among the mentally disordered, however, it'll be the rare client who will insist on this step or consent to the idea. Ultimately there is no better way to ensure the accuracy of the record of the assessment, however.

CONCLUSION

As good lawyers, we care about our clients. There is nothing wrong with being concerned for the mental health or physical well being of clients who are mentally disordered accused. It is perfectly natural to feel alarm at the prospect of an obviously psychotic client spending considerable time in jail, without appropriate, even necessary care or treatment. However, we cannot channel that concern into substituting our opinion of what is in the best interest of the client for informed meaningful instructions from the client. Unless our client is unfit, we are obliged to act in accordance with the client's instruction, whether it be to advance or pursue, consent to or oppose an NCR verdict. It is a grave mistake to import paternalism into our representation of our mentally disordered clients and a serious error that does not comport with professional standards required of us to treat these clients any differently than clients who do not suffer from serious mental illness. It is our responsibility to educate ourselves fully, advise our clients fully and then act on their advice, regardless of where we think their best interests lie. The responsible approach to the issue of criminal responsibility demands no less.

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NOTES:

[1] *R. v. Chaulk* (1990), 1990 CarswellMan 385, 1990 CarswellMan 239, 2 C.R. (4th) 1, [1991] 2 W.W.R. 385 (S.C.C.)

[2] *R. v. Guidolin*, 2011 CarswellOnt 2434, [2011] O.J. No. 1649 (Ont. C.A.); *R. v. Cascagnette*, 2011 ONSC 1893, 2011 CarswellOnt 2091 (Ont. S.C.J.)

[3] *R. v. Swain*, 1991 CarswellOnt 1016, 1991 CarswellOnt 93, 63 C.C.C. (3d) 481, 5 C.R. (4th) 253 (S.C.C.)

[4] *R. v. Piette*, 2005 CarswellBC 2948, [2005] B.C.J. No. 2688, 36 C.R. (6th) 181 (B.C. S.C.), *R. v. Gomez*, 2007 CarswellOnt 6517, [2007] O.J. No. 3908 (Ont. C.A.). See also *R. v. Firman*, 2006 CarswellOnt 6588, [2006] O.J. No. 4290 (Ont. C.J.)

[5] While psychiatric hospitals are intended to have a rehabilitative and treatment-focussed environment, the most secure facilities are more like jails than pleasant treatment centres. In *Penetanguishene Mental Health Centre v. Ontario (Attorney General)* (2004), 2004 CarswellOnt 1136, 2004 CarswellOnt 1137, [2003] S.C.J. No. 67, [2004] 1 S.C.R. 498, 19 C.R. (6th) 1 (S.C.C.) at paras. 29 and 31, the Supreme Court of Canada had this to say about conditions at Oak Ridge, the maximum secure unit at the Mental Health Centre – Penetanguishene:

> The rooms are cell-like, with barred or solid steel doors, barred windows and attached steel fixtures (sink, toilet, bed). The use of privacy curtains is limited. Access to privileges and facilities is strictly controlled. In some ward areas of Oak Ridge, detainees are not allowed to keep soap, a toothbrush or a comb in their rooms, or in some cases use a pen. Visits to the canteen may be escorted.
> . . .
> . . . choice of the type of hospital and level of security and conditions of detention will have a vital impact on the liberty interests of the detainee. Confinement to a cell-like room at Oak Ridge is a long way from a life of liberal access to the community at the Royal Ottawa Health Care Group facility at Brockville.

[6] *Winko v. Forensic Psychiatric Institute*, 1999 CarswellBC 1266, 1999 CarswellBC 1267, 25 C.R. (5th) 1, 135 C.C.C. (3d) 129 (S.C.C.)

[7] In the recent decision of *R. v. Guidolin*, 2011 CarswellOnt 2434, [2011] O.J. No. 1649 (Ont. C.A.) the Court of Appeal for Ontario overturned an NCR verdict on appeal. At para. 24 of the decision, the Court acknowledged that an NCR verdict would be the best way to protect the community from the Appellant and hopefully offer the Appellant some treatment. However, the Court held that this type of consideration of best interests was "not a proper basis in law for an NCRMD verdict."

[8] Clients who are unfit to stand trial are the only ones whose instructions are not determinative of the course pursued by defence counsel. "Unfit to stand trial" is defined in s. 2 of the *Criminal Code* as an inability, on account of mental disorder, to conduct a defence at any stage of proceedings or instruct counsel to do so. See also *R. v. Taylor*, 1992 CarswellOnt 120, [1992] O.J. No. 2394, 17 C.R. (4th) 371 (Ont. C.A.). Counsel acting for an unfit accused or as *amicus curiae* where the accused is unfit may not be able to obtain instructions or the instructions received may be of limited or no relevance or assistance in the proceeding at hand. There is a presumption of fitness to stand trial (see s.672.22) and the *Taylor* test sets the standard of fitness at such a minimal level that the person does not have to be able to instruct counsel in a manner that reflects his/her best interests. In other words, a mentally disordered client who gives instructions that are not in his/her best interests is not automatically considered unfit. In most cases, even the unfortunate instruction of the mentally ill client must be respected and acted upon by counsel.

Issues relating to fitness to stand trial raise a number of ethical considerations that are beyond the scope of this paper.

[9] In other practice areas, such as estates, videotaping the interview in which client instructions are obtained is becoming a very popular approach, for the obvious reason that the video speaks for itself in relation to the capacity of the client to instruct and the information provided in the process. Counsel to mentally disordered accused may wish to consider this approach, albeit with the caveat that one must be sensitive to the nature of the individual's illness – videotaping the client who already believes him or herself to be under constant camera surveillance is only going to make their delusions real for them, be traumatic and a barrier to the solicitor-client relationship.

[10] And ideally, witnessed by an associate.

[11] See s. 672.21(1) and *R. c. G. (B.)*, 1999 CarswellQue 1204, 1999 CarswellQue 1205, [1999] 2 S.C.R. 475, 24 C.R. (5th) 266 (S.C.C.)

[12] *G. (B.), supra*

[13] *R. v. Worth*, 1995 CarswellOnt 115, [1995] O.J. No. 1063, 40 C.R. (4th) 123 (Ont. C.A.), leave to appeal refused [1996] 3 S.C.R. xiv (S.C.C.); *R. v. Sweeney (No. 2)*, 1977 CarswellOnt 23, [1977] O.J. No. 2353 (Ont. C.A.)

Use Of Crown Disclosure In Collateral Proceedings

by Daniel Bernstein and Danielle Gallo

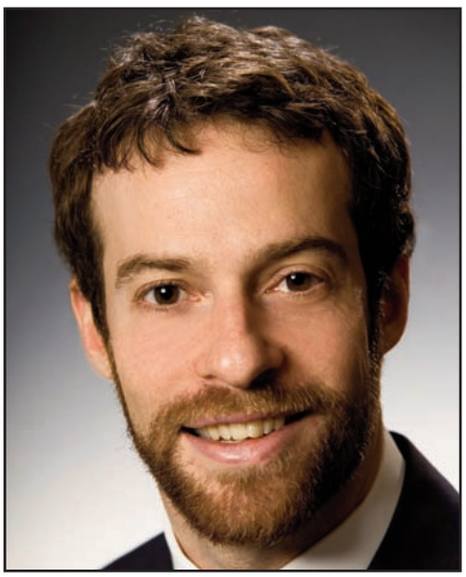

Photo courtesy of Daniel Bernstein.

Photo courtesy of Danielle Gallo.

USE OF CROWN DISCLOSURE IN COLLATERAL PROCEEDINGS

A. Overview

In criminal proceedings the accused is entitled to receive extensive disclosure from the Crown, commonly referred to as the Crown Brief.

The Crown Brief contains various components of the police investigation file, including the synopsis of allegations, police notes and occurrence reports, statements of witnesses and police officers, signed statements of witnesses, videotaped or audio-taped witness statements, surveillance reports, wiretap evidence, medical and scientific reports, and the criminal record of the accused. This broad disclosure is required to ensure that the accused's right to a fair trial and to make full answer and defence is not compromised. The overriding importance of these fundamental rights enti-

tles the accused to access a plethora of information that would otherwise be protected by privacy legislation or for public policy reasons.

The same right to broad disclosure of the Crown Brief is not automatically afforded to parties in civil litigation or other collateral proceedings in which the contents of the Crown Brief is relevant.

The Ontario Court of Appeal in *P. (D.) v. Wagg*, 2004 CarswellOnt 1983, 46 C.P.C. (5th) 13, 239 D.L.R. (4th) 501 (Ont. C.A.), additional reasons at 2004 CarswellOnt 2660 (Ont. C.A.) ("*Wagg*") adopted a screening mechanism for the dissemination of sensitive but relevant information in the Crown Brief in collateral proceedings. The thrust of the decision in *Wagg* is that disclosure will generally be allowed, unless there is real concern that the public interest would be impacted. Examples of possible public interest concerns with permitting disclosure are discussed below.

The same right to broad disclosure of the Crown Brief is not automatically afforded to parties in civil litigation or other collateral proceedings in which the contents of the Crown Brief is relevant.

The principles in *Wagg* have been applied in a range of collateral proceedings, including civil litigation, child protection proceedings, labour arbitrations, and professional regulatory proceedings.

Generally, the courts have followed the Court of Appeal's direction in *Wagg* to favour disclosure of the Crown Brief. In circumstances where the contemplated disclosure has posed a more significant (and less speculative) risk to the integrity of the ongoing criminal proceedings, courts have tended to tailor specific production orders to address those risks, rather than prohibit disclosure relevant to the collateral proceeding.

B. The Court of Appeal Decision in *Wagg*

In *Wagg*, the Court of Appeal considered whether the Crown Brief in a criminal proceeding against a gynaecologist for sexually assaulting a patient could be disclosed in a civil action by the patient against the physician. The criminal charges had been stayed due to unreasonable delay. The trial judge had declined to order production. On appeal the Divisional Court set out a screening mechanism to determine whether or not the Crown Brief should be disclosed. This screening mechanism was upheld by the Court of Appeal.

The screening mechanism requires a party with possession or control of the Crown Brief to disclose the Brief in his or her affidavit of documents. However, the documents in the Brief cannot be produced in the proceeding unless either:

(a) consent has been provided by (i) the relevant state authorities, namely, the Attorney General and the relevant police agency, and (ii) all the parties to the collateral proceeding; or

(b) a court order for production has been obtained on notice to (i) the appropriate state authorities and (ii) all parties in the collateral proceeding.

The overriding consideration for disclosure is whether the public interest in the administration of justice through full access of litigants to relevant information in the collateral proceeding outweighs the social value and public interest in non-disclosure.

The Court of Appeal anticipated that in many circumstances the state authorities and the parties to the collateral proceeding would be able to consent to disclosure issues without court intervention. The Court also directed the police and Attorney General, in considering a request for production, to bear in mind that the Crown does not have a proprietary interest in Crown disclosure and that Crown disclosure is to be used to ensure that justice is done.

Overall, the tenor in *Wagg* suggests a broad right to disclosure of the Crown Brief, tempered only by special circumstances involving third-party privacy issues or where necessary for the public interest or the administration of justice. As the Court of Appeal remarked:

Overall, the tenor in *Wagg* suggests a broad right to disclosure of the Crown Brief, tempered only by special circumstances involving third party privacy issues or where necessary for the public interest or the administration of justice.

> The guiding objective to be applied by the parties, the state agents and the court hearing any motion for production thus ought to be what Anderson J. said in *Reichmann v. Toronto Life Publishing Co.,* [1988] O.J. No. 961 (H.C.J.), "The consistent tendency in this Province has been to broaden and not circumscribe the right of discovery."

The screening mechanism crafted by the courts in *Wagg* has rendered the question of the existence of an implied undertaking not to use or disclose the Crown Brief for any collater-

al purpose moot, at least with respect to collateral proceedings. The Court of Appeal in *Wagg* remarked that while there were "compelling reasons for recognizing such a rule," it did not need to address it due to the application of the screening mechanism it had adopted.

C. Some Practical Considerations in Applying *Wagg*

Procedurally, if a party seeking disclosure of the Crown Brief consent cannot obtain the necessary consents, a motion is to be brought in the context of the collateral proceeding.

This motion should typically be made after the proceeding has been commenced (*Ker v. Lim*, 2010 ONSC 1517, 2010 CarswellOnt 1434 (Ont. S.C.J.)) and the statement of claim has been served on all the proposed defendants (*Publicover v. Ontario (Minister of Transportation)*, 2005 CarswellOnt 715 (Ont. S.C.J.)). The motion may be made to a judge or a master: *G. (N.) v. Upper Canada College*, 2004 CarswellOnt 1966, 50 C.P.C. (5th) 218 (Ont. C.A. [In Chambers]).

