



**LL.B. V Term**

**LB—501:  
MOOT COURT, MOCK TRIAL AND INTERNSHIP**

**Prepared and Edited by**

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**Faculty of Law  
University of Delhi  
Delhi – 110007  
2025**

**(For Private Circulation Only)**



## **LL.B. V Term**

### **LB—501: Moot Court, Mock Trial and Internship**

#### **Course Objectives:**

This Course aims to impart the practical skills of research, case analyses and strategy, witness handling, presentation of arguments at the trial and appellate stages of a case, and to draft and prepare the relevant documents pertaining to Moot Court, Mock Trial and Internship. The course has been divided into four components dealing with Moot courts, Mock trials, Court visits and Viva Voce/attendance. The purpose is to expose the students to the system of administration of justice in real life by visiting various courts and chambers of practicing counsels. This learning is basic and essential for the study of professional course of Law. By learning the practical aspect throughout the Course, the students shall gain the expertise in research and preparing the legal documents, filing and contesting the cases on strong grounds before the Courts of Law in India as well as in other countries.

**THERE IS NO SUPPLEMENTARY EXAM FOR THIS COURSE.**

#### **Course Learning Outcomes:**

After successful completion of this Course, students should be able to:

1. practice at all the stages of any case/matter and at all the fora with critical thinking
2. do appellate advocacy by independent research, preparation of arguments and presenting arguments in a persuasive manner in appellate courts
3. do trial advocacy, i.e., case analysis, client interviewing and advise, how to conduct examination-in-chief and cross-examination of witnesses, preparation and presentation of arguments on facts and law in the trial courts.
4. interview clients and advise them on procedural aspects of litigation, costs and possible legal and social consequences, etc.
5. work in teams and develop the cooperative nature essential for the legal practice.

#### **Contents:**

#### **Unit I: Mock Trial including Client Interviewing and Counselling and Case Analyses**

1. Client Interviewing Counselling- Oral exercise (5 marks)

The students will learn the basics of client interviewing and counselling through simulation exercises.

2. Case Analyses-Written exercise (5 marks)

The students will be required to do case analyses in the mock trial exercise to be done by them.

3. Mock Trial including Examination in Chief, Cross Examination, oral arguments, and written submission of arguments-5 marks each (Total 20 marks)

Teachers are advised to conduct at least two mock trials, one Civil and one Criminal during the semester for practice purposes. The students will be divided in teams of lawyers and witnesses. Each student will be required to function as a lawyer and witness in the mock trials being simulated in the classroom.

## Unit II: Moot Courts

The teacher teaching this course will supply three Moot Court problems to the students during a single semester requiring them to work on all three problems assigned to them, prepare written submissions (memorials) and present oral arguments in a moot court setting. **30 marks for this component are divided equally between written submission and oral arguments.** Students may be asked to work in teams at the discretion of teacher. Each student will prepare a case only on one side.

### A. Rules of Memorial submissions:

1. Each student must submit one typed and bound copy of the memorial on either side no later than the date fixed and announced in the class. Memorials will not be accepted after the prescribed date and time and the student will lose the marks assigned for that assignment.
2. Memorial specifications:
  - a) Memorials must be printed on A4 size white paper with black ink on **both sides of the paper.**
  - b) The body of the memorial must be in Fonts Times New Roman, Size 12 and footnotes in Fonts Times New Roman in Size 10.
  - c) Each page must have a margin of at least one-inch on all sides. **Do not add any designs or borders on the pages.**
  - d) Memorials should be submitted with differently coloured Title Page for each side:
    - Title page in blue colour for Petitioner / Appellant
    - Title page in red colour for respondent
    - The students shall provide their full name, enrollment number and exam roll number on the title page only.
  - e) The Memorial should not exceed 20 typed pages (line space 1.5) and shall consist of the following Parts:
    1. Title page in relevant colour containing the following **mandatory** information:
      - a. Name of the student in full, as per office record/attendance register
      - b. Section
      - c. Exam Roll Number

d. Class Roll number

e. Name of the case

2. Table of Contents
3. Table of Abbreviations
4. Index of Authorities/List of References and Cases
5. Statement of Jurisdiction
6. Statement of Facts
7. Statement of Issues
8. Summary of Arguments
9. Arguments Advanced/Detailed Pleadings
10. Prayer
11. Affidavit, if necessary

f) Relevant Annexures may be kept by the student and may be used during oral arguments, if necessary.

B. Rules re Oral Arguments:

- Court Language shall be English, unless prior permission is sought from the teacher to speak in Hindi.
- Each student would be given not more than 10 minutes to present their oral arguments
- Judges may, at their discretion extend oral argument time, up to a maximum of 5 minutes.
- Rebuttal *may* be allowed only to the petitioner and they would have to specify in the beginning the time they want to set apart for rebuttal.
- Evaluation: The oral performance will be evaluated based on communication skills, application of facts, persuasion / use of authorities, and response to questions.

### Unit III: Internship - Court Visit / Chamber placements

This part will require the students to be attached with **practicing lawyers with a minimum of ten years standing at the Bar**. Preparation for this component must begun from the first semester. Each student is required to spend at least one month doing internship during the summer vacation / winter break / mid-semester break. Full time internship during the semester is not permitted by the Bar Council of India and students may do only project work during the semester. During the internship, the students must keep record of client dealings, research and drafting done, fact investigations, etc. A certificate confirming the student's attendance and the work done during internship, (**preferably on the letter head of the concerned advocate under whom internship was done**) shall have to be attached with the internship diary to be submitted at the end of this semester.

During the court visits, the students are required to observe the following stages and write reports of their observation in the diary:

- Framing of charges/Issues
- Examination-in-Chief
- Cross-examination
- Final arguments

In the lawyer's chamber, they are required to do and record the following:

1. Read minimum of four case files to learn how files are prepared and maintained
2. Learn how to maintain records and accounts
3. Do legal research in at least two cases
4. Draft minimum of two documents in an ongoing case in the chamber
5. Observe client interviewing and counselling with the permission of the lawyer and clients in at least two cases

The students are expected to maintain a diary of their field visits, work done during placement and their observations. In the diary, they have to keep a log of the time spent by them each day including factual accounting of their experience of what they are doing, seeing and hearing. However, the diary should not be only descriptive of each day but should focus on what they learnt during the day. What were they thinking and feeling about their experiences? What is exciting or surprising? What is bothering them? What are their questions or insights about lawyering and judging? What criticism or praise do they have for the legal system? What else would they like to be taking place in their experience? They should be careful that while writing their accounts they do not reveal any confidential information.

**The diary should contain two parts: (a) the factual and analytical information about their internship; and (b) two legal documents drafted by them during internship. Each part will be evaluated separately for 15 marks each. This part carries a total of 30 marks.**

The diary is an integral part of the course, and students will be evaluated in terms of thoughtfulness and reflections about their learning experience. They must be sure to write the journal in their own words even if they went with another class fellow or were in a group and observed the same things.

**Note: In case of copying under any of the Units of the Course, matter will be reported to the authorities and a suitable action will lie as per the rules of University.**

### **Suggested Readings**

1. NRM Menon (ed.) *Clinical Legal Education* (1998)
2. Don Peters, *The Joy of Lawyering: Readings for Civil Clinic* (1996)
3. B. Malik, *The Art of a Lawyer* (9<sup>th</sup> Ed. 1999)
4. Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* (1993)
5. Thomas A. Mauet, *Trial Techniques* (1996)
6. Thomas A. Mauet, *Pre-trial* (1995)
7. Inns of School of Law, *Advocacy* (1999/2000)
8. Inns of School of Law, *Case Preparation* (1999/2000)

### **Readings Supplied in Course Material**

- |                                                                                              |    |
|----------------------------------------------------------------------------------------------|----|
| 1. "Client Interviewing" in Don Peters, <i>The Joy of Lawyering</i> , pp. 5-20               | 10 |
| 2. "Client Interviewing and Counseling" by Margaret Barry and Brian Landsberg                | 32 |
| 3. "Advice" in Conference Skills, Inns of Court School of Law, pp 131 -150 35 (1999/2000).   | 38 |
| 4. Kinds of Questions – Summary by Prof. Ved Kumari from Don Peters, <i>Joy of Lawyering</i> | 62 |

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| 5. “Advocacy Objectives”                                                                                                                                                        | 64  |
| 6. “Case Analysis, Persuasion, and Storytelling” by Steven Lubet in <i>Modern Trial Advocacy: Analyses and Practice</i> , pp. 1-13, (1993)                                      | 66  |
| 7. Questionnaire for Interviewers                                                                                                                                               | 78  |
| 8. “Case Planning Chart” by Jane Schukoske                                                                                                                                      | 82  |
| 9. Communication – Body Language                                                                                                                                                | 83  |
| 10. L. Spasova, “Paralinguistics as an Expression of Communicative Behaviour” in <i>Trakia Journal of Sciences</i> , Vol. 9, Suppl. 3, pp 204-209, 2011                         | 85  |
| 11. “The Trial Advocate” in Roger Haydock and John Sonsteng, <i>Trial: Theories, Tactics, Techniques</i>                                                                        | 92  |
| 12. “D.S. Hislop’s Advocacy Training” (Mimeo)                                                                                                                                   | 108 |
| 13. Gray’s Inn Advocacy Course for Pupils: 1993-1994                                                                                                                            | 117 |
| 14. Examination-in-Chief – Headlines                                                                                                                                            | 134 |
| 15. “Art of Interrogation” in B.K. Somasekhara (ed.) <i>Aiyar &amp; Aiyar’s The Principles and Precedents of the Art of Cross-Examination</i> (Tenth Edition, 2004) pp. 145-182 | 136 |
| 16. Witness Handling:                                                                                                                                                           |     |
| • Case 1 <i>State v. Monty Khanna</i> by Aman Hingorani                                                                                                                         | 163 |
| • Case 2 <i>State v. Mukesh</i> by Aman Hingorani                                                                                                                               | 170 |
| • Case 3 <i>Raj Malhotra v. Shivani Malhotra</i> by Aman Hingorani                                                                                                              | 176 |
| • Case 4 <i>Singer Consultants Pvt. Ltd v. WinSoft Telecommunications . Pvt. Ltd</i> by Aman Hingorani                                                                          | 196 |
| 17. Developing a Research Plan - Adopted from Kunz, et al. <i>The Process of Legal Research</i> (4 <sup>th</sup> ed. 1996)                                                      | 202 |
| 18. “Researching for a Legal Problem” by Ved Kumari                                                                                                                             | 204 |
| 19. “Legal Drafting Skills” – by Aman Hingorani                                                                                                                                 | 208 |
| 20. Appellate Arguments Demonstration Exercise - <i>Narcotics Control Bureau v Elizabeth Brown</i>                                                                              | 212 |

## 21. Moot Problems:

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| ● Moot Court Problem -2 | 234 |
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| 22. Ethical Dilemmas in the Lawyer–Client Relation: Concerns and Solutions | 243 |
| By Anirban Chakraborty , Asian Journal of Legal Education 7(1) 25–34, 2020 |     |

## Assessment of Students' Performance and Scheme of Examinations:

### 1. There is no written examination at the end of the semester in this paper.

The break up of marks in each unit may be changed in the paper from time to time. Broad division of marks is as follows:

Unit 1 = 30 marks

Unit 2 = 30 marks

Unit 3 – 30 marks

10 marks have been kept for attendance in these courses as follows:

|                  |                  |                    |
|------------------|------------------|--------------------|
| 70-75% - 1 mark  | 76-80% = 2 marks | 81-85% = 4 marks   |
| 86-90% = 6 marks | 91-95% = 8 marks | 96-100% = 10 marks |

## IMPORTANT NOTE:

1. The topics, cases and suggested readings given above are not exhaustive. The Committee of teachers teaching the Course shall be at liberty to revise the topics/cases/suggested readings.

2. Students are required to study/refer to the legislations as amended from time to time and consult the latest editions of books.



## **Don Peters: The Joy of Lawyering**

### **CLIENT INTERVIEWING**

"I want a divorce."

"It's all so confusing. I don't know why I am here or where to begin."

"I still love him but I can't take anymore." "He tried to kill me last night." "She never loved me. I don't want her to get a cent."

It's the lawyer's move. What should she do? Her client is sitting there, looking at her expectantly. She could remain silent and convey a non-verbal message that her client should continue. Or she could say something. But if she decides to say something, what should she say?

Lawyers need information before they can apply their knowledge of matrimonial law and practice to their client's situation. Information about their clients, their situations, and what they would like to do about them is absolutely essential. They also need to build rapport with their clients. They want working relationships where trust and accurate communication can flourish. How can they achieve these goals in interviews with matrimonial clients?

Matrimonial practice attaches to a set of human experiences that are laden with emotional content. Matrimonial interviews typically involve discussing the possible dissolution of what was once a close human bond, allocation of custody and support privileges and obligations, and distribution of marital assets. Building rapport and acquiring accurate information simultaneously in this environment is challenging. No model exists that helps lawyers attain these twin objectives in every matrimonial interview. Several specific techniques, however, can be consciously employed to reach these goals. These techniques are the tools of an effective matrimonial interviewer. They are the building blocks of all effective interviewing approaches and the units with which lawyers may analyze their performances. This chapter will describe and demonstrate them using specific examples from matrimonial contexts.

Although lawyers who choose to dominate or compete with clients use these tools to some degree, they work best with a decision to collaborate with clients using a participatory model of representation. This choice proceeds from an assumption that matrimonial clients are rational, self-directed, and capable of making their own decisions. Although the strong emotional currents of the divorce experience occasionally challenge these assumptions, most clients ultimately derive more satisfaction from a divorce outcome in which they actively participate.

A client-centered choice makes sense in interviewing. Clients must participate in the fact gathering process because lawyers cannot function competently unless they know basic information about both their clients' marital situations and what they want to do about them. Lawyers also need client participation to develop a working relationship featuring mutual trust, understanding, and respect. A client-centered approach is the most likely way to generate a client commitment to this type of working relationship. This value bias underlies this and all subsequent chapters.

#### **A. LISTENING**

Assume a matrimonial interview begins this way:

C: She never loved me. I don't want her to get a cent.

L: How long have you been married?

C: Seven years and love's been dead the last six. She's never respected me (spoken with increasing agitation and vocal tone)

L: Where were you married?

C: Here. Downtown, at the Courthouse.

L: Are you living together now?

C: No .... (short pause) Not exactly, you see, she ran off with . . .

L: (interrupting) How long have you been separated?

Crisp, probing questions like these are not the only way to gather information. Although they may be entirely appropriate in chambers or a courtroom before a judge who wants to hear a preordained testimonial checklist, they usually are an inefficient way to gather information at the beginning of an interview. They often are also not an effective way to build rapport and they can harm the relationship between lawyer and client.

The lawyer in this excerpt took immediate control of the interview and forced the client to respond to questions from his agenda. This approach does not gather information efficiently because the lawyer cannot, at least at this stage, ask every conceivably relevant question. This approach may also harm rapport because it communicates implicitly that the lawyer knows what is important and what should be talked about. The client here, for example, may incorrectly conclude that his wife's running off with someone is not relevant because the lawyer did not seem to want to hear about it. He may also become passive and dependent, a non-participant in a process that will ultimately ask him to make the inevitably difficult human choices that most matrimonial cases present.

There are other ways to gather information and build rapport. Listening is an excellent way to accomplish both. Lawyers cannot hear and understand information if they are talking and not listening. In addition, a particular kind of listening, called active listening, is the most effective rapport-building tool available to lawyers. So this exploration of effective interviewing tools begins with listening.

To talk and be listened to is a deep and basic human need. This need is often particularly acute for clients suffering the stresses and storms of matrimonial dissolutions. Notwithstanding its basic value, the skill of listening is elusive. It is hard work and difficult to do well. Perhaps it is the demise of radio. Maybe it stems from the fact that many people learn in infancy that being quiet accomplished little while initiating communication by talking or yelling sometimes worked better. Whatever the reason or reasons, lawyers, like many others, are often not effective listeners. Many lawyers think listening is inconsistent with their duty and desire to "do something" for their clients. They fail to see that supportive listening is a way to help clients. These lawyers, during those few times when they are not talking, are usually busy thinking about what they will do, say, or ask next. Listening fully with their ears, eyes, and complete attention is seldom thought important and "lawyerly." It is done skillfully even less frequently.

Listening well can be surprisingly difficult to do. Although it may seem to involve simply sitting back, not talking, and hearing what clients say, it is not that easy. Studies show that people normally speak at the rate of about 125 words per minute while we are able to listen at a rate of 500 words a minute. How lawyers fill this gap determines whether they are listening effectively.

Sometimes lawyers fill this gap with preoccupations about what is going on in their minds. Anxiety and insecurity, which can accompany an inexperienced lawyer's first interviews, are common, distracting preoccupations. They can intensify concern about what to do or say next and minimize concentration on hearing what the client is saying. This tendency also may be aggravated by the chaotic way that information often flows in matrimonial interviews. A client tells a fact relevant to custody in one sentence and jumps to an aspect of property distribution in the next. He then contradicts himself about his feelings toward his wife in the same sentence. This can be both very hard to follow and understand and is so terribly unsettling to a lawyer's need for order and structure.

Experienced lawyers need to beware of filling the gap with anticipated information that may or may not actually be involved in the client's situation. The routines of legal practice can easily lead to incorrect factual assumptions and premature diagnoses of situations. Not all divorcing thirty-five year old mothers of two children, for example, fit patterns that a lawyer may have evolved over years of matrimonial practice.

Another common listening mistake that lawyers often make is keeping quiet only to find an opening to get the floor again. This dynamic often occurs when lawyers feel a need to regain control of the interaction. Asking questions retakes control so lawyers concentrate on what to ask next rather than what their clients communicate.

Daydreaming and fantasizing, although vital to psychological wellbeing, are two more common listening errors. Lawyers must resist them and concentrate on listening to their clients during interviews. Another similar listening problem involve associations which lawyers make to client statements which can distract attention and even cause them to change topics. A client's mention of disciplinary problems with children, for example, may prompt an association with the lawyer's children or parents and cause him to lose track of what his client is saying. These associations can also cause lawyers unconsciously to attribute aspects of their experience to their clients, a phenomenon which psychologists call counter-transference. This can affect the content or tone of what the lawyer says next and trigger a response by the client. The risk of such distracting associations is great because matrimonial cases inevitably involve fundamental human dynamics that everyone has experienced on either a personal or vicarious level.

Awareness of, and determination to avoid, these and other listening traps may help lawyers listen more effectively. The skill of listening involves two broad approaches, passive and active listening:

### 1. Passive Listening

Passive listening is what most people probably conceptualize listening to be: not talking and letting someone else speak. It is a skill that begins with being silent. Doing it well requires learning to be comfortable with periods of silence. It also requires consciously realizing that being passive is not being incompetent. Talking connotes power and control. Remaining silent, however, is not necessarily the reverse. Lawyers do not lose control of interviews by listening passively. They may by listening, hear amazing things; things that can save them and their clients enormous amounts, of time and energy as their relationship progresses. Listening also builds rapport by conveying, in a powerful way, that lawyers care enough about their clients to stop talking and allow them to speak.

One specific way to use passive listening effectively in matrimonial interviews is to avoid filling every pause in a client's narration with a question. Assume a client suddenly stops speaking. What does that mean? It could mean that she has exhausted that topic and wants further direction from her lawyer. It could also mean that she is pausing to catch her breath; or she has seen a relationship between what she was saying and something else that she wants to organize mentally before sharing. She may even be generating her courage to tell something that is very difficult for her to articulate. There are countless other possibilities. A new question from her lawyer could easily destroy something important. It probably will

change the topic. A more effective response would be passive listening, remaining silent and conveying a non-verbal expectation that she should continue.

The non-verbal and non-committal encouragers of communication that are frequently used in social discourse are another type of essentially passive listening responses. Non verbal encouragers include attentive eye contact, head nods, and receptive posture. Non evaluative responses include the "I see," "yeses," "sures," and all of the other variations that are used to communicate nothing more than the speaker's statement is followed. Although these verbal remarks become troublesome echoes at deposition and trial, they are useful in interviewing. These remarks and actions acknowledge that lawyers are listening while not indicating how they are evaluating the client's messages. They remove the discomfort that might be caused to both participants if lawyers remain completely silent. They also combat inferences that lawyers are bored, disinterested, or falling asleep, possibilities that may be enhanced if nothing is said for long periods of time.

Passive listening is valuable because it lets lawyers receive information from their clients. It also affords a way of giving their clients freedom to communicate thoughts and feelings in interviews.

## 2 Active Listening

Another type of listening response that builds rapport and gathers information even more effectively than passive listening, is called active listening. This involves responding to pauses, and sometimes even questions, with a response that reflects, in different words, what clients have said. It is called active listening because it forces lawyers to hear what is said, and then to communicate it back in different words that prove an understanding of the client's message. The understandings generated by active listening may be crucial. A client who fears for her physical safety, for example, should receive different information about the economic importance of remaining in the marital home if her lawyer heard and understood her concerns.

An effective active listening response is probably a lawyer's best rapport-building tool. It proves that the lawyer has both heard and comprehended what the client communicated. Passive listening, even when accompanied by non-verbal and non-committal encouragers, only implies that hearing and understanding have occurred. Clients have to believe that their lawyer was listening because no explicit proof is provided.

Being heard and understood usually makes speakers feel better both about the person with whom they are communicating and the process of talking with that person. It creates a motivation for, and a climate conducive to, further sharing. This is particularly true when the topic is a personal, private matter and the listener is a busy professional; precisely the environment of matrimonial interviews.

Making a short speech which produces no feedback from the audience either during or after the presentation is roughly analogous to how matrimonial clients feel when their lawyers provide no active listening. Active listening is a way to provide feedback, and no feedback is usually experienced negatively. The speech was probably so bad that no one wants to talk about it. Withholding feedback also encourages less sharing, not more. Getting no feedback on a speech can minimize desire to give another. Similarly, withholding feedback from clients often makes them unwilling to share by narrating. Speeches also seldom involve the personal, intimate, and emotionally charged topics that clients commonly discuss in matrimonial interviews. Feedback in these situations can be crucially important for reasons that will be developed later.

Analogizing active listening to feedback is not completely accurate because feedback often implies evaluation and the most effective active listening responses are neutral and non-evaluative. They convey only proof of hearing and understanding by reflecting statements in different words. They are mirrors, not evaluations. The speech-maker probably wants someone to tell him how good the speech was. Matrimonial clients often also want their lawyers to tell them how good they are but neutral reflections ultimately are more effective.

Active listening responses may be directed at either the content or feelings contained in client statements. Content refers to objective "facts" the who, what, where, and when of situations. It is what courts are usually concerned with. Feelings are the terms clients use to describe their emotional reactions, both past and present, to events and situation. Formulating an active listening response on either level builds rapport and facilitates information gathering.

#### a. Content Reflections

C: I'd like custody but I just don't think I've got the time it takes to see to their needs. My job is very time-consuming and requires a lot of travel.

L: It would be difficult to balance the time demands of parenting with those of your career.

This is an example of an active listening response focused on the content of a client's statement; the conflict between parenting and a job requiring a lot of time and travel. The listener could have also reflected feeling here, perhaps frustration or anger about this conflict. The content reflection chosen had several advantages over passive listening. It proved that the lawyer heard and understood what the client said. Assuming an appropriate voice tone was used, it was neutral conveying no judgment about the merits of the choice of career over custody. It permitted clarification. If the client's present job was not his career objective, for example, the client could have clarified that and by doing so, perhaps identified a decision to be made regarding the importance of the position. The response also encouraged further sharing on this topic because the client could choose to respond by

elaborating further about the conflict, or the career, or both. This content reflection also left the client free to choose whether to continue on this topic or go to another one. An open question such as "tell me more" might have been more intrusive and less likely to produce information. Such a question, for example, might cause the client to wonder why more detail is wanted. A concealed judgment also might be implied in the question.

Content reflections typically follow a short statement about one fact or a related series of events. It is usually a single statement that follows a fairly short client narrative. You said this about that is how the response is phrased. Here are other examples:

C: I want the house because I was responsible for acquiring it.

L: Getting the house is a priority because your efforts enabled you to get it.

C: I was in the park walking to the subway. He was supposed to be watching our son.

He was reading and not paying any attention. Then Jeremy fell from the jungle gym.

L: You saw both the fall and that your husband was not supervising Jeremy.

The phrasing of content reflections is similar to leading questions because they follow a "you said this about that" pattern. If reflections are limited to what the client said, mistakes usually present no problem because clients will usually correct them. Content reflections are usually heard as requests for clarification if they are inaccurate. Additional information is then often provided.

C: I was in the park walking to the subway. He was supposed to be watching our son but he was reading and not paying any attention. Then Jeremy fell from the jungle gym.

L: You were coming out of free subway and saw the fall.

C: No. I was walking to the subway. I had not gone down into the station. I was still in the park when Jeremy fell.

Problems can develop, however, with inaccurate content reflections that go beyond what the client has said. These typically occur when lawyers either reflect content that the client did not present or anticipate what they think the client will say next. If the lawyer in the last illustration had said, "you saw Jordan fall and your husband did not," for example, she would be reflecting something that the client did not say; whether her husband saw the accident. The suggestive phrasing raises a risk that the client will agree with the content reflection thinking that it is what the lawyer wants to hear.

Anticipating what the client will say can result from an empathetic presence with the client to the extent that the lawyer has a strong, perhaps intuitive, sense of what is coming next. Supplying the words on the content level, however, runs the same risk of

suggestiveness. It should be avoided unless the client will not respond to suggestiveness. This is difficult to ascertain, particularly early in an interview. Anticipating and identifying unexpressed feelings do not present the same problem.

Both of these problems can be minimized by using frequent invitations to correct errors if accuracy is uncertain. "Please correct me if I get this wrong," "Let me see if I understand this," and "am I correct that" are useful introductory clauses to minimize risks that content reflections are inaccurate. Content responses should also be reflective, not interrogative. Conversational, neutral voice tones should be used.

Content summaries which synopsise larger segments of information are useful and should be used frequently in matrimonial interviewing. Summaries work best after long client narratives. Summarizing the "facts" after a long narrative to see if they are "right" can be an effective way to prove both listening and understanding. They solicit clarification of anything either missed or erroneously understood. They often also invite further elaboration effectively.

Another technique involves phrasing a question by incorporating a portion of the client's previous remarks. This technique, commonly done during direct examination to provide repetition and emphasis, is useful in interviewing to build rapport and stimulate memory. It works best after initial rapport has been established when information gathering is the primary objective. For example, the statement "my husband came home that night very intoxicated; it was quite unusual behavior for him" might be met with a question.

Phrasing the question this way builds more rapport than simply saying "what happened next" because it proves that at least a portion of the client's previous statement was heard and understood. A response that asked "what else did he do that night besides come home drunk" also can stimulate memory by indicating that intoxication has already been mentioned and understood. Since these responses accompany questions focusing on specific information, however, their rapport-building potential are limited. Non interrogative content reflections are more effective earlier in interviews because they invite further elaboration. Reflecting the above statement by saying "it was surprising to see him that way," for example, would permit this client either to elaborate more on this episode.

Many lawyers may find it difficult to conceptualize listening as a process of reflecting back messages received from clients. It takes practice to develop this skill once the values of active listening are acknowledged. Practicing content reflections is a good way to start because reflecting the content of what matrimonial clients say may be easier to do than reflecting the feelings they either express or imply. Most lawyers can identify facts more easily than feelings because they are the building blocks used in litigation. Claims for relief are constructed on facts so lawyers are thinking about and looking for them during matrimonial interviews.

#### b. Feeling Reflections

Representing matrimonial clients often means working with people experiencing emotional crises. Matrimonial interviews explore the disintegration of what was presumably once a very important, personal relationship and clients typically experience a progression of emotional reactions as they divorce. Discussing the marital breakdown and its consequences, including how children should be cared for and supported and how marital property should be divided, inevitably generates strong feelings and emotions.

These feelings and emotions are neither logical nor rational requiring neither legal analysis nor therapeutic intervention by matrimonial lawyers. They should, however, be acknowledged because they are important parts of the human experience of divorce. They should not be ignored. They are facts in the sense that they often influence outcomes as much as or even more than objective data.

The most effective way to respond to emotional expressions is with active listening statements that reflect them non-judgmentally. Here is an example:

Ms. Smith: (clenching her fist, speaking with an increasingly loud tone of voice)  
Then I found out he has been playing around with his secretary. (bangs her fist on the table) I couldn't believe it:

Lawyer: His conduct makes you furious.

The lawyer here identified a strong feeling expressed non-verbally and reflected it. The statement mirrored the feeling; it did not evaluate it. Doing this can both build rapport and generate information with extraordinary effectiveness.

Rapport is built by this type of active listening response in two ways. The most powerful way is its potential for conveying empathy. Reflecting the emotional content of client statements and capturing their correct feeling tone conclusively demonstrates an understanding of their situation. It conveys that the lawyer can enter the client's world and see the situation from that perspective. It proves that the lawyer is, in a sense, feeling with, not for, the client, the crucial distinction between empathy and sympathy.

No one knows exactly why skillful feeling reflections are so effective. Perhaps it is because it is such an unusual experience to have someone listen to intimate feelings without either judging them or substituting other agendas. It also feels good to share a difficult experience in both its factual and emotional components and to be heard and understood on both levels. That good feeling generates rapport and motivates continued disclosure. It also engenders feelings of importance and self-worth when a busy professional listens this carefully.

A neutral, non-judgmental feeling reflection is what most people want when seeking out a friend with whom to share a disturbing personal situation. People want to have their feelings heard and understood, rather than ignored, judged or minimized. Secrets are told to

friends who listen well and complete disclosure from most matrimonial clients usually involves sharing several. Skillful active listening responses will uncover these secrets much quicker than reassurances that the communications are protected by evidential privileges will.

Feeling reflections also build rapport by removing blocks to communication. They allow a potential release of emotion because clients who encounter understanding of their feelings may experience a discharge and a sense of relief. This discharge of feelings often makes clients feel better. It also may facilitate their willingness to move on and talk about other issues after their emotions have been acknowledged and discharged. Ms. Smith in the above illustration, for example, may continue to display her anger by other non-verbal means and vague statements if it is not acknowledged. Once it is reflected, however, she may be more inclined to move on to talk about other things. She may sense that there is no point dwelling on her anger since it has been heard and understood.

Reflecting feelings can temporarily intensify the emotions experienced by matrimonial clients. This intensification can be an unpleasant experience for lawyers. It can also discourage them from using additional feeling reflections even though more active listening is usually the best response to make if these storms develop. Remembering that most clients experience this discharge positively may also help lawyers weather these storms.

Although this discharge has slight therapeutic potential, lawyers should not reflect feelings for this purpose. They should reflect feelings to demonstrate empathy and to motivate further communication. They should not press a client to discharge emotion.

If clients choose to do so; fine; if not, fine. It is their choice.

If the intensification continues and no discharge occurs, a lawyer could share his desire to move to another topic and make a motivating statement to encourage it. A statement like this might be effective, for example, with a client who demonstrated a reluctance to do anything other than share anger:

"Ms. Smith, you clearly express your anger. I understand it. It is something you have to live with. You may want to work on resolving it. I have a reading list here of books that may help you start. I will also be happy to refer you to another helping professional who has the skills to work with you on this process. Without minimizing your anger, I'm feeling a need to get additional information about your situation. Could you tell me about ...

If this doesn't work, the other option to consider is adjourning the interview and making a therapeutic referral.

A matrimonial client who chooses not to discharge emotion may often respond to a feeling reflection in a way that generates information because the response is heard as an

invitation to talk more about the facts underlying the emotion. The angry Ms. Smith in the above illustration, for example, may respond: "Yes, I am angry. And let me tell you what else that rat has done." Then she may tell me about his penchant for poisoning neighborhood cats. This is a fact that may be relevant to case strategy and probably was not on the lawyer's checklist of topics to explore.

Feeling reflections also generate information in the same clarifying or self-correcting way that content summaries do because clients are usually happy to clarify or correct inaccurate responses. These clarifications also often add additional facts that enhance understanding of the overall situation. Consider this example:

C: I couldn't believe he would stoop so low as to associate with that woman.

L: You were angry.

C: No, I was disgusted, and convinced that the marriage was over. After that I cleaned out our joint accounts and moved in with my sister.

#### (1) Phrasing Feeling Reflections

Accuracy in reflecting feelings requires correctly gauging the intensity of the emotion rather than its existence. Rapport and motivation to communicate are developed best by feeling reflections that accurately capture the intensity of the emotion mirrored. Grossly inaccurate reflections may actually harm rapport. Responding to a client's clenched fist, desk-banging remarks about her husband's behavior by saying, "you seem a little bit upset about what he did" demonstrates the point. This client communicated a much more intense feeling than "upset." The minimizing phrase "a little bit" was also inaccurate. Common conversational phrases like "little bit," "sort of," "kind of," and the like often make feeling reflections inaccurate. This client may clarify and correct these mistakes and appreciate the effort to hear and understand. On the other hand, she may react negatively and wonder why her strong feelings were minimized.

Although content summaries should be limited only to the facts communicated, reflecting unexpressed feelings and emotions can be very effective because empathy can be dramatically displayed where feelings are either implied by tone and non-verbal conduct or stated vaguely. Bearing and understanding emotions that were not clearly communicated vividly demonstrates careful, attentive listening. Erroneous feeling reflections also seldom cause substantive harm. Reflecting anger when clients feel frustration, for example, usually has little effect even if they choose not to correct it. Since substantive results do not hinge on feelings, erroneous reflections do not compare to the havoc that occurs when mistaken facts stemming from inaccurate and uncorrected content responses are blasted away by the other lawyer at deposition or trial.

Phrasing feeling reflections is more challenging than content responses for several reasons. The non-objective nature of feelings often tempts lawyers to deviate from neutral responses and use judgmental or reassuring formulations. Both of these common responses present problems. Neither is fully empathetic.

Judgmental responses inhibit subsequent communication because even positive evaluations imply a willingness to judge less than favorable situations negatively. Statements approving a client's anger at her husband's infidelity, for example, may inhibit her willingness to disclose her extra-marital activity. Matrimonial clients typically receive a lot of judgment, much of it predictably negative, from their spouse, children, family, and friends. They don't need more from their lawyers and they may be less than candid to avoid it.

Positive judgments can also inadvertently minimize client emotions and overlook the complexity of situations. Saying "It's good to be angry at that drunken, abusive man" 'minimizes a client's anger by not acknowledging its intensity. It also communicates unclear, disturbing implications about her choice to live with this person for years.

Many matrimonial clients have strong needs to express anger at their spouses and want their lawyers to share their bitterness. Judgmental statements responding to this wish should be avoided. They will undermine explanations that the legal system is no longer concerned with finding fault and vindicating victims that may be necessary later. They also keep clients extremely partisan which usually harms chances to achieve either a creative settlement that benefits both spouses or a favorable outcome if the matter is ultimately litigated.

Lawyers should also recognize that powerful urges to help their clients may cause them to offer reassurances. They are not as effective as neutral reflections are despite their noble motivation. Reassuring responses are often heard as minimizations of feeling. Telling a matrimonial client, "don't worry, everyone is anxious at the start of a divorce, you'll get over it," minimizes the feeling by not acknowledging its intensity. It also communicates subtly that it, and perhaps other emotions as well, are not relevant.

Another ineffective tendency is to use an introductory phrase, often the same one, to begin every feeling reflection. "I can understand," as in "I can understand how that would make you angry," is the chief culprit. Clients often hear this as phony and patronizing, particularly when they are talking about feelings relating to events that, in their perception, a lawyer would never have experienced. If Ms. Smith was talking about her husband's sexual abuse of her daughter, for example, a lawyer expressing understanding of her anger probably is damaging rather than building rapport. Ms. Smith will probably find it hard to accept that her lawyer has ever dealt with such a situation personally. She will feel patronized and belittled.

Using other introductory phrases like "so you're saying," "I hear you saying," and "as I see it," all lengthen feeling reflections and threaten their effectiveness. They often make

feeling reflections seem hollow and insincere. The goal is reflecting emotions that clients express without mechanically applying a communication technique. It is usually more effective to eliminate introductory phrases and use simple reflective statements like "you're angry, frustrated, anxious, frightened," etc.

Making feeling reflections often feels awkward, forced and uncomfortable initially. These problems can seep into voice tones causing reflections to sound mechanical and insincere. An empathetic, confident reflection of the feeling or emotion either expressed or implied should be the goal. The cure for the problem is practice.

Another possible problem may involve finding the right words. Lawyers get so preoccupied with the rational and objective aspects of lawyering that their vocabulary for describing emotions often diminishes. Here is a list of thirty feeling words that may enlarge feeling vocabularies: happy, anxious, depressed, inadequate, fearful, confused, hurt, angry, lonely, guilty, suspicious, resentful, vulnerable, bored, miserable, disappointed, helpless, rejected, embarrassed, distressed, uncomfortable, abandoned, cheated, tricked, nervous, afraid, impatient, worried, troubled, and shocked.

Most matrimonial clients will experience all of these feelings, and others, during their divorce. Some may experience this entire vocabulary during their initial interviews. Looking for opportunities to reflect these feelings neutrally and non-judgmentally with these words will increase rapport and improve communication.

## (2) Types of Feeling Reflections

Effectively reflecting client feelings that are either implied by non-verbal conduct or vaguely expressed requires identifying the emotion communicated. Precise identification can help clients understand their emotional reactions and facilitate their ability to make decisions later. Anger is a good guess when a client clenches fists, bangs on the desk, and increases voice tones. Vaguely expressed emotions can be more difficult to discern. What does a client mean, for example, when he says "I'm really freaked." Is he angry, surprised, shocked, disgusted, frightened, or happy? Although identifying this emotion is not easy, wrong guesses run few risks because errors do not affect substantive results.

Feeling reflections can be even more difficult when emotions are expressed clearly and when none are communicated in situations where some would be expected. For example, it can be difficult to reflect with a paraphrase if a client says, "I am so angry when he acts this way." The emotion has been expressed clearly. Reflecting by parroting, or using the exact words, usually produces a negative reaction. At best it only produces a confirmation as clients either think or say "Yes, that's what I said." using a synonym, like furious or livid, also does little to build rapport and motivate further communication.

Several options are more effective when feelings have been expressed clearly. Passive listening involving pausing and not saying anything is one approach. The silence,

accompanied by supportive and encouraging non-verbal conduct, may produce the same reactions that are generated by effective reflections of implied or vaguely expressed feelings. Passively listening to clients who express anger clearly, for example, might encourage them to discuss the reasons for their anger and generate additional information.

A neutral statement that both comments on a process point and reflects using the same words is another effective response. Clients, for example, can be rewarded for expressing themselves clearly. Examples of this include: "You express your anger clearly;" "you are in touch with that anger;" "understanding that you are angry is important because it helps me to get the full picture."

Another option is a statement that mirrors the client's tone. Saying with intensity "yes, you are angry," for example, can minimize the damage done by the paraphrase. This emphasizes that the lawyer has heard the intensity of the emotion that has been clearly expressed.

Lawyers may also express understanding of the feeling if the situation is something either very common or clearly within the client's perception of their experience. No understanding should be expressed if neither is true to avoid patronizing the client. Saying "I can understand how angry you'd feel after seeing your husband drunk again," is probably acceptable because intoxication is an unfortunately common experience. A short statement that explains credibly how the lawyer can understand may also be effective. For example, saying "I've had family experiences with alcoholism and I can relate to how angry that makes you," for example, can make an expression of understanding more credible. These bridging statements should not, however, divert focus from the client's situation to the lawyers experience.

Occasionally matrimonial clients describe situations which would be extremely emotional for most people without expressing or implying any feeling. What should lawyers do then? Speculating about an expressed emotion might be received as intrusive prying." On the other hand, it might be either facilitative or corrected the speculation was inaccurate. Judging which way to go depends on an almost intuitive sense of how clients will respond. This is another occasion when a feeling reflection should include a short introductory phrase, such as "I imagine you felt angry and frustrated," or "the situation could have made you quite concerned about your health."

There is no easy answer to the question of how much feeling reflection should be done in matrimonial interviews. Much more that most lawyers do now is probably a safe prescription. After every client response is too often. It's always a judgment call in between. Factors in making these judgments include an evaluation of how much rapport has been developed, how openly and freely the client is narrating, and the intensity of the expression.

It may also be useful to distinguish between descriptions of past feelings and emotions that clients are presently experiencing. Matrimonial interviews present ample numbers of

each. Strongly implied present feelings should usually be reflected early in the interviews because little rapport has developed and the intensity suggests strong potential for empathetic facilitation of further communication. A clenched fist, desk banging implication of anger is an example of an opportunity to listen actively that should not be ignored. Although brief reflections of past feelings when they are expressed or implied can be empathetic, exploring them in depth may sidetrack interviews. A weak implication of a past feeling later in an interview thus might not warrant a reflection. A statement of how angry it made a client when her husband ignored her birthday seven years ago made late in the interview, for example, should probably be left unreflected.

Every feeling reflection should be purposeful. Lawyers are not going to resolve emotional conflicts therapeutically so they should not focus on feelings unnecessarily. Feeling reflections should not be used for voyeuristic reasons, to satisfy curiosity, or to control clients.

Developing and using active listening skills neither manipulates clients to express their feelings nor invades their privacy. It is simply a way to gain information and build rapport. It is a way to respond to the fact that lawyers can listen faster than clients can speak. It gives lawyers something to think about and concentrate on while their clients are talking. It also gives them a safe harbor during the emotional storms that matrimonial clients frequently experience during interviews. Lawyers often feel that they must say something when these storms come and feeling reflections are usually the most appropriate and effective responses they can make. They usually help both lawyers and clients weather the storm and emerge more fit for a better voyage together.

## B. MOTIVATING STATEMENTS

Although active listening is the best general tool for encouraging matrimonial clients to talk during interviews, statements designed to motivate communication can also be effective. They can often be combined with active listening responses but they do not involve reflections of the client's message using different words. Instead, they focus on other aspects of the communication process. The three primary types of motivating statements are: positive feedback about the communication process; expectative motivators; and remarks that recognize and combat communication inhibitors.

### 1. Positive Feedback about the Communication Process

The technique is simple but important and often overlooked. It involves giving clients occasional, sincere praise for behavior that is cooperative and helpful. Here are some common examples:

"You are doing an excellent job giving me details; I understand much better now."

"This is very helpful narration; I'll be able to focus my questions much more effectively later."

"Your sharing of this information even though it brought back unpleasant memories, has been valuable to my understanding of your situation."

A client-centered interviewing approach stresses active client participation in the information gathering and rapport building processes. Giving clients positive feedback about the valuable contributions they make during interviews motivates them to be more cooperative and communicative. This feedback responds to human needs for recognition and the esteem of others.

Statements providing positive feedback should identify and reinforce specific behaviors. Focusing positive evaluation on communication behavior rather than on either the content or the emotional aspects of client messages is important. Positive feedback about communication behaviors motivates by providing recognition and desire to repeat the rewarded conduct.

## 2 Expectative Motivators

This technique simply involves sharing expectations with clients. Making statements about expectations motivates communication in two ways. First, it alleviates client anxiety and discomfort creating greater freedom and willingness to communicate. Second, communicating expectations that information will be forthcoming often overcomes a reluctance to talk because the client's need to meet his lawyer's expectation may be stronger than his need to block disclosure.

Many matrimonial clients lack realistic expectations about the process, the law and lawyers. These inaccurate expectations can generate threatening perceptions and be a significant source of stress. Sharing how the system actually works can help many clients communicate better during interviews. Clients who present routine cases from the system's perspective, for example, may unrealistically fear that massive publicity will accompany their divorces. They don't know that the final hearing will take three minutes or less, be held in the virtual privacy of a judge's chambers, and be totally unpublicized. A general explanation of these kinds of systematic features may alleviate many of these concerns and it is probably an appropriate thing to do later in the interviews even if no block has been discerned. Specific expectative statements are usually effective any time client confusion or concern about a role or legal issue is sensed.

Many matrimonial clients have unrealistic expectations about interviews that can be alleviated by expectative statements. Some, for example, will be concerned about the role they should adopt during the interview. They may find a participatory approach discomforting if they expect their lawyer to ask the questions and see their responsibility only as answering them. A statement explaining an expectation that they should be an active participant throughout, beginning with a narration explaining both what their situation is and wishes are, may help alleviate that discomfort.

All clients want to know how much the divorce and their" lawyer are going to cost and concerns about these questions can produce anxiety and harm communication throughout an interview. Stating early what fee, if any, is charged for the initial consultation - together with an explanation that later fees and costs will be explained thoroughly usually allays these concerns. Some clients are concerned about how long the interview will last. An expectative statement on this topic is usually effective. This and the initial consultation fee can also be communicated at the time the appointment is made. Questions produced by any of these general expectative statements provide additional opportunities to minimize client worries.

Expectative motivators can also be focused effectively on specific pieces of information. Telling clients that information on a particular topic is expected can powerfully motivate them to meet that expectation. This technique works because of the human tendency to conform o another's explicit expectation. This desire to conform may also be stronger than other client needs being met by not sharing information. Research shows that this dynamic is even more pronounced when the suggestion comes from one perceived, as lawyers often are, as having higher status.

An empathetic identification of the difficulty of remembering the information can often be combined with an expectative statement on specific information. Lawyers need to be explicit about their expectation that information will be forthcoming because simply empathizing with the difficulty in remembering sends a message that no information is expected. Assume a client indicates that she cannot remember what happened immediately after her husband caught her with a lover. An effective empathetic, expectational motivator would be:

"I understand how hard it can be to recall unpleasant details that happened some time ago. I have the same difficulty myself. I often find that if I concentrate for a few minutes, things start to come back. Why don't you think about it for a bit? The information could be very significant to our decision-making down the road."

### C. RECOGNIZING AND COMBATIING COMMUNICATION INHIBITORS

Matrimonial clients do not block information simply to make their lawyer's lives miserable even though it sometimes seems that they do. Subjectively valid reasons for the non-disclosure usually exist. Lawyers need to know the psychological factors that inhibit communication to make effective judgments about when and how to use motivating statements regarding these blocks. Although the underlying psychological sources of these inhibitors do not need to be diagnosed, lawyers should know the common blocks and how to counter them. Professors Binder and Price describe the following six common inhibitors which impede complete communication in legal interviews. All of them are often present in matrimonial interviews.

#### 1. Ego Threat

Most matrimonial clients do not share information which they perceive as threatening to their self-esteem easily. People want to be evaluated favorably; that's why positive feedback is an effective motivator. They also typically fear and seek to avoid negative evaluations. Negative feelings about past or anticipated conduct make it difficult to disclose that information. This concern about self-esteem may also carry over to worry about these negative acts becoming public through the litigation process.

In matrimonial cases these inhibitors range from feelings of embarrassment and failure that the marriage did not work to shame and guilt about either past acts or future plans. Motivations for wanting the divorce may be ego threatening. Aspects of relationships to children may threaten clients' self-esteem. Remaining fault issues such as the relationship of marital misconduct to alimony also require inquiry about potentially ego-threatening topics.

## 2. Case Threat

This block is the reluctance to share information which clients perceive to be harmful to their case. Substantial misinformation about matrimonial law and procedure exists on cocktail and other circuits. It often produces strange ideas about what and what will not affect a position in a divorce adversely. This inhibitor is similar to ego threat but the two are not always present simultaneously. A client, for example, may have no ego qualms about sharing information about his extra-marital sexual activity. He may even derive ego satisfaction from talking about it. That same client, however, may be reluctant to mention it because he perceives that it could be harmful to his case.

## 3. Etiquette

This inhibitor includes all of the reasons that information is not disclosed because of role, cultural, or status notions. Candidly disclosing this kind of information would violate client notions of propriety. A man, for example, may think it is inappropriate to talk about relevant but intimate sexual matters with a female lawyer he has just met. There are things that black clients more easily tell black attorneys.

## 4. Trauma

This block occurs when a person has such unpleasant associations with a topic that recalling and retelling it are extremely painful. Most people are strongly motivated to avoid thinking and talking about unpleasant past events. A spouse who had been savagely beaten in the past, for example, might be very reluctant to discuss it. Recalling and retelling the unpleasant situation can also generate a re-experience of these feelings. Gathering information in matrimonial interviews often requires exploring areas where this inhibitor may be present.

## 5. Greater Need

This block occurs when a client has a need to talk about a topic different than the one which the lawyer wants to discuss. The inhibition does not come from a perception that the questions are either threatening or irrelevant but rather from a greater need to talk about something else. Clients who insist on sharing angry feelings about their spouses and resist sensitive efforts to move on after a reasonable time offer one common temple of this inhibitor.

## 6. Perceived Irrelevancy

This block stems from client perceptions that there is no reason to communicate on the point since it has nothing to do with what he or she perceives to be relevant. This block also does not involve client feelings of either threat or discomfort. It is often resolved by a motivational statement indicating why, in general terms, the topic is important. A matrimonial client discussing a custody question, for example, may not be motivated to respond to questions about his spouse's friends until he is told that they may be important sources of information to refute parental fitness claims.

Combatting these communication inhibitors requires recognizing them initially. Then an empathetic statement showing understanding of the difficulty combined with an appropriate motivating expression often dissolves the block. The diagnosis of the block may need to be either general or specific because many topics involve more than one inhibitor. A client who is manifesting verbal and non-verbal reluctance to discuss how she cared for her four year old son immediately after leaving her husband and moving in with another man, for example, could be inhibited by ego threat, case threat, trauma, or perceived irrelevancy. Attempting to identify the specific blocks that are present could both confuse the client and waste time. A general empathetic statement is probably more appropriate. This, for example, might work.

"I sense that this topic is difficult for you to discuss. The information could be very important so I need to ask these questions. Your cooperation will help me analyze the case and give you better information about your options and their consequences."

If it is pretty clear what the block is, a more specific diagnosis and motivating statement will probably be more effective. Assume a client has been divorced for several years and is now living with another man. Her ex-husband has filed a motion to modify the final judgment seeking to acquire custody of their children. The client has not fully answered questions about how the potential step-father gets along with her children and the block is probably either ego or case threat or both. This might be an effective motivator in this situation:

"This seems to be a difficult area. It is an important topic that I must explore fully before I can help you develop options and information about them. I will not think less of you if there have been some problems here. It is not my role to judge you

or your behavior. I want to help you make the best decisions possible and, to do that, I need you help in sharing all relevant information. That includes even things that you fear might either harm our case may embarrass you."

Facilitating communication from a client blocked by trauma is also best done by a specific diagnosis and motivating statement. Motivating clients blocked by trauma also often requires extensive feeling reflections and may produce the same type of cathartic discharge that can occur when other emotions are mirrored by active listening. This, for example, might work with the client who was savagely beaten and who doesn't want to remember, much less talk, about it:

"This is a painful memory for you and talking about it may cause you to relive some of that agony. I regret that our legal system makes this information important to our case but it does. That's why we need this information. I assure you that I'm not asking these questions to cause pain. These details could be crucial to our case."

Motivating statements indicating that the topic is open for discussion and important can also be used to combat etiquette blocks. This, for example, might be an effective way to begin asking questions about a client's past sexual conduct to ascertain whether an adultery defense will be an obstacle to an alimony claim:

"You may think it is inappropriate to discuss extra-marital sexual conduct by both you and your spouse in this interview. These issues, however, have important legal significance and could bear directly on some decisions you will have to make about the case in the near future. I have to ask you some questions on these topics to help you make fully informed decisions. I don't ask you these questions to pry into your life or to embarrass you. I hope you will understand and give me complete answers."

Motivating statements can also help clients blocked by a greater need to talk about something else. Sensitively phrased comments can help clients who insist on staying on intensely emotional levels see the need to discuss other topics. Greater need blocks that are not based on emotions can also be removed by statements of the lawyer's need. This, for example, could be effective:

"I'm concerned that we have only twenty minutes left today and I need to find out more information about other topics so that I can do the legal research necessary before our next appointment. I sense that you need to keep talking about this topic but I've got enough detail on it for now. I would prefer moving on."

Motivating statements should be phrased supportively, empathetically, and flexibly. They should not be presented as demands. Effective motivating statements often produce questions because they usually indicate that the information sought could be important to

either the lawyer's full understanding of the situation or the legal standards that apply to it. Clients, after hearing this, occasionally ask why the information is important.

Lawyers should respond to these questions to build rapport and keep the interview a shared, non-threatening experience. They should not be specific about the law if the facts are unknown, however, because of the possibility that clients will then tailor their remarks to produce the best result. A client who learns that marital misconduct might preclude alimony before answering questions exploring this topic, for example, might be motivated to give answers that avoid this result. The best response to such inquiries is a statement slightly more specific than the motivating expression but one that provides no detail that might distort. Here is an example:

L: I need to know whether you have been sexually involved with any men other than your husband since you were married. This information is important. It will help me determine what our options are so I ask the question not intending to embarrass you or to pry needlessly into your privacy.

C: Why is it important?

L: It bears upon some of the options and their potential consequences that you may want to consider.

C: I thought we have no-fault divorce.

L: We do. This information has no effect on your ability to get the divorce. It affects some of the relief you said you wanted.

C: What relief?

L: I'd rather not get into an extensive discussion of how the law applies to your situation until I understand it better. We can certainly talk about this topic later if you wish. It is, however, possibly relevant. Everything you tell me is completely confidential. Should we move to another topic and come back to this later?

C: No, I'm willing to talk about this if it is really important.

L: It is.

#### D. QUESTIONING

Although asking for information may seem to be the easiest way to get it, that is not the case in matrimonial interviews. Passive listening, reflections of content and feelings, and motivating statements often produce information and build rapport better than questions do. There are times during interviews with matrimonial clients, of course, when asking questions is totally appropriate. Using responses other than questions fifty percent of the

time is a good rule of thumb in matrimonial interviews. Although this percentage should be even higher near the beginning of interviews if clients are comfortable narrating, a fifty percent rule should help most lawyers avoid taking control of interviews prematurely by excessive questioning.

**Client Interviewing and Counseling**  
**Margaret Barry and Brian Landsberg**

(Excerpts adapted for CLE Course from Teaching Materials)

**1. Initial Client Interview**

**Lawyer's Goals: Some Ideas**

- Obtain necessary facts and information (Get leads for further investigation)
- Obtain client's version of facts
- Establish appropriate A/C relationship (Characteristics: respect and mutual trust)
- Establish rapport (Open questions and active listening are important techniques)
- Identify and clarify client's goals (Caution: don't leap to conclusions prematurely)
- Get authorization; establish contractual relationship
  - \* Written retainer agreement; supervisor's express approval required
  - \* Release of Documents
  - \* Conflict check
  - \* Explain student status, sign certified student form
- Determine if lawyer can/should accept the case
- Professional expertise and experience
- Time
- Personal and professional values
- Motivate client to participate fully

**Client's Goals: Some Ideas**

- Desire to tell her/his story to helping professional
- Desire to control to some extent how the interview proceeds  
(What topics are discussed; what details are discussed)
- Reassurance
  - Emotional contact with professional (analogy: doctor, dentist, car mechanic)

--Basis for deciding whether s/he wants to enter into an attorney/client relationship (N.B. You should always approach relationship as if the client has a choice b/ she/he does!)

--Wants to accomplish some substantive result

- \* Wants violence to stop

- \* Wants to have c/s at adequate level to cover expenses

- \* Wants to know what options are

--Gain understanding of the legal system (legal options; what she can expect)

--Fees (potential fees, costs, expenses)

--Closure (Wants to know what to expect next and when)

## **D. The Lawyer/Client Relationship**

### **1. Opening/small talk**

--How to plan for small talk

--Things that put people at ease (greeting, small talk, furniture arrangement, appearance, genuine-ness, listening, empathy)

### **2. Was There Rapport?**

-Did lawyer promote a relationship of trust and confidence?

-Was lawyer able to remain nonjudgmental?

-Did lawyer seem to be on the client's side?

-Was lawyer prepared to answer client's questions and deal with client's concerns?

### **3. Did Lawyer Use Active Listening Responses?**

-Were they successful?

-What other types of listening did lawyer try (passive, silence, body language, etc.)

-Why is listening so difficult?

### **4. Nature of Questioning**

-Did lawyer use sufficiently open-ended questions to enable client to tell the story from her own point of view?

-Was the lawyer able to refrain from asking closed, probing questions until the story had sufficiently emerged?

-Did lawyer use T-Funnel technique to clarify, gain specific information?

**5. Organization**

- Was the organization of the interview helpful?
- How could it have been improved?
- How was interview structured?

**Opening:** Open question such as: Please tell me about your problem, how it began, and what you'd like to do about it.

**Chronological Overview:**

- Open questions/ Active listening
- Minimum of probing for details
- Minimum interruption

**Preparatory Explanation:**

- Step by step - from beginning - in your own words
- event by event
- Basically, I want you to do the talking
- Planning on one hour today

**Theory Development:**

- juggling info
- T-funnel
- topic by topic (spark other topics)
- systematically

**Conclusion of Interview:**

- What you will do and by when
- What client needs to do
- Tell client expectations – don't expect her to read your mind
- establish attorney/client relationship
- signed retainer agreement

**6. Did Lawyer Find Out The Necessary Facts:**

- What other topics should have been covered?

-Any significant details omitted?

**7. Conclusion of Interview**

-Did client leave the interview knowing what the lawyer was going to do next, and when they would meet again?

-Did the lawyer give the client any info re the law, legal rights, instructions on how to behave, or the legal system?

-Should more (or less) have been said?

-Was information accurate?

**8. Dealing with the Unexpected**

-How did lawyer deal with the unexpected?

-Ideas re how to get comfortable with chaos?

-Was lawyer open and encouraging and nonjudgmental?

-Idea: ask client's permission to address topic X, then Y. Shows her she has been heard and understood.

-Watch tone of voice and body-language.

-What was lawyer communicating

**9. What Information Should You Share With Clients? When?**

-personal experiences/-personal values

-legal theories

-legal advice

-court process

|                                   |
|-----------------------------------|
| <b>Avoid Premature Diagnosis!</b> |
|-----------------------------------|

**10. Safety Planning: what it is and how to do it**

**A. Other Critique Topics**

**1. Techniques**

-eye contact

-body language

-tone of voice

-speed of voice

## **2. Form of Questions and Listening**

-open

-closed

-leading

-did questions elicit relevant info

-active listening

-silence

## **3. Substance**

-other questions should have asked

-set up next contact

-explain process

-explanation of role and supervisor's role (asked them to skip this time)

-accuracy of info provided re law and process

## **4. Team Coordination**

## **5. Ice-Breaking/Small Talk**

### **SPECIAL CONSIDERATIONS WHEN COUNSELING DOMESTIC VIOLENCE CLIENTS?**

#### **Domestic Violence**

- Non-legal as well as legal consequences are critical, i.e., safety, client's feelings
- Possibility of PTSD – can impair client's ability to make decisions
- Safety planning continues at counseling stage

#### **Impact of race/economic class/ gender on ability to effectively counsel client?**

- May affect ability to empathize or see from their perspective
- May affect ability to generate alternatives or see all consequences

### **What to do?**

- Be extra careful to ensure partnership model where you leave space for client to generate alternatives, examine consequences
- Identify your own personal position, what you would do --- make sure this is not what is guiding your advice

### **Some advice given by Dr. Mary Ann Dutton, clinical psychologist at George Washington University**

1. Willingness to Hear Details of Violence
2. You might feel like an intruder or may not want to hear all the gory details, make sure your hesitation does not inhibit gathering of relevant information.
3. Avoid Being A Voyeur, Eliciting Details Just To Hear Details
4. Support, Validation Role
5. Don't get so focused on professional role and forget to be human (e.g., client who confides to you that she is HIV positive)
6. Understand dynamics of control, be aware of power dynamics between you and client
7. (giving decision-making power to clients rather than making decisions for clients)
8. 5. Be aware of compassion fatigue, secondary traumatic stress which can affect those assisting clients who have been battered

## **ADVICE**

*Conference Skills*, Inns of Court School of Law, pp 131-150 (1999/2000)

### **7.1 Introduction**

As a barrister you hold yourself out as a specialist in various fields of practice and offer your professional expertise and experience in a way that should benefit the client. Commonly the client comes to the lawyer because he or she has been unable to resolve a problem alone. It is likely that this problem is a complex one and almost certainly of great importance to the lay client.

From the outset it is important to recognise that the term 'advising the client' has many connotations. The type of advice you give varies to meet the needs of the different stages of the client's case. You will continue to advise the client throughout your professional involvement, not just at the initial conference. Consider the many decisions that remain to be made by the client during the rest of the litigation process: the pre-trial negotiation, the trial, and in the post-trial period; sentencing and enforcement etc. At each stage you will have some contact with the client and naturally questions will have to be asked and the issues of the case thoroughly investigated. The additional information thrown up by this process will have to be assimilated with any existing knowledge of the case and its issues. Any preliminary conclusions will have to be adjusted to reflect this new, informed picture of the case. It is only at the end of these steps that you will be able to offer the client some concrete advice on the issues in the case. It is crucial that the client not only finds this advice satisfactory and of practical benefit at each stage but that he or she has a thorough understanding of its consequences. In order to meet these requirements you will have to appreciate the client's level of comprehension and be sympathetic to his or her level of education, age, background and so on as well as having an understanding of the legal and factual issues in the case.

The steps that go to make up the advice process are recorded in note form below. Whilst at first glance they may appear mechanical, after some practice the process will become more natural.

### **7.2 Advising: A Step by Step Guide**

- (a) Identify the objectives of the conference and isolate all the legal and factual issues of the case. Compare the two to isolate the relevant issues which require your advice in the conference. (See 5.6.)
- (b) Gather all necessary information from the papers and ask the client questions as necessary to complete your knowledge of the case. (See 6.6.)
- (c) Assimilate the new information with existing knowledge by filling the gaps and clarifying any ambiguities.
- (d) Analyse the legal and factual issues in the case considering the new information and your revised view of the client's instructions.

(e) Consider the merits of the case, application and so on with the benefit of this additional legal and factual analysis.

(f) Adjust as necessary any preliminary view that you formulated before the conference.

(g) Formulate your opinion and advice so that it is both practical and appropriate to the needs of the client and the requirements of the case.

(h) Consider how best you may communicate your conclusions to the client b using appropriate language and sufficient explanation.

(i) Identify all the strengths and weaknesses of the case for the client.

(j) Articulate your opinion to the client in a way that he or she can understand. (k) Take the client's final decision and any further instructions.

### **7.3 Terminology**

Before continuing to discuss the advice stage in greater detail it will be helpful to give some explanation of the terminology used in the study of advising clients on legal matters.

#### **7.3.1 ADVICE**

This term can be used in a general sense to include the whole process by which a barrister communicates information to clients and assists them during the conference. The information and help may take the form of one or more of the processes described elsewhere in this section. However, the term 'advice' may also be used more narrowly to include the barrister's particular instructions and detailed suggestions for action given to the client. Some commentators on the role of lawyers in conferences suggest that giving specific advice is not appropriate as it imposes the view of the lawyer on the client. However, on many occasions barristers in England and Wales do give overt advice to their clients. Indeed, some would argue that this is what they are engaged to do; in short it is what the client is paying them for.

#### **7.3.2 OPINION**

Used in the context of a conference an opinion is a discussion of the merits of the case by the barrister. For example, this might include the chances of success should the case go to trial or the likely outcomes and consequences of a negotiated settlement. In a broad sense this term is also applied to suggestions for future action made by the barrister to the client, but always following an evaluation of the strengths and weaknesses of the relevant features of the case.

#### **7.3.3 COUNSELLING**

This is a specific method of advising clients employed by some legal advisors and there is much debate amongst commentators about its various merits. It is designed to be used by the lawyer to advise the client of the full range of options, and the client invited to take the initiative. This involves the selection of a range of options that b suit the client's identified

needs and personal characteristics or that accord with the emotional demands of the client. (See 7.16 for a full discussion of this method.) This method of advising should not be confused with psychological support. The sort of counselling that might be offered by a qualified counsellor is not an appropriate method of advising in a legal conference.

#### **7.3.4 EXPLANATION**

This is a neutral method of assistance used to give the client definitions, descriptions and explanations. The lawyer acts as a guide and interpreter of the legal process and it may include explanations of legal terminology. Thus although statements of personal preference and suggestions of best choice are not relevant, various and numerous explanations will usually precede another form of advice-giving.

#### **7.4 Standard of Advice**

No matter in what style or method you advise your client, as a practising barrister you must reach the standards set by the profession.

Generally, a barrister should ensure that advice which he gives is practical, appropriate to the needs and circumstances of the particular client, and clearly and comprehensibly expressed.

(Paragraph 5.7, Annex F, Code of Conduct of the Bar of England and Wales: Written Standards for the Conduct of Professional Work.)

The standard is a high one, and rightly so, as you will be helping people to make some of the most important decisions in their lives. There are three key objectives for the quality of your advice that can be identified from this paragraph of the Code:

- (a) your advice should be practical;
- (b) your advice should be appropriate;
- (c) your advice should be expressed in a way that your client can understand.

In this chapter we will discuss the advice process in detail and investigate the skills you need to develop to meet the standard set by the profession.

When in pupillage and practice you should refresh your memory periodically of the duties you owe your lay and professional clients and the court. Regular reference should be made to the Bar Code of Conduct. The Code's paragraphs and appendices are not merely collections of professional ethics, but also offer clear guidance on good practice. Sometimes the Code deals with very specific circumstances, but it also indicates the spirit of the Bar's preferred approach to client care and the execution of the barrister's professional duties. For these reasons the Code's contents should form part of every barrister's general knowledge. (See Chapter 9 and the Professional Conduct Manual.)

#### **7.5 Reaching the Advice Stage: Assimilating New Information**

The question stage of the conference will only conclude once you have gathered all the information necessary to enable you to advise your client. Before completing that section of the conference you ought to check with the client that you have addressed all the relevant issues in the case. Next it will be necessary to assimilate this extra information with your existing knowledge of the case and the preparation that you carried out beforehand. When considering your preliminary view of the case you must remember that it was based upon facts that might now have to be revised, changed or rejected altogether. Further this provisional opinion will be based to some extent upon guesswork and speculation. In other words you will have passed judgment before you were in full command of all the relevant facts. If necessary you should adjust this prejudged view so that it is suitable to the circumstances of the client as they now appear. Finally you must take into account your impressions of the client formed from listening to his or her concerns and expectations. This will enable you to formulate advice that is both appropriate to these circumstances and practical to the needs of the individual client.

This process is not time-consuming, laborious nor mechanical. Indeed, you cannot afford to be dilatory when a client eager to hear your advice is in front of you. With practice and the experience that it brings this process will become swifter and more natural.

Throughout the conference you must analyse the legal and non-legal options open to your client. At various times during the questioning stage take an opportunity to collect your thoughts. Consult your notes briefly and consider the client's instructions in light of your preparation.

A practical and thorough plan with a clear layout can be your touchstone in the conference. Such a plan will highlight gaps in your knowledge and contain the appropriate legal research and suggest your preliminary view of the case.

## **7.6 Preparing for Your Oral Advice in the Conference**

To give your opinion of the case you will need to be fully prepared beforehand. This is because you will have little opportunity to consider the case in depth during the conference. The mental and social tasks that are part of the conference itself will occupy your mind most of your time. However, new information and perhaps a revised view of the case will materialise during your discussions with the client. Therefore you will have to rely upon your preparation whilst doing some thinking on your feet or seat. Only rarely will there be the chance to consult legal works or seek assistance from colleagues. The client's responses to your questions must be assimilated, analysed and compared with your preliminary view of the case. The client may introduce additional facts and instructions which will demand additional analysis and broaden the areas upon which the client will require advice. All this will have to be done whilst the client and solicitor are with you. The client expects and is entitled to professional advice that will help to resolve the problems he or she is facing. The lay and professional client may wish to participate and add to your comments, questions and opinion and you must listen to these interruptions and deal with them appropriately and

tactfully. Always remember the needs of the client are immediate and real; the person in front of you is the individual experiencing the difficulties firsthand.

## **7.7 How and When to Give the Client Advice**

Special care is required when you communicate your advice to the client. A common question is, 'when is it appropriate to inform the client of your advice?'. In the majority of conferences some if not all of your advice can be communicated orally and immediately. However, on certain occasions there will be a reason to delay the advice, if the client needs time to consider the options further or because you need to carry out additional research. A choice arises whether to telephone through this delayed advice to the solicitor or to put it into a written form. In either event it is important to let the client know when to expect your advice. However, if you have fully researched the law and understood the brief and received full answers to your questions you should be able to offer the client your advice at the conference itself.

When you are about to communicate your opinion let the client know that you are doing exactly this and ensure you have his or her undivided attention. Check that the client understands that you are moving to the advice stage. This will not only ensure that the client is listening attentively to what you have to say but also maintain your control of the conference.

To avoid confusing the client by delivering ill-informed advice you must exercise control over the conference. A logical order must be maintained. Ensure that you have covered all the issues with the client and that all relevant questions have been answered. Further you ought continuously to monitor the progress of the conference; keep an eye on the time and how efficiently you are addressing the issues of the case and achieving the objectives of the conference. It is your responsibility to decide when it is appropriate to give your opinion of the case to the client; this can only follow a thorough assessment of the issues by you. However, it does not follow that your advice will be at the end of the conference. If it is communicated too late there will be insufficient time to address the consequences of the client's decision. Often there will be many issues to address and several areas to advise upon. On each instance you will need to gather information on various topics, analyse the facts against the law and formulate and present your opinion. Of course, if you have adequately planned in advance, these tasks will be dealt with more efficiently and fully.

### **7.7.1 HOW TO DO IT: GIVING ADVICE**

- (a) Any conclusion reached ought to be clear to yourself so that you appear confident and are able to justify your advice.
- (b) Formulate the advice in language that is readily comprehensible to the client. Remember to be precise and practical, not vague or patronising.
- (c) Explain how you have reached your conclusion and set out the strengths and weaknesses of its consequences for the client personally.

(d) Check that the client has correctly heard your advice and understood it.

(e) Finally, it is of the utmost importance that the client is aware that the final decision is his or hers. Remember, your opinion is merely offered; the client has the freedom to accept or reject it.

## **7.8 Making Your Advice Clear to the Client**

A measure of the acceptable degree of conviction with which you can express your opinion to the client is given in an annex to the Code of Conduct. Although it deals specifically with a conference with a defendant in a criminal case, the spirit of the Code suggests that it may be applied generally to civil and criminal cases.

A barrister acting for a defendant should advise his lay client generally about his plea. In doing so he may, if necessary, express his advice in strong terms. He must, however, make it clear that the client has complete freedom of choice and that the responsibility for the plea is the client's.

(Paragraph 12.3, Annex F. Code of Conduct of the Bar of England and Wales: Standards Applicable to Criminal Cases.)

As is clear from the Code, the client always has freedom to accept or reject the advice that is given. Thus you must make this freedom to choose explicit. This should be done in a way that encourages the client to accept the responsibility rather than in a tone that might suggest that your interest in the conference ends with the client's decision.

At this crucial stage of the conference, when the client is on tenterhooks to hear your opinion of the best course to take, you must proceed with the utmost caution and sensitivity. It is unacceptable, for example, to state your advice boldly in the following way:

What you've just told me suggests that a guilty plea would be appropriate and I must warn you that the maximum sentence for violent disorder is five years' imprisonment.

Imagine the devastating effect of such a bombshell on the client! Also in part at least this advice is misleading.

The suggestion to plead guilty may well be founded on a realistic analysis of the client's position and therefore be justifiable in the circumstances. However, there is a world of difference between robust advice presented with justification to the client and an insensitive instruction to take the course of action that you as the lawyer have decided upon. Further, the bold and intimidating advice on possible sentence is incomplete therefore erroneous. The maximum sentence is only ever used in those rare cases where the offence is at the top end of the bracket; that is, it contains many aggravating features and few if any mitigating ones. There is always something that can be in the defendant's favour and in the majority of cases a sentence well below the maximum can be expected. To overburden the client with the shadow of five years in custody is both inhuman and unprofessional.

## **7.9 Warning the Client of the Consequences**

Clients may not always fully appreciate the consequences of any decision that they take, for example, the implications it might have on costs, the ensuing delay, inconvenience or litigation stress. Some side effects are of great importance to the individual client. Consider, for example, the effect of having a criminal record if the client is a wage earner looking for a new job; or the effect of receiving a bad credit rating if the client is setting up a business. Certain consequences will have a less tangible equally devastating effect. The social effect of being convicted for a violent sexual or the loss of face when an employer loses a case of discrimination are two examples. It is therefore part of your duty to offer advice in the light of the consequences of decisions that the client has made. This advice on collateral issues may include non-legal considerations as well as the usual advice on the legal consequences of your client's decision.

### **7.10 Giving the Client the Full Benefit of Your Services: Time Management**

It will be rare for you to receive instructions to hold a conference that covers only one area for advice. If there are several areas to advise upon, time can be scarce during the conference. Clearly you are required to meet all the objectives of the conference to satisfaction of both your lay and professional clients. However, there are limits upon the powers of concentration of both you and your client. Therefore it is legitimate to recognise that some of the issues faced by the client are of greater importance than others.

It is possible to construct a hierarchy of issues that require your advice. Some issues will have priority over others. Some are easy to prioritise; for example, those identified for you in the brief by your solicitor. The relative urgency of other issues can also assist you to decide whether they can be left until later. Thus a sound knowledge of the rules of procedure and the various time limits imposed on litigation is essential. Non-legal considerations that do not have a direct influence on the case may form part of the secondary issues and so may be left until later. Those which are at the heart of the matter, however, cannot. These will be the issues that are priorities in the case, issues that must be addressed and resolved as a matter of urgency or which take precedence over other peripheral issues.

It is not possible to make a list of priorities in the abstract. Only the individual circumstances of the case and the client will be able to tell you which needs are of greater or lesser importance. It is your responsibility to find out from the client what are the central issues. It is always worth considering to which areas to give priority and which to deal with either later or at another meeting. No one is superhuman so you must make a realistic estimation of your powers of concentration and those of the client before and during the conference.

If you are really pushed for time it may be appropriate to prioritise the issues upon which you intend to give your advice based upon your brief fee. You are only paid for that for which you are instructed and it is legitimate, but not automatically appropriate, to emphasise the legal function of the barrister. In any event non-legal advice, as opposed to consideration of non-legal options, may be more suitably given by another professional. For example, if a client instructs you to represent him or her in a personal injury case you might suggest an application for state benefits and even give an estimation of the likely financial award.

However, it would be negligent not to add that the client should seek professional advice from a benefits officer or a financial advisor working for a disability charity if appropriate.

### **7.11 Helping the Client to Understand Your Advice**

The lay client cannot be expected to understand the legal process nor the legal context of their case to the degree of sophistication that you do. It is therefore common to spend a significant amount of time explaining in everyday language the effect of the law on the client's case. Legal terminology and the court procedures that surround the case will also need to be explained. Further, some extra time may have to be spent explaining to the client why court litigation takes a certain route and warning him or her how to avoid delays. There are two objectives when you communicate your advice. You will obviously want the client to make a decision fully informed of all the consequences of that decision. And you will wish to pass on your advice to the client clearly and comprehensibly. In part you will realise these objectives if you ensure that the client appreciates the legal context of the decision. This might include the finality of the decision, its consequences for the future and the financial obligations that surround litigation. It is your responsibility to guide the client through the labyrinth of the law.

#### **7.11.1 HOW TO CHECK COMPREHENSION**

You must avoid prejudice and preconceptions when evaluating your client's apparent intelligence, but you should observe and appraise the client's level of comprehension. His or her formal education alone will not be an adequate indicator. Many clients will feel intimidated or overawed by the complexity of their case even though they have a wide experience of life apart from it. Therefore be patient with the client. This does not mean that you need to be condescending or unnecessarily simplistic in your explanations. For example, an illiterate defendant with a long record will not be able to read the charge sheet but he or she may know a lot about bail application procedures. Further, although the client may appear bewildered to be in a road traffic court, his or her thirty years' experience as a driver has probably given some insight into what is and what is not safe driving. It is easy to belittle clients inadvertently by forgetting that they are capable of contributing their knowledge or experience to assist themselves. Apart from making for poor manners this lapse of common sense can seriously disrupt the rapport established between you and the client. If you treat clients as slow, unintelligent beings, why should they take an active part in the conference? Further, how can you be surprised that they will not trust your judgment or integrity?

An observant stance and a carefully selected vocabulary are the keys to intelligent and considerate explanations. Gauge what you have to say to the client. Avoid clichés and pat phrases; they rarely have a long shelf life. Remember what is comprehensible to one client is not always understood by the next. So try to adapt your approach to suit the individual in front of you after you have learnt something about their personality and level of intelligence.

If asking a question to confirm understanding it is often wise to avoid leading or simple yes/no questions. Attempt to encourage the client to repeat back to you what you have explained or methodically investigate the client's comprehension with a series of open and

closed questions. Illustrate to the client why it is in his or her interest to understand what you are explaining. By showing the benefit of this additional knowledge you will facilitate greater powers of concentration and interest. If the client fails to see the benefit, ask yourself whether this information is wholly relevant. There is little point in overburdening the client with material of little relevance or import to his or her case.

### **7.11.2 EXPLAINING THE LAW**

At different stages in the life of the case the relevance of the substantive law to the client's case will be greater than at others. It can be expected that by the time the client comes to see the barrister in chambers he or she has some idea of the legal principles of the case. This is usually formed with the help of the solicitor. However, there can be no guarantee that this will always be so. The initial meeting may have been a brief one; the solicitor might not have explained the law sufficiently clearly or the client might simply have forgotten what he or she has been told.

In some circumstances you will be the first lawyer to discuss the case with the client. For example, at a magistrates' court first appearance hearing after a night in the cells the client may be totally ignorant of the legal basis of the charge. A similar position in a civil setting is an urgent without notice injunction for an ouster, for example. It is always wise to check with the client personally how much they understand with some open questions inviting a statement in simple terms of the case. This knowledge, no matter how rudimentary, can be built upon. If it is wide of the mark then some tactful re-tracking may be called for.

Always concentrate on the specific case and avoid taking a textbook approach to the law. The average lawyer spends three years studying his or her subject at university and the lay client cannot be expected to follow lengthy explanations of the law of evidence or intent. By using the client's case as a starting point you will focus your mind and help him or her to grasp the essentials of the law as it relates to the case. As part of your preparation you should consider what law needs to be explained to the client and how you are going to do this. As well as being relevant and pithy your explanations should avoid legal terminology where possible and always be free of lawyers' jargon and slang. (During your pupillage you will soon discover how barristers derive great delight from using their own dialect and shorthand when discussing a case with one another, but, hopefully, how this argot is dropped once they meet the client and address the court.)