On such a motion the parties objecting to disclosure are expected to particularize their concerns on a document by document basis, rather than object to the disclosure of the contents of the Crown Brief *en masse* (*Aylmer Meat Packers Inc. v. Ontario*, 2006 CarswellOnt 3542, 29 C.P.C. (6th) 395 (Ont. Master)).

Note that the specific screening mechanism set out in *Wagg* may not apply in all circumstances, particularly where another statute sets out an alternative procedure, for example under the *Regulated Health Professions Act* and the *Public Inquiries Act* (*College of Physicians & Surgeons (Ontario) v. Peel Regional Police Service*, 2009 CarswellOnt 5935, [2009] O.J. No. 4091 (Ont. Div. Ct.)). Furthermore, additional considerations apply to the release of records under the *Youth Criminal Justice Act* (e.g. *Native Child & Family Services v. N. (A.)*, 2010 ONSC 4113, 2010 CarswellOnt 5347 (Ont. S.C.J.)).

Lawyers prepare for the new e-disclosure

D. Possible Concerns with Producing the Crown Brief in Collateral Proceedings

The production of the Crown Brief has raised has raised important issues for defence and crown counsel.

These include for example:

- privacy interests of third parties affected by the disclosure of sensitive and personal information, including medical records, witness statements and diaries;
- disclosure of confidential police investigatory techniques and information;

Generally, courts have given effect to the Court of Appeal's direction in *Wagg* to favour broad disclosure of the Crown Brief, even in the face of objections from the Attorney General, the police and the accused, and in circumstances where the criminal proceedings are ongoing and concerns have been raised about potential interference with the administration of justice.

- disclosure of confidential information affecting national security;
- concerns about witness impeachment with statements made during the collateral proceeding;
- witness tainting, including the actual or apparent collaboration between witnesses based on the disclosure of information in the Crown Brief to witnesses as part of the collateral proceeding;
- a potential chilling effect on witnesses coming forward in criminal trials due to the possibility of their evidence being disclosed and used in collateral proceedings;
- circumvention of court orders, such as publication bans;
- prejudgment of guilt due to media accounts of evidence admitted from the Crown Brief in prior civil proceedings,;
- disclosure of evidence obtained in breach of an accused's Charter rights; and
- interference with the accused's right to a fair trial and right to make full answer and defence in light of some of the above concerns.

Generally, courts have given effect to the Court of Appeal's direction in *Wagg* to favour broad disclosure of the Crown Brief, even in the face of objections from the Attorney General, the police and the accused, and in circumstances where the criminal proceedings are ongoing and concerns have been raised about potential interference with the administration of justice.

One example of this is *1207678 Ontario Ltd. v. Canadian Surety Co.*, 2004 CarswellOnt 3261, [2004] O.J. No. 1045, 1 C.P.C. (6th) 203 (Ont. Master), a case decided following the Divisional Court's determination in *Wagg* but before the Court of Appeal's decision. In this case, the defendant in a civil action sought production of the Crown Brief from a related criminal investigation into the actions of the plaintiff. The criminal charges against the plaintiff had been withdrawn prior to the motion for production. The police and the AG both consented to this production. However, the plaintiff opposed the production on the basis that it would be unfair to allow the defendant to benefit from the police investigation in the civil proceedings.

The court rejected the argument that disclosure of the Crown Brief would somehow be unfair to the plaintiff in the civil proceeding:

> Given the undisputed relevance of the requested production, I find that the Plaintiff has not satisfied me that fairness in the civil proceeding will be compromised if production is ordered. On the contrary, it would be unfair to the Defendant if it is deprived of access to available evidence bearing semblance of relevance to the pleaded issues. The fact that the material was generated through the efforts of police or crown attorney does not, in itself, constitute unfairness to the civil litigant. For example, police accident reconstruction reports are often adduced in civil proceedings. It should not be forgotten that the Plaintiff has received full *Stinchcombe* disclosure in the criminal proceedings and therefore has had access to the fruits of the police investigation, parts of which may be helpful to it.

The court also expressly noted that the plaintiff did "not raise issue that the criminal proceedings will be compromised should the requested production be granted".

Similarly, in *Motorola Inc. v. Or*, 2010 ONSC 487, 2010 CarswellOnt 233, 85 C.P.C. (6th) 405 (Ont. Master), the court ordered production of the Crown Brief over the objection of the accused, who alleged *Charter* violations. In this case, the plaintiff in a civil proceeding applied for production of the Crown Brief from a related criminal proceeding. The accused/defendant opposed production on the basis that the evidence was obtained through an illegal police search and in breach of the defendant's *Charter* rights and thus inadmissible. The court ordered production of the Crown brief, holding that the alleged breach of the defendant's *Charter* rights did not render the evidence immune from production. Rather, the *Charter* issues related to whether or not the evidence was admissible in the civil proceeding, a question for the trial judge.

In circumstances where more significant concerns have been raised regarding the production of the Crown Brief, courts have shown a willingness to tai-

lor an order to address those concerns while still permitting disclosure, rather than prohibit production outright.

One example of this is *G. (N.) v. Upper Canada College*, 2004 CarswellOnt 1966, 50 C.P.C. (5th) 218 (Ont. C.A. [In Chambers]), where a restrictive order for production made by the Master was upheld by the Court of Appeal. In *N.G.*, a party to a civil proceeding applied for production of a videotaped statement given by a complainant, where criminal proceedings for sexual assault were ongoing. The Attorney General opposed this production due to concerns that witnesses would become "tainted" if they were to learn what the complainant told the police in the videotape.

The Master permitted production of the videotape, but subject to the following constraints:

1. only counsel for the parties to the civil action could receive copies of the videotape and transcript;
2. counsel could show the videotape to their clients (including insurers) and could discuss the contents with them, but were required to ensure that no copies were made; and
3. counsel and the parties were required to take all reasonable steps to ensure that potential witnesses in the criminal trial are not exposed to the contents of the videotape, subject to any ruling the trial judge may make with respect to admissibility and the imposition of any safeguards appropriate to that context.

The Court of Appeal upheld the Master's decision, concluding that any such risk was "speculative" due to the restrictions put in place in the original order, and denied the Attorney General's request for a stay of the order pending a final determination in the criminal proceeding. The court noted that such a stay would result in a delay to the civil proceeding that "clearly outweighs any harm that might be suffered by the Attorney General and its interest in a fair criminal trial by reason of the production of the videotape."

In other cases, the court has delayed production of the Crown Brief to address concerns regarding impacts of disclosure on ongoing criminal proceedings.

For example, in *Dixon v. Gibbs*, 2003 CarswellOnt 44, [2003] O.J. No. 75, 29 C.P.C. (5th) 290 (Ont. S.C.J.) the court agreed with the Attorney General's request to delay production of the Crown Brief in a collateral child custody proceeding, pending the completion of a preliminary inquiry in a criminal prosecution. The criminal proceedings involved the alleged hiring of a hit man by the accused father to murder the child's mother.

The AG argued that disclosure of the Crown Brief could prejudice the criminal prosecution if information in the Crown Brief was provided to a potential witness. The respondent mother argued that information in the Crown Brief was highly relevant to the issues of custody and access to their three year old child. The accused father consented to the disclosure of the Crown Brief.

While the court noted that the Crown Brief was relevant to the child custody proceeding, it determined that, in balancing the public interest, its production should be delayed until the completion of the preliminary inquiry in the criminal proceeding. At that point, the court noted that the crown witnesses would have given evidence under oath and their evidence could no longer be challenged as tainted or corrupted by the disclosing of evidence in the Crown Brief. The court distinguished the case before it from *Wagg*, primarily on the basis that the criminal charges, including the preliminary hearing, had not yet been held, thereby increasing concerns regarding potential interference with the administration of justice.

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Dealing Effectively With Ineffective Assistance of Counsel Claims

by Enzo Rondinelli

Introduction

For those of us that do a fair share of appellate work, we are quite familiar with two common complaints made by clients at our initial meeting with them: either the judge "screwed" them, or their lawyer did. Rarely is it acknowledged that the crystal clear HD surveillance video or the two-hour long confession may have played a part in their conviction. Similar to client complaints about police brutality upon arrest, the very large majority of complaints of ineffective assistance of counsel are unfounded. Nevertheless, the claim is a frequent one. Indeed, the claim became so commonplace in the mid to late 1990s, that it prompted the Ontario Court of Appeal to establish a procedural protocol regarding allegations of incompetence of trial counsel in criminal cases. The protocol can be viewed at the Court's website[1] and I do not propose to discuss it in any detail. Instead, I will highlight a three-prong approach that counsel confronted with the possibility of raising an ineffective assistance of counsel claim may wish to consider. The **WTF** approach involves being ***well-mannered*** during the investigation phase; evaluating the prospects of meeting the legal ***test*** for incompetence; and considering whether ***fresh evidence*** may be the better route to success.

The *WTF* approach involves being *well-mannered* during the investigation phase; evaluating the prospects of meeting the legal *test* for incompetence; and considering whether *fresh evidence* may be the better route to success.

Well-Mannered

No lawyer likes to be accused of being incompetent, particularly when the accusation rests on the implication that a wrongful conviction (and usually some accompanying imprisonment) has resulted due to a lawyer's actions. Therefore, sending the trial lawyer an "*Elliott* letter" in conformity with the Ontario Court of Appeal protocol outlining a long list of allegations that amount to the lawyer being professionally incompetent and demanding an explanation may, not surprisingly, be met with much agitation and defensive evasiveness on the part of the trial lawyer. Defence lawyers are accustomed to making arguments that police suffered from "tunnel vision" in becoming convinced that the client is guilty and thus ignoring other legitimate avenues of investigation. Appellate counsel must be careful to avoid similar tunnel vision of incompetence. Treating trial counsel with respect and civility throughout the protocol should be the norm and not the exception in dealing with such claims.

Treating trial counsel with respect and civility throughout the protocol should be the norm and not the exception in dealing with such claims.

I have found that calling the lawyer in question before sending any letter can serve two purposes. Firstly, it serves as an introduction to both yourself and the required protocol. Calling the trial lawyer will go a long way in fostering an initial investigation built on co-operation rather than encumbrances, as I explain to the lawyer: that I have been retained by his or her former client and some initial consultation with the client suggests that ineffective assistance of counsel may be an issue; that I understand how serious an allegation it is and that I do not take these sorts of allegations lightly; that I have not reached any conclusions with respect to the claim; and that in my experience, only in the rarest of cases have I found sufficient merit to continue any further than the initial investigation stage. In addition, many trial counsel are not fully aware of the Court of Appeal's protocol but come to appreciate through our conversation that my duty to investigate is particularized, further reducing any perceived acrimony between us.

Secondly, a phone call to trial counsel can quickly sort out fact from fiction. Since much of the initial foundation for the incompetence claim is derived from the client's own account, appellate counsel must always approach these claims with a good dose of wariness. As Justice Doherty most eloquently observed in *R. v. Archer*, 2005 CarswellOnt 4964, 34 C.R. (6th) 271 (Ont. C.A.) at para. 142: "Looking backwards through the bars of a jail cell is not the most reliable of vantage points from which to see events that culminated in the conviction." A simple phone call may uncover the real crux of the client's dissatisfaction (eg. excessive fees paid for an unwelcomed result) and can avoid the protocol unnecessarily being set in motion. The phone call may also shed light on the potential of fresh evidence to be used on appeal, more on that is discussed below.

The Test

It cannot be emphasized enough that the test to establish ineffective assistance of counsel is extremely high. As Justice Watt recently noted in *R. v. G. (D.M.)*, 2011 ONCA 343, 2011 CarswellOnt 2825 (Ont. C.A.):

> [101] The burden of establishing ineffective representation at trial that warrants appellate intervention rests upon the appellant who urges it. The burden is not easily discharged. Our approach to these claims requires caution: *B. (M.)* at para. 7.
>
> * * *
>
> [104] In large measure, the nature of any demonstrated incompetence will dictate the kind of inquiry required to determine the effect of that incompetence on the fairness of the trial. Pervasive incompetence demands that the focus of the inquiry be on the effect of that incompetence on the fairness of the adjudicative process: *Joanisse* at pp. 62-63.
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> * * *
>
> [107] The performance component has to do with incompetence on the part of trial counsel. We determine incompetence according to a standard of reasonableness that begins from a strong presumption that trial counsel's conduct falls within the vast expanse of reasonable professional assistance. We place the onus on the appellant to establish the conduct of counsel, whether acts or omissions, that are alleged not to have been the result of reasonable professional skill. We eschew the role of the Monday morning quarterback. The omniscience of hindsight occupies no place in our analysis: *B. (G.D.)* at para. 27.
>
> [108] It is critical to keep in mind that, during the course of criminal proceedings, defence counsel make many decisions in good faith and in the best interests of his or her client. We oughtnot look behind every decision counsel makes, except where it is essential to prevent a miscarriage of justice. Defence counsel need not always obtain approval for each and every decision they make in the conduct of an accused's defence: *B. (G.D.)* at para. 34.