### **7.11.3 EXPLAINING PROCEDURE**

Clients are often unaware of the procedural context of their case. The lack of an appreciation of the need for the numerous stages of litigation is illustrated by the common complaint that the law is oblique and unnecessarily slow. This is hardly surprising as it is the solicitor who prepares the papers in the case and during the initial stages of litigation the client is not always informed of developments that do not have immediate effect upon the conduct of the case. Also there are many stages in the early life of a case at which the client is not personally involved, interlocutory applications or solicitor-to-solicitor correspondence, for example. Lawyers on the other hand are only too aware of the mundane, run-of-the-mill

stages through which both civil and criminal cases go. Therefore lawyers can easily overlook the fact that the client will not understand their purpose or indeed the necessity for each step in the litigation process. Your client has a right to a full explanation of what is taking place. There is an advantage for you too: the informed client will more readily take an active role in the case's progress. Thus apart from the tactical advantages of a thorough understanding of the litigation processes, this knowledge is essential so that you can assist your client with clear and accurate explanations of civil and criminal litigation.

When explaining procedure to the client think carefully about how much detail he or she needs at this stage. Your concern is not to protect an arcane system, but rather to keep the client's attention on the issues that are important to the conference. The test is one of relevance: does the client need to know? When the client is being asked to make a choice or take a decision, obviously it will be necessary to a greater or lesser degree to inform him or her of the procedural implications; for example:

- (a) what delays might be met?
- (b) how long does the client have before he or she must act?
- (c) what are the cost or legal aid considerations?

Whilst not advocating the 'you needn't worry yourself about that, leave it to the lawyers' approach, you will need to consider how much time you can allocate to any explanation of procedure. Further, you must consider how easily the client will comprehend and how long he or she will be able to remember this information. Nonetheless the client who is fully informed will be less anxious about the future and will feel more in control of the destiny of the case. The benefit to you is that you will find that the client is more willing to collaborate with you. Most importantly, once people understand what is happening or likely to happen to their case they are better placed to take decisions for themselves and feel confident about the future. The fear of the unknown can be a great impediment to the successful conclusion of the conference.

#### **7.11.4 EXPLAINING FINANCIAL COSTS OF THE CASE**

The question of money and indeed figures generally will arise in most conferences and it is always wise to carry a pocket calculator and have an understanding of rudimentary arithmetic. What follows is merely an outline to assist you to think about the difficulties that you and the client can expect to face. (See the Case Preparation Manual, Chapter 18.)

##### **7.11.4.1 Fees**

The barrister never accepts money or other forms of payment from the client personally. The solicitor will deal with the financial affairs of the client and your clerk will negotiate any fee on your behalf. Great circumspection is therefore needed when discussing fees with a client. Nonetheless when advising the client on possible future action the financial costs must be discussed. No precise figures can be offered but a sensible range should be given where possible to give the client an accurate estimate of the financial cost of any legal help

they seek. This projection will be based upon your experience as well as your knowledge. It may be some time before you feel confident enough to give this advice to the client without some assistance. If you feel unable to advise yourself it may be appropriate to refer the client to the solicitor. Indeed it is your professional client who has the final responsibility of collecting the fees from your lay client.

#### **7.11.4.2 Costs**

In civil cases some costs can be stated with a greater degree of certainty than others, but the vast majority will be liable to taxation. Remember that whilst most costs follow the event there are numerous exceptions particularly at interim hearings. In any post-hearing conference you will have to be prepared to explain the effect of the order as to costs. Following a finding of guilt or a plea of guilty the prosecution may request that the defendant pays some of their costs. Care should be taken to discover from the prosecution what costs they are seeking from the defendant if there is a conviction. Note that these are often in addition to any fine or compensation that the court might impose. Again a range can be given based upon experience and knowledge of similar cases. (See further the Civil Litigation Manual and the Criminal Litigation and Sentencing Manual.)

#### **7.11.4.3 Legal aid**

In both civil and criminal cases the Legal Aid Board may require a financial contribution from the client and in these circumstances the cost of litigation can be a real concern for the client. The solicitor should include a copy of the Legal Aid Certificate in the brief which contains information about the level of the contribution and the extent and terms of the certificate. Obviously the longer the case goes on the greater the total sum the client will have to pay. In civil cases there is the added danger that the successful client, whether a claimant or a defendant, may have to repay the total amount of legal aid received through a process of recoupment. (See further the Civil Litigation Manual, Chapter 32.) Indeed civil legal aid has been described as being more in the form of a loan than a grant. All of these implications will need to be explained to the client and he or she will also need to be reminded of them at the appropriate times.

#### **7.11.4.4 Non-legal financial considerations**

Clients will often be under financial strain besides the cost of litigation. This may be because they are prevented from earning a wage following imprisonment or because the demands that the litigation is making on their time. At the early stages proceedings the client may not appreciate the degree of impact that the case will, on his or her time or purse. You have a duty to keep the client aware of the cost of litigation and this will include the non-legal costs. Some clients will lose their livelihoods as a result of their involvement with the criminal courts or by becoming embroiled in civil proceedings. You should not only alert the client to these possible consequences but also offer some practical advice. Suggestions of the non-legal options, or references to other professionals who will be able to offer assistance, ought to be made when appropriate. A working knowledge of the social benefits system is essential if practising family or criminal law where the means of the parties are often of

interest to the court itself. (See Remedies Manual.) Once again, when dealing with figures, it is best to think in terms of ranges and to admit uncertainty if it is appropriate to do so. Remember that most social benefits are discretionary so there can be few guarantees.

## **7. 12 Dealing With Conflicting Advice**

Occasionally the advice that you believe is appropriate will differ from that already communicated to the client by the solicitor or a counsel who previously held the brief. Two or more lawyers looking at the same case may hold differing, sometimes conflicting opinions. This is not as uncommon as some lay people may expect. Indeed in an adversarial system there is rarely certainty when applying the law to a set of facts identifying the strength or weaknesses of a case. The particular difficulty for the barrister in a situation such as this is that there are two clients and three duties. There is a professional client and a lay client, with separate duties owed to each and a third duty to the court. For the newly qualified lawyer this three-way pull can be the source of great anxiety. This is particularly so when there is the nagging feeling that any upset caused to either of the clients or the court will be reported back to chambers. In this part of the chapter we will look at this dilemma and offer some suggestions to assist you to overcome it.

The Code has set out some clear guidance and rules to assist in such difficult circumstances. The relevant paragraphs are quoted below, but the gist of the rules is that your primary duty is to your lay client.

A practising barrister:

- (a) must promote and protect fearlessly and by all proper and lawful means his lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including his professional client or fellow members of the legal profession); ...

(Paragraph 203.)

A practising barrister must not:

- (a) permit his absolute independence, integrity and freedom from external pressures to be compromised; ...

(Paragraph 205.)

A practising barrister is individually and personally responsible for his own conduct and for his professional work: he must exercise his own personal judgment in all his professional activities ...

(Paragraph 206.)

There is also the danger of confusing the client by offering an opinion different from that already indicated by the solicitor. This can be merely irksome to the client or place additional stress on him or her at an already stressful time. In most circumstances the client will only have received a preliminary view of the possibilities from the solicitor. The alert client will

appreciate that you are a specialist to whom they have been referred for more certain advice. If the client shows a reluctance to accept your view rather than the solicitor's, you must take control and justify why your views differ. Often the easiest way to support your view is to highlight to the client the additional information that you have gathered at the conference and explain how this affects the legal analysis of their case.

#### **7.12.1 DEALING WITH CONFLICTING ADVICE: HOW TO DO IT**

If your view of the case leads you to give advice which, if followed, would alter the litigation to a great degree, you may wish to consider the following suggested approach:

- (a) Avoid confusing clients or undermining their faith in their solicitor unless strictly appropriate.
- (b) If possible speak with the other lawyer with whom you disagree to discuss his or her views. That lawyer may know something that you do not.
- (c) If appropriate and practical recover the process by which you reached your advice to double-check your conclusions.
- (d) Highlight to the client your advice and identify its strengths and weaknesses.
- (e) Allow clients to make their decision, reminding them if necessary that the final decision remains theirs.
- (f) Inform clients of the effect of any change or adjustment that will result, e.g., extra costs, effect on procedure.
- (g) Inform the professional client of any changes - be prepared to explain and justify what has taken place.
- (h) Ensure that the court is informed of any developments and material changes.

#### **7.13 Expressing Risk to the Client**

This section introduces various methods by which you might express the risk involved in litigation to the client and considers the strengths and weaknesses of these methods. It is important to communicate the degree of chance directly to the client who can then make a decision in the full knowledge of the attendant risks of litigation. There are few certainties in law, trials, for example, are not so much investigations of the truth as testing conflicting testimonies to ascertain which is more believable. The verdict is guilty or not guilty rather than guilty or innocent. Likewise the levels of damages to be awarded for personal injury are not scientifically assessed but approximated. They are often only a symbolic sum to reflect what was suffered by the injured party. The client, however, will want to know what is going to happen: what the chances are of success at trial; how will the damages be assessed and at what level? Clearly, it is part of the lawyer's role to give estimations of these risks and chances.

##### **7.13.1 PRELIMINARY CONSIDERATIONS**

You should always attempt to be practical and realistic: do not forget the specific problem faced by the client before you. Any expression of risk will have to be effectively communicated to the individual client: will he or she be able to comprehend what you are saying? There are several methods and styles of expressing risk, which one you choose will depend upon your preference and its suitability for the issue in question. It may, of course, be necessary to experiment, particularly in the early stages of practice. Much can be learnt by observing other members of the profession and lessons can help to develop your repertoire.

### **7.13.2 INTRODUCING RISK ANALYSIS TO THE CLIENT: A SUGGESTED APPROACH**

- (a) Check that the client is fully satisfied that he or she has sufficient information about the strengths and weaknesses of the case.
- (b) Allow the client to raise any additional concerns if appropriate.
- (c) Ask the client to consider how the risk of failure/success is affected by the strengths and weaknesses.
- (d) Invite the client to estimate whether the relevant risk is high, nothing.
- (e) Ask the client to state explicitly whether he or she is willing to accept that level of risk of failure/success.

### **7.13.3 USE OF LANGUAGE**

The most common way of expressing a risk is to use everyday expressions: 'x is less risky than y'. Alternatively, phrases such as 'there's a good chance that ...', or 'such and such is unlikely to succeed' also give a measure of the risks involved. When adopting such expressions the speaker is attempting to pass on his or her judgment as swiftly as possible. Difficulties soon arise, however, once the recipient of this information requests explanation or justification of the estimate, or a clearer statement of what the precise risk is. Sometimes the answer may be that the lawyer runs through the strengths and weaknesses of the case again. For example, the number and quality of witnesses for the prosecution may be used to justify the estimation of the risk of conviction as 'great'. But if the client wants a clearer statement of what is meant by 'great' problems can arise. This is because the client wishes to know what the risk is not the lawyer's reasons for thinking that there is a risk of conviction in the first place. On occasion the lawyer may be able to side step the issue by using the following: 'by "great" I mean it's more likely than not that you will be convicted'. Although to a lay graduate this answer is transparently insufficient and inappropriate, to the lay client it may appear to be an acceptable one. In the worst circumstances it may even be taken as an indication that he or she ought not to question the barrister's advice. Thus there are some shortcomings with this method. However, it also has some advantages. By using everyday language and employing common phrases the level of communication from the lawyer to the client is often high. At a superficial level at least the client will understand what is being said. Further, this style can be utilised several times in the same conference when dealing

with the various issues or options, thus maintaining some consistency, e.g., by using a series of comparatives: better than, worse than, etc.

Naturally it is important for the lawyer to keep a tally of which item he or she lists as better than the next and so on. Some review of this list may be necessary as and when changes affect the order of the items on it. In this way the running order can be adjusted in a useful way during the life of the case, for example, if fresh evidence is revealed or a witness does not come up to proof. If this happens the lawyer can then say to the client: 'The chances of success have been reduced from a reasonably good chance to a poor chance of the judge finding in favour of our case'. A second advantage is that the lawyer will be protected against criticism from the client. Some clients will not have a disinterested memory and may complain that the court has imposed costs on them for an unsuccessful trial when the lawyer said that there was an excellent chance of success. The client's faulty memory can be checked against your record.

A final warning must be given. As was suggested, explanations of what is meant by good or bad and so on are not easy to give. One reason is that everyone has their own innate understanding of these words but few have the ability to articulate precisely their personalised meaning to others when applied to a particular situation. The inevitable vagueness that follows often leads to misunderstanding.

#### **7.13.4 METAPHORS AND SIMILES**

One can take everyday experiences and adapt them to the particular dilemma faced by the client. The client can, for example, be invited to compare the risks with a financial investment which might provide a series of bonuses. There is a likelihood that the investment may go down as well as up. If the chances of success are particularly low you might compare them with a lottery. These sorts of comparisons can be useful particularly if talking to a client with little or no experience of the law but able to think in an independent fashion. It goes without saying that a simile or comparison must be within the client's personal experience. You cannot expect everyone to have a working knowledge of gambling terms or of the stock market. Whilst this method of communicating risk is entertaining and readily comprehensible, it merely communicates the degree of risk superficially. There is only the hope that the client will be able to pick up intuitively that which is not being communicated explicitly. Thus an appeal to the client's real or imagined experiences is made in the hope that there will be a process of convergence. In short the lawyer hopes that the client will come to share his or her belief of the estimate of the risk without lengthy reasoning.

#### **7.13.5 NUMBERS, RATIOS, RANGES, FRACTIONS, PERCENTAGES, STATISTICS**

Figures carry their own mystique and should be used with caution. Some people will understand that the expressions 'the chances of success are 50:50' and 'the likelihood of us winning is 25%', do not mean that in the first case the chance of success is precisely half or in the second precisely one quarter. However, some people if asked what these two phrases are saying about the risks involved may fall into this trap. Therefore it is necessary to guard

against the temptation to believe that what sounds like an accurate statement of the risk is what it appears to be. You therefore have a responsibility to explain to the client clearly and without condescension that you are using the numbers, figures and ratios adverbially; this is to say, not as scientific measurements of the risk but as helpful expressions of your estimation of it.

#### **7.13.6 POUNDS AND PENCE**

If discussing monetary figures there are again several ways of expressing them. The most common way of expressing the outcome will be in pounds and pence. The obvious danger here is that the courts do not award monies in a precise fashion. Note should be made of the difference in civil law between liquidated and unliquidated damages (see the Civil Litigation Manual) and in criminal law between fixed and non-fixed fines (see the Criminal Litigation and Sentencing Manual). Most lawyers favour stating a range within which the final figure can be expected to fall. For example, 'In these sorts of whiplash cases the courts usually award damages from £2,000 to £4,000. With the facts as they are in your case I'd expect the final award to be in the £3,000 to £3,500 range'. A similar approach can be taken to fines and so on. Note should be made of the two ranges given. The first sets the general limits found in cases of the same nature, the second the specific limits that apply to the particular case. In this way the client is informed of the whole picture - it can be of particular use when it comes to advising on appeal. If the court in the whiplash case above only awarded £2,750 the lawyer may wish to point out that whilst it is low, and in his professional opinion appealable, it is not advisable to endure the extra costs and stresses of appeal for only a further £750 at most.

#### **7.14 Non-Verbal Expressions of Your Opinion**

The lawyer will be closely scrutinised by the client, especially when passing on vital information such as the length of sentence or the chances of successfully defending a civil case. The client will react to the way you give the information which (for him or her at least) is of vital importance. The client will be sensitive to your posture, eye contact and other indicators of confidence as well as the pitch of your voice. The client may be able to understand much of your opinion of his or her case and its merits observing you as well as listening to you. You ought to be aware of these facts throughout the advising stage and remember how it might affect the client's appreciation of the issues and merits of the case.

At different times some deference to the client's emotions ought to be given. Before dismissing an appeal against a custodial sentence some moments' reflection will show you that no matter how slim the chance is, the client may be willing to take it. This may be the case even if there are some attendant risks. Even so, there is the danger being insufficiently forthright if the risk is particularly slim. Clients will often detect your hesitancy but it is up to you to give the client the benefit of your express an honest opinion. There may be occasions when you think that the client's chances are rightly low or that he or she richly deserves the sentence that he or she has received. You must not sit in judgment and must keep your opinion on this point to yourself. On these occasions it is particularly important to guard against

inappropriate non-verb communication: practice itself is the best tutor. This is not merely a question of politeness nor a counsel for empathy. It is a central consideration when deciding how best to communicate your professional advice clearly and accurately to the client.

### **7.15 Assisting the Client to Estimate Risk**

In some circumstances it is not the barrister who has the necessary knowledge to assess the risk but the client. We have seen in Chapter 6 various methods to collect such information and the present chapter has stressed the importance of allowing the client to make the final decision. Just how far the barrister can assist (or interfere) in this process is a matter of degree and context. Clearly on occasions clients may require a little more time or some extra information or simply some reassurance that it is their role to make the decision.

As we have already seen, language has its limitations and non-verbal communication can have its own shortcomings. How can you ensure that the client absorbs the information and goes through the process of reflection and assesses the risks involved for himself or herself? There is no easy answer to this problem. However, if you have ensured that you and the client have acted collaboratively and co-operated during the advising process, there ought to be a convergence of estimates. In the best situations there may be perhaps even a shared, mutually understood language in which the different risks can be described and compared freely and clearly.

## **7.16 Legal Counselling**

### **7.16.1 INTRODUCTION**

In this section we will look at an approach to client advice that takes a different perspective on the client and his or her problems. This approach is known as legal counselling. This form of advice addresses the client's problems broadly and does not particularly isolate the legal options in order to resolve them. As we have already seen, no matter what approach you take to the client's case you should consider the non-legal options as well as the purely legal ones. However, legal counselling gives special prominence to the specifically non-legal options. The philosophy behind this approach is that the law is the refuge of last resort and anything that can help to avoid or cut short the client's involvement with the legal process is preferable to utilisation of purely legal options. However, this is not to say that the law or legal procedures must or can be avoided. Often the client has no option but to accept that they must continue to take part in the legal process if they are a defendant in a criminal case, for example. Nor does this process of client advice seek to avoid exploiting the procedures that are favourable to his or her cause, for example, using an interlocutory injunction to settle a neighbour's dispute. Nonetheless, the emphasis is on the future beyond the court-room and the lawyer seeks to help the client to resolve the underlying problems he or she is faced with.

Clearly, legal counselling takes you to the limits of your role as a lawyer and stretches your abilities and resources. It can be a demanding but greatly satisfying process for you and the client. But there are dangers, too. It is important to realise the difference between your

professional duties and functions and those of other professionals, for example, social workers, marriage guidance counsellors or financial advisors. You are first and foremost a lawyer and the client instructs you because you can fulfil that specialist function. Given the demands and risks involved you may not feel sufficiently confident to use this form of advising the client in the initial stages of practice. However, it is important that you understand how it functions so that you are prepared to observe it being carried out by senior barristers. Finally, with the ever-rising cost of litigation and the increasing importance of alternative dispute resolution, mediation and conciliation you are likely to have to address this type of conference with your clients regularly in the not too distant future.

### **7.16.2 THE LEGAL COUNSELLING PROCESS**

As with any form of advice, before attempting to engage the client in legal counselling you must gather all the necessary information. It is of particular importance when adopting this method of advising to gather sufficient information from the client to reveal all the relevant legal and non-legal options that are available. As in the advising method you will need to assimilate these new instructions with your existing knowledge of the case. You may need to adjust your preliminary views and opinions of the case if you go ahead with legal counselling.

The next stage is to order the options into logical sets. It may be appropriate to mix legal and non-legal options or to separate contentious from non-contentious options; each case will have to be investigated separately. Then you should analyse and attempt to prioritise the options within each category, or altogether, as is sensible and practical. Finally, before you present these to the client, ensure that the options are appropriate and specifically suited to his or her circumstances.

A brief example should help to clarify that the process is more fluid than it might appear at first sight. Imagine that you are instructed by a client to make a bail application. The client tells you that he wants bail but knows that he is wanted for charges on other offences at another magistrates' court. You gather as much information as is relevant on the current charges and background personal details of the client as far as they are relevant to the application for bail. However, you also go further and invite the client to state why bail is so important to him today. During this process you learn that the client is 27 years old and is planning to marry. However, he also adds that his girlfriend has told him 'to clean up his act' otherwise the engagement will be broken. From your conference and instructions you identify the following factors:

- (a) the client values his freedom;
- (b) he dislikes custody but is realistic about the danger of being picked up on the warrants for his arrest;
- (c) he has a real incentive to put his involvement with the wrong side of the law behind him.

Given the legal and factual circumstances of the case the options of possible action to take today are limited:

(a) You could advise that the client does not make an application for bail as the chances of it being granted are slim.

(b) You could go ahead and make a bail application in the hope that it will be granted and that the client will subsequently leave court before the police inform the prosecutor that there are outstanding warrants for his arrest.

(c) Alternatively you could counsel the client of the advantages of getting bail today and subsequently surrendering to custody on the outstanding warrants. Once he does that, he could request that all the charges are dealt with together and swiftly. This would enable him to begin to put his past behind him and face the future with his fiancée without the risk of his previous criminal career endangering their marriage.

Options (a) and (b) are both viable, but they ignore the client's background and his non-legal aspirations which option (c) puts at the centre of the advice. Only by asking the right sort of questions in the appropriate circumstances can you expect to discover sufficient insight into the client to be able to counsel him or her on the full range of options available.

There are several approaches to counselling that can be utilised but most follow a similar pattern. It is advisable to follow a suggested pattern if you are unfamiliar with this form of advising, this is because there is often a well-intentioned but misplaced temptation to usurp the client's role of decision maker at the same time as fulfilling one's own as counsellor or adviser. As with any form of advice this process follows an investigation of the client as a source of further information and instructions. The lawyer establishes and maintains control of the process by setting before the client the list of options that are suitable to the client's requirements. The client is then invited to add any options not included. This list will be broad and general; the object at this stage is to consider as many options as possible. A short discussion of the options may be appropriate here. However, the lawyer does not pass comment on their suitability, rather the client is encouraged by the lawyer to lead the discussion of the suitability of the full range of options. The lawyer assists the client to express his or her preferences and to investigate the suitability of the various options. In particular the various strengths and weaknesses of each option are identified and evaluated. An arrangement of options in order of suitability often follows from these investigations.

### **7.16.3 KEY AIMS OF COUNSELLING**

- To communicate the full range of options to the client in an order that is easy to follow.
- To allow the client sufficient time to consider the options as presented.
- To invite questions or comment from the client to establish clarity.
- To allow the client to make a choice without inappropriate assistance.
- To check that you have correctly understood the client's response.
- If no response is forthcoming, to investigate why and address the reasons for this.

- If more time is required you must give the client a realistic time estimate or deadline for the final decision.

#### **7.16.4 CLIENT CENTRED COUNSELLING**

The primary strength and defining feature of this process is the role of the client who is encouraged to be proactive, co-operative and collaborative. The client should be working as hard as, if not harder than, the lawyer during the counselling stage. Within the bounds of reason and the constraints of the time available a complete range of options ought to be discussed.

An appropriate style to adopt here is that of the experienced or advising friend. Compare this with the common advice-giving process where the most relevant role will often be that of the expert or specialist. Obviously with a little subtlety the same lawyer can exploit both roles in one conference. You might consider adopting one strategy for one issue and another for further issues. The key is to maintain control of the conference and to guide the client.

There are some disadvantages to the counselling process. It can be time consuming and the client is required to have a clear understanding of the whole case for the process to be a successful one. However, there are benefits. Because he or she is fully informed and has participated throughout the procedure, the client is more likely to be satisfied with the decision that is reached. There may be, for example, less uncertainty about the appropriateness and desirability of the next steps in the litigation. Additionally there may be occasions when the process can be covered in a short time, for example, when there are only limited options to consider.

Because the process does demand a lot from the client as well as the lawyer, the client must be informed about what is taking place at each stage. Simple questions such as 'what do you think?' are often inadequate and so careful preparation is required to get the most out of the client and out of the available time. In the final stage of the process the client makes a decision. The client is now on his or her own -the lawyer should only assist when specifically asked to do so or when the client is in clear difficulty, for example, acting under a misapprehension. The client may need time to consider the options and make the final selection. As this can be of significant length the lawyer ought to manage the available time appropriately. Once a preference is expressed, the lawyer may invite or pose questions to the client or invite comment to establish absolute clarity of his or her understanding of the final decision. Further, it may be wise to recap briefly the strengths and weaknesses of the final choice. It is vital that the client makes the choice independently. It is the client who has to live with the consequences of that decision. In this process the lawyer must be vigilant against assuming the client's role. This may even necessitate gently informing the client that you cannot take on the burden of telling the client what to do.

#### **7.16.5 SUMMARY**

The advantage of this method of advising is that the client enjoys the freedom to make an informed choice. This is a result of the presentation of the full range of options that are open

to him or her. Naturally you will need to encourage the client to think and work independently when you investigate possible options. Thus you should use questions that are designed to help the client to select and order the options. A cooperative and collaborative approach at these early stages will assist the process and set the right atmosphere for its later stages. However, the time that is necessary to carry out this process effectively can militate against its use when both client and lawyer are under a lot of pressure.

#### **7.16.6 USING LEGAL COUNSELLING**

There is some debate amongst the commentators about the role of the lawyer in counselling, particularly at the decision stage. Lawyers in the USA are said to be less willing to state their preference to the client as it is seen to be important to allow the client to choose the options unaided. However, what happens in practice is hard to say. Among Commonwealth lawyers, for example, those from New Zealand are said to be more willing to share or at least assist in the process of sifting and selection. The English and Welsh Bar does not appear to have a commonly accepted view; little research has taken place in this jurisdiction in any case. There does not appear to be any professional or ethical objection to the British lawyer effectively mixing joint selection of options with some overt expression of opinions based upon professional experience. (You may wish to experiment with a pure counselling process and one with a mixed constitution.)

#### **7.17 Some Specific Advising Situations**

In the final section of this chapter we will look at some conferences that follow a court hearing. These can be particularly difficult to plan for. Most court hearings have an element of the unknown: indeed this is why they can be stressful experiences for the client and the source of no little anxiety for the advocate, too.

After a hearing both you and the client will want to discuss its outcome in detail and address the immediate effects of the result. Following your performance in court as an advocate there is often little time for you to do more than to come down and collect your thoughts. During your preparation for the court appearance therefore you should always plan for this very important post-hearing conference. You will have little time to produce a plan for this conference as you leave the body of the court and meet the client in the corridor. It is essential, therefore, to have considered the main objectives of this conference in advance.

The following how-to-do-it guides are neither exhaustive nor prescriptive, but they do offer a general format for advising the client that can be applied in most circumstances. However, the post-hearing conference will make similar demands upon your skills as a barrister as that at which you gave your initial advice about the prospect of the case. Therefore remember to apply all the skills discussed above so as to enable you to advise the client satisfactorily. Finally, to ensure that you meet the high standards of the profession you must be flexible in your approach to both the unique characteristics of each case and the individual needs of every client. (See generally Chapter 8.)

### **7.17.1 CONFERENCE AFTER A SUCCESSFUL CIVIL HEARING**

- Ensure that the losing party is out of earshot (it may be wise to allow him or her to leave the court building).
- Attend to any urgent post-hearing court business first, e.g., lodging the draft order.
- Explain the judgment or order to the client in plain English, remembering the effect of the costs order and confirm his or her understanding of its effect (note: legal aid recoupment if applicable).
- Consider the need for preliminary advice on entering or enforcing the judgment.
- Check with the solicitor or his representative that all necessary documentation is in order and tell the client that you will telephone the solicitor from chambers, if appropriate.

### **7.17.2 CONFERENCE FOLLOWING AN UNSUCCESSFUL CIVIL HEARING**

- Ensure that the client understands that the hearing has ended unsuccessfully and explain why his or her case was defeated. Allow time for the client to absorb this.
- Explain in plain terms the effect of the judgment or order to the client and confirm that he or she understands this clearly. For example, spell out the danger of being arrested and placed in custody if the client breaches a non-molestation order with a power of arrest attached to it.
- Encourage the client to raise any questions about the effect of the judgment.
- Offer your preliminary advice on routes of appeal and the chances of success. Remember also to discuss the financial, emotional and other non-legal implications of an appeal.
- Offer the client the opportunity to reconsider alternative legal and non-legal options in the face of the defeat if there are any.
- Discuss and confirm the action that the client must take next, e.g., return of property, payment of money, observance of injunctions.
- Explain to the client the likely methods of enforcement of the judgment or order and any financial effects it will have.
- If appropriate explain to the client the sanctions that the court may apply if he or she disobeys its orders.
- Check with the solicitor or representative that all necessary documentation is in order; inform the client that you will telephone the solicitor from chambers, if appropriate.

### **7.17.3 CONFERENCE FOLLOWING A SUCCESSFUL CRIMINAL TRIAL**

- Ensure that all adverse witnesses and the public are out of earshot, or have left the court building.
- Advise the client on the effect of the 'not guilty' verdict, discontinuance, dismissal, etc.

- Advise the client of any further procedural matters that are outstanding, e.g., sentencing of offences pleaded to before the trial.
- Advise the client on the retrieval of any property retained by the prosecution, police or prison authorities.
- Counsel on immediate future arrangements if appropriate, e.g., accommodation, benefits.

#### **7.17.4 CONFERENCE FOLLOWING AN UNSUCCESSFUL CRIMINAL TRIAL**

- Ensure that all adverse witnesses, police officers, prosecutors and so on are out of earshot or have left the court building.
- Explain to the client the effect of the finding of guilt and allow time for this to be absorbed.
- If the sentence has not already been passed, inform the client of the process that will lead to sentence: pre-sentence report interviews, procedure at sentence hearing, the plea in mitigation, etc.
- Give your preliminary advice on the likely form of sentence and its duration.
- If the client has been found guilty after a trial: give your preliminary opinion on the likelihood of success and the attendant risks of an appeal against conviction.
- If bail with conditions attached is granted pending sentence, explain that breach of any condition may result in the client being arrested without warrant and his or her bail being withdrawn.
- If sentence has been passed: see below.
- Offer to address any immediate non-legal concerns.

#### **7.17.5 CONFERENCE FOLLOWING CASE LISTED FOR SENTENCE**

- If appropriate, ensure that all adverse witnesses and prosecution counsel are out of earshot or have left the court.
- Explain to the client in plain terms what he or she is required to do by the sentence. Allow the client time to absorb this.
- Explain to the client any comments passed by the judge when sentencing including why the court has passed that form of punishment for that period of time.
- Express your preliminary opinion on the likelihood of success of an appeal against sentence and the attendant risks.
- Advise as to any steps that must be taken by the client, e.g., the payment of a fine by installments or the requirement to co-operate with the Probation Service.
- If appropriate, inform the client that you will furnish the solicitor with a written advice on appeal against sentence within 21 days.

- Offer to investigate any non-legal concerns the client has, e.g., by ensuring the solicitor tells his or her family which prison the client has been sent to.

## KINDS OF QUESTIONS

Summary prepared by Ved Kumari from Don Peters, *The Joy of Lawyering: Readings For Civil Clinic* (1996)

| Kindsof questions                                                      | Advantages                                                                                                                                                                                                                                                                                                                                                                          | Disadvantages                                                                                                                                                                                                                                                                                                                                                                                                                              |
|------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Open</b> – leave clients free to provide broad range of information | <ul style="list-style-type: none"> <li>• Permit clients to select responses from their frames of reference and relevance</li> <li>• Allow free recall without interrupting questions from lawyer’s agenda</li> <li>• Clients can/do tell information which lawyer may have never thought of asking</li> <li>• Better at rapport building and as communication motivators</li> </ul> | <ul style="list-style-type: none"> <li>• Develop details poorly</li> <li>• No impetus to go back to specific time and search for specific points</li> <li>• Rapport difficulties with               <ul style="list-style-type: none"> <li>➤ Clients who are uncomfortable narrating due to different role expectation</li> <li>➤ Clients who may ramble onto</li> <li>➤ Irrelevant matters due to too much freedom</li> </ul> </li> </ul> |
| <b>Closed</b> –seek specific Information about specifictopic           | <ul style="list-style-type: none"> <li>• Excellent for rapport for initially reluctant speakers</li> <li>• Allow navigation past threatening areas surfacing before rapport building</li> <li>• Eliciting details</li> <li>• Generating recall</li> </ul>                                                                                                                           | <ul style="list-style-type: none"> <li>• Early use may inhibit information</li> <li>• Leave client feeling not heard or allowed to speak/ express</li> <li>• Loose opportunities to letoff steam</li> <li>• Lawyers cannot show empathy</li> <li>• Premature intrusion in threatening areas</li> </ul>                                                                                                                                     |

|                                                                                                         |                                                                                                                                                 |                                                                                                                                                                                           |
|---------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>Leading</b>—completely close the inquiry as clients are expected to agree with the suggestion</p> | <ul style="list-style-type: none"> <li>• Useful when eliciting known information which may not be forthcoming due to ego/case threat</li> </ul> | <ul style="list-style-type: none"> <li>• enhance chances of distortion and inaccurate answers</li> <li>• imply lack of confidence in client's ability to give suitable answers</li> </ul> |
|---------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

## **ADVOCACY OBJECTIVES**

The objectives of teaching advocacy are to enable students:

### **1. To understand the social, legal and strategic context of the hearing or presentation (occasion of advocacy).**

Content:

role of advocate, standpoint objectives or purpose of hearing alternative resolutions

evaluation of forum (status, implication)

legal significance (precedent, test case etc.)

financial considerations (including costs)

evaluation of success and failure

### **2. To prepare a suitable plan for the occasion.**

Content:

identify witnesses and other evidence identify relevant facts

construct logical factual propositions evidence analysis and fact appraisal

identify legal elements

outline case presentation

identify procedural/evidential issues

### **3. To effectively present an oral case on behalf of a client.**

Content:

prepare client/witnesses/tribunal for occasion introduce parties and advocates

summarise facts/law effectively and accurately organise witnesses and documents

examine witnesses in chief(leading/non-leading)

effectively produce documents/exhibits

re-examine witnesses when appropriate

### **4. To effectively challenge a witness.**

Content:

appreciate methods/opportunities to discredit identify conflicting/prejudicial testimony

effectively use questions in witness challenge identify alternative theory

structure challenge to support theory

emphasise significant agreement with own case

manage questioning economically

**5. To deliver a persuasive oral argument and summation.**

Content:

summarise salient testimony and construct case appreciate evidential quantum/burden

adopt style/demeanour appropriate for audience effectively engage in legal argument

balance commitment to client and objectivity persuasively and assertively pursue case

**6. To conclude a hearing or presentation.**

Content:

receive and record decision

inform tribunal of client's response/position

address forum on implications of decision

pursue consequential decisions (costs/ orders)

explain implications to client

**7. To practise an effective behaviour for advocacy.**

Content:

articulate clearly and confidently adopt appropriate stance and bearing employ a variety of oral techniques identify and observe ethical constraints

appreciate significance of advocacy interaction understand professional and legal requirements

**8. Reflect upon 1. above and evaluate experience.**

## **Case Analysis, Persuasion, and Storytelling**

By Steven Lubet in MODERN TRIAL ADVOCACY ANALYSES AND PRACTICE (1993)

### **I. THE IDEA OF A PERSUASIVE STORY**

#### **A. Trials as Stories**

The function of a trial is to resolve factual disputes. In order to hold a trial it is necessary that the parties be in disagreement concerning historical facts. These disagreements commonly involve the existence or occurrence of events or actions, but they may also turn upon questions of sequence, interpretation, characterization, or intent. Thus, trials may be held to answer questions such as these: What happened? What happened first? Why did it happen? Who made it happen?

Did it happen on purpose? Was it justified or fair? All of these questions are resolved by accumulating information about past events; if there is no dispute about past events the case should be resolved on summary judgment.

Trials, then, are held in order to allow the parties to persuade the judge or jury by recounting their versions of the historical facts. Another name for this process is storytelling. Each party to a trial has the opportunity to tell a story, albeit through the fairly stilted devices of jury address, direct and cross examination, and introduction of evidence. The framework for the stories - or their grammar - is set by the rules of procedure and evidence. The conclusion of the stories - the end to which they are directed - is controlled by the elements of the applicable substantive law. The content of the stories - their plot and *mise-en-scene* - is governed, of course, by the truth, or at least by so much of the truth as is available to the advocate. Thereafter, the party who succeeds in telling the most persuasive story should win.

But what is persuasive storytelling in the context of a trial? A persuasive story can establish an affirmative case if it has all, or most, of these characteristics: (1) it is told about people who have reasons for the way they act; (2) it accounts for or explains all of the known or undeniable facts; (3) it is told by credible witnesses; (4) it is supported by details; (5) it accords with common sense and contains no implausible elements; and (6) it is organized in a way that makes each succeeding fact increasingly more likely. On the other hand, defense lawyers must often tell "counter-stories" that negate the above aspects of the other side's case.

In addition to persuasiveness, a story presented at trial must consist of admissible evidence, and it must contain all of the elements of a legally cognizable claim or defense.

An advocate's task when preparing for trial is to conceive of and structure a true story, comprising only admissible evidence and containing all of the elements of a claim or defense, that is most likely to be believed or adopted by the trier of fact. This is a creative process, since seldom will the facts be undisputed or susceptible of but a single interpretation. To carry through this process the lawyer must "imagine" a series of

alternative scenarios, assessing each for its clarity, simplicity, and believability, as well as for its legal consequences.

## **B. Planning a Sample Story**

Assume, for example, that you represent a plaintiff who was injured in an automobile accident. You know from your law school torts class that in order to recover damages you will have to tell a story proving, at a minimum, that the defendant was negligent. You also know from your evidence class that the story will have to be built on admissible evidence, and you know from your ethics class that the story cannot be based on false or perjured testimony. <sup>2</sup> Your client knows only that when traffic slowed down to allow a fire truck to pass, she was hit from behind by the driver of the other automobile.

How can these basic facts be assembled into a persuasive trial story? First, we know that the story must be about people who act for reasons. Your client slowed down for a fire truck, which explains her actions. But why didn't the defendant slow down as well? Your story will be more persuasive if you can establish his reason.

True, a reason is not absolutely essential. Perhaps the defendant was such a poor driver that he simply drove about banging into other automobiles. On the other hand, consider what the absence of a reason implies. The plaintiff claims that traffic slowed for a fire truck, but the defendant - also part of traffic - did not slow down. Could it be that there was no fire truck? Perhaps there was a fire truck, but it was not sounding its siren or alerting traffic to stop. Is it possible that the plaintiff didn't slow down, but rather slammed on her brakes? In other word, the very absence of a reason for the defendant's actions may make the plaintiff's own testimony less believable.

The skilled advocate will therefore look for a reason or cause for the defendant's actions. Was the defendant drunk? In a hurry? Homicidal? Distracted? You can choose from among these potential reasons by "imagining" each one in the context of your story. Imagine how the story will be told if you claim that the defendant was drunk. Could such a story account for all of the known facts? If the police came to the scene, was the defendant arrested? Did any credible, disinterested witnesses see the defendant drinking or smell liquor on his breath? If not, drunkenness does not provide a persuasive reason for the defendant's actions.

Next, imagine telling your story about a homicidal defendant. Perhaps this wasn't an accident, but a murder attempt. Envision your impassioned plea for punitive damages. But wait, this story is too implausible. How would a murderer know that the plaintiff would be driving on that particular road? How would he know that a fire truck would be attempting to bypass traffic? How could he predict that the plaintiff would slow down enough, or that there would be no other cars in the way? Barring the discovery of additional facts that support such a theory, this story is unpersuasive.

Finally, imagine the story as told about a defendant who was in a hurry. This story accounts for the known facts, since it explains why traffic might slow while the defendant did not.

Perhaps the defendant saw the fire truck but was driving just a little too fast to stop in time; or he might have been so preoccupied with the importance of getting somewhere on time that he simply failed to notice the fire truck until it was too late. Moreover, there is nothing implausible or unbelievable about this theory. It is in complete harmony with everyone's everyday observations. Furthermore details that support the story should not be hard to come by. Was the defendant going to work in the morning? Did he have an important meeting to attend? Was he headed home after a long day? The trial lawyer can find details in virtually any destination that will support the theory of the hurried defendant. Note, however, that while such additional evidence of the defendant's haste will be helpful, the story does not rest upon any external witness's credibility. All of the major elements of the story may be inferred from the defendant's own actions.

How can this last story best be organized? Let us assume that the occurrence of the collision itself is not in issue, and recall that it is important that each fact make every succeeding element increasingly more likely. Which aspect should come first: the presence of the fire truck, or the fact that the defendant was in a hurry? Since the presence of the fire truck does not make it more likely that the defendant was in a hurry, that probably is not the most effective starting point. On the other hand, the defendant's haste does make it more likely that he would fail to notice the fire truck.

Thus, a skeletal version of our story, with some easily obtained details supplied, might go like this: we know there was a collision, but why did it happen? The defendant was driving south on Sheridan Road at 8:35 in the morning. It was the end of rush hour, and he had to be at work downtown. In fact, he had an important meeting that was to begin at 9:00 a.m. sharp. The defendant's parking lot is two blocks from his office. As traffic slowed for a passing fire truck, the defendant didn't notice it. Failing to stop in time, the defendant ran into the plaintiff's car.

Other details might also be available to support this story. Perhaps, immediately following the collision, the defendant ran to a phone booth to call his office. Similarly, there might be "counter-details" for the plaintiff to rebut. The point, however, is to organize your story on the principle of successive supporting detail.

## **II. THE ETHICS OF PERSUASIVE STORYTELLING**

In the preceding section we discussed the way in which an advocate imagines a persuasive theory or story. We also noted that lawyers are bound to the truth we are not free to pick stories simply on the basis of their persuasive value. Within this parameter, exactly how much room is there for creative theory choice?

### **A. Assuming That You "Know" the Truth**

Let us begin with the proposition that in most cases neither the lawyer nor the client will know with certainty what we might call all of the "relevant truth."

As in the scenario above, for example, the plaintiff knows her own actions, but has no special knowledge about the defendant. The lawyer, of course, is not free to persuade or coach the plaintiff to alter her own story simply to make it more effective.

This is not to say, however, that legal ethics permit us to do nothing more than put the plaintiff on the witness stand. The lawyer's duty of zealous representation requires further inquiry into the existence of additional details, not to mention the artful use of sequencing and emphasis. For instance, let us assume that the plaintiff has informed her lawyer with certainty that the fire truck was flashing its lights, but not sounding its siren or bell. There is no doubt that an attorney absolutely may not coach the plaintiff to testify that the siren and bell were sounding. Such testimony will be false, perjurious, and unethical.

On the other hand, there is no requirement that the absence of bell and siren be made the centerpiece of the plaintiff's direct examination. Sequencing and emphasis may be used to minimize the adverse impact of this information. Therefore, the direct examination could be developed as follows: "The fire truck was the largest vehicle on the road. It was the standard fire-engine red. All of its lights were flashing brightly – headlights, taillights, and red dome lights. It could be seen from all directions. All of the traffic, save the defendant, slowed down for the fire truck. It was not necessary to hear a siren in order to notice the fire truck." Thus, the lawyer has held closely to the truth, while establishing the irrelevance of the damaging information.

## **B. Assuming That You Don't Know the Truth**

A different situation arises when the advocate is not able to identify truth so closely, as in the example above concerning the defendant's reasons for failing to notice the fire truck in time. Recall that we considered a variety of possible reasons, including inattention, drunkenness, and homicide. Some reasons have clear forensic advantages over others. What are ethical limitations on the attorney's ability to choose the best one?

First, it should be clear that we are not bound to accept the defendant's story in the same way that we must give credence to our own client. The duty of zealous representation requires that we resolve doubts in our client's favor. Moreover, we speak to our client within a relationship of confidentiality, which not only protects her communication, but also gives her additional credibility. Without her consent, what our client tells us will go no further, and this knowledge gives her every reason to make a full disclosure. When our client gives us damaging facts (such as the absence of the fire truck's siren), it is even more likely to be true, since she obviously has no reason to inject such information falsely. Conversely, statements that we obtain from the defendant are not necessarily accompanied by comparable indicia of reliability, and we are entitled to mistrust them.

This is not to say that we must always accept information from our clients as revealed wisdom. Clients may mislead us as the result of misperception, forgetfulness, mistake, wishful thinking, reticence, ignorance, and, unfortunately, they occasionally lie. Moreover, opposing parties in litigation usually tell what they perceive as the truth! As a tactical matter, trial lawyers must always examine every statement of every witness for potential error or

falsehood. As an ethical matter, however, we should be more ready to assume that our client's words-both helpful and damaging - are likely to be true. It is, after all, the client's case.

Recognizing, then, that we must go beyond the opposite party's version of the facts, we next evaluate the entire universe of possible stories. In our example we determined that the "in a hurry" story would be the most persuasive. Simultaneously, we must also determine whether it is an ethical story to tell.

The key to determining the ethical value of any trial theory is whether it is supported by facts that we know, believe, or have a good faith basis to believe, are true. In other words, the story has to be based on facts that are "not false."

Returning to our fire truck case, assume that the defendant has denied that he was in a hurry. He has the right to make this denial, but as plaintiff's lawyers we have no duty to accept it. Assume also that we have not been able to locate a witness who can give direct evidence that the defendant was in a hurry. We do know where and when the collision occurred, and assume that we have also been able to learn numerous facts about the defendant's home, automobile, occupation, and place of employment. The following story emerges, based strictly on facts that we have no reason to doubt.

The defendant lives sixteen miles from his office. He usually takes the train to work, but on the day of the accident he drove. The accident occurred on a major thoroughfare approximately eleven miles from the defendant's office. The time of the accident was 8:35 a.m., and the defendant had scheduled an important, and potentially lucrative, meeting with a new client for 9:00 a.m. that day. The parking lot nearest to the defendant's office is over two blocks away. The first thing that the defendant did following the accident was telephone his office to say that he would be late.

Our conclusion is that the defendant was in a hurry. Driving on a familiar stretch of road, he was thinking about his appointment, maybe even starting to count the money, and he failed to pay sufficient attention to the traffic. We are entitled to ask the trier of fact to draw this inference, because we reasonably believe its entire basis to be true. The known facts can also support numerous other stories, or no story at all, but that is not an ethical concern. Perhaps the defendant was being particularly careful that morning, knowing how important it was that he arrive on time for his appointment. Perhaps the appointment had nothing to do with the accident. Those arguments can be made, and they may turn out to be more persuasive stories than our own. Our ultimate stories might be ineffective, or even foolish, but they are ethical so long as they are not built on a false foundation.

### **C. The Special Case of the Criminal Law**

The analysis above, regarding both persuasion and ethics, applies to civil and criminal cases alike. In the criminal law, however, the prosecutor has additional ethical obligations and the defense lawyer has somewhat greater latitude.

A criminal prosecutor is not only an advocate; she is also a public official. It is her duty to punish the guilty, not merely to win on behalf of a client. Therefore, a public prosecutor may not rely upon the "not false" standard for determining the ethical value of a particular theory. Rather, the prosecutor must personally believe in the legal validity of her case, and must refrain from bringing any prosecution that is not supported by probable cause.

Conversely, a criminal defendant is always entitled to plead not guilty, thereby putting the government to its burden of establishing guilt beyond a reasonable doubt. A plea of not guilty need not in any sense be "true," since its function is only to insist upon the constitutional right to trial. Of course, a criminal defendant has no right to introduce perjury or false evidence. However, a criminal defendant need not present any factual defense, and in most jurisdictions a conviction requires that the prosecution "exclude every reasonable hypothesis that is inconsistent with guilt." Thus, so long as she does not rely upon falsity or perjury, a criminal defense lawyer may argue for acquittal - that is, tell a story - based only upon "a reasonable hypothesis" of innocence.

### **III. PREPARING A PERSUASIVE TRIAL STORY**

Assume that you have decided upon the story that you want to tell. It is persuasive. It is about people who have reasons for the way they act. It accounts for all of the known facts. It is told by credible witnesses. It is supported by details. It accords with common sense. It can be organized in a way that makes each succeeding fact more likely.

How do you put your story in the form of a trial?

#### **A. Developing Your Theory and Your Theme**

Your case must have both a theory and a theme.

##### **1. Theory**

Your theory is the adaptation of your story to the legal issues in the case. A theory of the case should be expressed in a single paragraph that combines all account of the facts and the law in such a way as to lead to the conclusion that your client must win. A successful theory contains these elements:

*-It is logical.* A winning theory has internal logical force. It is based upon a foundation of undisputed or otherwise provable facts, all of which lead in a single direction. The facts upon which your theory is based should reinforce (and never contradict) each other. Indeed, they should lead to each other, each fact or premise implying the next, in an orderly and inevitable fashion.

*-It speaks to the legal elements of your case.* All of your trial persuasion must be in aid of a "legal" conclusion. Your theory must not only establish that your client is good or worthy (or that the other side is bad and unworthy), but also that the law entitles you to relief. Your theory therefore must be directed to prove every legal element that is necessary both to justify a verdict on your behalf and to preserve it on appeal. •

*-It is simple.* A good theory makes maximum use of undisputed facts. It relies as little as possible on evidence that may be hotly controverted, implausible, inadmissible, or otherwise difficult to prove.

*-It is easy to believe.* Even "true" theories may be difficult to believe because they contradict everyday experience, or because they require harsh judgments. You must strive to eliminate all implausible elements from your theory. Similarly, you should attempt to avoid arguments that depend upon proof of deception, falsification, ill motive, or personal attack. An airtight theory is able to encompass the entirety of the other side's case, and still result in your victory by sheer logical force.

To develop and express your theory, ask these three questions: What happened? Why did it happen? Why does that mean that my client should win? If your answer is longer than one paragraph, your theory may be logical and true, but it is probably too complicated.

## **2. Theme**

Just as your theory must appeal to logic, your theme must appeal to moral force. A logical theory tells the trier of fact the reason that your verdict must be entered. A moral theme shows why it should be entered. In other words, your theme—best presented in a single sentence—justifies the morality of your theory and appeals to the justice of the case.

A theme is a rhetorical or forensic device. It has no independent legal weight, but rather it gives persuasive force to your legal arguments. The most compelling themes appeal to shared values, civic virtues, or common motivations. They can be succinctly expressed and repeated at virtually every phase of the trial.

In a contracts case, for example, your theory will account for all of the facts surrounding the formation and breach of the contract, as well as the relevant law, say, of specific performance. Your theory will explain why a particular verdict is compelled by the law. Your theme will strengthen your theory by underscoring why entering that verdict is the right thing to do. Perhaps your theme will be, "The defendant would rather try to make money than live up to a promise." Or you might try, "This defendant tried to sell some property, and keep it too." Whatever the theme, you will want to introduce it during your opening statement, reinforce it during direct and cross examinations, and drive it home during your final argument.

## **B. Planning Your Final Argument**

Good trial preparation begins at the end. It makes great sense to plan your final argument first, because that aspect of the trial is the most similar to storytelling; it is the single element of the trial where it is permissible for you to suggest conclusions, articulate inferences, and otherwise present your theory to the trier of fact as an uninterrupted whole.

In other words, during final argument you are most allowed to say exactly what you want to say, limited only by the requirement that all arguments be supported by evidence contained in the trial record. Thus, by planning your final argument at the beginning of your

preparation, you will then be able to plan the balance of your case so as to ensure that the record contains every fact that you will need for summation.

Ask yourself these two questions: What do I want to say at the end of the case? What evidence must I introduce or elicit in order to be able to say it? The answers will give you the broad outline of your entire case.

### **C. Planning Your Case in Chief**

Your goal during your case in chief is to persuade the trier of fact as to the correctness of your theory, constantly invoking the moral leverage of your theme. To accomplish this, you have four basic tools: (1) jury address, which consists of opening statement and final argument; (2) testimony on direct examination, and to a lesser extent on cross examination; (3) introduction of exhibits, including real and documentary evidence; and (4) absolutely everything else that you do in the courtroom, including the way you look, act, react, speak, move, stand, and sit. The skills involved in each of these aspects of a trial will be discussed at length in later chapters. What follows here is an outline of the general steps to take in planning for trial.

#### **1. Consider Your Potential Witnesses and Exhibits**

Your first step is to list the legal elements of every claim or defense that you hope to establish. If you represent the plaintiff in a personal injury case, then you must offer evidence on all of the elements of negligence: duty, foreseeability, cause-in-fact, proximate cause, and damages. Next, list the evidence that you have available to support each such element. Most likely the bulk of your evidence will be in the form of witness testimony, but some of it will consist of documents, tangible objects, and other real evidence. For each such exhibit, note the witness through whom you will seek its introduction.

You are now ready to make decisions concerning your potential witnesses, by inverting the informational list that you just created.

#### **2. Evaluate Each Witness Individually**

Imagine what you would like to say in final argument about each witness you might call to the stand: What does this witness contribute to my theory? What positive facts may I introduce through this witness? Are other witnesses available for the same facts? Is this witness an effective vehicle for my theme? What can I say about this witness that will be logically and morally persuasive?

Once you have assembled all of the "positive" information about each witness, you must go on to consider all possible problems and weaknesses.

##### **a. Factual Weaknesses**

Are there likely to be inconsistencies or gaps in the witness's testimony? Does the witness have damaging information that is likely to be elicited on cross examination? If the answer to either question is affirmative, how can you minimize these problems? Can you resolve the

inconsistencies by re-evaluating your theory? Can another witness fill the gaps? Can you defuse the potentially damaging facts by bringing them out on direct examination?

### **b. Evidentiary Problems**

Each witness's testimony must be evaluated for possible evidentiary problems. Do not assume that any item of evidence or testimony is automatically admissible. Instead, you must be able to state a positive theory of admissibility for everything that you intend to offer during your case in chief. To prepare for objections ask yourself, "How would I try to keep this information out of evidence?" Then plan your response. If you are not absolutely confident in your ability to counter any objections, you have to go back to the law library.

### **c. Credibility Problems**

How is the witness likely to be attacked? Is the witness subject to challenge for bias or interest? Will perception be in issue? Is there potential for impeachment by prior inconsistent statements? Can you structure your direct examination so as to avoid or minimize these problems?

## **3. Decide Which Witness to Call**

Having evaluated the contributions, strengths, and weaknesses of all of your potential witnesses, you are now in a position to decide which ones you will call to the stand. Your central concern will be to make sure that all of your necessary evidence is admitted. You must call any witness who is the sole source of a crucial piece of information. Except in rare or compelling circumstances, you will also want to call any witness whose credibility or appearance is central to the internal logic or moral weight of your case.

All non-essential witnesses must be evaluated according to their strengths and weaknesses. You will want to consider eliminating witnesses whose testimony will be cumulative or repetitive of each other, since this will increase the likelihood of eliciting a damaging contradiction. You must also be willing to dispense with calling witnesses whose credibility is seriously suspect, or whose testimony has the potential to do you more harm than good.

Once you have arrived at your final list of witnesses, arrange them in the order that will be most helpful to your case. While there are no hard and fast rules for determining witness order, the following three principles should help you decide:

*Retention.* You want your evidence not only to be heard, but also to be retained. Studies have consistently suggested that judges and juries tend to best remember the evidence that they hear at the beginning and the end of the trial. Following this principle, you will want to call your most important witness first, and your next most important witness last. Start fast and end strong.

*Progression.* The "first and last" principle must occasionally give way to the need for logical progression. Some witnesses provide the foundation for the testimony of others. Thus, it may be necessary to call "predicate" witnesses early in the trial as a matter of both

logical development and legal admissibility. To the extent possible, you may also wish to arrange your witnesses so that accounts of key events are given in chronological order.

*Impact.* You may also order your witnesses to maximize their dramatic impact. For example, you might wish to begin a wrongful death case by calling one of the grieving parents of the deceased child. Conversely, a necessary witness who is also somewhat unsavory or impeachable should probably be buried in the middle of your case in chief. A variant on the impact principle is the near-universal practice of calling a criminal defendant as the last witness for the defense. This practice has arisen for two reasons. First, it postpones until the last possible moment that time that the lawyer must decide whether to call the defendant to the stand for exposure to cross examination. Second, and far more cynically, calling defendants last allows them to hear all of the other testimony before testifying. [While all occurrence witnesses are routinely excluded from the courtroom, the defendant has a constitutional right to be present throughout the trial.]

#### **D. Planning Your Cross Examinations**

It is inherently more difficult to plan a cross examination than it is to prepare for direct. It is impossible to safeguard yourself against all surprises, but the following four steps will help keep them to a minimum.

First, compile a list of every potential adverse witness. Imagine why the witness is likely to be called. Ask yourself, "How can this witness most hurt my case?" Always prepare for the worst possible alternative.

Second, consider whether there is a basis for keeping the witness off the stand. Is the witness competent to testify? Is it possible to invoke a privilege? Then consider whether any part of the expected testimony might be excludable. For every statement that the witness might make, imagine all reasonable evidentiary objections. Do the same thing concerning all exhibits that might be offered through the witness. For each objection plan your argument, and prepare for the likely counter-argument. You won't want to make every possible objection, but you will want to be prepared.

Third, consider the factual weaknesses of each opposing witness. Are there inconsistencies that can be exploited or enhanced? Is the witness's character subject to attack? Can the witness be impeached from prior statements? How can the witness be used to amplify your own theme?

Finally, catalog all of the favorable information that you will be able to obtain from each opposing witness.

#### **E. Re-evaluating Everything That You've Done**

Now that you have planned your case in chief and cross examinations, it is imperative that you go back and re-evaluate every aspect of your case. Do your direct examinations fully support and establish your theory? Do they leave any logical gaps? Are you satisfied that all of your necessary evidence will be admissible? Will it be credible? Do the potential cross

examinations raise issues with which you cannot cope? Will you be able to articulate your moral theme during most or all of the direct and cross examinations? If you are unable to answer these questions satisfactorily, you may need to readjust your theory or theme.

Assuming that you are satisfied with your theory, you should now have an excellent idea of what the evidence at trial will be. With this in mind, go back again and rework your final argument. Make sure that it is completely consistent with the expected evidence, and that it makes maximum use of the uncontroverted facts. Consider eliminating any parts of the argument that rest too heavily on evidence that you anticipate will be severely contested. Be sure that you structure your argument so that you can begin and end with your theme, and invoke it throughout. Finally, outline your opening statement, again beginning and ending with your theme, and raising each of the points to which you will return on final argument.

#### IV. CONCLUSION

The following chapters discuss all aspects of persuasion at trial, from the opening statement to the final argument. Trial lawyers must master numerous forensic skills, procedural rules, and examination techniques, but your starting point must always be your theory of the case - the story that you want to tell.

LITIGATION CHART

| Elements of Claims | Sources of Proof                                                                | Informal Fact                                                  | F o r m a l<br>Discovery                            |
|--------------------|---------------------------------------------------------------------------------|----------------------------------------------------------------|-----------------------------------------------------|
| Negligence         |                                                                                 |                                                                |                                                     |
| (a) Negligence     | Plaintiff<br>Police officers<br>Bystanders<br>Defendant                         | Interview<br>Interview<br>Interview                            | Deposition?<br>Deposition<br>and<br>interrogatories |
| (b) Causation      | Plaintiff<br>Defendant<br>Treating doctors<br>Police officers<br>Police reports | Interview<br>Interview<br>Interview<br>R e q u e s t<br>letter | Deposition<br>Deposition?                           |
| (c) Damages        |                                                                                 |                                                                |                                                     |
| a. Lost income     | Plaintiff<br>Employer<br>Employment<br>Records                                  | Interview<br>Interview<br><br>R e q u e s t                    | R e q u e s t to<br>admit                           |

|                       |                                                                 |                                                         |                                    |
|-----------------------|-----------------------------------------------------------------|---------------------------------------------------------|------------------------------------|
| b. Med. Expenses      | Med. Bills<br>Treating doctors<br>Pharmacy bills                | P l .<br>possession<br>Interview<br>P l .<br>possession | Deposition?<br>Request to<br>admit |
| c. Disability         | Plaintiff<br>Treating doctors<br>E m p l o y m e n t<br>records | Interview<br>Interview<br>R e q u e s t<br>letter       | Deposition?                        |
| d. Pain and suffering | Plaintiff<br>Treating doctors                                   | Interview<br>Interview                                  | Deposition?                        |

### Questionnaire for Interviewers

Name . . . . .

(Partner's Name).....

Date of interview ..... .

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#### SECTION ONE

(To be completed before you conduct the interview)

Please read the following questions and answer them briefly in the space provided.

1. Before you meet the 'client' describe briefly:

A. What are the objectives of the interview?

B. Describe briefly how you plan to structure the interview (topics, order, time, etc.):

C. What have you learned from your reading about interviewing that you intend to practice or avoid?

D. What is your role in the interview and what standpoint do you wish to adopt?

## SECTION TWO

(To be completed after the Interview)

2. In your conduct of the interview how well/poorly do you think that you performed the following?

|  |                             | Very Well | Well | Average | Not well | Poorly |
|--|-----------------------------|-----------|------|---------|----------|--------|
|  | Placing client at ease      |           |      |         |          |        |
|  | Empathizing with the client |           |      |         |          |        |
|  | Eliciting facts             |           |      |         |          |        |
|  | Checking facts and changes  |           |      |         |          |        |
|  | Explaining law              |           |      |         |          |        |
|  | Advising about implications |           |      |         |          |        |
|  | Agreeing follow up          |           |      |         |          |        |
|  | Reassuring client           |           |      |         |          |        |
|  | Note taking                 |           |      |         |          |        |
|  | Time management             |           |      |         |          |        |

B. What, if any, ethical or moral issues did you encounter?

3. A. What in brief are the key facts of the client's legal problem?

B. What is / are the legal issue(s) involved?

C. Were there other facts in the case which seriously concerned the client but which were not related to the legal issue(s)?

4. A. List the other possible outcomes in this case:

B. Which in your opinion is the most likely outcome?

C. What is/are the client's desired outcome(s)?

D. What are the main obstacles, if any, to this/these being achieved?

E. How will it / they (client's desired outcome(s)) be achieved?

F. What alternative strategies were available?

5. A. What did you learn from the interview?

B. What did the interview remind you of from your previous reading about interviewing?

C. What could you have done to improve the interview?

D. What do you think the client thought of the interview?

Name.....(Partner's Name) .....Date of interview

**CASE PLANNING CHART**

Case name: \_\_\_\_\_

Client Goals / Objectives:

| Legal Claim | Elements of Claim | Facts to support Claim | Source of Proof | Informal Discovery | Formal Discovery | Opponent's Defences (Theory, Proof, Discovery) |
|-------------|-------------------|------------------------|-----------------|--------------------|------------------|------------------------------------------------|
|             |                   |                        |                 |                    |                  |                                                |

## **Body Language (Non-verbal Communication)**

Observing yourself and others is non-verbal communication - the way we express ourselves, not by what we say, but by what we do.

Stop for a moment and examine yourself as you read this. If someone were observing you now, what non-verbal clues would they get about how you are feeling? Are you sitting forward or reclining back? Is your posture tense or relaxed? Are your eyes wide open, or do they keep closing? What does your facial expression communicate? Can you make your face expressionless? Don't people with expressionless faces communicate something to you?

Of course, we do not always intend to send non-verbal messages. Consider, for instance, behaviors like blushing, frowning, sweating, or stammering. We rarely try to act in these ways, and often we are not aware when we are doing so. Nonetheless, others recognize signs like these and make interpretations about us based on their observations.

Understanding that you, and everyone around you, are constantly, sending off non-verbal cues is important because it means that you have a constant source of information available about yourself and others. If you can tune into these signals, you will be more aware of how those around you are feeling and thinking, and you will be better able to respond to their behavior

### **Non-verbal Communication Transmits Feelings**

Although feelings are communicated quite well non-verbally, thoughts do not lend themselves to non-verbal channels. Without being able to use words, peoples' bodies generally express how they feel - nervous, embarrassed, playful, friendly, etc. What they think has to be gathered through some verbal medium.

Here is a list that contains both thoughts and feelings. Try to express each item non-verbally, and see which ones come most easily:

You are tired.

You are in favor of capital punishment.

You are attracted to another person in the group. You think marijuana should be legalized.

You are angry with someone in the group.

### **Non-verbal Communication Serves Many Functions**

Verbal and non-verbal communications are interconnected elements in every act of communication. Non-verbal behaviors can operate in several relationships to verbal messages.

a. First, non-verbal behaviors can repeat what is said verbally. If someone asked you for directions to the nearest drugstore, you could say, "North of here about two blocks," and then repeat your instructions non-verbally by pointing north.

b. Non-verbal messages may also substitute for verbal ones. When you see a familiar friend wearing a certain facial expression, you do not need to ask, "How's it going?" In the same way, experience has probably shown you that other kinds of looks, gestures, and other cues say, "I'm angry at you" or "I feel great" far better than words.

## **PARALINGUISTICS AS AN EXPRESSION OF COMMUNICATIVE BEHAVIOUR**

L. Spasova\*

### **INTRODUCTION**

In the process of communication we can observe some body-movements and some sound phenomenon which attend to the speech like a working language. These body-movements and sound phenomenon are not the part of the language system but they are an isolated system. For that reason they define like a paralinguage. The language is the main system of the communication but the paralinguage is an auxiliary sound system. The science of the paralinguage or the science of the non-verbal sign means is called paralinguistics. It is a part of the semiotics and researches the essence of the non-verbal sign means but like a part of the linguistics researches the links between the verbal and non-verbal communicative means. Like a paralinguistic word defines everything from the paralinguage. For example: the head nodding like a thing of the nod assent; the arch of the eyebrows like as surprise and so on. In the non-verbal communication the presenter takes a part in the organization of the statement or in the definite speech announcement and has the main role in the presentation.

The ability to express the definite information is a way to influence on the people. This is a whole magnetic packet of abilities, strategies and models, which is an ability for a successful communication.

The individual in the personality is united and co-ordinate entity and not one personal manifestation can not go into isolation, but into correlation between individual-past and individual-personality. So as not to destroy the relation personality-society and not to have the individual isolation, we can use the definite communicable behaviour. The communication like personal phenomenon and like interaction always is in the limelight of every humane activity. The most important emphasizes are not the more the search, the assimilation and the giving of the definite information, the more the ability to analyze the regularities and the components of the communication. The instrument of successful communication is not only the competence but also it is the way which its mechanism develops into. The positive beginning, the confidence in the statements, the provocation to sincere interest in another person, keeping away from the argument can be conducive to removal of barriers to the communication with the partner. The language, the behavior and the appearance are in the base of the humane communication and they define the cognitive, the internal active and the receptive aspect. These indices are determined, predicted and controlled as the individual personal abilities as well the encirclement.

### **Etiquette of presentation**

The first of all the etiquette of every presentation depends on the skills of the presenter. It is presented by the respect for the audience. The etiquette presenter shows tolerance of the listeners, he or she is tolerant to his or her opponents and can make up a constructive, original

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speech. Every day he or she pays attention to the following characteristics: hair cut, make-up, and discreet appearance, smile face affability, sympathy, way of dress; timbre of the voice; adequacy of the audience emotions; language expressions; education.

To present the respect to the audience, the public speaker comes on the time in and greets after the coming as well wants to undertake to give the correct information. The contact the individual-society is realized. And now from the presenter depend on if this connection will be successful or it will be an unpleasant obligation each other.

**The first contact** (Tozeva A, 2009) determines the beginning of the interaction and provides a possibility in the process of the communication to hold the other people's attention to you. Except for the words which use in the first meeting with a communicative partner we can use our expression of the face, the appearance, the body position, gestures, with the suitable intonation of the voice.

When someone makes an advent, everybody cannot notice **the sex, the age and the personal appearance**. The most variable from these components is the expression of the face. It can express: strictness, haughtiness, calmness, tolerance, delicacy and go on. The emotion which is presented with facial muscles helps in the **empathy** – the ability to understand another person's feelings and help them.

The association or the communication do not have to understand like one-sided process because in a conversation take part two partners. The communication can be formal or informal, oral or no-oral, directly or indirectly and it is not a single act but it is an active exchange in which take part two persons. It is important that the partners have influence each other, they change their behavior or they have other intentions.

### **Human voice**

The one of the components of the non-verbal communication is the **voice**. The human voice has different dimensions and can characterize the person by different qualities or features. Its qualities like height of the voice, the timbre, the ascents or the diction, the rate and the rhythm as well as the phonation or filling the pauses with the determine sounds; make the definite presenter's characterization.

It is improved by different observations that the height of the voice determines by the number of the vibrations of the vocal chords for one second. If the number of the vibrations increases, it can increase the height of the voice. By the more emotional conversations or like the person gives very important information, the height of the voice exchanges.

The **timbre** or the determinate voice's specifics can have influence on the receptivity, the rationalization, the perception, as well as the recreation of definite information. To avoid the undesired conflict, to keep away from uncomfortable situation, the calm well-balanced tone directs the attention of the listener to another direction and determines the result of the meeting.

The **ascents** are the divorce of a part of the word from another and the strong expression. The incorrect ascents or the unsuitable pronunciation can be a bad adviser in the business relationships. Between the partners have an invisible barrier, which cannot wipe out differences? In some cases to remove the entire barrier, the partners can use interlinguistics,

in which can make different languages as Esperanto, information languages, Global English, but they are not the best alternative in a business meetings.

The **manner of the pronunciation** or the diction must be clean, plain and clear. The speech of the presenter or the speaker exchanges depending on speaking conditions. In the different way it can sound in a public utterance, in a business meeting or in a conversation between some friends. In the Bulgarian literary language have the follow styles of the pronunciation: refined in the public utterance and conversations, colloquialness in the informal conversations. The incorrect diction is a repulsive component in the oral communication and it is not suitable to public expressions.

### **Speed of the speech**

The speed of the speech which consists of the quantity syllables is definite as rate or rhythm of the voice. The speed is changing quickly. By the more emotional conversations the presenter can not make an articulate speech and this emotional state destroy the public relationships between the communicators. This is a moment when we can pass from verbal to non-verbal communication. The speaker uses the **phonation**—e-e-e-rrrrr, ohhhhhhhhhhhh, ahhhhhhh and etc. Expression and emotion are connected to diction. The emotion has to link with the speaker's thoughts. It is connected with the expressing thoughts.

The components of the voice all definite the non-verbal means in the communication. The most comfortable and effective form of the communication with non-verbal means is the expression of the face. In a normal conversation between two or more communicators 10 % is the effect of the information, 40% is the pronunciation and 60% is the way of the pronunciation. The expression of the face has to be connected with the intentions or the purpose of the speaker. Every movement of the mimic muscle an exchange the business like conversation. The effective communication demands to make a connection with the eyes because the recipient get more information than from the words.

The expression of the face helps us to understand the other speakers when we make a conversation. The face and the eyes are the most noticeable parts of the body but they are difficult to understand. It is not possible to describe the number of the expressions which we can use in a conversation. The expression of the face is changing very quickly and momentarily in a conversation, but the listener can understand the announcements which he or she get.

### **Expression of face**

From some observations we determine that by the expression of the face can increase or decrease the distance between the lecturer and the audience. There is some variety:

- The severe look of the face: This is very powerful influence in the speaking but it is not very fruitful. In this case the voice is very expressive. The communication is in an informal communicative circle and we use the literary form of the language. If the strong tune and the cold expression of the face are continue very for long, the first effect is lost. The audience draws back and the lecturer cannot control the situation or he or she is not the leader.

- The gentle smile face can make very comfortable atmosphere in which the communication has another dimensions. The distance is short and the relationship: communicator-recipient is in an informal communicative situation. The height of the voice is decreasing and the lecturer can use different laconic jokes without sarcasm or irony.
- The calm but not indifferently expression of the face provoke respect and demand more tolerance and obligation from the listeners. The self-control of the public speaking is very important and the contents of the speech have to be with a lot of arguments. There is clear and correct diction which helps in the understanding and the learning.

### **Contact with Listeners**

The realization of the contact with the listeners is connected to appearance and construction of the first impression for the lecturer. When the audience is unknown, the speaker must give short information for me. The presentation can make in different way but everyone prefers the short information. The orators prefer to begin with the important information because they want to attract the attention of the listeners. It is important what greeting or appeal the presenter will use in the beginning: 'Ladies and gentlemen' or 'Dear ladies and gentlemen', sometime in the business circles the speaker can begin without appeal or with the words: 'Excuse me'. The most difficult task for the speaker is to predispose the listeners to myself in the beginning and make the grade in the end. This success can achieve with non-verbal communication. The position of the body is also very important. The body has to take up the needed space. Instead of we try to shrink into the corner, we can drop our arms without to stoop. The stand body suggests respect and authority. We can have a sense of self-confidence and self-control which are connected with the personal qualities of the orator. The audience accepts this calm behavior very quickly. If the listeners are every calm, still and listen carefully, this means that the orator will succeed to engage their attention.

### **The position of the body**

The position of the body can definite of other considerations. In a business discussion or in a business meeting the chairperson or the orator sits down on the central seat so that everyone can see him or her. In advance it determines two positions of the behaviour:

- Master of behavior or a man who aspires to control the situation and wants to dominate.
- Subordinate side or a dependent person who is in a state of subordination.

The lecturer can stand up when he or she is in front of a big audience of listeners. He or she is in the limelight and stand behind the desk. The standing position has some advantages:

- Everyone can see him or her and can form a clear view of the chairman.
- The chairman can observe the other partners of the communication.
- The standing position makes him or her severe with severe look and big exactingness.

- The voice travels everywhere and has an effect on the audience.
- It is quite possible to change the distance between the participants in a communication.

### **Lecturer's appearance**

The lecturer's appearance determines the attention of the listeners to him or her. Individual choice of clothing characterizes the person and gives a right idea of the speaker.

The word "Individual" comes from Latin word "individuum" which means indivisible. This is an idea of a person as an individual in the personality is united. The different person's qualities, the sex, the age, the education, the upbringing are very important. The person is a phenomenon which owns these components, but which component will show in a situation dependent on the inside factors. The social belonging of an individual determines the choice of the clothing. The most preferable and most receptive clothing is the formal which means respect and can be conducive to business. It is enough to put on a tie with a suit to pose a bigger obligation, a severity and an official character of a meeting.

It is possible the orator underestimates the situation or according to his or her estimation to come on the meeting with a daily clothing i. e. negligee, which means that the listeners can lose the attention. It is found that the communication is more successful when the lecturer's clothing is suitable to the situation. If the clothing is very formal this means that the speaker plays off and the audience may draw back i.e. it does not take an interest in him or her. Therefore the clothing is a very important thing in the communication and can help to make a right decision.

### **Non-verbal components**

The non-verbal components are also: hands' gestures, head's gestures and body's gestures. The language of the gestures helps to understand, learn and rethink of the correct information. By some gestures may overcome the distance between the speaker and listeners. Their usage is found in definite social group—for example the drivers do not have a chance to communicate face to face and the verbal communication is not possible. The two participants have understood that there is a barrier between them, and they use some suitable gestures, mimics or signs to make a conversation.

The gestures are a very important part of the person's behaviour and they can stand for different things in the different nationalities. For example for Bulgarians the nodding with a head means: 'Yes!' This is a positive answer or this is a greeting: 'Good afternoon!' In Russian this gesture means: 'No!' This variety can explain with the different way of understanding the world.

There are a lot of gestures and mimics which are using in different nationalities. The common gestures and mimics get over the barriers between the nationalities and decrease the distance. Also the bow is a very important part of greeting someone in Japanese. The Japanese do not shake hands because bowing the head is a mark of respect. The first bow of the day should be lower than other. In Thailand people clasp their hands together and lower their hands or eyes when they greet someone. It is difficult to accept the more formal manners because there are some nationalities which prefer to be casual and more informal. Americans sometimes signal their feelings of ease and importance in their offices by putting their feet on the desk whilst

on the telephone. In Japan, people would be shocked. Showing the soles of your feet is the height of bad manners. It is a social insult only exceeded by blowing your nose in public.

## **Gestures**

Depending on using of different parts of the body there are the following gestures: hands' gestures, head's gestures and body's gestures. The hands' gestures have used very often because they can help to make a conversation very quickly. They also help to express the words exactly and clearly. But the rude, incorrect or arrogant gestures which present in some social group are very unsuitable. There is some linguistics, logical describing movements which can help by understanding the scientific material.

The same gestures can use from different persons in typical situation. Gestures put words together into a sentence or associate some sentences but they are not connected with emotions. Gestures do not have paralinguistics functions but they can illustrate some information. For example when we point the inside part of the hand it means: 'Enough!' The movements of the left hand on the left and on the right: 'Goodbye' etc. The nonverbal signs have definite aim. We can express politeness as shaking hands, tip on back, smiling, etc.

We can ask: How to use the non-verbal signs to express the sentence? They are connected to understanding of the sentences. The mechanism of their understanding depends on the intuition, the intelligence and the abilities of the communicator. Their analysis in the context of the whole behaviour, the cultural traditions, and the intelligence is able to understand them.

The one of the components of the non-verbal communication is the voice. The human voice has different dimensions and can characterize the person by different qualities or features. Its qualities like height of the voice, the timbre, the accents or the diction, the rate and the rhythm as well as the phonation or filling the pauses with the determine sounds; make the definite presenter's characterization.

## **Conclusion**

It is improved by different observations that the height of the voice determines by the number of the vibrations of the vocal chords for one second. If the number of the vibrations increases, it can increase the height of the voice. By the more emotional conversations or like the person gives very important information, the height of the voice exchanges. The timbre or the determinate voice's specifics can have influence on the receptivity, the rationalization, the perception, as well as the recreation of definite information. To avoid the undesired conflict, to keep away from uncomfortable situation, the calm well-balanced tone directs the attention of the listener to another direction and determines the result of the meeting.

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## **THE TRIAL ADVOCATE**

in

**Roger Haydock and John Sonsteng, “Trial: Theories, Tactics, Techniques”, West Publishing Co. St. Paul, Minn. 1990, pp. 38-60**

### **I – THE TRIAL ATTORNEY**

#### **A. The Goal of the Trial Attorney**

The goal of the trial attorney is to win. A case is tried because other alternative efforts at resolving the dispute—negotiation, mediation, arbitration, trial by jousting – have been unsuccessful. The client obviously expects to win, and counsel must make every reasonable effort to win. However, this goal of winning must be kept in perspective, for this end does not justify all means. Winning is not everything, and it is not the only thing unless the steps taken to win comply with ethical norms.

#### **B. Roles of the Trial Attorney**

The trial lawyer is an advocate. The trial advocate uses all reasonable tactics and techniques to present the case to the judge or jury to secure a favourable outcome. The advocate increases the chances of victory by adopting a winning attitude.