Anyone who still has doubts as to the rigidness of the test need only re-read *R. v. Prebtani*, 2008 ONCA 735, 2008 CarswellOnt 6268 (Ont. C.A.), leave to appeal refused 2009 CarswellOnt 4374, 2009 CarswellOnt 4375 (S.C.C.). In that case, the appellant appealed his convictions for assault, assault with a knife, and uttering a death threat on

The key then, to a successful claim of ineffective assistance of counsel, is demonstrable prejudice to the client.

the grounds that he received ineffective assistance of counsel at trial. It was established on appeal that the trial counsel was unaware of the doctrine of recent fabrication and lacked sufficient legal knowledge about the admissibility of prior consistent statements, the collateral fact rule, and the permissible limits of examination and cross-examination of witnesses. Add to it that the trial lawyer was, unbeknownst to the appellant, suspended from practice by the Law Society of Upper Canada during the representation of the client, and it would appear to be a strong case of incompetence. Nevertheless, the Court dismissed the appeal, holding that the appellant was not prejudiced by trial counsel's conduct.

The key then, to a successful claim of ineffective assistance of counsel, is demonstrable prejudice to the client. As Justice Watt reminds us in *D.M.G.*, *supra* at para. 102, "In the absence of prejudice, it is superfluous to consider the performance or competence component." It is important for appellate counsel not to get caught up solely on the antics of trial counsel. The real question the Court of Appeal will want answered is, "So what?" In determining whether there is a legitimate answer to the "so what?" question, appellate counsel may consider discussing the facts of the case with senior trial counsel. If the conduct in question fails to raise any concerns of prejudice with an experienced counsel, the odds of convincing an appellate court of any harm are slim.

Fresh Evidence

There appears to be an interesting development in the case law in the last couple of years of which counsel should take notice. Rather than embark on a course of ineffective assistance of counsel — with its associated potential of antagonistic response by trial counsel and its high burden to establish — certain cases may instead be better suited by pursuing a different fresh evidence approach. In doing so, counsel will have to meet the fresh evidence test established in *R. v. Palmer* (1979), 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759, 14 C.R. (3d)

Prepping for trial.

22, 17 C.R. (3d) 34 (Fr.) (S.C.C.). That is: (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial; (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (3) the evidence must be credible in the sense that it is reasonably capable of belief; and (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

If appeal counsel is of the view that the potential exists that a miscarriage of justice occurred at trial, there may be no need to lay blame at the trial counsel's feet by way of an ineffective assistance of counsel claim. Instead, a more traditional resort to fresh evidence may be appropriate. This is particularly effective where forensic science is at play. For example, in *R. v. Hay*, 2010 SCC 54, 2010 CarswellOnt 8689, 2010 CarswellOnt 8690, 80 C.R. (6th) 23 (S.C.C.), the Supreme Court of Canada granted an order to release two trial exhibits and their delivery to the Centre of Forensic Sciences for examination for the purpose of supplementing an application for leave to appeal to the Supreme Court with fresh evidence. The exhibits in question were hair clippings and were released so it could be determined whether the hair was facial or scalp hair (an issue that was critical to determining whether the verdict was unreasonable). While this testing could have been undertaken at the time of trial, defence counsel at trial indicated that he was unaware that forensic analysis could distinguish between scalp and facial hairs. In addition, counsel on the appeal to the Court of Appeal indicated that he was similarly unaware of the feasibility of such testing. Due to the potential importance of such evidence, the Supreme Court allowed the release of the exhibits for testing because it was in "the interests of justice to do so."

Certain cases may instead be better suited by pursuing a different fresh evidence approach.

Recently in *R. v. A. (J.)*, 2011 SCC 17, 2011 CarswellOnt 2237, 2011 CarswellOnt 2238 (S.C.C.), the Supreme Court of Canada granted an appeal ordering a new trial on the basis of fresh evidence. The accused was convicted of sexual assault and assault with a weapon. The complainant had testified that the accused had bitten her finger during the assault and a police officer testified that he saw a cut on the accused's finger that looked like a bite mark. In convicting the accused, the trial judge relied on the injury to the accused's finger as corroborative evidence. On appeal, the accused moved to introduce fresh evidence from a forensic dentist, who concluded that the mark on his finger was not the result of a bite mark. While the Supreme Court held that the fresh evidence clearly did not meet the due diligence criterion, as this evidence could have been adduced at trial, the Court observed that the due diligence criterion should not trump the other *Palmer* criteria, particularly in circumstances such as here where trial counsel's strategy was not unreasonable given the nature of the anticipated Crown evidence. The Court ordered a new trial since the evidence was "sufficiently cogent that it could reasonably be expected to have affected the verdict."

Also of note are the growing number of wrongful convictions premised on the strength of the evidence of Dr. Charles Smith whom, given his stature at the time, the defence did not believe could successfully contest.[2] In none of these cases does the Court of Appeal criticize defence counsel for advising their clients in the manner that they did despite the clients' continued assertions of innocence.

These lines of cases demonstrate that it is acceptable for trial counsel to admit a mistake without having to admit incompetence. It is inevitable that mistakes are made during the heat of battle of a trial. Establishing the context within which trial counsel made particular decisions may enable both the appeal counsel and the trial lawyer to devise a plan for a united front on appeal. That is, one that focuses on remedying a wrongful conviction, rather than one that risks the Court of Appeal being sidetracked with an examination of the performance of trial counsel.

Conclusion

Ineffective assistance of counsel claims are serious business, both figuratively and literally. Such claims, even if ultimately determined to be spurious, can impact negatively on the aggrieved trial lawyer's ability to attract new clients. The lawyer's professional integrity will undoubtedly suffer as well. Therefore, counsel faced with a decision as to whether to pursue such a claim should make best efforts to not only investigate fully and fairly, but also to consider whether any viable alternatives exist that could better serve the client without risking unwarranted personal and professional embarrassment of a fellow lawyer.

NOTES:

[1] http://www.ontariocourts.on.ca/coa/en/notices/adminadv/protocol.htm

[2] *R. v. Sherret-Robinson*, 2009 ONCA 886, 2009 CarswellOnt 7782 (Ont. C.A.); *R. v. Marquardt*, 2011 ONCA 281, 2011 CarswellOnt 2328 (Ont. C.A.); *R. v. Brant*, 2011 ONCA 362, 2011 CarswellOnt 3005 (Ont. C.A.).

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Keeping Secrets: Should defence counsel ever undertake not to disclose information to a client?

by John Norris

The accused's right to be present at and participate in his or her trial is a cornerstone of our system of justice.2 It is rooted in the principles of fundamental justice, which contemplate an adversarial process for resolving the question of guilt or innocence.3 Fundamental justice requires "substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case."4

While proceedings in the absence of the accused are rare once a charge has been laid, there are circumstances in which resort to them may be necessary. Typically they will be concerned with an objection to disclosure or production on the basis of a privilege or some other recognized interest. Some objections are dealt with as a matter of common law (e.g. solicitor/client privilege); others will trigger proceedings under ss. 37 or 38 of the *Canada Evidence Act*. Whatever the case may be, it is axiomatic that the objection cannot be rendered moot by the choice of procedure for deciding whether it is properly made. As a result, in some circumstances it will be necessary to conduct a proceeding which the accused him or herself cannot be present at or be privy to its contents unless and until the matter is determined in his or her

While proceedings in the absence of the accused are rare once a charge has been laid, there are circumstances in which resort to them may be necessary.

favour. This is so even if the ruling can have a direct bearing on something as fundamental as the right to make full answer and defence. Other circumstances can also require withholding information from the accused: for example, measures to protect the identity of a witness (e.g. withholding the witness's name, having the witness testify behind a screen or via close circuit television with his or her face obscured, etc.).[5]

The need to withhold information from the accused or to engage in *ex parte*, *in camera* proceedings will vary from case to case and issue to issue. A claim of informer privilege or solicitor/client privilege is generally – but not always – easily determined on well-established principles and a simple evidentiary record. On the other hand, some issues bearing on the right to disclosure — for example, the balancing of interests under ss. 37 or 38 of the *Canada Evidence Act* — can be much more difficult to decide in a given case, both legally and factually. Whether the closed proceeding is simple or complex, the exclusion of the accused is contrary to the fundamental principle that an adversarial process is the best mechanism for achieving just results and raises serious concerns under s. 7 of the *Charter*. As the Supreme Court of Canada held in *R. v. Basi* concerning a claim of informer privilege, it is "essential that claims of privilege be resolved accurately and fairly, bearing in mind that *ex parte* proceedings raise serious procedural fairness concerns of particular significance in the conduct of criminal prosecutions, where the liberty of the accused is at stake."[6] As a result, the Court emphasized that "the interest of accused persons in being present (or, at least, represented) at any proceeding relating to the charges they face remains a fundamental one, even where s. 650, by its very terms, has no application. An *ex parte* procedure is particularly troubling when the person excluded from the proceeding faces criminal conviction and its consequences."[7]

One way to ensure a fair proceeding when information must be withheld from the accused is to allow defence counsel to have access to the information and to participate in any closed proceeding on appropriate terms and conditions.

One way to ensure a fair proceeding when information must be withheld from the accused is to allow defence counsel to have access to the information and to participate in any closed proceeding on appropriate terms and conditions. This has many significant benefits. Defence counsel enjoys his or her client's confidence, is duty bound to protect and promote the client's interests with undivided loyalty, will be thoroughly familiar with the case and will have been instructed on the client's defence. As well, an adversarial process can play a critical role in preventing over-claiming of privileges or other reasons to withhold disclosure. Giving defence counsel access to the information withheld from the client and the opportunity to participate in the closed hearing might appear to be the optimal approach not only from the point of view of the accused but also from that of the administration of justice. The accused's own counsel continues to represent his or her interests and counsel's familiarity with the brief will ensure not only that the process unfolds efficiently but also that the court receives the greatest possible assistance.

One example of defence counsel being granted access to confidential information (much of it protected as a matter of national security) is the Air India trial.[8] On undertakings of confidentiality to the court, defence counsel were permitted essentially unrestricted access to the massive files generated over many years of investigation by the Canadian Security Intelligence Service and the RCMP into the Air India bombings for the purpose of identifying material whose disclosure was judged necessary for the accused to make full answer and defence. Defence counsel, with the singular advantage of knowing their clients' brief, were able to sift quickly through vast quantities of irrelevant material and identify the small subset of material that could be of assistance to the defence. Through negotiations, agreement was reached over all disclosure requests pursued by the defence. As a result, time-consuming and complex litigation under s. 38 of the *Canada Evidence Act* was avoided.

Of course, allowing defence counsel to have access to the classified files required a fundamental change in the solicitor/client relationship; defence counsel would no longer be free to share everything he or she knew with his or her client.