An all-out effort is governed by trial rules, ethics, and common sense. A process that involves acrimony or questionable approaches does not serve the client’s interests or the system of justice. The belief that trial lawyers must be dominating, rude, and controlling is incorrect and significantly decreases the chances of winning. The effective trial lawyer must be firm, persistent, and compassionate. These approaches substantially increase the chances of winning.

The trial lawyer also has a number of additional roles during litigation. As a court officer, the attorney must follow the ethical norms of the system. As a counsellor, the attorney provides well reasoned advice to the client. As an investigator, the attorney gathers and preserves information. As a facilitator, the attorney considers alternative dispute resolution approaches to resolve the lawsuit before trial. As a negotiator, the attorney determines the possibilities of settlement and makes good faith efforts to resolve the dispute prior to and during litigation. As a litigator, the attorney drafts pleadings, conducts discovery, and brings and defends motions. As an appellate lawyer, the attorney brings or defends an appeal. As a dreamer, the trial lawyer believes this case is the case.

#### **C. Other Functions of the Trial Lawyer**

In addition to the trial lawyer functioning in the role of an advocate, the successful trial attorney also adopts functions performed by other professions. The trial lawyer must also, in part, be an artist, scientist, psychologist, historian, and theatre director employing the various approaches used by these and other professionals. As an artist, the trial lawyer must be creative, imaginative, and intuitive. As a scientist, the trial advocate must be rational, logical, and disciplined. As a psychologist, the trial attorney must understand human behaviour and decision-making and predict how the judges and jurors will react to the case or issues at hand.

Using the methods of the historian, trial advocates recreate the past in the courtroom. The facts are presented in a summary narrative during opening statement and closing argument. The evidence is presented to the judge in a way that will enable them to understand

what happened. Although trial advocates are not bound by the historian's need to be objective and impartial, they must still present the truth of their client's story.

As a director, the trial advocate also directs a play complete with actors and props. The courtroom is the theatre in which the trial lawyer directs and acts in this nonfiction play. The witnesses are the actors and the trial exhibits are the props. The judge and jury are the audience.

#### **D. Character Traits**

All trial attorneys have specific personality and character traits that influence their professional approach and behaviour. Some traits that all effective trial advocates possess include integrity, honesty, fairness, sensitivity, and respect for others. Successful trial lawyers make certain that these traits are displayed in every trial.

The judge must be able to trust the attorney. They rely upon the attorney's word and explanations. An untrustworthy trial attorney is an ineffective advocate. The attorney must also display a sincere belief in the merits of the client's case. The failure to appear sincere may cause the judge and jury to conclude that if the attorney does not believe in or care about the case, they need not either.

A trial lawyer must also appear fair before the judge and jury. A lawyer who seems to take advantage of the situation or who appears sneaky or underhanded will not establish the integrity needed to maintain an appearance of fairness. The attorney must also treat the judge and jurors with respect. Any other treatment will only insult and alienate these decision makers.

Additionally, trial attorneys encounter a full range of personality temperaments in dealing with opposing attorneys, witnesses, judges, and jurors. These individuals may be courteous or rude, cooperative or hostile, friendly or arrogant, pleasant or intimidating, trustworthy or untrustworthy. The trial attorney must adopt various approaches to deal with this broad spectrum of personalities. Occasionally, however, counting to ten and meditating may be the only viable approach.

#### **E. Balanced Attitude**

Trial attorneys suffer stress from one or more of the following sources: the pressure to win, unrealistic expectations, fear of failure money, ego, physical discomfort, fatigue, anxieties, tension, peer pressure, neglect of personal and family matters, emotional withdrawal, preoccupation with a trial, and law school memories. Attorneys may take cases for financial rewards but may also take them to accept a difficult challenge, work with a specific client, obtain publicity, achieve fame, satisfy a legal fantasy, change the law, protect a client's rights, or promote justice. These motivations may result in added stress. To maintain a properly balanced attitude toward trial work, an attorney must cope with the stress of being an advocate. Suggestions that help lawyers deal with stress include:

- Before accepting a trial, reflect on the reasons why you are taking the case and your expectations.
- Maintain a proper relationship with the client. Involve the client in making decisions and avoid overly controlling the case.
- Do not worry about events or matters that cannot be altered. Learn to let go and accept what cannot be changed.

- Expect that relationships with family, friends, and colleague will be disrupted. Advise them that problems may arise.
- Discuss your feelings and attitudes with family members and other caring listeners.
- Monitor the trial workload to avoid becoming overworked. Delegate appropriate responsibility and tasks to support staff. Learn not to interfere unnecessarily and second-guess decisions.
- Exercise your body as well as your mind.
- Avoid tobacco, alcohol, drugs, and other harmful sources of escape.
- Discuss the case with the client and colleagues after its conclusion.
- Celebrate the end of the trial. Enjoy the experience of trying the case, whether you win or lose. Plan a break after the trial.
- Become a law professor instead.

## **F. Client Relationships**

Clients place their fate – or so it seems – in the hands of trial attorneys. This reliance places enormous responsibility on the trial attorney to justify the client's trust. The relationship between the client and the attorney varies depending upon the needs of the client, the client's familiarity with litigation, and the client's and attorney views of the appropriate relationship. Initially, the client and the attorney in consultation with each other should identify the interest and needs of the client that the attorney has to preserve or advance. Potential solutions should then be evaluated to determine how the client's views can best be achieved. Finally, a course of action must be implemented to achieve the goals of the client.

These decisions regarding the client's needs and goals, alternative solutions, and resulting actions involve both the client and the attorney. Clients must decide what their needs are. Clients and lawyers must evaluate alternative solutions. Lawyers must implement the decisions made. The more a decision has a substantial legal or non-legal impact on a client, the more critical it is to have the client involved in making that decision. The more a decision involves professional expertise and skills, the more likely it is that the attorney can make the decision. The key to effective client/attorney relationships is communication and the continuing involvement of the client in the pre-trial preparation and the trial itself.

## **II – ALTERNATIVES TO TRIAL**

### **A. Settlement and Plea Bargains**

Settlement is an important part of the pre-trial litigation process. Over ninety percent of civil and criminal cases are settled or plea bargained. The negotiation process, with its numerous strategies and tactics, comprises a substantial area of practice. One of the most important factors affecting both settlement and the results of negotiation is the attorney's trial skills. The willingness of the attorney to try a case, the experience of that attorney, and the preparation of the case for trial all significantly influence the results of a negotiated settlement. Many judges take an active role in the settlement process. These judges encourage settlement and are directly involved in settlement conferences or discussions. Judicial approval or consent is not normally required for settlement of civil litigation unless the case involves a class action or an injury to a minor. In most cases, the parties may enter into any settlement they believe will serve their interests.

The type of settlement agreement depends upon the nature and circumstances of the civil case. One universal settlement document is a dismissal with prejudice which disposes of the case. The dismissal may be a stipulation signed by the attorneys to the litigation which dismisses the case, or it may be an order signed by the judge based on a stipulation by the parties. The dismissal should specify whether the costs are to be borne by each of the parties or are to be paid by one of the parties.

In criminal cases, the judge usually needs to approve the plea bargain entered into by the prosecutor, victim, accused, and Investigative Officer (as per Criminal Procedure Code, 1974). The plea bargain may consist of a guilty plea, a plea to a less serious offense, *nolo contendere*, or another plea authorised in the jurisdiction, and may also include conditions of probation and sentencing. Pleas of guilty are taken in open court. The defense counsel, prosecutor, and judge all have an obligation to make sure that the defendant understands what is happening. They must also insure that the plea is complete and legally sufficient to support a conviction.

### **B. Arbitration**

There are two types of arbitration. One is a private, voluntary process where a neutral third person, usually with specialized subject matter expertise, is selected by the parties and renders a binding decision. The other is a compulsory but non-binding process (often called court-annexed arbitration) which is required by some jurisdictions. In this non-binding pre-trial proceeding, the arbitrator, usually an attorney randomly selected from a panel of arbitrators, hears each party present proofs and arguments and renders a decision. If the decision is acceptable to both parties, the lawsuit is dismissed. If the decision is unacceptable, the case goes to trial.

### **C. Mediation**

Mediation is an informal process where a neutral person assists the parties in reaching a mutually acceptable agreement. The mediator's primary role is to facilitate a negotiated settlement between the parties. The mediator does not decide any issues or make any decisions. In some jurisdictions, mediation is compulsory, and the parties must attempt to mediate a settlement in good faith before proceeding to trial.

### **D. Private Judging**

Parties to a dispute may agree or be ordered by the court to submit their dispute to a private (usually former or retired) judge for resolution and the decision by the private judge may be binding or may be reviewable *de novo* by the presiding trial judge.

### **E. Court Ordered Procedures**

A growing number of jurisdictions are using one or more of these alternatives to resolve disputes prior to trial. Judges by statute or rule have discretion to require parties to submit to a dispute resolution procedure. If the procedure is not successful in resolving the case, the trial is held.

### **F. Trial by Ordeal**

Primitive trial methods have been abolished in almost all Indian jurisdictions. For example, trial by water in which a guilty person would float and then be executed while an innocent person would sink and presumably drown made everyone a loser. And, trial by gagging in which, the credibility of a person depended on their not choking on some inedible morsel,

such as a hairball, left too many parties with a bad taste in their mouths. Smart trial advocates check local rules for the availability of these alternative dispute proceedings.

### **III – FUNDAMENTAL APPROACHES OF PERSUASION**

This section explains established methods of persuasion that significantly influence the presentation of a case and that apply to all phases of the trial. The trial lawyer should be familiar with and attempt to employ these approaches in trying a case.

#### **A. Primacy and Recency**

People remember best that which they hear first and last. The doctrines of primacy what a person hears first – and recency – what a person hears last – may dictate when evidence and statements ought to be made during a trial. These doctrines apply to the trial as a whole as well as to each stage of the trial, including the opening of the case by briefly stating the whole case, witness examinations, and the closing argument.

#### **B. Reasonable Repetition**

The more times individuals perceive something the more likely they will believe it and remember it. During trial, evidence can be repeated a reasonable number of times to increase the chances that the fact finders will recall and believe it. An unreasonable number of repetitions may cause the fact finder to tire of the evidence and result in sustained objections. What is reasonable depends on the facts and the circumstances of the case, how long the trial lasts, how much time passes between repetitions, and how the matter is repeated.

#### **C. The Rule of Three**

The trial lawyer's approach to a trial is based on the following format: Outline what happened (brief statement of the whole facts), explain what happened through witnesses and documents (evidence), and summarize what happened (summation). This format follows the rule of persuasion: "Tell them what you are going to tell them, tell them, and tell them what you have told them."

#### **D. Visual Senses**

Studies indicate that individuals remember a much larger percent of what they both see and hear compared to what they just hear. The use of visual aids and trial exhibits increases the likelihood that the fact finder will recall and understand specific evidence.

#### **E. Impact Words**

Individuals react to words that are used to describe an event. Descriptive words emphasizing specific facts of a case create more vivid images of an event than non descriptive words. Descriptive language includes impact words that graphically describe a situation, such as "smashed" instead of "hit," "huge" instead of "large," "shrieked" instead of "yelled." These impact words affect the fact finder's perception of what happened and are usually more easily remembered by the fact finder.

For example, in an automobile accident case, when the accident is described merely as a "collision," this neutral term will not create a specific image of the accident and the extent of liability and significant damages may be less likely. When the accident is described as a "violent crash," there is created a more graphic image of the accident and liability and a greater likelihood of high damages.

Impact words should be selected to accurately convey what happened. Impact words should be factually descriptive, not exaggerated conclusions unsupported by the evidence. Thesauruses, dictionaries, work of literature, and action comic books may serve as sources of such words and phrases.

### **F. Images**

Individuals learn and understand by forming images in their minds. When fact finders hear a word or listen to a description of an event, they visualize images based on what they have heard. The goal of the attorney is to use words and descriptions that create images that accurately and vividly describe the story the attorney is telling.

For example, when an attorney says the word “chair” to a fact finder, the judge draws a mental image of a chair. That image might be of a wooden chair, a padded chair, a rocking chair, a desk chair, or a plastic chair. The trial attorney must make certain that the actual chair involved in the case is the image the fact finders picture in their minds. The more vital the details of this chair are to the case, the more precise the attorney must be in presenting details that give an accurate picture.

As another example, when an attorney asks Jude to assess damages for pain and suffering, the attorney must use words that make the judge feel the pain and suffering. Witnesses should not merely say they had a headache, but that it felt as if someone was inside their head pounding with a hammer. Witnesses should not merely say that their leg was cut by a saw, but that they felt the intense, burning pain of that hot metal slicing through their flesh.

### **G. Imagination**

The images created in the fact finders’ minds may be clear or hazy, complete or incomplete. An ideally communicated image should involve the senses, including sight, hearing, touch, and smell, and should focus on all details of an event. This, however, is impossible at trial because everything cannot be completely recreated. The fact finder must use imagination to fill in the details of what happened. The attorney must make the critical images as realistic and complete as possible to enable the fact finder to imagine the event as vividly and accurately as possible.

### **H. Active Involvement of the Fact Finder**

A fact finder who becomes mentally and emotionally involved in a case is more likely to be interested in the case and more likely to remember evidence. The goal of the trial attorney is to present the events in such a way that the fact finders think they are a part of the case, perceive they are observing what actually happened in the past, and feel the emotions of the situation. The more successfully the attorney can meet this goal, the more likely the fact finder will believe and accept what the witnesses tell them.

### **L. Storytelling Techniques**

Effective storytelling techniques are useful to successful trial attorneys. Techniques employed in literature, from fairytales and cartoons to classic plays, may be adapted to the trial setting. One technique is the initial creation of an image to gain attention. Stories often begin with “It was a dark and stormy night” for a reason. Good story tellers immediately draw the reader into the story and maintain the reader’s attention throughout. Another storytelling technique frequently used in trials is adapted from the theatre: the playwright first establishes the circumstances of time and place, introduces the protagonists, develops the problem, and then

presents solutions to the problem. This technique may be useful in opening statements and final argument, and in deciding the order in which witnesses will testify.

#### **J. Understandable Language**

Clarity of expression is critical. The words an attorney chooses help or hinder the understanding of the fact finder. Simple and clear language is preferable to complex legalese. Large words used only to show off vocabulary skills turn off the jury. Overly simplistic words and explanations sound condescending. The attorney must balance the use of simple, understandable language with the depiction of a credible, memorable story. For example, extensive employment of multi-syllabic verbiage merely in an effort to flaunt superior linguistic proficiency serves only to alienate the recipients of such apparent arrogance.

#### **K. Simple Explanations**

The more straightforward and less convoluted an explanation, the more likely it will be accepted as true. The trial attorney should provide the fact finder with as simple and credible an explanation of what happened as possible. This type of presentation fulfills the need of many judges looking for a reasonable, straightforward answer to explain a case, even when the case is difficult and complex. A trial attorney who is unable to satisfy these expectations may be unsuccessful. Unfortunately, lawyers are not always trained to develop simple explanations, but are often taught in law school to present complicated explanations of both sides of a case. For example, in analyzing a criminal case, a criminal defense lawyer could argue that the defendant was not present at the armed robbery, or if the defendant was present, the defendant was not holding a gun, or if the defendant was holding a gun, it was used in self-defense. These possible explanations may generate a high grade in a law school exam, but will only convince a fact finder of the defendant's guilt. The selection of a simple and reasonable explanation is usually more effective than the use of complicated, alternative explanations.

#### **L. Avoiding Contradictions**

The theory of a case must be explained in a cohesive and integral manner. The trial advocate must avoid presenting contradictory positions. The possible argument that the defendant was not at the scene of the crime, but if he was there he was acting in self-defense is contradictory and ineffective. No fact finder would believe either explanation. Who would? Some situations require a presentation of alternative explanations during the trial. These presentations are most effective if they are not described as contradictory positions. One way of avoiding making contradictory statements is to avoid using the words "but" or "however" or the phrase "even if." These terms may unintentionally concede the validity of the other side's explanation. It is better to affirmatively state a position and then add another explanation, using such terms as "moreover" or "further." For example, in an automobile accident case, the plaintiff may contend that she was hit in the crosswalk while the defendant contends that she was hit outside the crosswalk. There are various ways the plaintiff's attorney could explain this apparent contradiction to the jury. Plaintiff's counsel could argue that plaintiff was in the crosswalk when she was hit, or if she wasn't in the crosswalk, she was hit negligently by the defendant outside the crosswalk. A more effective explanation to avoid this contradictory statement would be: "The defendant negligently struck plaintiff where she was walking; moreover, we will prove that she was walking in the crosswalk."

#### **M. Developing Interest**

The presentation of a case must be made interesting by the trial attorney to hold the attention and mould the decision of the judge. Some cases are interesting by their very nature, and interesting facts aid an attorney in maintaining attention. For example, a wrongful death or murder case is usually dramatic. Other cases, such as those involving commercial litigation and real estate are not nearly as exciting. The trial attorney's task in such cases is to make the evidence intriguing. For example, every commercial litigation case is about people making business decisions. The trial advocate must present these people and these decisions in as stimulating a way as possible. As another example, every real estate case involves a unique piece of property. The trial advocate might be able to establish the special value of this property to increase the interest level of the case.

However uninteresting the facts may initially seem, the trial advocate must create and develop as much interest as possible so the fact finder will be more likely to understand and remember the facts and less likely to be bored and unimpressed. Every case involves some matters that can be made interesting. The trial attorney who can develop interest in an otherwise unexciting case greatly increases the chances of winning.

#### **N. Attention Span**

Audiences, including judges, as well as the readers of this book, have limited attention spans. A case must be presented in a way to maximize the attention span of the fact finders and must avoid presenting information the fact finder cannot absorb. Attention spans can be increased if the presentation is interesting, dramatic, reasonably paced, and otherwise well presented. Judges and jurors take their duties seriously and attempt to pay close attention to everything that happens in the courtroom. The length of an opening statement, witness examination, or summation must be based not only on what must be said, but on the fact finder's likely attention span. Not all judges have the same attention span. The trial attorney must be sensitive and observe the judge and make certain that they are paying sufficient attention to what is going on.

#### **O. Developing Emotions and Reactions**

A trial attorney may be able to use the emotions inherent in a case as an actor relies on the emotions inherent in a play. An actor does not become the source of an emotional catharsis; it is the re-enactment of an event that creates cathartic reactions in the audience. A good actor leads the audience to the threshold of emotion, and the culmination of that emotion is felt by the audience.

In a trial setting, a good lawyer tries to create an atmosphere in which the judges are affected by emotions at the right time. In a wrongful death case, the plaintiff's lawyer wants the jurors to feel grief in such a way that their compassion favourably affects their judgment during deliberations. A good plaintiff's lawyer wants to see teardrop stains on the verdict form, not just tears in the courtroom.

#### **P. Establishing Realism**

A successful play or movie captures the audience so they forget they are at a play or watching a movie. A poorly presented dramatic act makes the audience aware of what they are watching and anxious for the end of the make-believe story. The goal of a trial lawyer parallels that of the playwright and director. The trial lawyer wants the fact finders to forget they are jurors and a judge at a trial, but instead believe they are observers at an event unfolding before them. If they remain aware that the event is only a trial and that the

attorneys are acting like lawyers, then they may be more distracted by the process and less involved in the story.

#### **Q. Identification with Fact Finder**

Judges and jurors are more likely to believe a witness or favour a party if they can identify with that individual. Perceiving similarities between themselves and the witness or party helps form this identification. Fact finders may not consciously disbelieve a witness because they do not identify with that witness, but usually the more a witness or party has in common with a fact finder, the more likely the fact finder will identify with and believe that person. Background information that establishes similarities between the witness and the fact finders should be emphasized. Specific examples of similarities should be described during the direct examination of the witness. The questions should not be so numerous or obvious, however, that the fact finders perceive that the witness is artificially being portrayed to be like them.

### **IV – ELEMENTS OF ADVOCACY**

There are a variety of approaches to trying a case. These variations reflect the difference in opinions among trial lawyers regarding aspects of the trial process. This section describes some of these approaches regarding important elements of a case presentation. Trial lawyers must form their own individual position regarding these varying approaches and apply them as needed or appropriate in each case.

#### **A. The Persuasive Advocate**

Many trial lawyers believe that advocacy requires them to convince the judge or jury of the correctness and righteousness of their client's position by attempting to "sell" the position to the judge or jury. Typically, these advocates ask the judge or jurors to find "in favour of" or "for" or "on behalf of their client. The underlying premise is that the advocate's client deserves a certain result because the advocate has convinced the judge the client is entitled to win. This approach places a burden on the advocate to convince the fact finders to believe and accept the arguments advanced by the advocate.

Another view of the advocate's role is that the advocate provides the judge and jury with information which would lead reasonable people to come to but one conclusion. This approach does not require that the attorney usurp the judge or jury's function by telling or convincing the judge or jurors how they must decide a case. The burden remains on the judge or jury to reach a decision based on the facts, the law, and justice. Rather than attempt to cajole, sell, or otherwise convince the fact finders, the attorney simply says "here are the facts, here is the law, and the result you should reach is clear."

These two approaches reflect opposing views of the advocate's role. An approach that combines the benefits of both approaches may be most effective. The benefit of the first adversarial approach is that it can result in a very persuasive and compelling presentation. The disadvantage of the first approach is that the trial attorney may appear to be inappropriately biased, partisan, and manipulative. The benefit of the second advocacy approach is that the fact finders reach their own conclusion based on the information the attorney presents to them. The disadvantage is that the attorney may appear to be uncertain and unsure. The trial attorney should assume the most effective approach for each case.

#### **B. Involvement of Advocate**

The degree to which advocates should involve themselves in cases is a matter of disagreement among trial lawyers. Some argue that attorneys should not emphasize their professional beliefs during the trial, while others argue that it is critical to establish this professional belief. Trial attorneys who suggest that the display of involvement is necessary say things like “I will prove to you” and “I will introduce evidence to convince you of these facts.” Trial lawyers who suggest that their involvement should be diminished use phrases during the trial before the judge, such as “you will hear evidence and you will conclude...”

These two positions do share common principles and may differ only in the emphasis placed upon them. The judge must be given the impression that the advocate believes in the client and the case presented. The judge is unlikely to find in favour of a client whose lawyer expresses doubts about whether that client should win.

How lawyers express their belief in a case may be a matter of approach and style. Some lawyers may need to become more professionally involved in the presentation of the case to demonstrate this appearance. They may say things like: “We believe the evidence will show” and “We will prove.” Other attorneys may be able to create this appearance by being less actively involved. They may tell a story which is of itself compelling and persuasive. Whichever approach is taken, trial advocates must be confident and sure of the validity of their clients’ positions and not be equivocal or uncertain. Some jurors rely upon the attorney’s judgment in deciding a case. These jurors will be adversely influenced by an attorney who does not appear to support the client’s position.

### **C. The Objective Partisan**

The trial attorney has a dual nature. A trial lawyer is both a partisan and an objective participant in the trial. The lawyer as a partisan needs to present selective evidence to the fact finder and zealously argue for the client’s position. The attorney as an objective participant must appear to present evidence in an objective way and provide reasonable explanations. If the judge perceive that a lawyer is too partisan, they will be less likely to believe that lawyer. Likewise, if the judge and jurors perceive that a lawyer is too objective, then they may be less influenced because the lawyer does not advocate a position. Successful trial lawyers are aware of this dual role and attempt to balance their position and be an “objective partisan” during the trial.

### **D. The Trusting Appearance of the Advocate**

The trial advocate must be perceived by the jurors as being sincere, honest, and trustworthy. Many trial advocates suggest that the attorneys forget they are lawyers during a trial. They advise not to sound or talk like a lawyer lest the jurors focus on the role as a “hired gun.” Some jurors view the lawyer as biased from the outset and distrust anything that the lawyer says. But this is true for the lawyers on both sides. The attorney who appears most sincere, honest and trustworthy will have a greater chance for success in the trial.

### **E. Open-Mindedness of Jurors and Judge**

It is difficult, if not impossible, for the judge to have a completely open mind at the beginning of or during a trial. Many trial advocates believe that no judge ever has a completely open mind and present their case based on this premise. All fact finders have some biases and prejudices, and some of the judges will be partial to one side or the other. The decision-making processes of judges and jurors parallel other decision-making processes in life. Many individuals make decisions without complete information. Many people form initial

impressions or develop opinions and make decisions based on those initial impressions and opinions. Many people make up their minds early and are reluctant to change positions. The trial advocate must take these dynamics of human decision-making into account.

At the early stages of the trial, each juror and the judge begins forming impressions about the case, about the attorneys, and about the parties. The notion that judges and jurors impartially absorb information during a trial and then wait carefully to decide a case is largely inaccurate. Many fact finders selectively listen for evidence that supports their initial inclination or position. They listen for, believe, and remember evidence that supports their position. Evidence that does not support their position is rejected, disbelieved, rationalized, forgotten, or not even heard. Many judges and jurors make up their minds well before the closing argument and advance reasons during jury deliberations to justify their conclusions.

The degree to which these initial impressions develop into a firm opinion varies among fact finders. The impression may turn into an opinion, which may turn into a firm opinion, which may turn into a final position. The nature of the decision-making process also varies. Each judge forms some impressions, has some inclination, and develops a position; usually well before the end of the trial.

The lack of open-mindedness on the part of the fact finders affects the way a trial advocate presents a case. Because jurors and judges begin to form some impressions early in a case, the trial lawyer must provide them with information early enough in the case to shape their views and gain their support. It is much more difficult to change someone's mind once it is made up or to alter an opinion once it is formed. If there is any doubt about this truism, read Supreme Court decisions. The longer the time passes in a trial and the surer a judge becomes, the more difficult it is to change that individual's position. The goal of the trial advocate is to provide the information and reasons sufficient for the judge to want to find for the advocate's client early in a case, and then to continue to provide information and reasons to support that decision during the trial.

## **F. Memories of Witnesses**

In preparing a case, a trial attorney must determine the degree to which each witness has an accurate recollection of an event. Regardless of what witnesses say they remember, the attorney must assess the credibility of witnesses and the plausibility of their stories. There exists a range of opinion among trial lawyers regarding people's ability to remember. Some advocates suggest that witnesses remember very little, if anything at all. These advocates suggest that witnesses draw on the few recollections they have, collect evidence from other sources (such as other individuals or documents) and use the law of probability to form a recollection. Other lawyers believe that witnesses are able to draw upon the resources of their memory and accurately recall things that happened in the past. All these advocates may be correct. The answer may depend upon the witness, the ability of that individual to perceive and remember the event, and the impact the event had upon the witness. The degree of accuracy often depends upon whether the witness had any reason or expectation to perceive or recall an event.

Cases which arise from situations that the parties did not expect to be litigated may result in less complete and less accurate recollections by witnesses. For example, in a typical automobile accident case, the parties do not expect or anticipate being involved in an accident and have little reason to focus on the events that occur before an accident. Accordingly, there

is no reason for them to concentrate on remembering their speed, distances, or the traffic situation. After the accident, however, witnesses to the event may pay close attention to what is said or how people act because they may expect to be called on to give a statement. Accordingly, it is more likely that the later part of their stories will be more complete and accurate. In a criminal case, the victim of a crime may or may not have good reasons to be able to identify the defendant. Some victims are so scared or frightened during the crime that they are unable to look at the criminal, while other victims may want to get a good look so they can later help catch the criminal. All victims will be asked by the police for a description of the criminal, and the degree of accuracy of this description depends upon how the witness reacted during the crime.

Our adversarial system presumes that witnesses remember significant details and can describe them during their direct examination. The system relies on cross-examination as a means of testing the accuracy and reliability of a story. Psychology studies show that most witnesses add details that they did not perceive and that they do not actually recall. This “filling in the details” phenomenon is often done unconsciously and without the witness intending to exaggerate or lie. Some witnesses, however, intentionally add favourable information without the attorney’s knowledge. Regardless of the psychological processes affecting the perception and recollection of a witness, and the hidden agenda of a witness, trial attorneys must nevertheless present witnesses along with their good faith stories to the fact finder and challenge adverse witnesses on cross-examination.

### **G. Displaying a Relationship with a Client**

The nature of the case and the kind of client dictate what relationship should be displayed between an attorney and client during the trial. If the fact finder is likely to perceive the client as a credible or a good person, the trial advocate should display a close relationship with the client by being seen with the client, talking with the client, and appearing to like the client. In cases in which the fact finder may not identify with or like a client, trial lawyers disagree as to the relationship they should establish in front of the judge. Some lawyers believe that they should distance themselves from this kind of client as much as possible, fearing that the appearance of a close relationship with such a client will hurt the attorney’s standing in the eyes of the fact finder. Other lawyers believe that such a client needs visible support from the attorney during a trial. They fear the opposite reaction from the judge, who may not support the client because it appears that the client’s own attorney wants nothing to do with the client. An attorney must decide the kind of relationship with the client the attorney wants to display during the trial.

### **H. Personal Embarrassments**

Inevitably, trial lawyers make mistakes and errors of judgment. The attorney’s reactions to these situations increases or decreases the chances of winning. When we make mistakes, we are naturally inclined to think about ourselves first and what the judge will think about us and then find a scapegoat for our errors. When we learn about some surprise information at the beginning of a trial, we may want to blame our client for not telling us about this information rather than ourselves for not properly discovering it. When we ask an awkward question during jury selection, we may want to blame the judge for refusing to ask such a question instead of blaming ourselves for not properly asking it. When the witness makes a misstatement on the stand, we may be inclined to shift the blame to the witness rather than

have the judge think we did not properly prepare the witness. These reactions are natural and normal, but they must be avoided by the professional trial attorney.

There is no place for a trial attorney to be concerned about personal embarrassments during the trial. The trial advocate should not embarrass the client or undercut the client's position. The trial attorney should usually assume responsibility for the mistake or error, take the blame, and move on as quickly as possible. In other words, *mea culpa*.

## **V – METHODS OF EFFECTIVE PRESENTATION**

Much is written and said about trial advocacy being an art dependent upon an advocate's intuition and talent. Some trial lawyers have substantial natural talent while other lawyers have less talent and need to work harder and rehearse more. All trial lawyers have some talent and capabilities that they can develop and enhance to make them effective advocates. There are techniques which can be employed to make a lawyer more effective and persuasive. Methodical planning, thorough preparation, and intense practice can make most any lawyer a competent and skilled advocate. This section describes some general principles of effective communication skills.

### **A. A Good Person**

A principle of rhetoric is that an effective orator is a "good person who speaks well." Similarly, an effective trial advocate must be a person who displays good sense, good will, and good character and who presents the case well.

### **B. Confidence**

The trial attorney must appear confident, in control of the case, and in command of the courtroom. Thorough preparation develops the necessary confidence, and an effective presentation allows the attorney to remain in control. Successful trial advocates view the courtroom as "their" courtroom, where they present their client's case. They understand the courtroom is a public place and not the provincial territory of either the judge or opposing counsel. Trial advocates must be as comfortable as possible in "their" courtroom surroundings.

### **C. Speaking**

In preparing a speech, effective speakers do not focus on all of the specific words they are to deliver but on the ideas and images they wish to express and evoke. A speech which is simply read from a prepared text is rarely interesting. Similarly, a memorized speech, where the speaker merely recites words rather than explaining ideas or evoking images, is also unpersuasive. The most successful approach is to focus on the ideas that need to be expressed and explained, practice out loud, and then present the ideas using specific words when needed for impact.

### **D. Eye Contact**

Eye contact is critical to establishing credibility and persuasion. Looking judges in the eyes while talking substantially increases the impact of what is being said. The lack of eye contact causes the judge to doubt the attorney's sincerity, or, at best, causes them to lose interest in what the attorney is saying. Although staring at a judge will undoubtedly make that person uncomfortable and adversely affect the attorney's rapport with the individual, the attorney must make periodic eye contact with the decision makers.

Advocates must speak with their heads up and avoid the extensive use of notes which prevent them from maintaining sufficient eye contact. Some advocates get nervous and lose their concentration while looking a judge directly in the eyes. An effective way to look at someone to prevent this reaction is to focus on the bridge of the person's nose rather than the pupils of the person's eyes. The speaker avoids the intensity of eye contact, while the listener perceives that the speaker is looking at the listener.

### **E. Body Language**

Body language is a significant part of the trial attorney's communication process. The key to effective body language is congruence, that is, the body language of the attorney should match what the attorney says or communicates. An attorney whose body language evidences lack of confidence or uncertainty is unable to be persuasive. An attorney who stands in awkward positions or who slouches in a chair or whose posture appears indifferent may display an inattentive and uncaring attitude. Trial attorneys must be constantly conscious of how they stand and how they sit and the position of their bodies because they always are on view in front of the judge and jurors. Excessive body movement, crossed arms or ankles, or inappropriate movement may interfere with communication. Successful trial lawyers make sure that their body language is consistent with the message they are communicating.

### **F. Gestures**

Good speakers employ gestures to make a presentation more effective. An attorney should incorporate appropriate gestures into a presentation. Steady hands and controlled arm movements help develop an appearance of confidence and make a presentation more interesting. The lack of any gestures, jerky hand movements, or wild waving of the arms need to be avoided. Gestures should be natural, firm, and purposeful.

### **G. Appearance**

The attorney's appearance is an important consideration throughout the trial. A speaker's appearance often affects the listener's perceptions of that person. An attorney who is well-groomed usually appears more professional and credible to the judge. The attorney's appearance should be consistent with the personality and approach of the attorney. Counsel should dress comfortably, in a manner that suits their taste and that conforms to the customs or rules of decorum established or promulgated in a jurisdiction. Many attorneys dress according to a standard they believe is expected of them by the judge. Other attorneys dress according to the view they want the judge to have of them. Some attorneys prefer to wear a distinctive piece of clothing during a trial to help the judge remember and identify the attorney.

The dress of an attorney should not become an issue that detracts attention from the client's case. Attorneys may have to put aside personal tastes and conform their dress to the standards of a community or Judge so as to safeguard and promote the best interests of a client. If the Judge is bothered by or unnecessarily talk about an item of clothing or Jewellery worn by an attorney, then that item may be inappropriate.

### **H. Vocal Tone and Pace**

The tone, volume, modulation, and pace of an attorney's deliver affect the listening capabilities of the judge. A dull, mono tone presentation is as ineffective as a loud, boisterous approach. A balanced and well-modulated approach is usually most effective. Sometimes the

best thing an attorney can say is nothing. This technique comes in handy sometimes, especially when the attorney's mind goes blank. Silence can be an effective way to highlight a point, to gain attention, or to create a transition. A trial attorney must learn to tolerate appropriate silence in the courtroom and to use it constructively.

## **VI – ETHICS**

The process of becoming a trial lawyer includes an understanding of and adherence to ethical norms. Trial lawyers must adopt and follow ethical standards. Each trial lawyer must reflect on, wrestle with, and come to an understanding of the values, norms, and ethics that should be preserved and that shape the judgment and conduct of the advocate. All trial advocates are members of a community consisting of clients, colleagues, opponents, judicial officers, and the public. Each trial lawyer is not only a lawyer but also a person, guided not only by professional or legal ethics but also by individual and community concerns and values. This section specifically describes the shaping of ethical guidelines formed by decision makers within the adversary system, constraints within the system, and professional rules of conduct and behaviour.

### **A. Sources of Decision-Making Power**

Attorneys do not have power to control the fates of parties, but attorneys can influence the source of such power. It is the ability of the attorney to persuade the jury and convince the judge to remedy a wrong that activates the power within the adversary system. A jury's verdict determines a criminal defendant's liberty and determines what money damages a civil plaintiff is entitled to. A judge's decision can enforce constitutionally protected rights, enjoin corporations from infringing on contractual rights of individuals, and order the government to spend millions of dollars. These enormous powers are unleashed depending upon an attorney's preparation and presentation of a case.

Attorneys influence the results of a case by selecting the theories to be advanced, the evidence to be introduced, and the law to be explained. Attorneys shape the evidence the jurors see and hear by presenting it in a certain perspective and by explaining its significance. Attorneys also shape the law that applies to the facts by choosing claims and defences to assert and by explaining the effect of these laws on the facts. Trial attorneys must wield such power only for good reasons, not for evil purposes, and, of course, always to protect Gotham City.

### **B. Constraints**

Clients have limited resources. The lack of sufficient funds makes it impossible to do everything that could be done in a case. Many cases do not justify significant monetary expenditures. The client, the case, or both, limit what should be done to completely prepare and present a case. The trial lawyer must work within these limitations to do the best possible job. Lawyers have only limited available time. Even now, imagine what you would rather be doing. Enough of that. The time that an attorney can devote to a case is limited by the fee charged, professional hours available, and the lawyer's life outside the practice of law. Trial attorneys must decide what takes priority in specific cases, in the law practice in general, and in their personal lives.

### **C. Professional Rules of Conduct**

The rules of professional conduct and state ethical rules provide both a set of disciplinary rules and guidelines for advocates. Some of the rules deal with the external, objective conduct of an attorney. Many rules deal with internal, subjective thinking of the lawyer. It is often difficult to apply these rules and guidelines to litigation cases where there are two or more versions of what happened, to opponents who may dislike each other, and to trial advocates who are skilled at creating plausible explanations and portraying questionable behaviour as legitimate. Attorneys must develop an internal code of ethics and constantly monitor their own conduct to determine whether it complies with the norms of the profession and their own ethical norms.

Every state has rules that establish standards and impose restraints on a lawyer's behaviour. The Rules of Professional Conduct (Model Rules) have been adopted by about half of the states with major modifications in some states. The other states have rules based, to varying degrees, on the Code of Professional Responsibility. These varying rules attempt to codify norms which reflect the collective views and values of lawyers. State rules of procedure, case law, and local customs and traditions also regulate the conduct of trial lawyers. In India, the professional ethics of the Advocates are governed by the Bar Council Acts/ Rules.

## **Advocacy Notes**

### **D.S. HISLOP'S ADVOCACY TRAINING**

Evidence in Chief:

Is the evidence given by your own witness in your case? Experienced trial lawyers recognize that most trials are won on the strengths of your case in chief not on the weaknesses of your opponents' case.

Consequently, effective direct examinations that clearly, logically and forcefully present the facts of your case will usually have a decisive effect on the outcome of the trial.

It is important that the purpose of examination in chief must be kept in mind. It should elicit from the witness in a clear, and logical progression the observations and activities of the witness so that the trier of fact, whether it be a Jury or Judge alone, understands, accepts and remembers his testimony.

How is this done?

Preparation:

Calling your evidence is as much as an art form as the smartest and most skillful cross examination.

How do I Prepare:

1. Decide in your own mind why you want to call the witness -
  - what evidence can he give that helps your case.
  - if he/she cannot help your case, do not call him/her. Why give your opponent the chance to cross examine without there being a material gain for your case.

2. Once you have made the decision -

- having decided what evidence the witness can give to assist your case

List the key points you want the witness to make

3. Organize that Evidence Logically -

- Usually but not always, this will result in a chronological presentation of testimony. Experience has shown that jurors and judges like other people are best able to comprehend and remember a series of events or other information if they are presented in the same chronological order as they occurred.