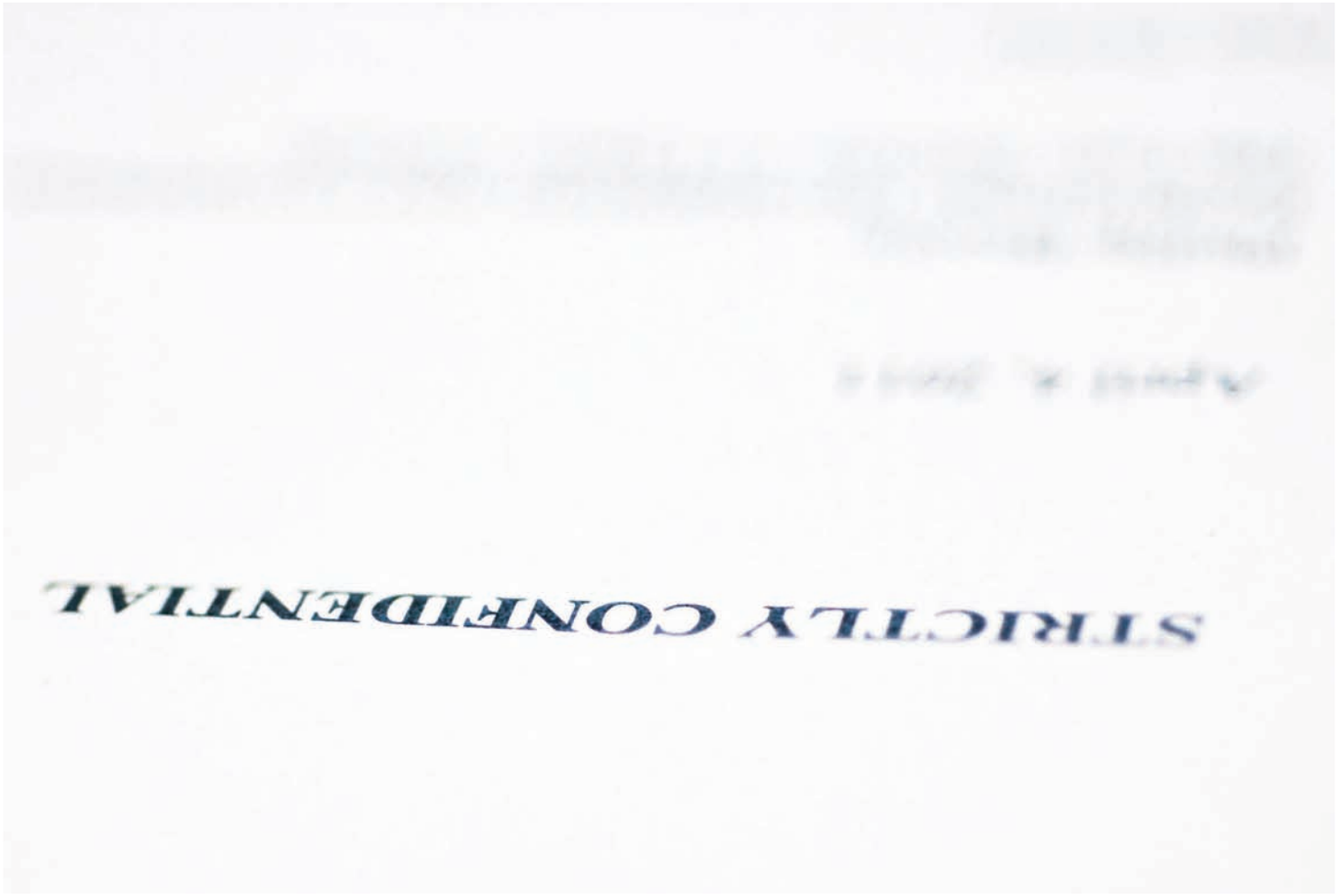
Of course, allowing defence counsel to have access to the classified files required a fundamental change in the solicitor/client relationship; defence counsel would no longer be free to share everything he or she knew with his or her client. On the contrary, as a condition of access to the classified material and participation in any closed hearing, counsel would be required to assume an obligation not to

share certain information with his or her client.

In general, the freeflow of information is essential to the solicitor-client relationship. Counsel must be "honest and candid" when advising clients.[9] Just as the client must provide the lawyer with all relevant information if the lawyer is to provide the best advice, so too must the lawyer provide the client with all relevant information if the client is to provide appropriate instructions.[10] The duty to provide competent services entails keeping a client reasonably informed.[11] Being in possession of relevant information which the lawyer is unable to share with a client (e.g. because it is privileged information from another client) creates a potentially disqualifying conflict of interest.[12]

Clearly, the general rule is that the lawyer is required to share all relevant information with the client. The only example of non-disclosure addressed directly by the *LSUC Rules of Professional Conduct* is medical-legal reports. A lawyer who receives a medical-legal report from a physician or health professional that is accompanied by the proviso that it not be shown to the client must return the report immediately unless the lawyer has received specific instructions from the client to accept the report on this basis.[13] If a client asks to see a medical-legal report that contains opinions or findings that if disclosed might cause harm or injury to the client, the lawyer must attempt to dissuade the client from seeing the report but if the client insists, the lawyer must produce the report.[14] The obligation to share information trumps even the risk of harm or injury to the client.

The question of whether defence counsel should be allowed to have access to information that cannot be shared with the client was considered by the Supreme Court of Canada in *Basi*. In a prosecution of former political aides for corruption and breach of trust in connection with alleged bid-rigging in the sale of BC Rail, the Crown objected to disclosure of certain information on the grounds of informer privilege. The Crown applied to call evidence to establish the privilege in an *in camera* proceeding from which not only the public but also the three defendants and their counsel were excluded. Justice Bennett (as she



then was) ruled that defence counsel would be permitted to participate in the *in camera* hearing to determine whether informer privilege had been properly claimed.[15] This participation was conditional upon defence counsel undertaking that "he or she will not disclose anything heard in the *in camera* hearing to anyone, including his or her client, other members of his or her law firm, their family or any members of the public without further order of this Court. Failure to comply with this order will result in a contempt of court hearing."

The Crown responded by filing a certificate under s. 37(1) of the *Canada Evidence Act* to the effect that objection was taken to the procedure adopted by the trial judge. Justice Bennett dismissed the application pursuant to s. 37(1) and ruled that the *in camera* hearing would occur with defence counsel present. The Crown's appeal of this ruling was dismissed by a majority of the British Columbia Court of Appeal.[16]

The constant worry for defence counsel entrusted with information that he or she is obliged not to disclose is the risk of inadvertent or accidental disclosure.

On the Crown's further appeal, the Supreme Court of Canada held that for a judge to allow anyone other than the informer, the police and the Crown to have access to information which might reveal the informer's identity would undermine the privilege itself. The Court held: "No one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies."[17]

Of course, the accused may refuse to provide the necessary instructions and waiver to permit defence counsel to participate in closed proceeding. Or defence counsel may be unwilling to become privy to a process from which his or her client is excluded. But where defence counsel are willing and able to provide the requisite undertaking, there can be no doubt that the undertaking of counsel is a powerful tool for maintaining confidentiality. As Donald J.A. observed in *Basi*:

> The sanctions against disclosure are powerful enough to keep the secret closely held. If defence counsel were to disclose the informant's identity in breach of the court-ordered undertaking, they would likely bring their careers to an end. As to any activity in pursuit of a defence that might indirectly tip off the identity, counsel are aware they must tread carefully, as must the prosecution, and they will seek the permission of the judge prior to engaging in any such activity. In short, the force of the undertaking effectively prevents a breach of a duty, while providing the respondents the right to full answer and defence. The limitations on the right created by the undertaking are accepted by the respondents as a practical compromise.[18]

As long as anyone privy to the identifying information is duty-bound to maintain its confidentiality, the privilege is safeguarded. The Court's conclusion that the "circle of privilege" cannot be expanded does rather seem to beg the question.

Equally important to the Court's analysis, however, was this observation: "To hold otherwise is to place defence counsel in an awkward and professionally undesirable position. The concern is not that defence counsel would intentionally violate their undertakings or the court order; rather, it is that *respecting* the undertakings and court order would, at best, strain the necessary relationship between defence counsel and their accused clients" and, at worst, create conflicting duties that could require defence counsel to withdraw.[19]

Drawing on *Basi* and other jurisprudence,[20]the following practical and ethical considerations weigh heavily against defence counsel ever agreeing to become privy to information on the condition that it cannot be shared with the client.

First, the constant worry for defence counsel entrusted with information that he or she is obliged not to disclose is the risk of inadvertent or accidental disclosure. While the degree of risk will vary from case to case, it cannot always be determined in advance. In *R. v. G*, the Court of Appeal quoted with approval the following comments by Bryson J. in *D&J Constructions v. Head*:

The withholding of information can be corrosive to the solicitor/client relationship in broader ways.

> it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control.[30]

Critically, in every case the caution that counsel must exercise to avoid unauthorized disclosure of information can erode or impair the very relationship that made using defence counsel in the closed hearing seem like such a good idea in the first place. The vigilance and second-guessing that counsel must engage in to ensure that he or she fulfills the obligation to the court he or she has assumed can impede the freeflow of information and advice that

is the essence of the solicitor-client relationship.

Second, the withholding of information can be corrosive to the solicitor-client relationship in broader ways. As the Court of Appeal noted in *R. v. G*, "the relationship between a lawyer in the know and his client is bound to be damaged because, in addition to preventing frankness and fettering the free flow of information between lawyer and client, the order is likely to nurture in the client a belief that his lawyers are putting other interests, possibly including those of the prosecution, above his own."[22] In a similar vein, the Supreme Court of Canada observed in *Basi*:

> It is true that defence counsel gave their undertakings of non-disclosure with the consent of their clients. At the time, however, the privileged information was otherwise inaccessible to both the accused *and* their counsel. Once the information is in the hands of their counsel, the consent freely given beforehand might understandably be viewed by the accused as consent given without choice. And consent thought to have been given without choice, even if not repudiated, is bound to be resented.[23]

Third, as the proceedings unfold after defence counsel has had access to the closed material, defence counsel could conclude that their professional obligations do not permit them to continue to act in the matter and they must therefore seek leave to withdraw. Defence counsel could find himself caught in a conflict between the duty to represent the client's best interests and the duty to the court not to disclose or act on information heard *in camera*.[24] Again, this is something that might be completely unforeseeable. What is defence counsel to do if, for example, the client suggests that counsel interview and potentially call as a witness someone who counsel knows from the closed material is a confidential informant against the client? Equally, information disclosed in the course of the closed hearing may lead Crown counsel to conclude that defence counsel has been placed in a conflict of interest and to move to have counsel removed. In either case, removing counsel from the record can have significant costs not only to the accused but also to the administration of justice generally.

Finally, in the real world of criminal litigation, there are other risks too. An unscrupulous client might try to obtain the withheld information from counsel through carefully crafted questions. Counsel could become the target of threats or extortion from third parties. Someone who found it to be advantageous to leak confidential information might find it convenient to shift suspicion onto defence counsel. While all this might seem to be the stuff of fiction, the stakes associated with certain types of cases and certain types of confidential information can be very high indeed. These kinds of risks cannot simply be dismissed as fanciful.

Before venturing into this minefield, it must, of course, be shown that information must be withheld from the accused or that a closed hearing is necessary for the proper adjudication of the point in issue. The Crown, of course, cannot introduce withheld information as evidence at a criminal trial without providing it to the defence.[25] But when collateral proceedings are triggered, it must be remembered that it is always better to adjudicate matters in open court and in the presence of the accused if possible.[26] Thus, the Court held in *Basi* with respect to the determination of informer privilege that "the accused and defence counsel should [...] be excluded from the proceedings only when the identity of the confidential informant cannot be otherwise protected. And even then, only to the necessary extent."[27] A closed hearing "should be seen as a last resort."[28] If a closed hearing is necessary, to protect the interest of the accused in being present or, at least, represented, at any proceeding relating to criminal charges he or she is facing, "trial judges should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence. Trial judges have broad discretion to craft appropriate procedures in this regard."[29] This can include providing defence counsel with the opportunity to suggest questions to be put to witnesses in the *ex parte* hearing, providing a redacted or summarized version of the evidence presented *ex parte* and providing defence counsel with the opportunity to make submissions on the issues to be determined.[30] It can also include the appointment of an *amicus curiae* to make the closed proceeding more adversarial in nature.[31] With such measures available, it would require compelling circumstances justify assuming all the risks associated with defence counsel receiving information on an undertaking of confidentiality.

While creating a barrier to the free flow of information is a fundamental change in the relationship between solicitor and client, there is no reason why, as a matter of principle, counsel could not recommend it to his or her client or why the client (on independent advice) could not agree to it. That said, the practical and ethical considerations outlined above suggest that it should only be in the exceptional case that defence counsel should ever agree to a restriction on his or her right and, indeed, duty to share information with the client.

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NOTES:

[2] *Criminal Code,* s. 650. See *R. v. Barrow*, 1987 CarswellNS 344, 1987 CarswellNS 42, [1987] 2 S.C.R. 694, 61 C.R. (3d) 305 (S.C.C.) at paras. 11, 16-21 and 34; *R. v. Côté*, 1986 CarswellQue 99, 1986 CarswellQue 4, [1986] 1 S.C.R. 2, 49 C.R. (3d) 351 (S.C.C.) at paras. 12-15; and *R. v. Hertrich*, 1982 CarswellOnt 1258, 67 C.C.C. (2d) 510 (Ont. C.A.) at pp. at 526-28 [C.C.C.], leave to appeal refused [1982] 2 S.C.R. x (S.C.C.).

[3] *R. v. Swain*, 1991 CarswellOnt 1016, 1991 CarswellOnt 93, [1991] 1 S.C.R. 933, 4 O.R. (3d) 383, 5 C.R. (4th) 253 (S.C.C.) at paras. 34-35.

[4] *Charkaoui, Re*, 2007 CarswellNat 325, 2007 CarswellNat 326, [2007] 1 S.C.R. 350, 54 Admin. L.R. (4th) 1, 44 C.R. (6th) 1, 59 Imm. L.R. (3d) 1 (S.C.C.) at para. 61.

[5] See the comprehensive discussion of these sorts of measures in *Air India Flight 182: A Canadian Tragedy,* Report of the Commission of Inquiry into the Investigation of the Bombing of air India Flight 182), Volume III, "The Relationship between Intelligence and Evidence and the Challenges of Terrorism Prosecutions," pp. 198-221.

[6]2009 CarswellBC 3869, 2009 CarswellBC 3870, 70 C.R. (6th) 18, 248 C.C.C. (3d) 257 (S.C.C.) at para. 52.

[7] Para. 54.

[8] *Charkaoui*, *supra* note 4, at para. 78.

[9] *LSUC Rules of Professional Conduct,* Rule 2.02(1).

[10] Proulx and Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001), at pp. 135-36.

[11] See, for example, CBA Code of Professional Conduct, Ch. II, comm. 7(a).

[12] The commentary to rule 2.04 of the LSUC Rules of Professional Conduct states that conflicting interests include "the duties and loyalties of a lawyer to any other client, including the obligation to communicate information."

[13] LSUC Rules of Professional Conduct, rule 2.02(7).

[14] LSUC Rules of Professional Conduct, rule 2.02(8).

[15] 2007 BCSC 1898, 2007 CarswellBC 3683 (B.C. S.C. [In Chambers]), affirmed 2008 CarswellBC 3322, 59 C.R. (6th) 297 (B.C. C.A.), reversed 2009 CarswellBC 3869, 2009 CarswellBC 3870, 70 C.R. (6th) 18 (S.C.C.), additional reasons to 2007 BCSC 1888, 2007 CarswellBsC 3682 (B.C. S.C. [In Chambers]).

[16] 2008 CarswellBC 3322, 59 C.R. (6th) 297, 235 C.C.C. (3d) 383 (B.C. C.A.), reversed 2009 CarswellBC 3869, 2009 CarswellBC 3870, 70 C.R. (6th) 18 (S.C.C.) ("*Basi* (BCCA)")

[17] *Basi, supra* note 15, at para. 44.

[18] *Basi* (BCCA), *supra* note 16, at para. 73.

[19] *Basi, supra* note 15 at paras. 45 and 46; *R. v. Ahmad*, 2011 SCC 6, 2011 CarswellOnt 583, 2011 CarswellOnt 584, 81 C.R. (6th) 201 (S.C.C.) at para. 49.

[20] See, for example, *R. v. G*, [2004] EWCA Crim 1368, [2004] 2 Cr. App. R. 37, [2004] 1 W.L.R. 2932 (Eng. C.A.) and *R v. Davis*, [2006] EWCA Crim 1155. *R. v. G* concerned a large-scale prosecution for investment fraud in which Crown counsel inadvertently disclosed in an unredacted paragraph of a document highly secret and sensitive material which the trial judge had previously ruled was not subject to disclosure on the basis of public interest immunity. Some, although not all, of the defence counsel read the sensitive material before the trial judge made a ruling prohibiting further disclosure or dissemination of the information in question. On an urgent appeal to the Court of Appeal, the Court ruled that defence counsel who were privy to the information could not continue to act at trial. *Davis* concerned the use of witness anonymity orders in the United Kingdom. The judgment of the Court of Appeal was subsequently overturned by the House of Lords, but not on this point: see [2008] UKHL 36.

[21] *Ibid* at para. 13.

[22] *Supra* note 20, at para. 13.

[23] *Basi*, *supra* note 15, at para. 47.

[24] *Basi, supra* note 15, at para. 46.

[25] *Basi, supra* note 15, at para. 51.

[26] Regarding the open court principle, see *Toronto Star Newspapers Ltd. v. Ontario*, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 29 C.R. (6th) 251, 197 C.C.C. (3d) 1 (S.C.C.); *Re Vancouver Sun*, 2004 CarswellBC 1376, 2004 CarswellBC 1377, 21 C.R. (6th) 142, [2005] 2 W.W.R. 671, 184 C.C.C. (3d) 515 (S.C.C.) at paras. 22-31; and *Re Application to proceed in camera* (2007), 2007 CarswellBC 2418, 2007 CarswellBC 2419, [2008] 1 W.W.R. 223, 51 C.R. (6th) 262, 73 B.C.L.R. (4th) 34, 224 C.C.C. (3d) 1 (S.C.C.) at paras. 31-37.

[27] *Basi*, *supra* note 15, para. 53.

[28] *Application to Proceed In Camera (Re), ibid*, at para. 41.

[29] *Basi, supra* note 15, para. 55.

[30] Similarly, see the procedure adopted by Watt J. (as he then was) for editing a wiretap affidavit in *R. v. Parmar*, 1987 CarswellOnt 824, 34 C.C.C. (3d) 260 (Ont. H.C.).

[31] *Application to Proceed In Camera (Re)*, *supra* note 26, at para. 48; *R. v. Ahmad*, *supra* note 19 at para. 47.

National Security Litigation: When is Half a Loaf Enough?

by Anil K. Kapoor

The most vexing problem in national security litigation arises out of the use of secret intelligence information in a public court process.

Intelligence agencies conduct their work in secret. It is not in anyone's interest to have it any other way. Secrecy is very much the standard operating procedure for intelligence agencies the world over; CSIS is no different. Our ability to maintain co-operation from our allies and to maintain our ability to share information depends very much on our ability to maintain their confidence that information can be protected. This is also true of human sources that are likely not to co-operate if intelligence agencies cannot keep their information and identities secret. Ultimately, secrecy and control of intelligence information is a necessary operating norm and is fundamental to the work of intelligence agencies.

In a very real sense, the judiciary is the bulwark against state excess, ensuring that individuals are at liberty to pursue their lives without unjustified state intrusion.

No less fundamental is the public nature of our justice system. The justice system is a cornerstone of our democratic process. It must transact its business in public to earn and maintain the respect and confidence of the public. In a very real sense, the judiciary is the bulwark against state excess, ensuring that individuals are at liberty to pursue their lives without unjustified state intrusion. Without public confidence the judiciary cannot effec-

tively discharge this responsibility. Secret judicial processes undermine public confidence in the judiciary and are rightly considered an anathema. Quite apart from the relationship between the wider public and the judicial process, another fundamental tenet of our system is that persons who are brought to court or who turn to the court for redress are able to participate in the process: they have the right to be heard and to advocate their position. When secrecy prevents people from obtaining information about their case, confidence in our courts is eroded.

The stakes can be high when deciding if and how much information can be publicly disclosed. There is no doubt that some information is properly protected, just as there is no doubt that government routinely overstates the need for secrecy. The Special Advocates' role is two-fold: first, to challenge government assertions of national security privilege, and second, to test the government's case in closed hearings to the extent that such a challenge is necessary.

National security litigation is dominated by the tension between the need for an open court process and the need to keep intelligence information secret. A series of procedural innovations have been developed to ease this tension and to better meet the challenges associated with handling security intelligence information in the court system. Perhaps the most revolutionary innovation is the creation of Special Advocates. The use of Special Advocates and the tension between secrecy and openness creates unique issues for counsel to be mindful of when litigating national security cases.

The role of the Special Advocate in national security litigation is unlike any other in our system. A Special Advocate is at once an advocate for a particular litigant, a guardian of the litigant's adversaries' secrets, and shares characteristics traditionally associated with amicus. The role was created through amendments to the security certificate process in division nine of the *Immigration Refugee Protection Act (IRPA)*, and has been replicated on comparable terms in civil and criminal cases involving national security information.

The key to successfully navigating national security litigation is to have close co-operation between the lawyers who act for the litigant and the Special Advocate. Without effective co-operation and co-ordination, the litigant's interests will not be adequately advanced and protected.

Intelligence information is amongst the most sensitive that our government possesses. Often the information is from other agencies or from human and technical sources, both domestic and foreign. The secrecy imperative may originate sfrom a concern for maintaining international relationships, as the information at issue may be the property of a foreign government. In addition, the information may concern present and future threats, the publicity of which will undermine our national security. Therefore, the stakes can be high when deciding if and how much information can be publicly disclosed. There is no doubt that some information is properly protected, just as there is no doubt that government routinely overstates the need for secrecy; the difficulty lies in devising a process that can identify the information that is properly protected and to protect nothing more.

Secrecy, or the need for confidentiality, shapes the contours of the role of the Special Advocate and defines their ethical duties and responsibilities, which are different than the familiar fiduciary responsibilities one maintains in a traditional solicitor-client relationship.

To appreciate the challenges posed, a brief review of the security certificate regime is in order. Security certificates can be issued by the Ministers of Public Safety and of Citizenship and Immigration Canada (the Ministers), pursuant to which non-citizens can be removed on the grounds that they are inadmissible to Canada because they pose a threat to national security. The certificate is then referred to the Federal Court to determine if it is reasonable. The presiding judge may rely on undisclosed information to conclude that the person is a threat to the nation's security and order that person's deportation. The reliance on information that has not been disclosed to decide the *lis* is unique in Canadian law.[1] The basis for keeping the information secret is that its disclosure would be injurious to national security or to the safety of any person. However, the fact that decisions can be made on information that has not been disclosed moved the Supreme Court to invalidate that portion of the legislation in 2007 because it failed to provide basic due process protections. The Supreme Court reasoned:

> Under the IRPA, the government effectively decides what can be disclosed to the named person. Not only is the named person not shown the information and not permitted to participate in proceedings involving it, but no one but the judge may look at the information with a view to protecting the named person's interests. Why the drafters of the legislation did not provide for special counsel to objectively review the material with a view to protecting the named person's

> interest, as was formerly done for the review of security certificates by SIRC and is presently done in the United Kingdom, has not been explained. The special counsel system may not be perfect from the named person's perspective, given that special counsel cannot reveal confidential material. But, without compromising security, it better protects the named person's s. 7 interests.
>
> I conclude that the IRPA's procedures for determining whether a certificate is reasonable and for detention review cannot be justified as minimal impairments of the individual's right to a judicial determination on the facts and the law and right to know and meet the case. Mechanisms developed in Canada and abroad illustrate that the government can do more to protect the individual while keeping critical information confidential than it has done in the IRPA. Precisely what more should be done is a matter for Parliament to decide. But it is clear that more must be done to meet the requirements of a free and democratic society.[2]

Parliament was given a year to enact constitutionally compliant legislation.

In a subsequent decision, the Supreme Court ruled that the named person[3] is entitled to disclosure of information that is in the Ministers' possession, regardless of whether it is relied upon. This ruling has been interpreted as requiring broad disclosure to the named person.[4]

In particular, the Ministers are now[5] required to make disclosure of all information and intelligence in their possession related to the named person, which essentially amounts to the entire intelligence file. Some of this information is information over which the Ministers claim national security privilege.[6] The non-classified information is provided to the named person and his or her counsel (Open Counsel), as well as to the Special Advocates. The classified information (information subject to the Ministers' assertion of national security privilege) is produced to the Court and to the Special Advocates. Both the non-classified and classified materials include information upon which the Ministers may or may not rely upon in making their case.

Since the Supreme Court found that there was no constitutional infirmity in having a system that permits closed hearings,[7] a system had to be devised to provide for participation on behalf of the named person and for disclosure to the named person of the case to meet. The Special Advocate[8] is meant to address the first concern; the second is addressed by the release of judicial summaries of the closed material to the named person with a view to informing them of the case to meet. These innovations are designed to make security certificate litigation approximate "regular" litigation.

The Special Advocates' role is twofold: first, to challenge government assertions of national security privilege, and second, to test the government's case in closed hearings[9] to the extent that such a challenge is necessary.[10] This process essentially allows the named person's interest to be protected in closed hearings by adversarial challenge when previously the court only heard from the Ministers.

Similarly, production to Open Counsel, be it by summary or otherwise, should be informative and as complete as possible, all the while ensuring that properly protected information is not disclosed. Providing this information will "fund" the open process all with a view to rendering it efficacious and regularized.

The role of the Special Advocate is vital to making this system work. If counsel does not discharge their duties vigorously the named person will not have their interests protected.