Example:

The witness, the plaintiff in an automobile collision case, could testify in the following order:

- a. his background
- b. description of collision location

- c. what occurred just before the collision d. how the collision actually occurred
- e. what happened immediately after the collision
- f. emergency room and initial treatment
- g. continued treatment
- h. present physical limitations and handicaps i. financial losses to date

Example:

The witness to an attack on a man in the street could testify in the following order:

- a. background of witness
- b. location of event
- c. location of the witness
- d. the incident
- e. the quality of the observation - unobscured?
- f. what the witness heard before, during and after the incident
- g. the state of the victim
- h. the flight of the assailant
- i. the arrival of the emergency services

Of course as you become more adept as a trial lawyer you will find this not an inflexible rule. Sometimes presenting the most dramatic or important testimony early in chief when the trier of fact is most alert and still listening can sometimes be a better approach.

Example:

Q. Mrs. Jones, do you and your husband have children?

A. No, before the accident we planned to start a family

Q. Why did you change your mind?

A. We did not change our minds. It is just that as a result of the accident I suffered internal injuries that have made me infertile, unable to have children.

Wham! You immediately have not only the attention of the judge or jury but you have their sympathy, then you can go on to elicit the details of the accident (paragraphs b. to i. inclusive.)

So you have organized your material, how do you best effectively present it

4. How do you present it-

The Golden Rule is that your witness is the one who is telling the story not you. You want the trier of fact to hear the evidence from the witness, not you. You want your witness to make an impression and to be believed.

This is best done by the trier of fact hearing from the witness not you. The witness should be the centre of attention not you.

You are there to facilitate the telling of the story by your witness

5. How do you achieve this-

- Short simple questions
- eliciting one point at a time
- choose language carefully
- do not lead the witness, open ended questions only:

-why

-when

-how

-where

- leading questions not only will draw a reprimand from the judge but it is counter-productive to your purpose

6. Listen to answers the witness gives -

- if you do not understand the answer how do you think the judge or jury will
- the answer may only be as half as good as it could be, you may have to probe deeper

7. Holding the interest of the trier of fact -

- appear interested yourself in what the witness is saying
- do not simply introduce the witness and then invite him or her to "tell us all what happened." This is easy and the lazy man's way!
- it will lead to ineffective, boring evidence, where you as counsel have no control whatsoever over the content and is likely to lead to the adducing of irrelevant evidence which will submerge the relevant evidence you want the trier of fact to accept and remember.

- the better way to put your witnesses testimony before the court is I suggest in this way:

8. Build your questions on the preceding answers:

Example:

The witness is being called to say that he was looking out of the first floor front bedroom window of his house at 10.30 am on 2 July when he saw a young boy throw a stone through the window of a toy shop directly across the road, take a toy gun from the window and run off to the right and out of view. A young boy is on trial for the offence and is relying on an alibi.

Having got the witness to give his name, the next answer counsel will want the witness to give is his address. Question: " What is your address?"

The next answer he wants is that there is a toy shop directly across the road: the assumption is that there is no plan. There should be but there is not. This cannot be obtained by a leading question and will take three non-leading questions to obtain it. Thus:

Q: Are there any buildings on the opposite side of the road from your house?

A: Yes

Q: Are any of those buildings directly opposite your house

A: Yes

Q: What building is that? A: A toy shop

- note that each question is built on the previous answer. This technique is sometimes referred to as piggy-backing

Q: Where were you on the morning of the 2 July?

A: In my home

Q: When you were in your home that morning did anything happen outside your home which you were aware?

A: Yes

Q: How did you become aware of it?

A: I saw it

Q: Where were you in your home when you saw this happen?

A: In my bedroom

Q: What were you doing in your bedroom?

A: Just looking out the window

Q: Is your bedroom to the front or the back of your house?

A: The front

Q: What is opposite your house as you look out your bedroom window?

A: The toy shop

Q : What did you see happen?

- The value of piggy-backing is threefold:
  - controlling the witness
  - allowing you to follow your planned structure
  - it provides a memorable picture

#### 9. Pace-

- As you get more adept at adducing evidence in chief you can start using more sophisticated techniques such as the use of pace.
- Pace involves controlling the speed of examination. This is particularly important where the evidence you are wishing to adduce from the witness involves the happening of an incident.
- Remember that the jury, unlike you and the witness has never heard the testimony before. Its ability to receive, digest and comprehend is limited
- The critical part of for instance most murders will take place in a few seconds.

In such a situation pace can be employed by you to control the witness to slow down the action if that indeed suits your purpose. You may wish to slow it down and show the action frame by frame.

#### Example:

You act for Bill Smith who is charged with the murder of his neighbour Jim Jones. Jones is hard working but rather ill tempered. He works night shift and thus has to sleep during the day. Smith has recently lost his job and is rather enjoying being unemployed. He also likes his new sound system which he bought with his redundancy money. He especially like playing it loudly during the day. It has already been the source of heated arguments between Jones and Smith. On the 4 August at 10.30 am Jones had just got himself to sleep after a hard nights work when he was awoken by the thump, thump of Smiths music. He flew into a rage, picked up a metal bar from his tool bag and stormed next door to Smiths house. He bursts in through the back door into Smiths kitchen to confront Smith. In a complete rage he takes a swing with the bar at Smith, for the most part misses and goes to take another swing at Smith. Meanwhile Smith is preparing his breakfast, slicing up fish with a butcher's knife. Smith is taken completely by surprise, panics and lunges out with the knife and thrusts it through Jones heart. Jones dies immediately.

As Counsel for Smith you have received instructions which make it clear that your defence is self defence. You wish to call your client to give evidence.

You have two particular problems that you must resolve in the planning of your clients evidence in chief. You can resolve each problem by using pace in completely opposite ways.

Your problems are as follows:

Firstly you need to convey to the jury that the incident happened very quickly. Because the very essence of self defence is that it is a spontaneous reaction borne of fear of very serious harm to oneself or another.

Secondly, the need to convey the very real threat the client felt.

- So one of your objectives calls for an examination in chief that conveys the speed and suddenness of the attack and the other calls for the slowing of everything down frame by frame in order that the jury may focus on the feelings of fear felt by your client Smith.
- So how do we achieve this?

We achieve this by breaking our evidence in chief into two parts, using pace to different effect in each part.

First:

Q: Where were you on the morning of the 6th of December 1998?

A: I was at home.

Q: Can you recall what time you got up that day?

A: At about 10 am.

Q: When you got up did you intend to have breakfast.

A: Yes.

Q: What were you going to eat?

A: Fish.

Q: Who was going to cook it? A: Me

Q: Where were you going to cook your breakfast?

A: In my kitchen

Witness shown a knife.

Q: Do you recognize that knife?

A: Yes, its mine I was using it that morning to cut up the fish

Q: Did you end up cooking the fish?

A: No

Q: Why not?

A: Because that mad man Jones from next door came crashing through my back door and attacked me with an iron bar

So here with the use of short sharp sentences you have created the sense of a sudden attack. So once the speed and suddenness of the attack has been conveyed back track and slow the action down to achieve your second purpose.

Example:

Q: When was the first time you realized Jones was in your kitchen?

A: I was at the bench cutting up the fish when I heard a crashing noise

Q: Did that cause you to do anything?

A: I just turned around

Q: And what did you see?

A: I saw Jones coming at me with an iron bar

Q: Was he walking or running?

A: He was launching himself at me

Q: Did you see his face?

A: Yes, it was all contorted with rage

Q: Did he say anything?

A: Yes, he said he was going to kill me.

Q: Did you say anything

A: No, I did not have a chance, I was shocked

Q: How did he appear to you?

A: Completely out of control, raging like a bull

Q: How did you feel?

A: Terrified, I thought I was going to die

Q: What happened then?

A: He struck at my head with a bar but missed because I think he slipped on the old mat on my floor

Q: What did he do next if anything?

A: He recovered his balance and took an enormous swing at me with the bar

Q: Can you demonstrate the motion he used for us with this bar? [Witness Demonstrates]

Q: Had you moved at all from where you were when he first came into your kitchen

A: No, I was in shock, I had no time to move and anyway there was nowhere for me to run to, he was right on to me

Q: How did this make you feel?

A: I was terrified, I thought I was going to die, I just panicked, I had the knife still in my hand and just thrust it at him, he was going to kill me.

- Other techniques
- different types of witnesses

### **Cross Examination:**

Cross examination is a skilled that can be learned by the combination of a careful study of the basic principles of cross examination and trial experience.

Cross examination is very easy to get wrong. Good cross examination technique is usually that which distinguishes the good trial lawyer from the not so good.

Cardinal Rules:

- Prepare
- Before you get to your feet
  - ask yourself:
    - do I really need to cross examine this witness
    - have the points I would like to make from this witness already been made by any other witness
    - can I get away with not asking any questions
    - was the witness credible
- Purposes of cross examination

There are two basic approaches to cross examination:

a. Elicit favourable testimony. This involves getting the witness to agree with those facts that support your case in chief and are consistent with your theory of the case.

b. Conduct a destructive cross examination. This involves asking the kind of questions which will discredit the witness or his testimony so that the jury will minimize or even disregard it.

It is important to bear in mind these two categories because you will as a matter of good common sense always seek to elicit favourable testimony first before embarking upon destructive cross examination.

Sometimes You will have to determine whether to forgo destructive cross examination.

- Elements of Cross Examination

Successful cross examinations are invariably those that follow a preplanned structure that gives the examination a logical and persuasive order. In relation to your planned structure:

- a. Have your cross examination establish as few points as possible.  
Keep the points simple. Stick with your strongest points.
- b. Make you strongest points at the beginning and at the end.
- c. Vary the order of you subject matter. But make it clear to the jury where you are going. Help them!
- d. Do not repeat the evidence in chief or allow the witness to do this

### **Rules of Cross Examination**

- Leading questions only, no open ended questions
- Make a statement of fact and have the witness agree with it
- Short sharp questions
- Simple language
- Know the probable answer before you ask it
- Listen to the witnesses answers
- Do not argue with the witness
- Keep control of your witness
- Be courteous but firm
- Be a good actor
- When you have made your points Sit Down

### **Specific Skills**

- the difficult policeman
- the witness who has given a previous inconsistent statement
- the expert witness

## **GRAY'S INN ADVOCACY COURSE FOR PUPILS: 1993-1994**

### **1 INTRODUCTION**

- 1.1 The theme of these Guidelines can be summarised by the key words which appear precisely or with variations many times:

PREPARATION

PERFORMANCE

COMMUNICATION

PERSUASION

- 1.2 There is more in the Guidelines than you can hope to absorb in one reading: to that extent, they will be useful to you after the Course is completed. In any event, advocacy is not learnt merely by reading or even by just reading and observing. It has to be practised again and again in order to master the

PERFORMANCE SKILLS

which are the tools with which an advocate communicates and persuades.

- 1.3 That is what, in the end, advocacy is: a performance skill. Looked at in that way, it assumes preparation, but not just that preparation which is involved in mastering the subject-matter of the brief and the relevant law and procedure.

Proper preparation for advocacy involves, also

PREPARING FOR PERFORMANCE

Just as a musician, say, is not content with merely learning the notes of a composition but goes on to think about, practise and rehearse the music to be played, so an advocate must do more than merely learn the facts and the law of the brief.

- 1.4 The function of advocacy is to communicate and to persuade. To communicate you must know you are communicating

WHY

WHAT

you are communicating. To persuade you must know

HOW

to communicate as an advocate.

- 1.5 Our objective in the Advocacy Course is to help you master at least the basic performance skills relevant to advocacy. Your objective must be to take advantage of the teaching that you will receive from those who can perform the skills themselves.

- 1.6 Like all performance skills, advocacy is taught by

## EXPLANATION

And

It is learnt by

## OBOBSERVATION

and

## PRACTICE

- 1.7 Our target is that, by the end of the Course, you should, have achieved, at least, such a minimum level of competence as an advocate that, when you begin to advocate as a barrister

**you will not damage your client by making fundamental mistakes.**

If between us, you and we can advance you to a stage beyond that minimum level of competence, the work that we will have done together will be even more satisfactory - for you, for your clients, for the administration of justice and for the Bar.

## 2 THE BASICS

- 2.1 Contrary to a popular view, there is only one kind of advocacy. In whatever tribunal a barrister appears, the advocacy in which he/she engages is about communication and persuasion. It involves the appropriate deployment of the performance skills. The WHY?, WHAT? and HOW? questions arise every time you stand on your feet, however minor or major the piece of work, whether or not witnesses are involved. What is different is the way in which you will use your skills. That is why the Gray's Inn Course involves Interlocutory and Trial Exercises.

### 2.2 The Starting Point

- 2.2.1 All advocacy starts with reading and mastering the papers, followed by researching the relevant law and procedure. . This is only the first part of preparation. The assumption in both the Interlocutory and Trial Exercises is that you will have done that. If you have not, it will soon become apparent and everything else that you do in the Course will be worthless.

- 2.2.2 The next and crucial stage of preparation is the working out of the

## CASE CONCEPT

- 2.2.3 What does that involve? It involves thinking through what has been learnt by the first stage and

- (a) identifying the

## OBJECTIVE

that is, the result which the barrister wants to achieve: and

- (b) working out the structure of the

## ARGUMENT

to be presented at the end of the trial or hearing to achieve that objective.

2.2.4 Obviously, the Case Concept at which a barrister arrives before the trial or hearing commences may have to be reconsidered as the case develops, particularly in witness actions in which the evidence of the witnesses may differ from what appears in their statements/proofs.

2.2.5 Nonetheless, the Case Concept is the key to all that a barrister does during the trial or hearing. It determines the answers to the WHY? and WHAT? questions. Unless what the barrister does is consistent with the Case Concept, his/her advocacy is flawed and mistakes will be made - many of them so fundamental as to fatally damage the client's cause.

## 2.3 Handling Witnesses

2.3.1 Human observation is fallible. Human memory is even more fallible.

Almost all witnesses have difficulties in recounting their recollections accurately and chronologically in court. Proofs of evidence or witness statements are reconstructions of memory and are affected to some extent by what the witnesses have learnt from the solicitors or investigators seeking the proofs/statements, are those matters which the latter think are important. That is true even in those instances when the witnesses actually write out their own proofs of statements. When the witnesses come to give evidence, a different kind of reconstruction takes place: there are different influences on memory, with the result that there are frequently significant differences between proofs/statements and testimony.

2.3.2 Whether a witness is being examined in chief or cross-examined, the approach of counsel is determined by those factors. The examiner must accommodate to them in order to obtain the evidence which is required: the cross-examiner needs to do the same, whether the purpose of the cross-examination is frankly destructive or more sophisticated.

2.3.3 Whichever function counsel is performing with regard to a witness the essentials are:

## STRUCTURE

### PERTINENT AND PRECISE QUESTIONS

### CLARITY OF EXPRESSION AND DELIVERY

## 2.4 Examination in Chief

2.4.1 Decisions to call witnesses are determined by the Case Concept. There must be a purpose consistent with it for calling a witness to give evidence. It is that purpose which answers the WHY? question. The witness must be called because evidence which he can give is essential to the client's case. It is likely that not all

the evidence which the witness can give is essential: it is only the essential parts that should be adduced: that is the answer to the WHAT? question.

- 2.4.2 The method of calling a witness (the answer to the HOW? question) is governed by a basic rule of evidence and procedure:

#### NO LEADING QUESTIONS IN EXAMINATION IN CHIEF

Not asking leading questions imposes disciplines which have to be learnt and practised from scratch. During the Trial Exercise, you will get help with this discipline through explanation and demonstration. What follows are some simple tips.

- 2.4.3 First,

#### THINK OF THE ANSWER

that you want to obtain and then

#### WORK OUT THE QUESTION(S)

that is/are necessary to obtain the desired answer. Too often, counsel concentrate on the question before really addressing the answer that is wanted. On most occasions, the form of the question will be determined by identifying the desired answer.

- 2.4.4 Second

#### BUILD YOUR QUESTIONS ON THE PRECEDING ANSWERS

- 2.4.5 Example:

The witness is being called to say that he was looking out of the first floor front bedroom window of his house at 10.30am on 2 February when he saw a young boy throw a stone through the window of a toy shop directly across the road, take a toy gun from the window and run off to the right and out of view. A young boy is on trial for the offence and is relying on an alibi.

Having got the witness to give his name, the next answer:- counsel will want the witness to give his address. Question: "What is your address?"

The next answer he wants is that there is a toy shop directly across the road: the assumption is that there is not a plan (which there should be). This cannot be obtained by a leading question and will take three non leading questions to obtain it. Thus:

Question: "Are there any buildings on the opposite side of the road from your house?"

Answer: "Yes."

Question: "Is there any of those buildings on the other side of the road which is directly opposite your house?"

Answer: "Yes."

Question: "What building is that?"

Answer: "A toy shop."

Note: there were no assumptions in any of those questions and. n me second question had been omitted, the use of "directly opposite" would have contained an assumption. And note, also, the building of question on preceding answer. This technique is sometimes called

#### PIGGY-BACKING

Next, counsel will want to get the witness to say that he was at home at 10.30am on 2 February. This may pose a problem, in that the witness may not recall the date, although he recalls the incident, so that the date will have to be established by some other means. But, assuming for the purposes of the example that the witness can recall the date, the examination might proceed as follows:

Question: "Where were you on the morning of 2 February?"

Answer: "In my home."

Question: "When you were in your home that morning, did anything happen outside of which you were aware?"

Answer: "Yes."

Question: "How did you become aware of it?"

Answer: "I saw it."

Question: "Where were you in your home when you saw this thing happen?"

Answer: "In my bedroom."

Question: "What were you doing when you saw this thing happen?"

Answer: "I was just looking out of the window. "

Question: "Where in the house is your bedroom?"

Answer: "At the front."

Question: "How many floors are there in your house?"

Answer: "Two."

Question: "On which floor is your bedroom?"

Answer: "On the first floor."

Question: "What time was it that you saw this thing happen from your first floor front bedroom window?"

Answer: "About 10.30am."

Question: "What did you see happen at about 10.30am when you were looking out of that window?"

Answer: "I saw a young boy throw a stone through the window of the jeweller's across the road."

And so on. Again note that there were no leading questions and no assumptions in any of the questions and that each question was aimed at a specific answer and was built on the preceding answer(s).

2.4.6 The value of piggy-backing is threefold: first, the witness is always under

CONTROL

second, the witness can follow the

STRUCTURE

third, a comprehensive and memorable

PICTURE

is being painted for the tribunal receiving the evidence.

2.4.7 There is a great mystique about examination in chief but it is essentially simple.

It is a private, somewhat formalised, conversation between counsel and the witness being conducted for a public audience. About the only difference between an ordinary, if inquisitive, private conversation and a good examination in chief is the avoidance of any leading questions, which is what gives it its formality: otherwise, it is an ordinary conversation.

2.5 Cross-examination

2.5.1 There are only two reasons to cross-examine any witness:

UNDERMINING

the reliability of evidence damaging the cross-examiner's client's case; and

SUPPORTING

cross-examiner's client's case by bringing out evidence which is favourable to it. So sometimes, only one reason applies: sometimes both. Whether either applies and, if so, which is determined by the cross-examiner's Case Concept.

2.5.2 The answers to the "WHY? and WHAT? questions are contained in the preceding paragraph.

2.5.3 The answer to the HOW? question is founded on the fundamental rule about cross-examination: maintain control. The basic technique is to:

ASK ONLY LEADING QUESTIONS

There will be circumstances in which it will pay the cross-examiner not to ask leading questions but the basic technique must be mastered first.

2.5.4 Go back to the example of examination in chief and assume that the witness has given a detailed account of what he saw and a description of the young boy which could fit the defendant. Assume, also, that the sole purpose of the cross-

examination is to undermine the reliability of the observation and, thus, of the description. The cross-examiner knows (because he has been to the locus in quo) that there are large trees in the front garden of the witness's house, that the road is a double-decker bus route and that, from 9.00 am to 11.00 am, it is usual for there to be cars and vans parked on both sides of the road and for shoppers to be walking up and down pavement on the opposite side of the road from the witness's house. The cross-examination might follow these lines:

Question: "There is a front garden to your house, is there not?"

Answer: "Yes."

Question: "And there are two large trees in front of your garden?"

Answer: "Yes."

Question: "Those two trees rise to a height of about 10 feet, do they not?"

Answer: "Yes."

Question: "Those trees are both at the road end of your garden, aren't they?"

Answer: "Yes."

Question: "And they stand about 10' apart at the road end of your garden, don't they?"

Answer: "Yes."

Question: "You have to look through the branches of those trees to see what is happening on the other side of the road, don't you?"

Answer: "Yes."

Note that there were no "I suggest..." or "I put it you..." questions, that every single question was leading, that each was framed to achieve the desired answer and that each built on the answer(s) that had preceded it. The rest of the cross examination would proceed in the same way, never asking the witness an open question, never asking him for an expression of opinion. At the end, it would be safe to put the essential point, "You are wrong about the description of the young boy," or "You cannot be sure of the description you have given of the young boy," both of which call for a statement of opinion/belief but with the answer to which even if the witness maintains the accuracy of his description the cross-examiner can live.

#### 2.5.5 Remember the advice given about examination in chief:

First

THINK OF THE ANSWER

that you want to obtain and then

WORK OUT THE QUESTION(S)

that is/are necessary to obtain the desired answer.

## 2.6 Re-examination

### 2.6.1 The basic rule about re-examination is

#### DON'T RE-EXAMINE

So is the second and the third. Re-examination is the most difficult to structure and control. The rule against leading questions applies and witnesses are prone to try to adjust their recollections to meet the thrust of the cross-examination and not to say what they actually recall.

2.6.2 However, sometimes, it is essential to re-examine. The fundamental purpose of re-examination is to clarify an ambiguity which has arisen in the witness's evidence during cross examination. There may be a supplementary purpose, namely to take appropriate advantage of evidence damaging to the cross examiner's client's case which has emerged during cross examination. Mere repetition of evidence already given is not an acceptable purpose for Re examination.

2.6.3 Whether it be the fundamental or the supplementary purpose which leads to the re examination, the problem facing the re-examiner is to contain the re-examination within the purpose parameter - and to do so without leading.

2.6.4 Suppose, in the example which I have been using to illustrate the basic techniques of examination and cross-examination, the witness has said in cross-examination that he was observing the events for some time, unspecified. The re-examiner might think it necessary to clarify for how long the witness was observing, anticipating that he will say that he was watching for about a minute and assuming that the period of time was not obtained from the witness in chief. The re examination might proceed thus:

Question: "You told the court that you were watching what that young boy was doing for some time. For how long were you watching him?"

Answer: "For about a minute."

Question: "What was he .doing when you first saw him?"

Answer: "He was actually throwing something at the window of the jeweller's shop."

Question: "What was he doing when you last saw him."

Answer: "He was running to my right and out of my sight."

Question: "What sight of him did you have during that period of about a minute between your first and last sight of him?"

Answer: "Well, I never lost sight of him."

## 2.7 General hints

- 2.7.1 Questions which begin with, "What...", "When...", "How..." , "Where..." are, usually, non-leading. Questions which begin with, "Did..." , "Was..." , "Were..." are, usually, leading.
- 2.7.2 You will have noticed that the second question in the examination in chief example was apparently a "Did..." question. It was not leading question. Why not? The reason is that it contained the "magic" word, "any..." Posed in this form, it did not assume that some event occurred or was observed and it left the witness free to say that nothing had occurred or been observed.
- 2.7.3 You will sometimes hear a clumsy (and wrong) variation of the "Was any..." , "Did any..." formulation: something along the lines of, "Did you see something happen or not?" If you think about it, such a question is leading because it assumes that something did happen which the witness should have been in a position to see.
- 2.7.4 Witnesses' reactions to questions are important to examiner and cross-examiner alike. They may tell the counsel whether the witness is doubtful or certain about the answers being given or embarrassed by the answers or unusually tense. Too often counsel bury their heads in their notebooks, whether they be on their feet or listening: they miss valuable signals. So

#### WITNESSES NEED TO BE OBSERVED

### 2.8 Opening and Closing Speeches

2.8.1 These are two quite different events.

2.8.2 The purpose of an opening speech is to

#### OUTLINE THE CASE

Outline the case which counsel intends to present. It is not a vehicle for argument. It is the vehicle for

#### SKETCHING THE PICTURE

and

#### SETTING THE AGENDA FOR THE TRIAL

- 2.8.3 A good opening speech will carefully ration detail. First because, absent the evidence from the Witnesses, the detail is difficult for any tribunal to hold in its memory and, second, because too much detail offers too many hostages to fortune: remember the points made in paragraphs 2.3.1, above.
- 2.8.4 As with everything else in a trial, an opening speech will reflect the Case Concept.
- 2.8.5 Note that defence opening speeches in criminal (and defamation) cases may depart, occasionally, from the stated purpose of an opening. There may be reason for indulging in a review of the detail and quality of the prosecution's or plaintiff's evidence but, even when that is so, the review should be brief and a

matter of headlines only. If it is any more detailed than that it is liable (a) to give the prosecution/plaintiff too much warning of the way in which the defence will approach the matter in closing and (b) to make the closing speech boringly repetitious.

2.8.6 The purpose of a closing speech is to

#### ARGUE THE CASE

to state the points on which counsel is relying and to justify those points. . Note the emphasis on argument. There is a real difference between assertion and argument: too many closing speeches are full of assertions and spare of argument and mere assertions do no more than identify the points without justifying them.

2.8.7 It is important to treat the tribunal with respect: the tribunal (lay or professional) will have a recollection of the evidence, particularly of the evidence which struck it at the time it was given as being important. The good closing speech builds upon that and does not dismiss it as insignificant.

2.8.8 All speeches must have a

#### STRUCTURE

There is a strong case for telling the tribunal from the outset what that structure is: it enables the tribunal to follow the significance, in the overall context, of the individual points and arguments. There will be occasions when counsel wants to make a closing speech as though it were a (spoken) detective story but such a course requires a good deal of experience for it to be adopted in the right case and to be effective. Certainly, at the beginning of a barrister's life as an advocate, it is better to announce the structure. Apart from anything else, identifying the structure to the tribunal is a very good discipline on the content of the speech.

2.9 Legal Submissions

2.9.1 I intend this heading to be read as applying to submissions in the course of a trial to interlocutory applications and to appellate work.

2.9.2 The purpose and content of a legal submission will be determined by the Case Concept. By now, that cannot come as any surprise.

2.9.3 Moreover, the WHY? , WHAT? and HOW? questions are as relevant to the aspect of advocacy to all others.

2.9.4 WHY make a legal submission? The answer may be that that is the purpose of the hearing itself - and will be if the context is an interlocutory application or an appeal. In the course of a trial, the answer is to be found, first in the Case Concept. The question translates into such as, "Is it necessary to make this submission in order to assist in attaining the ultimate objective? If the answer to the question posed in that way is, "Yes!", then the submission should be made. If the answer is, "No!" then, unless there is some other imperative for making it, the submission should not be made.

2.9.5 WHAT should be the content of a legal submission? This will depend, obviously, on (a) the context and (b) the purpose as defined by the Case Concept. Assuming that the parameters of the submission have been identified by these means, the content should be:

A SHORT STATEMENT OF THE ISSUES

A STATEMENT OF THE DESIRED RESULT

A SUMMARY OF THE POINTS TO BE ARGUED

THE ARGUMENT, POINT BY POINT

2.9.6 HOW should a legal submission be argued? Arguing a legal submission is as much a performance skill as any other aspect of advocacy: communication and persuasion are still the essence of the exercise. The essentials of handling a witness (see paragraph 2.3.3, above) are, *mutatis mutandis*, the same for making a legal submission:

STRUCTURE

PERTINENT AND PRECISE POINTS

CLARITY OF EXPRESSION AND DELIVERY

The fact that the tribunal is a judge (or a bench of judges) does not, in any way, diminish the importance of making your advocacy as attractive as you can. Judges can be swayed by well-presented and well-founded arguments, just as a lay tribunal can. Whilst it may be necessary to tell the judge what you say the applicable law is, save in those cases where the law is in doubt or you need to argue that some apparently applicable authority should be distinguished, it is generally unnecessary to read great chunks of authorities or Acts / Regulations. Indeed, one of the most persistent failures of advocacy in this field is the dreary reading of judgments or speeches. Even if great chunks have to be read, the obligation on the advocate is to make the reading interesting. Further, it is good advocacy to tell the judge(s) why you are reading the passage before you start to do so and to summarize the point that you are seeking to make from the passage which you are about to read. The increasing use of skeleton arguments is a development to be applauded. Skeletons perform three functions:

- (a) they force the advocates to structure the submissions;
- (b) they provide the agenda with which the advocates and the court will work;
- (c) they lead to more succinct and precise oral arguments.

Whenever counsel can predict that a legal submission will be made, skeletons ought always to be prepared and submitted (to judge and opponent), at the latest, shortly before the submission is to be made. Whenever the order of events and/or the dates are to be relevant to the submission, a chronology should be provided, whenever possible an agreed chronology. A seamless oral statement of a detailed chronology is a waste of everyone's time and works against persuasion.

### 3 STYLE

- 3.1 Styles of advocacy vary and the Course is not designed to teach a standard style.
- 3.2 However, aspects of style, which apply to all advocacy, can - and will - be taught and learnt during the Course.
- 3.3 There are a number of basic rules which should be observed:

#### AUDIBILITY

#### PRESENTATION

#### MANNERS

### 3.4 Audibility

- 3.4.1 First, the obvious. Mumbling, talking down to the papers, these are bad advocacy. Both inhibitor sometimes, prohibit, communication and, consequently, persuasion.
- 3.4.2 Even some who speak directly to the tribunal (or witness) remain inaudible. They have not pitched their voices to the circumstances of the courtroom - or to the tribunal. It is a fundamental that, if an advocate is not being heard clearly, the fault is the advocate's and not the audience's. From time to time, you will see even experienced advocates react with irritation if the judge, jury or witness says that the advocate cannot be heard clearly. If the advocate's irritation is with him/herself, then it is well-directed, even if it were better not shown. Usually, the irritation is manifestly with those who say they cannot hear: then it is ill-directed as well as bad manners. It is a useful tip that, if you appear in a courtroom with which you are not familiar, you should try out the acoustics before the court sits and try to discover, from the court staff, whether there are problems with audibility in that room - or with the tribunal.
- 3.4.3 In addressing this problem, I am not suggesting that everything that an advocate says should be said *fortissimo*: far from it. One of the greatest concert pianists of my time, Solomon, could so hold his audience and judge the acoustics that he could be heard clearly all round the Royal Albert Hall when playing a pianissimo passage. I deal with the use of voice in the next section: for now, the point to be made is that responsibility of being heard is the advocate's.

### 3.5 Presentation

- 3.5.1 The Human voice is a musical instrument. Everyone can vary tone, pitch, and shade. Monotonous delivery is bad advocacy: it bores the audience and it usually ends up with boring speaker.
- 3.5.2 It is not only the ability to vary tone, pitch and shade that the advocate needs to master: pace is equally important. Varying pace is a way of holding attention: it is also a valuable tool in emphasizing particular points. Pauses, not always where they might be expected, add to emphasis.

- 3.5.3 A useful way of mastering these techniques is to deliver shadow speeches into a tape recorder and then to listen to the recording. The effect is sometimes shocking.
- 3.5.4 Mannerisms fare frequently an irritant to the audience. Fidgeting, for example, distracts, whether it is done with papers, a pen, the gown or just the hands. The use of padding words or phrases is a constant feature of the performances of many advocates. Some judges become wearily enured to it, others do not and juries most certainly do not. The lingua franca of modern advocacy contains masses of these padding phrases, such as: "in my respectful submission"; "if your Lordship pleases"; "I am much obliged"; and most irritating of all, the constant repetition my Lord", "your Lordship" almost in every sentence. In examining witnesses, you will hear other counsel start almost every question with, "Can/ will you tell the court" and respond to every answer with, "Thank you" or "Right". As with fidgeting, you need to school yourself to avoid padding words and phrases and to make your language interesting.
- 3.5.5 The English language is a remarkable tool for communication and persuasion if properly used. We are a long way from the (supposedly) flowery language which the great advocates of the 1920s and 1930s used: we believe that we live in a world of commonplace language. In a sense we do, but that is no reason for not using the tool of simple language imaginatively. The use of short, precise sentences is a worthwhile skill to master so long as short precise sentences do not become boring in themselves because they lack (colour in language and delivery. The actual words that are used may be a very important weapon in the advocate's locker. The Americans conducted an experiment which well illustrates this: the subject-matter was the distance between two people. The question was posed in two different ways: "How far was X from Y?" and "How close was X to Y?" The difference in response was something like 28%. And whilst I am on the use of language, here are two other features which you will see when you go around the courts. At one end of the unacceptable, you will hear counsel deliberately (or, sometimes without thought) use legal professional jargon in addressing witnesses or juries: such as "inter alia" or "locus in quo" or "mutatis mutandis" (!) or "heretofore - or the like. The only effect of using that kind of language is to inhibit communication. At the other end of the unacceptable, you will hear counsel using slang, not for immediate effect, but because they think it will ingratiate them with the witness or jury or simply, because they do not know any better. It is crucial to good advocacy that the advocate commands the

RESPECT

and

TRUST

of witnesses, juries and judges. The first two are liable to regard the advocate as patronizing them if slang is the apparently main feature of the advocate's language: the judges regard it, rightly, as sloppy and unimpressive.

### 3.5.6 APPEARANCE MATTERS

The advocate who turns up in court looking a mess, untidy, with dirty shirts, collars, bands lacks self-respect and will not command the respect of the witness or the tribunal.

### 3.5.7 BODY LANGUAGE MATTERS

as well. The advocate who stands like a stuffed dummy will have the impact of a stuffed dummy. The advocate who stands like a coiled predator, ready to pounce on its prey, will hardly create an ambience of calm and sympathy: it may be necessary from time to time to come over as a coiled predator; but if it is not, do not do it. Similarly, the advocate who presents him/herself as tired or laid-back or uninterested will produce the corresponding impact on the audience: unless he or she means to achieve this impact, the self-presentation is counter-productive.

- 3.5.8 Gestures need to be used for appropriate impact and only appropriate impact. The random use of gestures is, at the least, confusing for the audience: at worst, it is a positive irritant, the constant use of gestures, even more so.

## 3.6 MANNERS

- 3.6.1 It should not need to be said that

### GOOD MANNERS

Are the sine qua non of good advocacy but, unfortunately, it has to be. There are far too many complaints of rudeness and arrogance to professional and lay tribunals, particularly by the young Bar.

- 3.6.2 Turning up late in court, assuming that the court will forgive your unannounced absence because you have something else to do, treating witnesses rudely, displaying anger or irritation or contempt for witnesses, tribunals and opponents: all these are frequent features of advocacy in many of our courts and they are inexcusable, as well as being symptoms of bad advocacy.
- 3.6.3 Hands are a problem: where to put them. Do not put them in your pockets when advocating, it is bad manners. Try not to think about them and then they will not get in the way.

## 4 SOME RANDOM POINTS

### 4.1 *Management of Papers*

Papers are a nuisance in court: life would be much easier if there were some other way of having the essential material available to the advocate when advocating. The trouble is that they are essential. Because they are essential, they must be organized so that what is needed at any time is easily and efficiently available. That may mean nothing more than putting them in appropriate files: it may mean more, like flagging the required pages in clear way: it may mean even more, depending on the volume of paper in the case.

Whichever, though must be given to their organization to facilitate the function of advocacy.

## 4.2 *Notes*

- 4.2.1 Notes will (almost always) be made in mastering the brief. They are (equally almost always) useless as an aid to advocacy because they are too derailed or too messy or both. If notes are to be used as an aid to the function of advocacy, then they need to be created with that objective in mind. Ease of reading and relevance are the keys. Making notes for court is a particular skill and has to be worked upon and perfected. Making notes in court, during the trial or hearing, demands even more carefully developed skills. It is one thing to sit behind a leader (or Pupil Master) and to take notes for him/her: it is something quite different to make notes for oneself, whether of an opponent's examination or cross-examination or speech or one's own examination or cross-examination. Indeed, apart from ticking off headlines as one deals with the topic, it seems almost impossible to make a detailed note of evidence when one is on one's feet: it is almost impossible, at least to do so without interrupting the flow of examination or cross-examination. There is no easy solution to this problem: each of us has to work out our own solution. Sometimes, you can rely upon your Instructing Solicitor (or his representative) to keep a note for you but, unfortunately, you will find yourself frequently unsupported in court when you start. The solution that most of us have arrived at is to train our memories to carry, at least, the salient points of the evidence as given in our memories and to make a rapid note of those salient points as soon as we sit down, checking the notes whenever possible, with some other source in court, including our opponent.

- 4.2.2 When making a submission or a speech

### DO NOT READ

It is both lazy and boring and it inhibits communication and persuasion. Plan your submission or speech beforehand and, if you need notes, produce them as headlines which will function as triggers to structure and content. If you have to use notes for a submission or speech or for handling witnesses, do not be bashful about doing so. Let the audience see what you are doing: you do not want them wondering what you are doing and being distracted by their curiosity.

## 4.3 Addressing Witnesses

There is a tendency amongst young barristers to be unctuous or "matey" with witnesses. Avoid it. There is no need to say, "Good morning Mr. ..." or the similar when standing to examine or cross-examine: indeed, it probably works against establishing the correct relationship with the witnesses. They know that they have come to a formal environment and frequently do not know how to react if greeted in that way, it embarrasses them and then you have to work hard to overcome that embarrassment. With a female witness, try to find out whether she prefers to be addressed as "Mrs", "Miss" or "Ms" and then use

the preferred method of address. If a witness has a title or rank, use that as the method of address. Unless you are dealing with a child, do not address the witness by first name: you are not friends, not even acquaintances and using first names is a presumption on your part. Never argue with a witness and, unless you want it to happen for effect, do not encourage the witness to argue with you.

#### 4.4 Addressing Tribunal

Some judges are "My Lord", some are "My Lady", some are "Your Honour", some are "Sir" or "Madam". Find out which is the correct method of address and then use it and only it and, preferably, only once. Remember that the judge is the representative of the Sovereign: you bow to the judge when he/she comes in to court and he/she bows back, not the other way round.

#### 4.5 Getting things wrong

If you do get something wrong - and you will - be prepared to say so and with grace. There is nothing more disarming than a frank apology and correction.

#### 4.6 The court staff

Every experienced advocate knows that it pays to get on with the court staff. You learn more about the foibles (and worse) of your tribunal from the court usher than from any other source. If you are appearing at a Magistrates' Court, you will have a far easier life if you make contact with and cultivate the gaoler and the warrant officer.

#### 4.7 Your opponent

Advocacy is a stressful skill. There is no point in making it more stressful by meeting your opponent as if he/she is a personal enemy. Indeed, you probably make your client's cause more difficult to advance if you do.

### 5 CONCLUSION

5.1 This Paper is properly entitled Guidelines. It has not been drafted as an absolute Prescription, although some of the points are as near absolutes as one can have in advocacy.

5.2 The approach underlying it is set out clearly in paragraphs 1.3 and 1.4: advocacy is a

#### PERFORMANCE SKILL

Nowhere in the Paper have I talked about the art of advocacy". There is art in advocacy but it is a developed art and, in any event, is only a small part of good advocacy. The key to all good advocacy is the mastering of the techniques which make up a performance skill. I encourage you to read and retain the lessons contained in the Paper in that light.

Michael Hill QC

February 1994.



**Possible Headline Topics**  
**EXAMINATION IN CHIEF**

**Forms of Questions**

1. No leading questions: open but focused. Use of who, what, when, where, why and how, describe, explain, tell...questions.
2. Short, simple questions: One point at a time.
3. Think of desired answer: formulate the questions
4. Use of language: appropriate to witness' understanding.
5. Establish facts not conclusions or opinions.