Once appointed to a brief and prior to reviewing any confidential information, Special Advocates are free to consult with whomever they choose, whenever and as often as they wish. However, once confidential information has been reviewed, Special Advocates are prohibited from communicating with anyone about the proceeding except with leave of the court.

It is important to underscore that there is no solicitor-client relationship between the named person and the Special Advocate.[11] Consequently, the duty to inform the named person is not governed by ethical rules requiring communication between counsel and the client. Instead, the *IRPA* governs the relationship between the Special Advocate, the named person, and his or her counsel. Despite not being in a solicitor-client relationship, all communication between them is protected as if it were a solicitor-client communication.[12]

The Special Advocate is to "protect" the interests of the named person in closed hearings, which means respecting the named person's decisions, notwithstanding that they are made without the benefit of all the information.

The management of the relationship between Open Counsel and Special Advocates has important consequences for the conduct of the litigation. To put this into focus, think of any case that you have recently litigated and ask, "what if neither I nor my client knew half of what transpired, how would I conduct the litigation?" That is precisely the position in which Open Counsel find themselves. The loss of control for many is nothing short of an existential crisis.

While the presiding judge will prepare summaries of the closed information, many counsel argue that is a poor substitute for actually seeing and analyzing the information, and formulating their strategy pursuant to the retainer.

Open Counsel have carriage of the litigation and are expected to provide advice to their client about any number of strategic issues that may arise during the course of the case, without access to the whole brief.

For the Special Advocate, the challenge is somewhat different. The Special Advocate is the only person on the named person's side who has knowledge of the whole case. Yet, the Special Advocate is not in a solicitor-client relationship with and is not able to provide advice to the named person, nor is the Special Advocate responsible to make decisions about the carriage of the litigation. Rather, the Special Advocate is to "protect" the interests of the named person in closed hearings, which means respecting the named person's decisions, notwithstanding that they are made without the benefit of all the information.

These structural obstacles, which are the result of permitting reliance upon undisclosed intelligence information, can be overcome in some measure by close co-operation and co-ordination between Open Counsel and the Special Advocate. The two sets of counsel must work together to ensure that the most effective position is advanced on behalf of the named person. In order to accomplish the most effective representation, Open Counsel should be in regular contact with their Special Advocates, bringing them within their litigation team, providing them access to their strategic considerations and their position on the variety of issues that may arise in the course of the case. This type of communication is not prohibited under the *IRPA*: that is Open Counsel can freely communicate with their Special Advocates as much and as often as they wish; it is the Special Advocate who cannot communicate with Open Counsel. While this is one-way communication, its value ought not to be underestimated.

For their part, when the Special Advocate feels it is important to discuss issues with Open Counsel, the Special Advocate can seek leave to communicate. The particular reason why communication is necessary can be more persuasively advanced if the Special Advocate has intimate knowledge of the named person's approach to the case; this knowledge will enable the Special Advocate to persuade the judge of the value added by authorizing communication of course without compromising the confidence of any intelligence information.

The Special Advocate has to be extremely cautious in deciding how to ask for leave. The Special Advocate must first decide if the application for leave should be made *ex parte* the Ministers' counsel. If you so conclude, then you would seek an *ex parte* hearing on notice to the Ministers to allow them to make submissions on the appropriateness of the *ex parte* request. As well, the request for leave to communicate has to be articulated in such a way that the Special Advocate does not reveal any sensitive information about the named person's case. After all, the presiding judge should not have access to counsel's brief. The danger is that an undisciplined request may reveal information to the presiding judge that may undermine the named person's position. The request to communicate may concern a sensitive topic that has to described in a way that preserves the named person's confidence; it must be a well considered and developed request.

Without effective co-operation Special Advocates may unwittingly take positions in closed hearings that undermine what the named person will do in open hearings. As well, where the Special Advocate knows the named person's position and there is information in closed proceedings that supports that position, the Special Advocate will want to be sure that information is publicly released and, if it cannot be publicly released, will want to emphasize it at the appropriate time in closed hearings.

The ethical challenges not only reside with those who are assisting the named person; government counsel has significant challenges as well arising from the use of protected intelligence information, albeit of a different nature. Ministers' counsel are permitted to have the same counsel appear in both open and closed proceedings. While this provides them with the advantage of having counsel in both proceedings know the whole, it can be problematic. Ministers' counsel have to be extremely vigilent and disciplined to not reveal any national security protected information while litigating in open. This is not as easy as it might seem. Counsel has a constellation of facts, both public and closed, in their working knowledge of the brief. Counsel will have to consider whether any particulr submission or line of questioning open would reveal closed content, directly or indirectly. This is taken very seriously by Ministers' counsel for obvious reasons, inadvertent disclosure, of the kind discussed here, can have devastating consequences for current, ongoing, domestic and/or foreign intelligence investigations.

The efficacy of any challenge to a claim of national security privilege turns upon the presence of counsel to oppose the government's claim.

The challenges confronting counsel in security certificate litigation result from the decision to permit the government to rely upon undisclosed intelligence information to determine if the named person is a national security threat. Once the rubicon was crossed, fairness requires that there be counsel in the closed hearing to protect the named person's interest. This is true not only in the immigration context but in any context where national security privilege is relied upon to withhold information from a litigant. The effica-

cy of any challenge to a claim of national security privilege turns upon the presence of counsel to oppose the government's claim. Where there is a closed hearing to determine a claim of national security privilege, be it in a criminal or civil case, the appointment of counsel should be sought to perform a function similar to that of Special Advocates in immigration cases. Such an appointment will go some distance to remedying the unfairness of determining a client's right to information without representation. After all, a hearing without representation is no hearing at all.

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NOTES:

[1] For example, in a criminal case where informer privilege is claimed, the information over which the privilege is claimed will not form part of the evidentiary offering upon which the trier of fact will rely to determine the accused's guilt or innocence. By contrast, in security certificate cases the judge will have access to information that is undisclosed due to national security privilege to decide if the named person is a threat to Canada.

[2] *Re Charkaoui*, 2007 CarswellNat 325, 2007 CarswellNat 326, [2007] 1 S.C.R. 350, 54 Admin. L.R. (4th) 1, 44 C.R. (6th) 1, 59 Imm. L.R. (3d) 1 (S.C.C.) at para. 86-87 per McLachlin C.J.C.

[3] This euphemism refers to the target of the security certificate; the person the government says is a threat to our nation's security.

[4] *Re Charkaoui,* 2008 SCC 38, 2008 CarswellNat 1898, 2008 CarswellNat 1899, 58 C.R. (6th) 45, 70 Imm. L.R. (3d) 1 (S.C.C.) at para. 47 – 64 per Fish and Lebel J.J.

[5] Previously the Ministers were not required to make such broad disclosure; indeed, the Federal Court of Appeal had opined that the Charter did not apply to this process, despite the fact that named persons could be detained in custody in some instances for years on end.

[6] Section 83(1)(c)(d) *IRPA*.

[7] *Supra* note 1, see paras. 67-84 where the Court reasons that the named person can be deprived of information upon which their liberty is determined without constitutional objection provided that a reasonable substitute is devised, such as the Security Intelligence Review Committee ("SIRC") model or the use of Special Advocates.

[8] Section 85 *Immigration Refugee Protection Act (IRPA)* is the provision that was enacted to meet the constitutional deficiency identified by the S.C.C.; In addition to the providing for Special Advocates, Parliament added an evidentiary provision which prohibits a judge from relying upon any information that was obtained as a result of torture or cruel, inhuman or degrading treatment within the meaning of the Convention Against Torture (see s. 83(1.1) *IRPA*).

[9] Meaning *in camera* proceedings at which neither the named person nor the public is permitted access.

[10] It is theoretically possible that the Ministers' claims of national security privilege would be dismissed, resulting in all the material being produced to open counsel.

[11] Section 85.1(3) *IRPA*.

[12] Section 85.1(4) *IRPA*.

Regulator and Resource: How the Law Society can Help with Your Ethical Questions

by Phil Downes

As a licensee of the Law Society of Upper Canada[1] you have already or will at some point come to know one facet or another of your governing body, beyond simply writing a cheque for your annual fees. The ominous face of the regulator is the complaint letter and the clinically worded command to respond, hopefully followed eventually by a letter telling you there is not enough evidence to proceed (i.e. you did nothing wrong). There are the practice reviews and the spot audits too, and the generally overarching sense that the Law Society is your big brother, and not the charitable one that has a companion sister. But there is another side to the Law Society that wants to be and even *can* be your helper in times of need if you know how to access it and there are resources to respond.

There are two reasons to turn to the Law Society for assistance in responding to ethical problems in your practice. First, if you are lucky or clever enough to reach the right person you have a good chance of speaking to someone who has encountered your problem before. If he or she has not, you may well be referred to someone who has, and who can help you out. Second, if you implement the advice you are given and your action results in a complaint, there is at least some basis to suggest to the complaints department that they should back you up.

In representing individuals subject to disciplinary proceedings at the Law Society, I not infrequently see situations in which the failure of the lawyer to pay attention to the Law Society's and Lawpro's practice resources is held against the lawyer in any attempt to explain or rationalize his or her decisions. Keeping a record of the resources you have consulted is always

a prudent move in the event that things turn sour at the end of the day.

But here is the real challenge: when and how, in practice, should you resort to the Law Society for advice? This very practical issue is the subject of what follows.

Your Situation

You have a problem that you have identified as being partially or entirely an issue of professional ethics or obligations. Invariably this will mean that the resolution of this problem could mean that you succeed or fail in following one or more of the Rules of Professional Conduct.[2] As a criminal lawyer, for example, you might encounter the following problems which engage the Rules:[3]

Scenario (1)[4]

You have been contacted, consulted, or actually retained to represent a client on a serious criminal charge such as a homicide or a large-scale criminal organization drug conspiracy/wiretap case. You have never acted on such a case before and indeed have never litigated any type of search issues and have never done a jury trial. Can you accept the case?

Relevant Rule of Professional Conduct

The commentary to rule 2.01 states:

> A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk, or expense to the client. . ..A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task.

This kind of problem is one for which the rule that governs is easy to find and understand. What presents the real ethical dilemma is whether it applies in any given circumstance and if so, how you can address it without simply declining the case, which of course is the easy and most conservative answer.

Scenario (2)

You have been retained by the friend of an accused charged with a serious aggravated assault. Your client is not a suspect but has some knowledge of events in and around the incident. The police have contacted you and asked if your client is prepared to give a statement. While meeting with you the client produces a pair of pants which he had loaned to the accused to wear on the night of the incident. They may have bloodstains on them. Your client instructs you to turn them over to the police. What do you do and how do you do it? What should you say to the police?

Relevant Rule of Professional Conduct

There is no rule addressing this situation directly. It engages, to a degree, rule 2.03(1), which deals with the duty of confidentiality:

> A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

This situation is one which, although it may not arise frequently, must be answered carefully and correctly. Doing the wrong thing could have serious repercussions for you and your client. The rules will not give you the answer, but they will provide some basis upon which you can build your analysis. Is this a situation for which you can turn to the Law Society resources for help? More below.

Scenario (3)

Your client is charged with sexual assault. When you interview the client, he maintains his innocence. After reviewing the disclosure, however, you conclude that the case against your client is very strong. The Crown offers a plea to a simple assault. Your client instructs you to accept the Crown's offer although he tells you that he did nothing wrong and has been wrongfully charged. What can and should you do?

Relevant Rule of Professional Conduct

This scenario engages a clear rule of professional conduct but also calls for some strategic advice on how to deal with the client in these circumstances. So on the one hand rule 4.01 (9) will assist you:

> (9) Where, following investigation,
>
> (a) a lawyer for an accused or potential accused advises his or her client about the prospects for an acquittal or finding of guilt,
>
> (b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea,
>
> (c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged, and
>
> (d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea, the lawyer may enter into an agreement with the prosecutor about a guilty plea.

On the other hand, the rule raises

some obvious questions: what does "prepared to admit" mean in paragraph (c)? Must you follow your client's instructions to enter the plea? What do you say in court when asked if the facts as read are admitted? The rules will not give you an answer to those practical problems. The Law Society might, but don't count on it.

What to do

The most common response for most of us when faced with an ethical issue or a problem engaging issues of professional responsibility is, I suspect, to wander down the literal or electronic hallway, pick up the phone to talk to a trusted or senior colleague or float the question out on the Listserve. It is what gives us immediate comfort in two respects: first, we have, often subconsciously, "offloaded" the problem and brought someone else into the circle of responsibility for doing the right thing. Second, we feel we are "doing something" to resolve the dilemma. That may be so, but unless the situation has a measure of urgency to it I suggest that you first sit down and process from first principles the issues that have arisen and the factors you will need to consider in coming to a solution.

Unless the situation has a measure of urgency to it I suggest that you first sit down and process from first principles the issues that have arisen and the factors you will need to consider in coming to a solution.

Then do some basic research. It is here that you may gain some benefit from checking out the Law Society website at www.lsuc.on.ca and accessing the "For Lawyers" tab. There you will find links to information grouped under a variety of headings. Keep your eye on the ball because one of the downsides with the website is that it tends to have multiple access points to certain information or documents so it is easy to become overwhelmed with figuring out what to click on to find what you need.

Here are some suggestions:

(1) Under the "Manage Your Practice" banner there are a few links to try. "Frequently Asked Questions" will take you to an alphabetical listing of practice management topics called the "knowledge tree."

These are not topics of substantive law but relate more to the practical conduct of your practice, from conflict of interest to drafting a Retainer Agreement or how to properly withdraw money from your trust account. For example, if a client wants to retain you with a cash retainer of $2,500 today and three subsequent payments of $2,500 over the next six months, can you accept that manner of payment, and if so, are there any obligations you have in doing so? The knowledge tree has a heading called "Cash and Money Laundering Requirements" which in turn has a link called "Cash Limits and Exceptions, Definitions" which answers this question.

These FAQs are just that: posed as hypotheticals with an answer provided. Because they try to cover all areas of practice, however, you are not necessarily going to find something that nicely fits the hypothetical you are facing, and even if you do, the responses are not always comprehensive. For example, under the FAQ heading "Conflicts of Interest: Conflicts of Interest, Withdrawal of Services" the following hypothetical is posed:

> I act for two separate clients in two separate criminal matters. Both clients, "Client A" and "Client B", were charged with summary criminal offences arising from different incidents. The two clients did not know each other and the only connection between them is that they each retained me. Client A advised me that she discarded a weapon in a certain location. The weapon was later found by the police and attributed to Client B's alleged crime. Client B has denied ownership or any knowledge of the weapon. Can I advise the police or Client B that I know the weapon belongs to Client A?

Try looking at the suggested answer and ask yourself what your obligations are if maintaining client confidentiality results in a wrongful conviction.

(2) Under the "Improve Your Practice" banner there are links to "Practice Area Resources" divided by practice area.

There is a criminal law link which then provides you with subject areas each of which contains substantive and practical suggestions on daily matters in your practice, such as how to prepare for a bail hearing or how to conduct a preliminary hearing. These do not necessarily address the kind of ethical problems described above.

(3) Under the "Get Help" banner there are two links. One takes you to a page designed to lead you to help on substantive legal research and the other is a link called "Ask a Practice Management Question." If you have not found the answer you are looking for on the website, this may be your next step.

Clicking on that will give you the telephone number for the Resource Centre at (416) 947-3315 or 1 800 668 7380 ext. 3315. The Law Society website tells us that:

> This strictly confidential telephone service provides you with assistance in interpreting your obligations under the Rules of Professional Conduct or the Paralegal

Rules of Conduct. The Practice Management Helpline is available to give you valuable insight into Law Society regulations, as well as your most pressing ethical and practice management issues.

The Resource Centre is the first step for accessing several different information services. It is only available between 9 a.m. and 5 p.m., outside of which you are invited to leave a voicemail, which should be replied to the following business day. You may also be given the option of leaving a voicemail rather than waiting on hold to speak to someone. If your situation is urgent (for example you have to be in court and really need immediate advice) mention that in your voicemail and your call will be given priority.

The Practice Management Helpline does not deal with any substantive legal issues. It is aimed at providing advice on issues that arise that relate to how you conduct your practice. The Helpline is staffed by administrators who have a detailed and extensive knowledge of the Rules of Professional Conduct and of where to find the answer to problems relating to practice management. Issues relating to bookkeeping, systems to implement, and other practical issues to help in the operation of your practice can be addressed by these staff.

So if you describe hypothetical (1) above to them you will almost surely be immediately advised of the relevant Rule and of any commentary or other resources to analyse the problem. Remember, the answers to these kinds of issues are rule-based and you will not be speaking to a lawyer. Although these people have an in-depth knowledge of the Rules and the resources available to address the issue, you are unlikely to be able to engage in a

detailed discussion about the nuances of what the rules require and how to apply them.

They can, however, refer your inquiry to one of the staff lawyers at the Law Society. That will happen if your ethical problem is really one that is rooted in issues of substantive criminal law or relates to an issue covered by the rules that involves dealing with clients, witnesses, or matters that arise in the course of your work as a criminal lawyer. This may include such things as conflicts of interest, confidentiality, fraud, and mandatory reports to the Law Society, communicating with a represented witness or how to deal with real evidence coming into your possession. Scenario (2), above, would likely be referred to a staff lawyer to address with you.

In the majority of cases you should not expect that you will end the call with a clear direction on what to say or do. That may happen where the answer is clearly provided for in the rules, but it is more likely that the staff lawyer will equip you with the tools to help you come to the right conclusion on your own.

Bear in mind that that the practice management helpline receives lots of calls and the number of staff lawyers available to respond is limited. Indeed to my knowledge there is only one staff lawyer who provides advice through the practice management helpline who has any real knowledge of criminal law and practice. So there is likely a natural tendency to want to "screen out" calls from being forwarded to staff lawyers.

Also remember that regardless of the knowledge of the staff lawyer assisting you, he or she is also bound by the Rules of Professional Conduct and will naturally be reluctant to "tell you what to do." In the majority of cases you should not expect that you will end the call with a clear direction on what to say or do. That may happen where the answer is clearly provided for in the rules, but it is more likely that the staff lawyer will equip you with the tools to help you come to the right conclusion on your own.

Unless it is being done as part of the formal mentoring program, do not expect the Law Society to give you the name of a senior lawyer to call for help. Rightly or wrongly, it is part of the culture of the Law Society that it sees itself as the authority on issues of professionalism and practice management, so my sense is that referring the problem to a private lawyer is seen by the Law Society as an abdication of their proper role. We all know, however, that our particular branch of this profession is populated by people willing and able to give their time to assist a colleague in doing the right thing. There are senior members of the criminal bar who will gladly speak to you without even thinking of charging a fee in order to "chew over" an ethical dilemma. The experience of our colleagues will, in my view, almost invariably be the best answer to our problems, so even if the Law Society staff do not recommend it, it is a course of action that is virtually always worth following.

(4) If your question is clearly answered by the rules then you are fine, but if there is a nuance to it, write your question down as precisely as possible and email it to the Practice Management Helpline.

You can do this by going to www.lsuc.on.ca and clicking on the "For Lawyers" tab. At the bottom of the page you will see a link called "select a Law Society department to e-mail." That will take you to a form with a drop-down menu of departments at the Law Society to which you can send an email. Practice Management Helpline is one of them.

If you do seek advice from the Law Society, make a detailed note of who you spoke to and when, and what you were told. It will help in the unfortunate event that your action is later criticized or subject to review by the Law Society itself.

There are senior members of the criminal bar who will gladly speak to you without even thinking of charging a fee in order to "chew over" an ethical dilemma. The experience of our colleagues will, in my view, almost invariably be the best answer to our problems, so even if the Law Society staff do not recommend it, it is a course of action that is virtually always worth following.

Conclusion

Finding the answer to an ethical conundrum can be a frustrating exercise. We want and need answers quickly and easily. But we need to resist the urge to expect that anyone, whether it is the Law Society, our colleagues, our research or ourselves, will be able to provide the definitive answer at the drop of a hat. The focus of this article has been on how the Law Society can

play a role in coming to the right answer. It can, but you have to appreciate the practical limitations of seeking advice from the regulator.

We are trained and paid precisely in order to undertake analysis and exercise judgment based on a set of facts, principles, and rules. If the answers were easy they would be online and anyone could find them. Ethical dilemmas are just that, dilemmas, one definition of which is "a problem that seems to defy a satisfactory solution." You have to be prepared to work at coming to the best possible answer. Accessing the resources the Law Society has to offer can and should be one part of your strategy. And if you find the resources wanting or are not satisfied, try writing to them to let them know. If they solve your problem for you and you get some good advice, however, consider letting them know that too.

Phil Downes is a sole practitioner at Simcoe Chambers, concentrating in the area of criminal and quasi-criminal law, as well as regulatory and professional discipline matters, with a particular expertise in appeals, "white collar" crime, and representing lawyers subject to discipline proceedings.

NOTES:

[1] Sort of like a truck driver or an owner of a pizza franchise.

[2] Available through the Law Society website at http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=10272.

[3] The following is not intended to be an exhaustive guide to the Rules of Professional Conduct for each scenario. It is intended to give an impression of how and to what extent ethical problems in criminal law are captured by the Rules.

[4] For other scenarios, see the "Practice Tips" in the April 8, 2011 edition of *Ontario Reports* at pages lxxxv to lxxxix, available online at http://digital.ontarioreports.ca/ontarioreports/20110408?pg=28#pg88.

THE DOCKET

SEXUAL ASSAULT

Sexual Assault — *Actus reus* - Consent — Consensual erotic asphyxiation — Sexual activity continued while complainant was unconscious — Consent to engage in the sexual activity complained of was given by the complainant in advance of unconsciousness — Consensual sexual activity continued after the complainant regained consciousness — The complainant's unconsciousness rendered prior consent inoperative as she was incapable of continuing or revoking consent - Sexual activity that occurred during the period of unconsciousness lacked consent — Consent is a conscious agreement of the complainant to engage in every sexual act in a particular encounter at the time it occurs - Complainant must be conscious throughout the sexual activity in question.

R. v. A. (J.), 2011 CarswellOnt 3515, 2011 CarswellOnt 3516, 2011 SCC 28; McLachlin C.J. (Deschamps, Albella, Charron, Rothstein and Cromwell JJ. concurring); Fish J. dissenting (Binnie and LeBel JJ. concurring).

OFFENCES

Obstruction of justice — Section 139(3)(a) of the *Criminal Code* - Elements of the offence — Indictment particularized to include the words "by threat or other corrupt means" — What constitutes dissuasion by corrupt means — Accused was convicted of attempting to obstruct justice by dissuading a Crown witness from giving evidence by corrupt means — Accused called the witness and told him that co-accused's counsel would attempt to expose him on a fraud — Accused suggested that the witness not attend court, and when asked how he could remain in compliance with his subpoena, the accused suggested that he obtain a note from his doctor — The suggestion to obtain the medical note constituted dissuasion by corrupt means — Suggested way of avoiding testifying was not simply a logistical detail, rather it was part of the "overall persuasive package" intended to delay and obstruct the course of justice — Appeal allowed, convictions restored.

R. v. Reynolds, 2011 CarswellOnt 2684, 2011 CarswellOnt 2685, 2011 SCC 19; McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring.

EVIDENCE

Fresh evidence — Application of the *Palmer* test — Expert opinion tendered for the first time on appeal — Failure to meet the due diligence criteria - Complainant claimed that she bit the accused's finger during alleged sexual assault — Officer testified that he observed a cut that looked like a tooth mark on accused's finger — Trial counsel regarded it as a "minor generic scratch" and did not contemplate expert evidence — No expert testimony contemplated by the trial Crown - Expert opinion obtained post-conviction refuted officer's evidence that the cut appeared to be a bite mark - Failure to meet the diligence criteria is not determinative — Proposed expert evidence was relevant, credible and could reasonably be expected to have affected the result as the trial judge used the evidence of the injured finger as confirmatory of the complainant's evidence and contradictory to the accused's evidence — Case was "a close one" involving implausibilities to both the complainant's and accused's versions.

R. v. A. (J.), 2011 CarswellOnt 2237, 2011 CarswellOnt 2238, 2011 SCC 17; Charron J. (McLachlin C.J. and Binnie, Fish and Cromwell JJ. concurring); Rothstein J. dissenting (Deschamps J. concurring).

SEARCH AND SEIZURE

Legality of arrest — Reasonable grounds that indictable offence has been committed — Possession of a controlled substance — Section 495(1) of the *Criminal Code* - Sections 8 and 24(2) of the *Charter* - Vehicle pulled over for speeding and officer smelled freshly burnt marijuana — Pat down search conducted for officer safety — Cash in the amount of $5,410 was located in the accused's pocket — Accused arrested for possession of a controlled substance — Search of vehicle incident to arrest led to discovery of 100 grams of crack cocaine — The quantity of money found gave the officer reasonable grounds that the accused had a quantity of marijuana over 30 grams, the threshold to constitute an indictable offence — Arrest pursuant to s. 495(1)(a) was lawful — Even if breach was found, evidence would not have been excluded under s. 24(2) as the breach was not serious, officer acted in good faith, there was a reduced expectation of privacy in the vehicle and the admission of real evidence would not render the trial unfair.