**Sequence of Questions/Structure**

1. Help witness to tell the story: focus on witness.
2. Help tribunal to follow account.
3. Use of exhibits, plans, photos etc.
4. Identify issues before asking questions- relevance.
5. Listen to answers.
6. Link question to content of previous answer: "piggy-backing"

**Control of Witness**

1. Know your material.
2. Form of questions- short and focused (see above).
3. Demonstrate clear direction.
4. Use of voice/ eye contact.
5. Transition questions/ headings to highlight new topics.

**General matters**

1. Highlighting of important issues: Case Analysis.
2. Uses of notes to assist not distract.
3. Including judge/ jury.
4. Variations in pace/ voice.
5. Timing/ pauses.
6. Use of Language – words that communicate and persuade.

7. Not interrupting witness.

## **ART OF INTERROGATION**

B.K. Somasekhara (ed.) *Aiyar & Aiyar's The Principles and Precedents of the Art of Cross-Examination* (Tenth Edition, 2004), pp. 145-182

### **1. FORMS OF INTERROGATION**

Strictly speaking, interrogation is not cross-examination, but cross-examination is a form of interrogation. Literally, interrogation is a process of questioning of or enquiring a person closely, thoroughly or formally.

'Interrogatory' is the questioning of or suggestive enquiring, i.e., a formal set of questioning in law, formally put to an accused person. Grammatically, as an adjective or pronoun it is the interrogative asking of a question. It is put in a wider capsule to mean question, query, inquiry, demand, probe, challenge, controvert, debate, probing, leading, question, cross question, etc. Academically, 'interrogation' includes all forms of questioning to elicit information for the purpose of drawing conclusions to know the truth. Legally, interrogation is not cross-examination. It is not defined in law, but is understood as a part of investigation which includes all the proceedings under the Code of Criminal Procedure (or criminal procedural law) for the collection of evidence, conducted by a police officer or by any person (other than a magistrate) who is authorized by a magistrate in this behalf.

'Trial' is not defined but used in law very frequently, for instance-trial before a court of sessions (Ch. XVIII and Ss. 225 to 237), trial of warrant cases (Ch. XIX, Ss. 238 to 250 ), trial of summons cases (Ch. XX, Ss. 251 to 259) and summary trials (Ch. XXI, Ss. 260 to 265 of Cr PC). They are all part of judicial proceedings and are included within its definition and include any proceeding in the course of which evidence is or may be legally taken on oath [s 2(i) of Cr PC]. The Indian Evidence Act while dealing with implications of investigations under Ss. 24 to 30 and the effect of a statement to police officers during investigations, distinguished it from evidence given in court (s 3 of the Indian Evidence Act) and examination of witnesses by the court and parties and advocates. The separate Ch. IV is provided in the Indian Evidence Act in this regard and cross-examination is covered by s 137. The totality of all this keeps 'interrogation' beyond the meaning of cross-examination. Categorically stated in the true sense, 'interrogation' is a conversation between the interrogator and the suspect who is accused of involvement in a particular incident or group of incidents. Many companies use the word interview as a substitute for interrogation. For the sake of clarity in this text, interview will be used to indicate a nonaccusatory conversation while interrogation will represent the change to an accusatory tone.

Without meaning an investigation into the expression and using it in the sense of questioning during cross-examination in different ways and for different legal results, several components of interrogation could be:

- (i) Leading questions.
- (ii) Misleading questions.
- (iii) Direct questions.

- (iv) Indirect questions.
- (v) Fishing questions.
- (vi) Questions testing credibility.
- (vii) Questions that divert the attention.
- (viii) Digressive questions.
- (ix) Progressive and cumulative questions.
- (x) Retrogressive questions.
- (xi) Developing questions.
- (xii) Conducive questions.
- (xiii) Searching questions.
- (xiv) Suggestive questions.
- (xv) Cross-interrogation.
- (xvi) Intimidating questions.
- (xvii) Incriminating questions.

## **2. MEANING OF LEADING QUESTIONS**

'A question' says Bentham, is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. These include questions like; Is your name not so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived with him for so many years? It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner while he pretends ignorance and is asking for information is in reality giving instead of receiving it. It has often been declared that a question is objectionable as a leading one which embodies a material fact and admits of an answer by a simple affirmative or negative. While it is true that a question which may be answered by 'Yes' or 'No' is generally leading, there may be such questions which in no way suggest the answer desired and to which there is no real objection. On the other hand, leading questions are by no means limited to those which may be answered by 'Yes' or 'No'. A question proposed to a witness in the form whether or not, that is, in the alternative, is not necessarily leading. However, it may be so when proposed in that form, if it is so framed as to suggest to the witness the answer desired. It would answer no practical purpose to cite the numerous decisions which determine whether particular questions are leading or not, as each case must be determined with reference to its own particular circumstances and to the definition continued in this section, namely, that a question is leading which suggests to the witness the answer which he is to make, or which puts into his mouth words, which he is to echo back. 'Leading' is a relative, not an absolute term. If a question merely suggests a subject which suggests an answer or a specific thing, it is not leading. A question is proper when it merely directs the attention of the subject in respect of which he is questioned. It follows

from the broad and flexible character of the controlling principle that its application is to be left to the discretion of the trial court. Evidence which is improperly obtained by leading questions without first declaring the witness hostile should not be considered. It was held by the Kerala High Court in *State of Kerala v Vijayan alias Rajan*, that leading questions relating to undisputed matters or introductory matters or matters already proved are beyond the purview of the discretionary powers of the court, vide second para of s 142 of the Indian Evidence Act.

Almost invariably, the examiner will know in a general way what his witness is going to say since the witness will earlier have signed a statement, called his 'proof' of what he can depose to, and it will be on the basis of this proof that the counsel will have decided to call him. Nevertheless, the witness must tell his own story in court. This means that he must not be asked leading questions. A leading question is one which suggests the answer. Similarly, one must not ask a question such, 'Did you see John Smith at the scene of the crime?' but rather 'Did you see anyone?' and 'Whom did you see?' A question which admits of a simple 'Yes' or 'No' as an answer is usually a leading one, but not always. It is seriously in dispute. Thus, 'Did you see anyone?' is usually all right, because it is not usually in dispute whether the witness saw anyone or not, but the question 'Did you see John Smith?' is usually objectionable.

A leading question is one which puts words into the witness's mouth, or suggests directly the answer which the examiner expects of him. It is, however, permissible to lead the witness on the following matters:

- a. On preliminary matters, preparatory to questions about the facts in issue. It is usual, for example to lead the witness's name and address.
- b. On any matters which are not in dispute.
- c. Where a witness is called to deal with some fact already in evidence, he may be asked directly about that fact.
- d. Where leave has been granted to treat the witness as hostile.
- e. By agreement between all concerned.

It is common and good practice for an advocate to indicate to his opponent over what area the opponent may lead a given witness without objection.

Any question suggesting the answer which the person putting wishes or expects to receive, is called a leading question. It is a question framed in such a manner that it throws a hint as to or suggests directly or indirectly, the answer which the examiner desires to elicit from the witness, e.g., when a witness called to testify to an alleged assault on A by B is asked 'Did you see B take a stick and strike A?' or 'Did you not hear him say this?' Leading questions, says Taylor, are questions which suggest to the witness the answer desired or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative.

Questions may legitimately suggest to the witness, the topic of the answers; they may be necessary for this purpose where the witness is not aware of the next answering topic to be testified about, or where he is aware of it but its terms remain dormant in his memory until by the emotion of some detail the associated details are revived and independently remembered. Questions on the other hand, which so suggest the specific tenor of the reply as desired by

counsel that such a reply is likely to be given irrespective of an actual memory, are illegitimate. The following passages indicate the scope of the rule:

A question is leading which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, as was here done, or plainly suggests the answer which the party wishes to get from him.

Putting leading questions by the magistrate while recording a confession in the form of questions and answers virtually cross-examining the accused was deprecated and excluded from the evidence.

As a general rule, leading questions must not be asked during the examination-in-chief if objected to by the adverse party except with the permission of the court.

The rule has a rationale. A witness has a natural or sometimes unconscious bias in favor of the party calling and he will therefore be too ready to say 'Yes' or 'No', as soon as he realizes from the question that the one or the other answer is desired from him. A hint conveyed by the interrogator as to the sort of answer he would like, would be welcome to a witness who did not know what exactly to say, and in the case of collusion between the witness and the interrogator, the scope of mischief is infinite.

Another reason is that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is 'expected to prove; and that consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favorable to his side, or even put a false gloss upon the whole. The rule therefore is that on material points. A party will not be allowed to lead his own witnesses but leading questions are allowed during cross-examination (s 143 of the Indian Evidence Act). To an honest or intelligent witness who has come to speak the truth, a leading question may make no difference in his reply; but a witness who is dull or headless or confused, or who has no recollection or who is seeking a hint as to what reply should be given, it is apt to give a reply in the manner suggested, without considering the question properly. When a question is ruled out on the ground that it is suggestive and improper, the same may be allowed to be put in another form but where the mischief created by putting the leading question is irretrievable, there can be no complaint if the court disallows the question even in another shape.

A fair trial and procedural justice is ensured under Ss. 141 to 143 of the Indian Evidence Act which can be read into a constitutional protection of the right to liberty under art 21 of the Constitution. It is a procedure established by law within the meaning of art 21 of the Constitution of India.

The rule is exceptionable, viz.-

- a) it cannot be allowed if objected to by the adverse party,
- b) unless permitted by the court, and
- c) it is allowed if leading questions are introductory or undisputed or which have already been sufficiently proved.

Though no case for general permission to cross-examination is made out, it may be necessary on particular topics to allow leading questions to be put in order to give the court a clear picture of the reaction of the witness to these questions. The section says, 'If not objected to by the adverse party'. In practice leading questions are often allowed to pass without objection, sometimes by express and sometimes by tacit consent. This matter occurs where the questions relate to matters which, though strictly speaking in issue, the examiner is aware of, are not meant to object. On the other hand, however, every unfounded objection is constantly taken on this ground. If the objection is not taken at the time, the answer will have been taken down in the judge's notes, and it will be too late to object afterwards on the score of having been elicited by a leading question. Sometimes, the judge himself will interfere to prevent leading questions from being put; but it is the duty of the opposing counsel to take the objection, and except in cases where, as above-mentioned, the objection is advisedly not taken, it is only through want of practical skill that the omission occurs. At the same time it is to be observed that the evidence is elicited by a series of leading questions unobjected to, the effect of evidence so obtained is very much weakened. It is advisable, therefore (except where permissible) not to put too many questions, whether it be likely that objection be taken to them or not. The whole subject of leading questions is left entirely to the discretion of the court. The latter part of the section permits putting questions on introductory or undisputed matters. 'The second part of s 142 goes further than English law and requires the judge to give permission in certain cases.'

### **3. LEADING QUESTIONS - EXCEPTION**

As, however, the rule is merely intended to prevent the examination from being conducted unfairly, the rule is subject to three specific exceptions mentioned in s 142 and in s 154 of the Indian Evidence Act. These exceptions are:

- a) Introductory and undisputed or sufficiently established matter.
- b) Adverse witness.
- c) Leading questions may be asked with the permission of the court at the discretion of the judge.

#### **(i) INTRODUCTORY AND UNDISPUTED OR SUFFICIENTLY ESTABLISHED MATTER**

The rule must be enforced in a reasonable sense, and must, therefore, not be applied to that part of the examination which is introductory to that which is material. If indeed it were not allowed to approach the point at issue by leading questions, examinations would be most inconveniently protracted. To abridge the proceedings and bring the witness as soon as possible to the material point on which he is to speak, the examiner may lead him on to that point and may recapitulate to him the acknowledged facts of the case which have already been established.

#### **(ii) ADVERSE WITNESS**

A witness who proves to be adverse to the party calling him may in the discretion of the court be led, or rather cross-examined.

### **(iii) LEADING QUESTIONS MAY BE ASKED WITH PERMISSION OF COURT - DISCRETION OF JUDGE**

The court has a wide discretion with reference to this, which is not controllable by the court of appeal, and the judge will always relax the rule whenever he considers it necessary in the interest of justice and it is always relaxed in the following cases:

#### **(a) Identification**

For this purpose a witness may be directed to look at a particular person and say whether he is the man. Indeed, whenever from the nature of the case the mind of the witness cannot be directed to the subject of enquiry without a particular specification of it, questions may be put in a leading form.<sup>36</sup> Much, however, depends upon the circumstances of each particular case; and it is often advisable not to lead even where permissible. Thus, in a criminal trial, where the question turns to identity, although it would be perfectly regular to point to the accused and ask a witness if that is the person to whom his evidence relates, yet if the witness can unassisted single out the accused, his testimony will have more weight.

#### **(b) Contradiction**

Where one witness is called to contradict another as to expressions used by the latter, but which he denies having used, he may be asked directly:

'Did the other witness use such and such expressions?' The authorities are, however, stated to be not quite agreed as to the reason of this exception; and some contend that the memory of the second witness ought first to be exhausted by his being asked what the other said on the occasion in question. Similarly, a leading question may be put when it is necessary to contradict a witness on the other side as to the contents of a paper which has been destroyed. The case last-cited was an action on a policy of insurance of goods on board a ship. The defence was that the goods were not lost, and that the plaintiff himself had written a letter to his son stating that he had disposed of all his goods at a profit of 30 per cent. The son was called and cross-examined as to the contents of the letter. He swore that it was lost, but that it contained no intimation of the kind supposed and only said that the plaintiff might have disposed of his goods at a greater profit as he had been offered 5s for a pair of cotton stockings he then wore. To contradict his testimony, several witnesses were produced to depose that the letter had been read when received in London. One of the witnesses, having stated all that he recollected of it, was asked 'if it contained anything about the plaintiff having been offered 5s, for a pair of cotton stockings.' This being objected to as a leading question, Lord Ellenborough ruled that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained a particular passage recited to him which has been sworn to on the other side; otherwise it would be impossible ever to come to a direct contradiction.

#### **(c) Defective memory**

The rule will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from defective memory. It is common practice, when a witness cannot recollect a circumstance, to refresh his recollection by a leading question, after the court is satisfied that his memory has been exhausted by questions framed in the ordinary manner.

Similarly when the witness state that he could not remember the names of the members of a firm so as to repeat them without suggestion, but thought that he might recognise them if they are read to him, this was allowed to be done. A question is not objectionable which merely directs the attention of the witness to a particular topic without suggesting the answer required. Thus, to prove a slander imputing that 'A was bankrupt whose name was in the bankruptcy list and would appear in the next Gazette', a witness who only proved the first two expressions was allowed to be asked, 'Was anything said about the Gazette?' Upon a similar principle the court will sometimes allow a pointed or leading question to be put to a witness of tender years whose attention cannot otherwise be called to the matter under investigation.

#### **(d) Complicated matters**

The rule will also be relaxed where the inability of a witness to answer questions put in the regular way arises from the complicated nature of the matter as to which he is interrogated.

The above instances are mentioned as those in which the rule is generally and commonly relaxed, but it will be remembered that the court has a wide discretion to allow leading questions, not only in these but in other cases in which justice or convenience requires that they should be put. As already observed, unfounded objections are constantly taken on this ground. In the under mentioned case, in which it was held that prima facie evidence of a partnership having been given, the declaration of one partner is evidence against another partner; a witness, called to prove that A and B were partners was asked whether A had interfered in the business of B and it was held not to be a leading question. Lord Ellenborough observed as follows:

I wish that objections to questions as leading might be a little better considered before they are made. It is necessary to a certain extent to lead the mind of the witness to the subject of inquiry. In general no objections are more frivolous than those which are made to questions as leading ones.

As soon as the witness has been conducted to the material portion of his examination, as soon as the time and place of the scene of action has been fixed, it is generally the easiest course to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he had heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar, ignorant witness is not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the court and the jury know as much of the matter as he himself does, because it has been the common topic of conversation in his own neighborhood; and, therefore, his attention cannot easily be drawn to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal. However, if his attention is first drawn to the transaction by asking him when and where it happened, and he is told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time. Similarly, Alison says:

It is often a convenient way of examining to ask a witness whether such a thing was said or done, because a thing mentioned aids his recollection, and brings him to that state of proceedings on which it is desired that he should dilate. However, this is not always fair; and when any subject is approached on which his evidence

is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also if the witness is at all intelligent, a more consistent and intelligible statement will generally be got than by putting separate questions, for the witnesses generally think over the subject on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel.

#### **4. MISLEADING QUESTIONS**

Misleading questions are those improper questions which are in reality sever questions combined or in which some assumption is covertly made which the questioner would not dare to put openly or such questions as unfair and perplexing.

Questions which assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the fact are not allowed as a misleading question. A question which assumes a fact that may be in controversy is leading, when put on direct examination, because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect. Conversely, such a question may become improper on cross-examination, because it may by implication put into the mouth of an unwilling witness, a statement of fact which he never intended to make and thus incorrectly attribute to his testimony, which is not his.

Another inveterate abuse is the grouping of several questions admitting of different answers into one long composite question and a demand of a categorical answer-'Yes' or 'No'. Even a cool witness is puzzled and misled. Such composite or ensnaring questions should never be allowed. The remedy for the trick as proposed by Aristotle is that 'several questions should be at once decomposed into their several parts. Only a single question admits of a single answer'. The following anecdote illustrates the evil:

Sir Frank Lockwood was once engaged in a case in which Sir Charles Russell (the late Chief Justice of England) was the opposing counsel. Sir Charles was trying to browbeat a witness into giving a direct answer, 'Yes' or 'No'. 'You can answer any question Yes or No', declared Sir Charles. 'Oh, can you?' retorted Lockwood: 'May I ask if you have left off beating your wife?' To such a composite question: 'Did you throw the born child into the well as the result of which he died of drowning?' - a direct answer for which 'Yes' or 'No' is impossible. From the accused girl's answer 'Yes', it cannot be inferred that she admitted that the child was born alive.

Every witness must be allowed fair play. It is unworthy of an advocate to attempt to corner a witness by putting a question which involves an assumption that he or another witness had made a statement that has not been made. Very often, witnesses are puzzled by questions in which assumptions of facts are covertly made, lest the trick be detected when questions are direct. Under this head come questions like these: 'When did you cease beating your wife?', 'When did you cease to be an enemy of the plaintiff?', 'When did you stop communicating with him?', 'Do you go there still?', 'Does he bear ill feeling even now?', 'When did you sell your interest in the claim?', 'When did you retire from the conspiracy?' The authors of Port Royal Logic give this example:

In the same way, if, knowing probity of a judge, any' one should seek me if he sold justice still, I could not reply simply by saying 'no', since the 'no' would signify that he did not sell it now, but leave to be inferred, at the same time, that I allowed that he had formally sold it.

In the context of justice and fair play and a constitutional safeguard under art 21 of the Constitution of India which is inherent in the concept of reasonableness, misleading questions are prohibited.

The rule is equally applicable during the examination-in-chief, cross-examination and re-examination and to all persons including the counsel and authorities in all sorts of proceedings. Whether objected or not to such questions, it is the duty of the court to disallow misleading and improper questions. The sessions court allowing such questions and not being more watchful was deprecated by the Supreme Court.

In an unfair misleading question and the court's duty to illustrate, the question put to a witness Rani Bala, in all probability, was, 'Can you deny that Ram Prasad was beaten for an illicit connection with you?' She is reported to have said, 'I cannot say if Ram Prasad was beaten for illicit connection with me.' It cannot be inferred from this answer that she admitted having an illicit connection with Ram Prasad. In such cases the court should take down the question in cross-examination and then the answer as enjoined in O VXIII, r 10 of the Code of Civil Procedure.

Questions may be termed direct or indirect only in relation to the particular fact to be elicited. A question may be called direct which, if answered, will either confirm or disprove the fact interrogated; on the other hand, it may be styled indirectly when its answer will neither confirm nor prove the fact directly, but will tend to establish it only inferentially, either by itself or when taken along with other facts.

In direct questioning it is necessary to put the questions in such a form as to answer which either in the affirmative or negative, may either suggest the fact aimed at only inferentially or tend to cast a partial reflection upon it, without doing any harm to the cause.

A cross-examiner in general ought not to ask questions, the answers to which, if unfavorable, will be conclusive against him.

The plain direct questions which best elicit the truth from the witness desirous of telling the whole truth and nothing but the truth, would, to a witness who desires to suppress some of the truth, operate as a signal for silence. The surest course is, by almost imperceptible degrees, to conduct him to the end. Elicit one small fact which is remotely connected with the main object of your enquiry. He may not see the chain of connection, and will answer that question freely, or deem it not worth evading. A very small admission usually requires another to confirm or explain it. Having said so much, the witness cannot stop there; he must go on in self-defense, and thus by judicious approach, you bring him to the main point. Even if then he should turn upon you and say no more, you have done enough to satisfy the judge or jury that his silence is as significant as would have been his confession.

## **5. DIRECT AND INDIRECT QUESTIONS**

There are several divisions of evidence which, although in some degree are arbitrary, will be found useful to bear in mind. In the first place, evidence is either direct or indirect accordingly as the principle fact follows from the evidentiary—the *factum probandum* from the *factum probans* immediately or by inference. In jurisprudence, however, direct evidence is commonly used in a secondary sense, viz. as limited to cases where the principle fact, or *factum probandum*, is attested directly by witnesses, things or documents.

Indirect evidence known in forensic procedure by the name of circumstantial evidence, is either conclusive or presumptive. It is conclusive, where the connection between the principle and evidentiary facts i.e. the *factum probandum*, and the *factum probans* are a necessary consequence of the laws of nature. It is presumptive, where it is only on a greater or lesser degree of probability.

Direct evidence is to be contrasted with 'indirect' evidence in the sense of either hearsay (i.e., that which the witness heard from another) or circumstantial evidence (i.e., evidence from which inferences may be drawn). Indirect evidence is as much evidence as direct evidence. Direct evidence may, however, have more or less weight according to the judgment of the tribunal on fact. Its only virtue may be that there is only an area of possible doubt about it, namely, the truth and accuracy of the witness; whereas, in the case of indirect evidence the problems of judging the weight of hearsay or deciding on proper inference arise.

Direct evidence is contrasted with circumstantial evidence. Direct evidence consists either of the testimony of a witness who perceived the act to be proved or the production of a document or thing which constitutes the fact to be proved. Circumstantial evidence of a fact to be proved is the testimony of a witness who perceived the fact to be proved, by another fact from which the existence or non-existence of the fact can be deduced, or the production of a document or thing from which the fact to be proved can be deduced. The fact to be proved can be either a fact in issue or a fact relevant to the issue. Suppose a fact in issue is whether A used a certain knife. A fact relevant to this fact in issue is whether A had the knife in his possession, for if we find he had it in his possession, we may go on and find he used it. If T says he saw the knife in A's hand, he is giving direct evidence of a relevant fact (possession), but only circumstantial evidence of A's using the knife. If he says he saw the knife in A's possession it is a relevant fact and circumstantial evidence of A's using the knife is a fact in issue. Of course, all witnesses necessarily give direct evidence of whatever it was they perceived, and here T is giving direct evidence of the possession of the knife, from which we may deduce A's possession of it, and the A's use of it.

Circumstantial evidence is also used, not in contrast to direct, i.e., not in describing the quality of the testimony given, but as a description of the fact proved, if they are not directly in issue, but only logically related to a fact in issue. Relevant facts constitute circumstantial evidence, e.g., 'Possession of recently stolen goods is circumstantial evidence of guilty knowledge'.

Direct and indirect evidence are sometimes equated with hearsay and non-hearsay evidence. The terminology is generally employed to distinguish these uses of prior statements even if confusing. Traditionally, prior statement tended as relevant for a purpose other than that of proving the truth of a fact stated have been described as 'direct evidence, and for this purpose 'direct' means only the opposite of 'circumstantial'. Admissible evidence of prior statements

may either be 'direct' (non-circumstantial} or circumstantial evidence of a fact. For example, the making of a statement may be 'direct' evidence that the statement was in fact made, and may be admissible to prove both facts. To describe evidence as 'direct' in the sense of not being simply to describe the statement which are not hearsay as 'non-hearsay', adapting slightly the helpful usage of the American Federal Rules of Evidence.

The term 'direct evidence' has a second meaning in the usage of many writers. The alternative term 'percipient evidence' not only avoids any possibility of confusion, but it is also more appropriate to describe the opposite of hearsay evidence. Hearsay is a complex subject, occupying in its own right chapters of this book, and only a brief distinction can be made here. Percipient evidence is evidence of facts which a witness personally perceives using any of his senses. Hearsay evidence is given when a witness recounts a statement made (orally, in a document or otherwise) by another person and where the proponent of the evidence asserts that what the person, who made the statement said, was true. Thus, the evidence of W that he saw D rob the bank is percipient evidence, whereas the evidence of H (who was not present at the scene of the robbery) that W told H that D robbed the bank is hearsay, if tendered to prove that D robbed the bank. Hearsay is inadmissible unless it falls under an exception recognized by law.

## **6. FISHING QUESTIONS**

Point blank questions by the cross-examiner intended to bring out some answer useful in any manner and for any purpose are fishing questions. They are tricky questions, the answers to which may provide material to develop theories during cross-examination. They may be prejudicial to the party or witness or the case, and even to the fairness in the proceeding and the 'result. Sometimes, fishing questions are worse than misleading questions which can be controlled by the courts.

A fishing question has no legal definition or meaning except as an art and a part of the interrogatory form of cross-examination. If we see fishing Concise Oxford Dictionary) as a noun is the activity of catching the fish for food or sport, and as a fishing line (Concise Oxford Dictionary), a long thread of silk with a boiled hook attached to a fishing rod, a fishing question could be a question during cross-examination in the hands of the skilled cross-examiner (killer fisher person) with a tricky form of relevancy (as per the law of evidence) to act as a bait to get attracted and caught by obliging an answer upon which a theory can be developed to destroy the testimony or to strengthen the weak theories of the cross-examiner.

Like misleading questions are to be controlled or prevented by the courts akin to or more misleading (as a fishy-dubious question) fishing questions should be allowed as a matter of duty. Whether objected to or not the court shall record the fishing question and allow or disallow with a ruling supported by reasons. The judge can put questions under s 138 of the Indian Evidence Act or use his own power to control such cross-examination. The courts have full power to prevent an abuse of the right to cross-examine in any manner appropriate to the circumstance of the case. The cross-examiner can be kept within proper bounds in the examination and cross-examination of the witness and conduct their cases with due regard to their responsibility to the public and the court.

## **7. QUESTIONS TESTING CREDIT**

Where interrogation is carried out only to test the memory or credit of the witness, it is a cross-examination testing credit. The phrase to discredit a witness does not necessarily convey the notion of discrediting by making him appear to be perjured. What is meant is that the cross-examiner must by that method, attempt to show that the witness' evidence is not to be implicitly believed; that it is mistaken in the whole or a part of it.

Cox says:

By adopting this manner of dealing, you not only act in strict accordance with justice, truth and charity, but you are far more likely to attain your object that by charging willful falsehood and perjury; by which course if you fail to impress the jury, you endanger your cause. It does not infrequently happen that a charge of perjury against the witness on the other side induces the jury to make the trial a question of the honour of the witnesses instead of the issue on the record'. They say, 'If we find for the defendant, after what had been said by this counsel against the plaintiff's witnesses, we shall be confirming his assertion that they are perjured, which we do not believe' - and so to save the characters of their neighbours whom they believe to be unjustly impugned they give a verdict against the assailant. Such a result of browbeating and of imputation, perjury and falsehood is by no means rare, and while it affords another instance of the truth of the remark we have already made more than once, that honesty is wisdom as well as virtue, it should be treasured in your wise memory as a warning against a style of cross-examination once popular, but now daily falling more and more into disrepute and which is really as bad in policy as it is discreditable in practice. In truth without imputing perjury you will find an ample field for trying the testimony of a witness by cross-examination and of showing to the jury its weakness or worthlessness by bringing into play all that knowledge of the physiology of mind and of the value of the evidence which it is presumed that you have acquired in your training for the office of an advocate.

Thus armed, you will experience no difficulty in applying the various tests by which the truth is tried with much more of a command over the witness and vastly more of influence with the jury who will always acknowledge the probability or mistake in a witness when they will not believe him to be perjured.

A cross-examiner's questions testing the credit of a witness is lawful. The credit can be shaken by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

The cross-examiner has wider power in doing it which exceeds its scope given under s 138 of the Indian Evidence Act. All that is permissible under Ss. 146 to 153 of the Indian Evidence Act cannot be made punishable under s 500 of the Indian Penal Code. Questions may be put to test the veracity and to impeach the credit of the witness.

The questions in cross-examination could adopt four modes of impeaching credit:

- a) by cross-examination as to his knowledge of the facts deposed to, opportunities of observation, powers of memory and perception, disinterestedness (s 138); his

character (s 140); his veracity, position in life, injury to character by criminating questions (ss 146, 147 and 132); his errors, omissions, antecedents, mode of life, etc. (ss 146 and 148);

- b) by written (s 145) or oral (s 155 cl3) statements;
- c) by evidence of persons showing that the witness bears a general bad reputation confronting him with his previous inconsistent statements, reputation for untruthfulness (s 155 ell), or by proof that the witness has been bribed, or has accepted the offer of a bribe (s 155 cl 2};
- d) by calling witnesses or offering other evidence (e.g. under s 145 or s 155 cl 3) to contradict the witness on all relevant matters, but not on irrelevant matters.

When the questions put to a witness in cross-examination for discrediting him relate to facts directly relevant to the matters in issue, his answers may always be contradicted by any evidence. If the question in cross-examination is relevant only in so far as it affects the credit of a witness, but is otherwise irrelevant, the answer cannot be contradicted except in the case of (a) previous conviction, or (b) bias.

When the witness is not speaking the truth on a particular point, the attention should be drawn to the fact in the cross-examination for providing an opportunity to explain. This may be applicable to all the cases in which it is proposed to impeach the witness's credit. Former contradictory or inconsistent statement of a witness can be used under s 146 of the Indian Evidence Act to shake the credit or test the veracity of the witness.

## **8. DIGRESSIVE QUESTIONS**

In order to use this method effectively, it is necessary to find out some collateral means tending to contradict the facts deposed to by the witness, not in an open manner by eliciting an inconsistent statement from the mouth of the witness, but by extracting something that in effect can be associated with the matter sought for.<sup>79</sup> Digressive questions are not unlawful but may be lawful for several purposes permitted in law.

## **9. PROGRESSIVE AND CUMULATIVE QUESTIONS**

When the circumstances of the case do not permit a point being made out by direct questions, it becomes necessary to lead the witness on and extract from him bit by bit that which you require as a whole.

This is always the safest course to adopt in dealing with unwilling witnesses, who, though not liars, are found inclined to avoid or suppress the truth, if possible. You must begin with some unimportant and remotely connected fact, with the fact that you are aiming at. The witness is likely to relate to it, not realizing perhaps exactly its bearing, and not seeing the chain of connection and will answer question the uncautiously. Having admitted that much, you can lead him gradually nearer and nearer by successive approaches to the gist of the matter and having secured him thus far you can, if necessary, put the fact clearly to him.

Such questions are lawful so long as they conform to the rules of evidence under Ch. II, Ss. 5 to 55 of the Indian Evidence Act and other prohibitive provision and particularly s 146 of the Indian Evidence Act. However, it should not be misleading.

## **10. RETROGRESSIVE QUESTIONS**

The retrogressive questions involve a process which is just the reverse of the progressive. When a witness has deposed to any fact in his examination-in-chief in a positive manner, naturally he would not like to realize from his position if asked directly in opposition to it. He will not, however, object to yield to slight and imperceptible modifications of his statement, if he is asked about surrounding facts tending to tone down or minimize his statement, but not intended to contradict it totally. There is nothing which witnesses of every grade or rank or intellect are so sensitive to as self-contradiction. The dread of being made to appear as lying often arms the resolution of the witness to adhere to his original statement without qualification. Get little answers to little questions, and you will find as a rule that answers are strung together like a row of beads within the man, and if you draw gently, so as not to break the thread, they will come with the utmost ease, and without causing the witness the slightest pain.

## **11. DEVELOPING QUESTIONS**

The process of developing questions often improves into a very successful one in dealing with witnesses who do not depose to facts from their own perception, but testify to them in an indirect manner. They are mostly experts who make assertions from their professional experience or special study of any subject upon which their aid is sought in the way of testimony. As they do not speak about any direct perception, they cannot be led to state any fact forming a component part of the transaction itself. However, they would yield to suggestions tending to disaffirm their opinion based upon their experience, if the modifications suggested may not tend to upset their views or contradict their opinion. Cross-examination of expert witnesses and witnesses for opinion may be adopted to them (Ss. 45 to 51 of the Indian Evidence Act).

## **12. CONDUCTIVE QUESTIONS**

The greatest difficulty often felt is with regard to negative testimony, i.e., when the witness' statement consists of a simple denial of something which is asserted on your side to have taken place. A pure negative of some occurrence, or a simple quotation of some statement made by others to the witness himself or which forms parts of a conversation that took place within the hearing of the witness, admits of very little scope for cross-examination. The witness ought to be first made to assume some affirmative form with regard to any of the elements laid down in those rules (that is, rules showing connection of cause and effect), and then proceed with regard to which the relation of cause and effect are quite apparent. If one is established or admitted, the other could be inferred as a matter of course and if questions are addressed relating to such facts, they may induce certain answers which may obviously lead to certain irresistible conclusions. You may pick certain facts from the affirmative made which forms a link of the facts or events in question, and ask the witness about it. If he happens to affirm it, then proceed with other facts affirmative of such facts in the sequence of cause and effect. When you find the witness sufficiently advanced, throw round him some other facts, observing their chain of causal relation. If you succeed in laying round him a chain of facts, press the facts all round by eliciting facts, adding fresh links to the chain till you compel him to give some answer which either throws him away from his negative position and draws him into some answer which will compel him to admit what you desire or

render his denial of the fact highly improbable and not worthy of credence. When you are satisfied that you have extracted sufficient proof for causes from the witness to justify you in assuming that the court will presume the effect you desire, it is better to leave the matter and proceed to another. For if you only proceed far enough, you will enable the witness to understand how you have been approaching him on all sides, and he may by one single answer recover all his lost ground, by giving some explanation made upon the spur of the moment, or by alleging that he misunderstood his questions or by putting an artistic test to all your fine questions and his answers, by adding a point-blank denial to what you have been trying to establish.

### **13. SEARCHING QUESTIONS**

Questions tending to show that the cross-examiner is in possession of certain facts which, if divulged, will put the witness to disgrace or humble him before the public, are known as searching questions. The cross-examiner may, by putting a few questions, give the witness to understand that the examiner knows the weakness of the witness, and if the witness will not proceed in a proper manner, his disgrace is certain.

### **14. SUGGESTIVE QUESTIONS**

In cross-examining witnesses, we may sometimes obtain answers more accurate and extensive, or suitable to our purpose, by putting suggestive questions that if we leave them free to answer spontaneously. There is a tendency in the human mind to yield to outward suggestions, and, if an idea or image is positively suggested to the witness and impressed upon his mind, he may under special circumstances be induced to adopt it. Everybody is aware that we perceive, that is, we really see much more than is really taken cognizance of by our organs of sense. In such cases if the cross-examiner presses upon the mind of the witness questions positively suggestive of the true idea or image, it tends to evolve in the witness, the idea or image of the events foreseen and calls them to his recollection in their true or original form by a sort of reaction. It dispels the gloom crowding upon his recollection from other morbid states of mind; and the original impressions are revived, and represented to his mind in their original light or vividness. In case of a suggestive question put by the cross-examiner to the witness (under cross-examination) the impression which is directly produced by the suggestion can arouse "the original image, owing to the association of ideas. The suggestion of an idea or image offered in a positive form, sets in action a mental association previously existing in the witness's mind, which had become vague or confused on account of the morbid state of his memory. Put to him your own suggestions as to those circumstances (on which he is being cross-examined) and he may find relief in accepting your suggestions instead of straining his imagination to invent a suitable answer. It is always easier to give your assent to any suggestion answering a purpose than to invent an ingenious answer by exerting your imaginative faculty. Besides, your suggestions may prevent him from getting an opportunity to reflect. It will engage his attention and he will not have the leisure to conduct his answers, or to see how they share with the story he has already told. However, then your skill ought to be to throw out such designed suggestions as may apparently suit the occasion, and, tempt the witness to adopt it though in reality it may prove destructive of his narration and involve him into further difficulties.

Leading, suggestive, progressive, cumulative and developing questions are illustrated by the following:

From the cross-examination of WA Cadbury by Sir Edward Carson KC:

1. Is it a fact that San Thome cocoa has been a slave grown to your knowledge for eight years?-Yes.
2. Was it slavery of a very atrocious character? -Yes.
3. Men, women and children taken forcibly from their homes against their will? -Yes.
4. & (5) Were they marched like cattle? ...I cannot answer that, quite.
6. Were they labeled when they went on board the ship? -Yes.
7. How far had they to march? -Various distances. Some came from more than a thousand miles, some from quite near the coast.
8. Never to return again? - Never to return.
9. From the information which you procured did they go down in shackles? - It is the usual custom, I believe, to shackle them at night on the march.
10. Those who could not keep up with the march were murdered? -I have seen a statement to that effect.
11. You do not doubt it? -I do not doubt that it has been so in some cases.
12. The men, women, and children are freely bought and sold? - I do not believe, so far as I knew, that there has been anything that corresponded to the open slave market of fifty years ago. It is done now more by subtle trickery and arrangements of that kind.
13. You do not suggest that it is better because done by subtle trickery? No.
14. The children born to the women who are taken out as slaves become the property of the owners of the slaves? - I believe that the children born on the estate do.
15. Was it not the most cruel and atrocious form of slavery that ever existed? - I cannot distinguish between slavery and slavery. All slavery is atrocious.
16. Knowing it was atrocious; you took the main portion of your supply of cocoa for the profit of your business from the islands conducted under this system? -Yes, for a period of some years.
17. You do not look upon that as anything unusual? -Not under the circumstances.
18. (Sir E Carson quoted from a report of the board of Messrs. Cadbury: 'There seems little doubt that public opinion would condemn the existing conditions of labour if the facts could be made known.')
19. Does that represent your view? -Yes.
20. Would there be difficulty about making the facts known? - There would be no difficulty.

21.If you had made public the facts, public opinion would have condemned the conditions of labour and you would not have gone on?- I think so.

Comments- Question Nos 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 etc., are leading questions.

Question Nos 3, 9, 12, 14 are suggestive questions.

All questions adopt the manner of progressive and developing interrogation.

## **15. CROSS-INTERROGATIONS**

When a witness refuses to admit a certain point, or denies it, or as is so common in this country, takes refuge in a general evasive reply, the only remedy is to take him in the opposite way, and this is a plan which rarely fails in the end. The matter can be best explained with an illustration. A, on being asked if a certain signature is his, and being unwilling to admit it, says 'It looks like mine,' he is then asked: 'Is it your signature?' He replies, 'I don't know,' or 'it looks something like mine.' It would be very unsatisfactory if one could not carry the matter any further for the witness attempts to hedge himself within these evasions. He should then be asked questions as to the points wherein he draws the distinction between the signature shown to him, and his own, as to the formation of the letters, the curves and the style. Should no satisfactory result be obtained from these replies, he should be asked: 'Are you prepared to swear that this signature is not yours?' It will be found that, as a rule, he will refuse to swear it is his. One's object will be obtained for one can then satisfactorily urge that he was not prepared to swear it was not his signature. When the question of signature is important, it will also be found very effectual to submit to the witness, several of his signatures, both those which are admitted to be genuine and those which you wish to prove is his in such a way that he cannot gain the least inkling as to the document to which they are subscribed, and one may even get the signature, one wishes to prove, admitted to be genuine.