R. v. Loewen, 2011 CarswellAlta 695, 2011 CarswellAlta 696, 2011 SCC 2; McLachlin C.J. (Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ. concurring).

Search incident to arrest — Limits on police power — Search of data contained on cellular phone — When warrantless search will be lawful - Section 8 of the *Charter* - Search incident to arrest for break and enter included search of stored data on cellphone — Police had information that accused had previously stolen cellphones - Photograph implicating the accused in robbery offences was found when police tried to identify the owner of the phone — Search warrant for cell

phone was subsequently obtained — Ownership of the cellphone was relevant to the offences for which the accused had been arrested — Police had a lawful basis to conduct cursory search to determine ownership — Section 8 of the *Charter* not infringed as photograph was obtained during lawful cursory search — No open-ended power to search data contained in cellphone held by any arrested person without a warrant — If reasonable grounds exist that the search of a cell phone would provide evidence of the offence, a search warrant should be obtained.

R. v. Manley, 2011 CarswellOnt 803, 2011 ONCA 128; Sharpe J.A. (Winkler C.J.O. and Karakatsanis J.).

Warrantless search — Reasonable expectation of privacy — Laptop issued to teacher for employment and personal use — Initial search and seizure conducted by school board — Sections 8 and 24(2) of the *Charter* - School technician accessed accused's computer remotely for routine maintenance and obtained "screen shot" of sexually inappropriate images of underage student — School seized laptop, copied temporary internet files with browsing history and surrendered evidence to police — Accused had reasonable expectation of privacy in the information stored in the hard drive, subject to a limited right of access by school technicians performing work-related functions — Images were in plain view to technician and subsequent surrender of them to police did not constitute a "seizure" — School officials' subsequent seizure of laptop and copying internet browsing history was justified to ensure a safe school environment — Police are not relieved from obtaining search warrant even when provided with evidence that was originally gathered in compliance with the *Charter* — Laptop, mirror image of hard drive and disc with internet browsing history was obtained in breach of s. 8 of the *Charter* — Evidence excluded.

R. v. Cole, 2011 ONCA 218, 2011 CarswellOnt 1766; Karakatsanis J.A. (Winkler C.J.O. and Sharpe J.A. concurring).

PROCEDURE

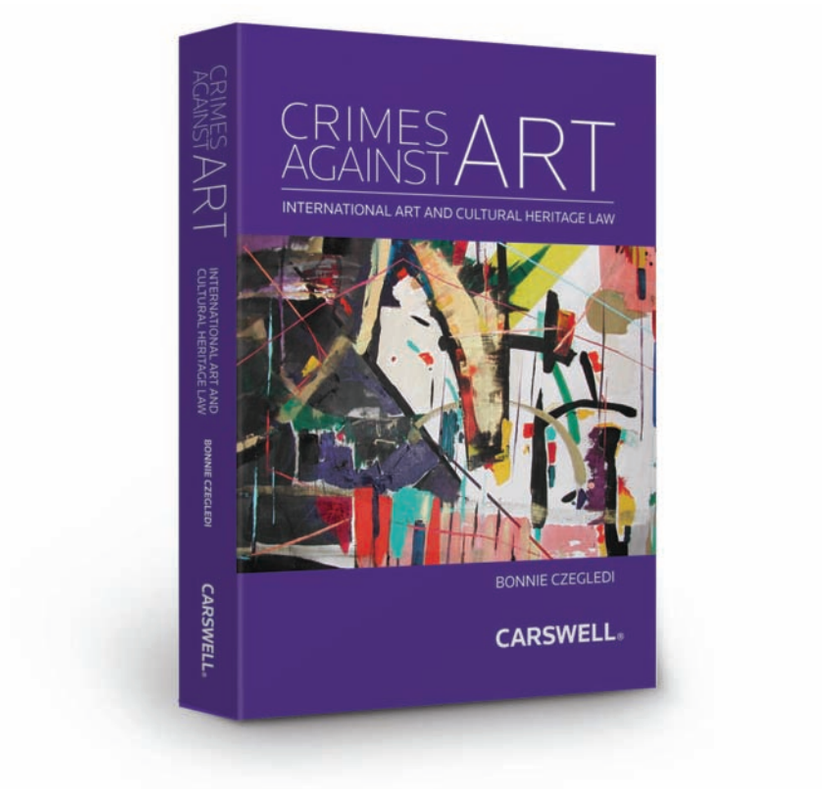
Nolo contendere* - Procedure resulting in *de facto* admission of guilt with no inquiry of the accused by trial judge - Relationship between pleas and admissions** - Sections 606 and 655 of the ***Criminal Code — Prior to arraignment, defence counsel advised the trial judge that the accused would plead not guilty but was content that the allegations be read in, that they would not be disputed and that he understood that a conviction would follow - Plea of not guilty was entered — Truth or accuracy of the Crown's allegations was never admitted by the accused or counsel — Allegations never became formal admissions as there was no agreement by, or on behalf of, the accused — Circumstances required the trial judge to conduct an inquiry of the accused to ensure that he understood the nature and effect of the procedure, as it was the functional equivalent of a guilty plea — Manner in which the prosecutor discharged burden of proof and the absence of an inquiry by trial judge caused a miscarriage of justice through procedural unfairness — Conviction set aside and new trial ordered.

R. v. G. (D.M.), 2011 ONCA 343, 2011 CarswellOnt 2825; Watt J.A. (O'Connor A.C.J.O. and Simmons J.A. concurring).

EXTRADITION

Extradition — Conduct based approach to dual criminality — Application of *Fischbacher v. Canada* - Minister of Justice may surrender on materially different offences than those in the authority to proceed (ATP) and committal order — Assurances sought in relation to sentence — United States indictment contained offences relating to a 34-month drug conspiracy — ATP contained two substantive offences in relation to one alleged transaction — Accused consented to committal for offences in the ATP — Minister refused to seek assurances from the U.S. that all aggravating factors on sentence be proven beyond a reasonable doubt and ordered surrender on all offences contained in the U.S. indictment — Decision to surrender on charges materially different from those in the ATP and committal order is not unreasonable, nor was refusal to seek assurances.

United States v. Barbu, 2010 CarswellOnt 9784, 2010 ONCA 891; MacFarland J.A. (MacPherson J.A. concurring); Sharpe J.A. dissenting; application for leave to appeal to the SCC dismissed, 2011 CarswellOnt 3591, 2011 CarswellOnt 3592.



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MEMBER PROFILE

Indira Stewart

by Joe Di Luca

This issue's sacrificial lamb is Indira Stewart. Indira grew up in Toronto and did her undergrad at Brown University in Rhode Island where she studied literature and film. After university she worked in New York in the film business for about a year, mostly the graveyard shift as an editorial assistant. As logic would dictate, her next move was a stint as a case worker at a public defender office in Harlem. This highly lucrative gig gave her the financial security she always craved. It also provided the impetus to go to law school. With a law degree from the University of Ottawa under her belt, she clerked at the Superior Court of Justice in Toronto and then worked as an associate at Lockyer Campbell Posner LLP. For those interested, she has a treasure trove of good stories and dark secrets from both jobs. Regrettably, contractual commitments, personal undertakings, and sealed minutes of settlement prevent these stories from ever being leaked.

A natural born risk-taker, Indira recently struck out on her own as a sole practitioner and has joined the merry band of misfits and miscreants at Simcoe Chambers. In a confidential interview she indicated that the move was primarily motivated by money. She also revealed that she has concrete plans on becoming the next Chief Justice of Ontario or in the alternative the Canadian version of Nancy Grace. Either way, we haven't seen the last of Indira.

And with that, let's move on to the questions.

QUESTIONS

Finish the Sentence

1. If I never went to law school, I would have become **a documentary film-maker**

2. If I win 10 million dollars, I will **move to an office farther from the bathroom. (For those who have never been in Simcoe Chambers, the "junior" offices come with wonderful audio and olfactory access to the bathrooms)**

3. If I could appoint the next Chief Justice of Canada it would be (not a lawyer or judge) **Tina Fey. (Hopefully not in character as Sarah Palin – Ed.)**

4. Canada's next Prime Minister will be **different. Hopefully. (Yes, maybe it will be Tim Hudak – Ed.)**

5. If I could pick one injustice to undo it would be **racial profiling.**

6. If I could represent/defend a historical figure it would be **Eve. (That would leave a pretty small jury pool – Ed.)**

7. My greatest regret in life is **not learning more languages.**

8. Most people don't know that I **spent my early childhood living on a farm. (I am so tempted to say "it shows..." but I won't – Ed.)**

9. I am afraid of **Joe's editorial comments. (Come on, you know I'm joking ...and I kept my promise to not mention a word about your criminal charges – Ed.)**

10. I really embarrassed myself when I **filled out this survey (see #9).**

CHOICES

1. Romantic or Hunter/Provider? **Romantic.**

2. Superman or Wonder Woman? **Lois Lane. (That's not a choice – Ed.)**

3. Manolo or Crocs? **Neither. Sneakers. Preferably red ones. (Ok I get it – you are a contrarian – Ed)**

4. 30 days' jail or two-year conditional sentence? **Two-year conditional.**

5. Dog or Cat? **Allergic to both. (Yes, but which would you choose?)**

6. Canoe or Speedboat? **Canoe.**

7. Muskoka cottage or condo in Florida? **A rock in Georgian Bay. (Again – that wasn't an option – ed.)**

8. Cash paying drunk driving case or legal aid murder? **Either. Gladly.**

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9. Pinot Noir or Chardonnay? **Yes, please. (I fully understand and appreciate this answer but you still have not made a choice – maybe you should become a judge – Ed)**

10. Blackberry or iPhone? **iPhone. (Ok that's better –ed)**

FAVOURITES

1. Author (Fiction): **Jane Austen**
2. Book: **A Fine Balance**
3. City: **Barcelona**
4. Lawyer: **Atticus Finch**
5. Journalist: **Anna Maria Tremonti**
6. Canadian: **Norman Jewison**
7. Travel destination: **India**
8. Movie: **The Big Chill**
9. Actor: **Erin Dann (A fabulous choice if I say so myself – ed.)**

continued from page 2

plagues too many prosecutors. She then spent much of her time in office fighting to minimize a massive scandal in which her office had failed to turn over exculpatory evidence in thousands of sex abuse cases. When the California bar finally did discipline a member of her staff in 2009 for misconduct in four cases, Carr fought to strip the bar of its power to discipline prosecutors. In February of 2010, following a judge's decision to release an accused sex offender because Carr's office had failed to turn over an exculpatory videotape, Carr announced that her office would be boycotting the judge.

Eleanor Odom:

During a highly publicized 2007 trial of two parents accused of murdering one of their children, Odom took the occasion of the dead child's birthday to pull out a cake, dim the courtroom lights, place and light candles, and lead the prosecution in a ghoulish rendition of "Happy Birthday" to the dead kid's ghost. The gimmick not only helped win a conviction, it helped Odom win a regular commentary gig on *The Nancy Grace Show*. She has since thrown her hat in the ring for a judicial opening.

There have been a handful of recent occasions where the CLA, reluctantly, has seen fit to report the prosecutorial misconduct of Crown counsel to the Law Society of Upper Canada for investigation into whether some form of professional discipline is appropriate. Those decisions are never taken lightly by the Board. In each case, the Board carefully considers the transcripts of the proceedings in question and examines any judicial findings relating to the prosecutor's alleged misconduct.

Regrettably, however, the Law Society has so far failed to adequately respond to any of those complaints, one of which dates back more than three years and involved clear judicial findings of prosecutorial misconduct. The glacial pace of the Law Society's investigation process is unfair to the lawyer under investigation, to the lawyer(s) with whom that lawyer continues to litigate, and to the public at large. If the Law Society does not soon find a way to improve its system for handling complaints of prosecutorial misconduct, the resulting message will be that the Rules of Professional Conduct are noble in theory but no good in practice, at least not when it comes to the prosecution of criminal cases. Continuation of its lackadaisical approach to allegations of prosecutorial misconduct is unlikely to help breed respect for the Rules amongst the defence bar.

NOTES:

[1] *R. v. Murray [Evidence-Solicitor-Client-Privilege],* [2000] O.J. No. 685 (S.C.).

[2] A.M. Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last", [2008] 46 O.H.L.J. 1.

[3] *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372.

[4] Visit http://www.theagitator.com/2011/01/03/vote-for-the-worst-prosecutor-of-2010/.