A. 'I cannot swear it, but I do not recollect ever saying it,'

Q. 'Or representing it?'

A. 'I do not recollect it.

Q. 'Will you swear that you have not?'

A. 'I will not swear it, but I do not recollect it.'

Q. 'You were applied to by some person or other, very soon after you were discharged from the princess, were you not?'

A. 'Not very soon after'.

Q. 'For example, within half a year?'

A. 'Not six months; it was more than six months. It was nearly one year after I had left her service.'

Q. 'You are understood to say, you were applied to, to know what you had to say with respect to the Princess, is not that so?'

A. 'One year after I had left her service.'

Q. 'Did or did not somebody apply to you in order to know what you had to say with respect to the Princess, about a year after you left the service of her Royal Highness or at whatever period?'

A. 'One year after.'

This manner of cross-interrogation continued for days. Here is an example of what later followed relating to the proper introduction, or cross-questioning upon an instrument written by the witness:

From the cross-examination of Louisa Demont, in Queen Caroline's trial-

Q. 'Is that your writing?' (A letter being shown to witness, folded so that she might see the last line and a half).

A. 'It is not exactly like my writing.'

Q. 'Do not believe it to be your writing or not?'

A. 'It is not exactly like my handwriting?'

Q. 'Do you believe it to be your handwriting?'

A. 'I do not recollect having written it, nor do I think that it is exactly like my character.'

Q. 'Do you believe it to be your handwriting, yes or no?'

A. 'I Do not think it is exactly my handwriting : I do not recollect having written it.'

Q. 'Do you believe it to be your handwriting, yes or no?'

A. 'I cannot decide whether it is my handwriting; it is not quite like it; and I do not recollect having written it.' Q. 'Do you believe it to be your writing?'

A. 'It is not exactly like my handwriting?'

Q. 'Do you believe it to be your writing?'

A. 'I cannot tell what else to answer; I cannot answer a thing of which I am not sure.'

The witness, while within her rights, was not asserting something when she was not sure of it, nevertheless Demont has resorted too frequently to the tune of the damaging answer, 'I do not recollect.'

The manner of questioning, however, was somewhat improper as will be shown.

By a Lord: 'You are not asked whether you know it to be yours, but whether you believe it to be yours?'

A. 'I cannot say positively that it is not my handwriting, but I do not believe it is.'

Mr. Williams: 'How much of that paper that has been before you so long, was submitted to your eye during the time you have given the answers you have given?'

A. 'A line and a half.'

Q. 'Before it was folded down, as it now is, did you not see higher up in the paper several lines more than that line and a half?'

A. 'When they presented it to me, there I saw something more, but I do not recollect how many lines, nor what it was.'

Q. 'Do you mean to say, that when the counsel showed you the paper, before it was in the hands of the Interpreter, it was not near enough for you to see the writing?' -...

## **16. INTIMIDATING QUESTIONS**

Questions which cause shame or anger in the witness and are put by coercive and confusing manner are intimidating questions.

## **17. INCRIMINATING QUESTIONS**

The questions, the tendency of which expose the witness or the wife or the husband of the witness, to any criminal charge, penalty or forfeiture, I are incriminating questions.

## **18. METHODS OF NARRATION AND THEIR ADVANTAGES AND DISADVANTAGES**

A witness may be examined either by allowing him to narrate the facts in this own way or by making him answer questions one by one. A witness about to narrate facts may be left to tell his story in his own way; or it may be drawn from him by questions put to him. The former method of telling the story is open to these objections where the witness may not think enough to call to mind all he can relate; from carelessness or oversight he may omit to mention some circumstances; he may think or fancy the circumstances he withholds is not material to a proper understanding of the story; indeed, he may think or fancy that his story will be best understood if it is not headed with matters which he vi.e.ws as redundant but which nevertheless is essential to see the facts in their proportions and color.

### **(a) MERITS AND DEFECTS OF THE FORMER METHOD**

Another danger is that the witness will confine himself to things, which he himself saw, heard, or did, but will diverge into hearsay that which he has heard someone else say, were seen, heard or done. Supposing, besides, the witness does not wish to speak the whole truth, it is obvious his wish will be promoted, by leaving him to tell his tale in his own way.

### **(b) MERITS AND DEFECTS OF THE TTER METHOD**

In the other method of obtaining a relation of facts, the one by question and answer, the object of the interrogator is to get from the witness all he, himself saw, heard, said and did, excluding hearsay, and other irrelevant matter. And the questions being framed with a view to this excision, if the witness confines himself strictly to the questions addressed to him, his answers will contain hearsay or their irrelevant matter. However, according to this method, the witness' narrative consists solely of his answers to the questions put to him, the obvious inconvenience is that if all the questions required to bring out the witness's whole story are not put to him, may in this evidence leave out circumstances important to be known.

## **19. DO NOT ASK A QUESTION TOO BROADLY**

Carefully avoid asking for much at the time. Get little answers to little questions, and you will find as a rule that answers are strung together like a row of beads within the man; and if you

draw gently, so as not to break the thread, they will come with the utmost ease and without causing the patient the slightest pain. In fact, till he hears you sum up his evidence, he will have no idea of what he has been delivered.

Let him see that your questions are of the simplest possible kind, even so simple and so easily answered, that it seems almost stupid to ask or answer them. 'Of course', he will say to one; 'Certainly', to another; 'no doubt about that', to a third and so on. Presently you slip one in, that is neither 'of course' nor 'certainly', and get your answer. Look upon him as a lump of human nature in the witness-box, out of which you may by ingenuity and skill extract something, be it even so small, which you can find nowhere else in the case.

## **20. DO NOT PLACE WHOLE POINT BEFORE WITNESS IN ONE QUESTION**

Whenever your question is too large, the answer will be worthless.

Q. 'Were you present at the meeting of the trustees when an agreement was entered into between them and the plaintiff?'

A. 'Yes.'

Q. 'Will you be kind enough to tell us what took place between the parties with reference to the agreement that was then entered into between them?'

A. This is instance of verbosity, which shows that in putting questions, long drawn sentences should be avoided. The more neatly a question is put the better, as it has to be understood not only by the witness but also by the jury. All that was necessary to be asked might have been put in the following words:

Q. 'Was an agreement entered into between the trustees and the plaintiff?'

A. 'What was it?'

## **21. DO NOT PUT QUESTION TOO DIRECTLY**

The probability is that the witness will know your difficulty and avoid giving you exactly what you wish. If not altogether straightforward (and for such witnesses you should always be prepared) he will be on the alert, and unless you circumvent him, will evade your question.

Rule explained-On this point Harris in his work 'Hints on Advocacy' says:

A series of questions, not one of them indicative of, but each leading up to the point, will accomplish the work. If the fact be there, you can draw it out, or if you do not so far succeed, you can put the witness in such a position that from his very silence the inference will be obvious.

One of the greatest cross-examiners of our day advised a pupil while cross-examining a hostile witness upon a point that was material, to put ten unimportant questions to one that was important, and when he put the important one he put it as though it were the most unimportant of all. And when you have once got the answer you want leave it. Divert the mind of the witness by some other question of no relevancy at all.

There is no occasion to emphasize an answer while the witness is in the box, if the question is properly put. The time for that will come when you sum up or reply. If the witness sees from

your manner that he has said something which is detrimental to the party for whom he gives evidence, unless he is an honest witness he will endeavor to qualify it, and, perhaps, succeed in neutralizing its effect. If you leave it alone, it may be that your opponent may not perceive its full effect until it has passed into the region of comment.

In a case of murder, to which the defense of insanity was set up, a medical witness was called on the part of the accused who swore that in his judgment the accused at the time he killed the deceased was affected with homicidal mania, and was urged to the act by an irresistible impulse. The judge then asked him, 'Do you think accused would have acted as he did, if a policeman had been present?' to which the witness at once answered in the negative on which the judge remarked, 'Your definition of irresistible impulse then must be an impulse irresistible at all times except when a policeman is present'.

No doubt there is some degree of fascination in solving a mystery but when you find that the explanation of it is immensely to your disadvantage, you will not really enjoy the quiet smile of your opponent when he finds that you have cleared up something which he could not, and which had been purposely left for the exercise of your ingenuity and inquiry. 'If you don't know whether the ice will bear, you had better not venture on it.'

The following was the cross-examination of an intelligent police constable: That was the straightforward way of putting it. The judge liked straightforwardness. Jury admits the young counsel's jaunty manner, and the police constable likes to be dealt with without any attempt to circumvent him. However, that is a very dangerous question for the accused. It would cost him his liberty.

Q. 'Why did you suspect him?' asked counsel.

A. 'I know he was one of the worst thieves we got.'

Mark the impression that the question and the answer would have made upon the jury. How any answer to such 'a question would benefit the accused, it is impossible to know.

The following is an alibi which was set up in a charge of murder:

It was alleged that the prisoner had slept on the night of the murder, in a cottage a great many miles away from the scene, and that he was in bed by a certain hour. The tenant of the cottage with whom the prisoner was lodged was called by the Crown and said that the prisoner was not at home on the particular night. It was considered advisable to break her down during cross-examination, which was to this effect:

Q. 'How do you say he did not come home that night?'

A. 'Because I sat up.'

Q. 'But might he not have come in and you not have heard him?'

A. 'He could not.'

Q. 'You might have been asleep?' A. 'I was not asleep.'

Q. 'How long did you sit up without going to sleep?'

A. 'Until four o'clock in the morning.'

Q. 'How do you know he did not come in while you were asleep?'

A. 'Because I looked in his bedroom to see if he had been in and his bed had not been slept in.'

## **22. NEVER ASK A QUESTION UNLESS SURE OF THE ANSWER**

'There is the old theory, never ask a question unless you are sure of the answer, but that would destroy a good deal of cross-examination. No counsel should ever risk an important question unless he knows and feels the question is proper and right in its form, having regard to form only. I will tell you why this is a dangerous thing. Counsels on the other side are waiting for an opportunity at every turn to pass of their client if he is in the hands of a skillful cross-examiner. Counsel gets up very often and objects; he is asked, what is your objection? 'Well, I object to the form of the question.' It may or may not be a good objection but you have defeated by your objectionable form of question, that which you have been laboring to obtain for 15 minutes or half an hour. How did you do it? The witness has stopped, but has heard the question and he is given a moment or two of thought, and he knows what you are driving at, no matter how cleverly you have put it. And by the time you get back to the question, the witness has got his 'mind', and you get your answer favorable of course to the opposing party.

In a criminal case, especially in a capital case, so long as your cause stands well, ask few questions; and be certain never to ask any the answer to which, if against you, may destroy your client, unless you know the witness perfectly well, and know his answer will be favourable, or unless you will be prepared with testimony to destroy him if he plays traitor to the truth and your expectations.

## **23. AVOID EQUIVOCAL QUESTIONS**

An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it always leads to, or excuses an equivocal answer. Singleness of purpose clearly expressed is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunningness but by the light of truth, or if by cunningness it is the cunningness of the witness and not of the counsel.

## **24. Do NOT REPEAT QUESTIONS**

During cross-examination, though sometimes by sheer repetition you may be able to unnerve a witness and get the truth out from him. Let your questions be couched in simple and homely phrases. Avoid verbosity which verges on the ludicrous. While conducting a cross-examination do not put your questions with eyes fixed on the ceiling. You may feel that that it is a very stylish thing to do, possibly because you have seen some senior advocate effecting that pose. However, what may be posed as stylish for a senior may be childish for a junior.

## **25. TRY TO ELICIT 'YES' REPLIES**

Arrange your questions in such a way that the witness cannot but answer 'yes'. This is not so simple as it seems and is practically the sum and substance of all the rules given above and to follow later for the conduct of an effective cross-examination. I should prefer to call this technique of cross-examination the Socratic approach to cross-examination.

## **26. ART OF PUTTING ILLUSTRATED QUESTIONS**

Mrs. Bartlett was tried for the murder of her husband by poisoning. Rev Dyson was also suspected to be *particeps criminis* and the cross-examination of Dyson by Clarke ranks as a forensic feat. The cross-examination is reproduced here to give an idea of the forms of questions which may safely be termed as insured.

The following is the cross-examination of Dyson:

Clarke began his questioning in a quiet, even tone. The spectators and perhaps the Rev Dyson too waited for the storm that never was to break.

'Whatever your relations were with regard to Mrs. Bartlett, they were relations that were known to her husband.'

'Oh yes.'

'And did you down to the last day of his life endeavour to reciprocate his friendship and to deserve his confidence.'

'I did.'

'Were you sincerely solicitous for his welfare?'

'I was.'

'And do you believe that every day of that illness you and his wife were both anxious for his welfare and tried to save him?'

'I do.'

'You became aware -at a very early period of your acquaintance that Mr. Bartlett had peculiar views on the subject of marriage?'

'Yes.'

'Did he ask you whether you thought the teaching of the Bible was distinctly in favour of having one wife?'

'He did.'

'Did he suggest you that his idea was that there might be a wife for companionship and a wife for household duties?'

'He did.'

'He suggested to you that a man should have two wives?'

'Yes.'

'That would have struck you as a most outrageous suggestion, would it not?'

'A very remarkable suggestion.'

The scandalized judge could not restrain himself.

'Did it not strike you', he asked 'as an unwholesome sort of talk in the family circle?'

'Not coming from him, my lord', 'the Reverend Dyson answered. 'He was a man who has some strange ideas.'

This answer to the Bench was of immense value to Clarke. It furnished the support for the extraordinary story which Mrs. Bartlett has told to Dr. Leach. Before anyone could make his mind, he would have to be independently and thoroughly convinced that Edwin Bartlett had some very strange ideas indeed.

'Did he ever make reference,' Clarke asked the Reverend Dyson, 'to marriage between you and Mrs. Bartlett after he should be dead?'

'He made statements which left no doubt in my mind but that he contemplated Mrs. Bartlett and myself being ultimately married.'

In strict accordance with his policy of steering clear of any head on dash, Clarke made a studiously indirect approach to a dangerous part of the Reverend Dyson's evidence - his assertion that he had been told by Mrs. Bartlett of an internal ailment which caused her husband spasms and was shortening his life. Clarke neither contested nor admitted his assertion. He simply took steps to demonstrate that such statements might have been made innocently.

'You told my learned friend that you have seen Mr. Bartlett put his hand to his side and complain of some convulsive pain?'

'Yes.'

'One more than one occasion?'

'Yes.'

'When his wife has been there?'

'Yes.'

The first point was made. Clarke moved swiftly on.

'Did he ever mention the possible duration of his life?'

'I think he did.'

'When?'

'I cannot say.'

'Was it not when you were on holiday at Dover?'

'I cannot swear that.'

On matters which did not implicate him personally, the Reverend Dyson was scrupulous to a fault.

At Dover did he mention something about his condition?'

'I think so.'

'What was it?'

'He said he was not the strong man he once was.'

'Did he say what was the cause? '

'He attributed it,' the Reverend Dyson said, 'to over work.'

The second point was made. If the prisoner had indeed talked of an internal disease, there has been signs that might excuse such a conclusion; if she had indeed talked of it shortening his life, he himself had been disturbed about his health.

Her remarks if ever made no longer seemed so damning.

Clarke now struck the preliminary notes of what has been previously catalogued among his major themes. He began to set the stage for his theory of suicide.

'You were with Mr. Bartlett, were you not, at the very beginning of his illness?'

'I was.'

'Before this time, had he appeared to you to be getting into an ailing and low condition?'

'He seemed very much worn out at night when he returned.'

'Very weary, very depressed, complaining of sleeplessness?'

'During the actual sickness?'

'Yes.'

As that sickness were on, did he become more depressed?'

'He varied', the Reverend Dyson said.

'You have seen him crying, have you not?'

'Once.'

'When was that?'

'The Monday in Christmas week.'

At that time was he talking about not recovering?'

'He spoke very little.' I

Clarke tried another way round.

'Is it not the impression on your mind that at that time he thought he would not recover?'

'Yes, I have that impression.'

'When you went on the following Sunday, was he not even worse?' The Reverend Dyson demurred.

'No, I thought he was brighter. But...'

'But?'

'He contradicted himself.'

'How?'

Then it came out: the perfect answer for Clarke's purpose.

'Well, he asked me whether anyone could be lower than he was without passing away altogether.'

In print, the author can italicise or underline. In court, counsel must use other means for emphasis.

'He asked you whether it was possible for a man to be lower than that without passing away altogether?'

'Yes.'

'According to that expression, he was thinking of himself as one actually on the edge between life and death?'

'Yes.'

Thrice had the Reverend Dyson said it: threefold had been its impact on the jury.

Very grave, very firm, but still without heat or rancour, Clarke now drew the witness to the central point of all. His questions on his subject were deliberately few and heavily insured against an unexpected answer.

'Did you mention to Mr. Bartlett that you had got the chloroform?'

'Mr. Bartlett? No.'

'You understood that Mrs. Bartlett did not desire it to be mentioned to him?'

'Not specifically the chloroform', replied the Reverend Dyson, 'But the affliction for which she wanted it.'

The opening was no larger than a crack, but the able cross-examiner needs no more.

'Then she never asked you not to mention you had got the chloroform?'

'No, But I think', the minister characteristically added, 'I ought to state, in justice to myself, that there was a visitor there and I could not give it to her in his presence.'

The Reverend Dyson urge to clear himself and intervened again. Now the trick was on the table for the taking.

At all events, she had not asked you to keep it secret?'

'No.'

Although he would have hardly dared to hope so at the time, the Reverend Dyson's ordeal was drawing to a close. On further matters Edward Clarke was done.

'You said, did you not, that you threw away the bottles you had bought from the chemists' shops on Tooting Commer as you were going to church on January 3rd?'

'I did.'

'Were you then in great anxiety and distress about your position?'

'I was.'

'You were afraid the effect of your having bought the bottles might get you into trouble?'

'Precisely.'

'You had in your mind what might happen to yourself?'

'What might have been the cause of Mr. Bartlett's death?'

'What might happen to yourself?' Clarke quietly insisted.

'The thought was in my mind, 'the Reverend Dyson said, 'that possibly the chloroform I had bought had been the cause of Mr. Bartlett's death.

'And you thought you would be ruined if the matter came out.'

'I thought I would be ruined if my fears were true.'

'That is, if you were associated with the matter?'

'Yes 'said the Reverend Dyson, 'I saw that danger.'

Here was another solid gain for the defense.

### **Witness Handling**

#### **CASE 1: STATE V. MONTY KHANNA**

Prepared By Dr Aman Hingorani

#### **Note for Participants**

You will find attached:

1. Statement of Offence
2. Witness Statements (three prosecution witnesses and three defence witnesses)
3. Relevant Sections of the Indian Penal Code, 1860
4. Ethical Exercise
5. Prior Inconsistent Statement exercise

The instructions given might not conform to actual practice. For instance, one may have to cross examine the accused in the exercise while in actual practice, an accused in a criminal case is not cross examined but is required to give his or her statement under Section 313 Code of Criminal Procedure. We make these assumptions purely for the purpose of the exercise, so as to run the exercise within a particular methodology.

#### ***STATE v. MONTY KHANNA***

#### **CHARGE**

Monty Khanna, son of RadheyShyam Khanna, is charged as follows: STATEMENT OF OFFENCE

ASSAULT AND CRIMINAL FORCE WITH INTENT TO OUTRAGE AND INSULT MODESTY OF WOMAN, contrary to Sections 354 and 509, Indian Penal Code, 1860

#### **PARTICULARS OF OFFENCE**

You, Monty Khanna, assaulted and used criminal force with the intention to outrage and insult the modesty of Ms. Kashish, daughter of Mr. Zorawar Singh, and intruded upon her privacy on 31 December Yr-1 at the Happy Hotel, New Delhi

#### **STATEMENT OF KASHISH**

1. My name is Kashish Singh. My father's name Zorawar Singh. I am 19 years old and my residential address is Flat No. 5B, Janakpuri, Delhi.
2. I have two sisters, both younger to me. One is aged 16 years and the other is aged 14 years. My father died one year ago. My mother and my paternal grandmother stay with us. I am the sole earning member of the family.

3. I have been working in a travel agency known as Honeymoon Travels Ltd. since December 15, Yr -1. I am the personal secretary to the Director of the company. I was given to understand at the time of my appointment that in this line, we employees are expected to stay back late at work if required.
4. I know Monty Khanna who is the personal secretary to the Managing Director of the company. He is about 40 years old. He is married and has a daughter my age. He has been with the company for the last 15 years. Monty Khanna was very friendly when he met me. Rather, he was over friendly. He used to always compliment me when he saw me. He told me how nice my hair looks and how smooth and fair my complexion was. He always wanted to take me out for coffee. On my birthday on December 21, Yr- 1, he even tried to hug me. I was surprised at such familiarity. He just laughed at my awkwardness and said that I should consider myself lucky as it was not every girl who could get helped by an influential person like him. I did not say anything or complain about him as I thought that maybe he is like that by nature. Also, I had just joined the job and he could have me thrown out of job as he had been there for 15 years. Nobody would believe me as he was married and had a good reputation.
5. On December 31, Yr- 1, we all employees were asked to attend the office party organised to celebrate New Year's eve at Happy Hotel. Monty Khanna told me in the afternoon that he would pick me up by 7 pm so that we could reach the Hotel by 8 pm, as required. I was hesitant to go with him but had no option as I do not have a car and did not want to travel alone at night using public transport. Also, he had his driver with him.
6. As soon as I got in his car, Monty Khanna told me that I was looking gorgeous in my saree. He had that funny look in his eye. I tried to maintain a normal conversation. We reached the hotel at about 8.15 pm.
7. The party was organised in the Easy Life restaurant in the top floor of the hotel. As soon as we got into the lift to go to the top floor, Monty Khanna tried to hold my hand. I pushed it away and told him to control himself. He pulled me towards him and tried to kiss me. He said we should enjoy ourselves and that nobody would find out. I started crying for my mother. I told him that I would scream if he came near me. He then calmed down. I was too shocked and upset at his conduct to say anything.
8. On reaching the top floor, I rushed out of the lift, scared and terrified. The manager of the restaurant was surprised to see my fallen face. He asked me what the matter was but I kept quiet as I was so embarrassed.
9. Throughout the party, Monty Khanna was eyeing me. I felt uneasy about it. I left the party early and went home. I was too ashamed and worried to tell my mother about the incident. What she might think. I could hardly concentrate at work. I wanted to kill myself because I would have to see Monty Khanna at work every day.
10. Next day at work, I did not meet Monty Khanna. I was tense the whole day and broke down when my colleague, Poornima, asked me what was the problem? I told her about it. She was very angry and told me to complain to the Managing Director immediately about Monty Khanna.

11. After a week, I told my mother about it. After all, if I kept quiet, he would behave like that with someone else. My mother talked to my uncle, with whom I went to the police and lodged my complaint.

Signed ..... Dated ..... .

### **STATEMENT OF POORNIMA**

1. I, Poornima, w/o Rajesh Roshan, r/o 565, Rohini, Delhi, work in Honeymoon Travels Pvt Ltd as the receptionist. I have been working there for two years now.

2. I know Kashish and Monty Khanna as we work in the same company. Kashish joined the company very recently, only in December Yr - 1. Monty Khanna was working years before I joined the company.

3. I am friendly with Kashish, just like I am with other colleagues. We have often had lunch together. Once, we went out shopping as well. Ever since Kashish joined the company, she seemed disturbed about Monty Khanna's behaviour towards her. They had to often stay back late in office for work. Monty Khanna was trying to be too friendly with her, and even flirt with her. He often asked her out. One day, when he gave her lift home in her car, he even tried to touch her cheek and held her hand. She did not tell anyone about Monty Khanna's misconduct as she did not want to loose her job. Kashish also found out on Christmas Eve of Yr - 1 that Monty Khanna was married and had children.

4. On January 1, Yr 0, Kashish came to the office, very nervous and tense. She obviously had not slept the entire night. I tried to talk to her several times. Eventually, during coffee break at about 4 pm, she started crying and told me, in a disjointed manner, that Monty Khanna had tried to misbehave with her the previous evening in the lift of Happy Hotel. I did not go to that party as I was celebrating with my husband. I consoled her and told herto report the matter to the higher officials in writing. She did not want to tell her family as she felt too embarrassed about it.

Signed .....Dated . . . . .

### **STATEMENT OF RAJIV KAPOOR, MANAGER, HAPPY HOTEL**

1. I, Rajiv Kapoor, son of. Ramesh Kapoor, resident of 55 Patel Nagar, Delhi, work as Manager, Easy Life restaurant in Happy Hotel, New Delhi. I have been working there for about 5 years now.

2. I know Monty Khanna. He is personal secretary to the Managing Director of Honeymoon Travels Pvt Ltd. Monty Khanna often comes to the restaurant. Each time he comes to the restaurant, he is accompanied by a different young lady. He is a lively man and often gets intimate with the lady accompanying him. Such behaviour is normally considered objectionable by the hotel management but as Honeymoon Travels Pvt Ltd. is a good client of the hotel, I don't think it is my business to intervene.

3. On New Year eve, a party was organised by Honeymoon Travels Ltd at the restaurant. Monty Khanna came to the party accompanied by a young lady who I had not seen earlier. She stepped out of the lift, nervous, harassed and upset. I asked her whether I could help her. She looked away and joined the party. I saw her leave shortly. Monty Khanna left with her.

## **STATEMENT OF MONTY KHANNA**

1.I, Monty Khanna, son of RadheyShyam Khanna, resident of 44, Greater Kailash I, New Delhi work in Honeymoon Travels Pvt Ltd for the past 15 years. I am the personal secretary of the Managing Director of the company. I am of good character and reputation in the community. My employers can vouch for me that I have been an exemplary employee and enjoy a good professional relationship with all the staff.

2. That I am 40 years old and am married. I have a 20 year old daughter. I know Kashish who just joined the company in December Yr - 1 as personal secretary of the Director of the company. As she is so young and inexperienced, I tried to encourage her and help her. After all, she is of the same age as my daughter. I have always had fatherly feelings for her. She too always looked up to me for encouragement.

3. I became familiar with Kashish because I often used to invite her for a cup of coffee or a cup of tea. Sometimes we have to stay late in the office but she never objected to anything. Since she does not have a car, I usually gave her a lift home in my car. She was always grateful for that. We had such a warm, affectionate relationship. In fact on her birthday on 21 December, she gave me a hug to express her attachment to me.

4. During my interaction with Kashish, I discovered that she was keen for promotion in the company. She is an intelligent and able young lady. I encouraged her to improve her position by showing willingness and doing extra work from time to time. That would impress her managers and might even get attention of the Managing Director. She jokingly said to me that she might even get promoted to my job soon. I replied that the company would have to fire me first. Again I was joking with her but I realise now that she was not joking - she is a very ambitious woman who will stop at nothing to achieve her goal.

5. A day before Christmas, we got late at work. Kashish asked me to give her a lift home. On the way in my car she began to talk to me about her private life. She started talking to me about her intimate thoughts. She was depressed because she had no man in her life. She was emotional and had tears on her cheeks. I reached across and wiped them from her face. I felt sorry for her and my actions were instinctive in a fatherly fashion. She held my hand for a long while and said how she would like to have a man like me and she had dreamt of being with me. I was taken aback by this. I told her that I was married and had a daughter. She got very upset and disturbed on learning this.

6. Since that day I have tried to be kind to her. I realise that she is going through a difficult emotional time. I have spent time with her and encouraged her. Her behaviour towards me, however, has become very odd. She often sits and day dreams at her desk. She looks at me differently.

7. The office organised a New Year Eve party at Happy Hotel on 31 December Yr - 1. I offered Kashish that I would pick her up as I knew she had no car. She happily agreed. We had lighthearted exchanges in the car. My driver, Sanjay, was driving the car. We reached the hotel about 8.15 pm and took the lift to Easy Life restaurant on the top floor of the hotel. Suddenly in the lift, Kashish came into my arms and tried to kiss me. I firmly pushed her away saying that I do not appreciate such conduct. Kashish got very upset at my firm stand.

She began crying saying I was uncaring for her feelings. She threatened me by saying that I would regret my actions and then stormed out of the lift. I followed her.

8. Kashish was quiet and subdued in the party. Though I had rebuked her, I was keeping a watch on her as I did not want her to do anything drastic. I tried to calm her by telling her that I did have feelings for her, she was an attractive woman, sometimes one has to be patient - the future would bring emotional satisfaction and we could continue our good relationship. She was still upset and angry when she left the party. I followed her and suggested that I would drop her somewhere near to her house. She did not say anything but walked in the direction of my car. My driver, Sanjay, opened the door for her and I joined her on the back seat. During the journey back she had calmed down and we spoke about our day and the work in a normal manner. We said our goodbyes in our normal familiar way.

9. I only found out about her allegations about 10 days later when the Managing Director called me in and introduced me to the police officers. I said straightaway that there was a mistake here - and the Managing Director agreed. He said he would be speaking to the company's lawyers to sort this out.

10. The allegations against me are false. Although I accept that there were some mutual warm feelings of affection between us I deny that I molested Kashish or intruded upon her privacy. I believe Kashish has her own personal emotional problems and, being ambitious, she is after my job. This is one way in which she can get me out of the way.

#### **STATEMENT OF SANJIV BHATIA, MANAGING DIRECTOR**

1. I, Sanjiv Bhatia, S/o Sunil Bhatia, R/o 1/8, Karol Bagh, Delhi - 5, am the Managing Director of H6neymoon Travels Pvt. Ltd. for past ten years. I know both Ms. Kashish and Mr. Monty who are working in my company.

2. I state that the working environment in my company is very good and no complaint about sexual harassment has been received in this company before the incident under dispute.

3. That on receiving the complaint, I decided to try to resolve the matter amicably. As Ms. Kashish was very agitated and disturbed at the time of making complaint against Mr. Monty, we decided to talk to her after some time and sort out the matter.

4. On making further enquiries in the company it seems that Ms. Kashish had a soft spot for Mr. Monty. The two had got on very well. Ms. Kashish seems to have made her intentions clear to fellow staff that she would like to know Mr. Monty better as she felt he was the ideal man for her. I too had noticed that whenever I needed someone to stay back late in office, Mr. Monty used to suggest Ms. Kashish. As far as I was concerned the two worked very well together. I always saw them together at one or other's desk often sitting side by side. I have noticed when leaving the office late at night that they were often the last of my employees to leave.

5. That I have never received any complaint of this nature against Mr. Monty, who has been with the company for the last 15 years. He has very good relations with other employees of the company.

### **STATEMENT OF SANJAY, DRIVER**

1. I, Sanjay, S/o Ajay Singh, R/o 21, Pitampura, Delhi, am driver of Mr. Monty Khanna for the last two years.

2. On 31 December Yr -1, I had taken Mr. Monty Khanna to the Happy Hotel. Before going to the Happy Hotel, we drove first to Ms. Kashish's house to pick her up. During the journey to Happy Hotel, they were talking to each other in the pleasant manner. After they went inside the Hotel, I waited for them in the parking.

3. Mr. Monty and Ms. Kashish came out of the Hotel around 11 p.m. I was waiting for them. Ms. Kashish came straight to the car. I opened the door for her. She looked tired and did not acknowledge or smile at me as she normally does when Mr. Monty Khanna gives her a lift home. She is a very attractive lady and was looking very pretty that night.

4. Mr. Monty Khanna got into the back with her. And the conversation between them was the usual chirpy talk. I hear that kind of talk between them but it is not my business to listen in and so I cannot say what they talk about. I just notice that they are always very happy together. They often joke that they should live with each other since they spend so much time together and it would mean I could finish my driving in the evening.

## **RELEVANT SECTIONS OF THE INDIAN PENAL CODE, 1860**

350. Criminal force -Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to. be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

351 Assault - Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

354. Assault or criminal force to woman with intent to outrage her modesty - Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine."

'354A. Sexual harassment and punishment for sexual harassment:-

(1) A man committing any of the following acts-

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

509. Word, gesture or act intended to insult the modesty of a woman - Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years, and also with fine

### **Witness Handling**

### **CASE 2: STATE V. MUKESH**

**Prepared By Dr Aman Hingorani**

**State v Mukesh**

**NOTE FOR PARTICIPANTS**

You will find attached:

1. Statement of Offence
2. Witness Statements (two prosecution witnesses and two defense witnesses)
3. Extracts of Relevant Sections of Indian Penal Code, 1860

There is no dispute that the accused has injured the complainant's eye which has caused her to be in severe bodily pain for twenty days.

The instructions given might not conform to actual practice. For instance, one may have to cross examine the accused in the exercise while in actual practice, an accused in a criminal case is not cross examined but is required to give his or her statement under Section 313 Code of Criminal Procedure. We make these assumptions purely for the purpose of the exercise, so as to run the exercise within a particular methodology.

**State v Mukesh**

**CHARGE**

Mukesh, son of Rajesh, is charged as follows:

**STATEMENT OF OFFENCE**

VOLUNTARILY CAUSING GREIVIOUS HURT, contrary to Section 322 read with Section 325, Indian Penal Code, 1860

**PARTICULARS OF OFFENCE**

Mukesh, on the 1st January Yr .... outside 345 Green Park, New Delhi, voluntarily caused Monika grievous hurt by damaging her right eye and thereby caused her to be in severe bodily pain for a period of twenty days.

**STATEMENT OF MONIKA**

I am aged 35 and mother of two children, Sanjay and Sonia. The children's father is Mukesh, aged 38. We were married for about 10 years, and the children are aged 8 and 5. We divorced in March of Yr... 1. The marriage used to be OK, although Mukesh has assaulted me many times before. There have been five occasions in Yr - 3 when I reported violence to the police but refused to make a statement. On each occasion he had punched me once in the stomach, usually after a fight about money. A policeman called Satinder always attended to my complaints. I never had a visible injury.

In July of Yr...2, I discovered Mukesh was having an affair when he told me he was leaving me for Roshni, a wealthy divorcee who runs a health club. I have no doubt she set her

sights on him and carefully stole him from me. I was very angry, and broke all the windows at the club. I am sorry that I did this, and pleaded guilty to criminal damage and was fined by the local magistrate. I have no other convictions for violence. However, I have three convictions for shoplifting in Yr...2, Yr...3 and Yr...4. I stole for the children at a time Mukesh was unemployed and we had no money. On each occasion, I pleaded not guilty and Mukesh came to court to lie for me that I had not known what I was doing because I was on medication for depression. Neither of us were believed, and I was rightly convicted, and fined.

On Christmas Day of Yr...1, the children were with me. This had annoyed Mukesh. He had wanted to see them, but I promised him that he could take them on New Year's Eve. On New Year's Eve, I phoned him at 8 a.m. to say the children were tired from a party the previous night and, so, instead of having them from 10 a.m. on 31st December Yr...1 to 10 am on 1st January Yr...0 he could have them only from 2 pm to 5 pm on 31st December Yr...1. He was really angry and hung up. He did not come to the door to collect the children, which he normally does, but beeped his horn, and they went to him.

He deliberately did not return the children until 10 a.m. on 1st January Yr 0. I was terribly worried. He would not answer his phone. When they arrived, I ran out the door. Sanjay was hugging Roshni goodbye and was tearful. Sonia was hugging Mukesh, carried in arms. Both had expensive presents to bribe the children against me: Sanjay had brand new cricket bat and Sonia was wearing a designer dress. I stood near Mukesh. He would not look at me, nor release Sonia who was singing a Hindi film song for him. I asked Mukesh to put her down. He ignored me. I reached to take Sonia, extending my arms. Without warning and in front of the children, with his left hand, he punched me straight in the right eye. The car keys, which he had in his hand, went into my eye. I was knocked to the ground. I saw him put Sonia down. Dazed, I got up and tried to smack Mukesh across the face, but missed, and ended up pulling his hair. Roshni pulled me off him, and generally roughed me up. I became hysterical, the children were crying, and Mukesh and Roshni guiltily got in the car and fled. I called the police immediately. Sub Inspector Satinder attended. My right eye is hurt very badly and I want Mukesh prosecuted and want sole custody of the children.

#### **STATEMENT OF SUB INSPECTOR SATINDER OF P. S. GREEN PARK**

On 1<sup>st</sup> January Yr... at 10.36 am I was on duty alone at the Police Station when I received a call from Mrs. Monika reporting that her former husband, Mr. Mukesh had threatened to kidnap her children and had struck her in the face. I know Ms. Monika as I have previously attended her home Yr...3 years ago in relation to five allegations domestic violence to her by Mr. Mukesh. It was always alleged he had punched her in the stomach, which he would never comment on, saying wait and see if she makes a statement, which she never did.

On arriving at her home, 345 Green Park, she was angry and tearful. Her right eye was badly damaged. Her children were crying, pleading to be allowed to keep some presents. She explained Mr. Mukesh had kept the children later than agreed, on returning them had been offensive to her, and as she was leading her daughter away from him, she had been poked in her eye by him with his car keys and he had to be restrained by his new girlfriend.

I drove to Mr. Mukesh home at 678 HauzKhas and arrested him for voluntarily causing grievous hurt and cautioned him. He said "Look, whatever you think about the other times we've met, this time even you can see what has happened. She's mad. I had to hit her. I'm sorry for it, but you would have done the same." He was taken to Green Park Police Station where he was charged at 2 p.m. Ms. Roshni, Mr. Mukesh's girlfriend, came to the police station and at 1 pm while Mr. Mukesh was in custody, spoke to me at the front desk. She told me she knew he should not have hit Mrs. Monika, but he had a temper and found Christmas without the children difficult. She asked if Mr. Mukesh could simply be released on bail. I explained he would have to go to Court.

### **STATEMENT OF MUKESH, SON OF RAJESH**

I live at 678 HauzKhas with Roshni. I used to live with Monika at 345 Green Park. We were married for ten years, from when she was 25 and I was 28. We have two children together; Sanjay and Sonia aged 8 and 5. I am charged with voluntarily causing grievous hurt to Monika on 1st January Yr...0 I deny the charge. I admit I struck her, but it was in self-defense and defense of Roshni. I only struck her once to calm her down. Feelings were running high as this was the first Christmas I had been separated from my children. Monika had refused to let me see them on Christmas Day. This upset me, but I made a great effort to remain friendly and negotiated for New Year's Eve. Overnight stay was agreed. However, early on New Year's Eve, Monika rang to say I could only have them from 2 pm for the afternoon. She said they did not really want to see me. This upset me. It was a lie. I got rather angry on the phone, said I would collect them at 2 pm and hung up.

Monika did not tell me the children were to go home for 5 pm another lie. At my home, we played together and I gave Sanjay a cricket bat and Sonia a dress. They were very happy and told me they wanted to live with me and Roshni. I did not take any calls as I did not want our short time together interrupted. I accept the phone probably did ring at 5 pm. but I did not know it was Monika. I brought the children to Monika at 10 a.m. on 1st January. She stormed out of the house and was at the car, shouting the children were late, as I pulled Sonia into my arms from the back seat. Sonia began crying. Monika was pulling at my jacket to put Sonia down. Sonia said "Daddy, Please tell mummy to be nice to us and let us live at your house".

Monika clearly heard this, and the effect was immediate and shocking. She flew at me while Sonia was still in my arms. She pulled my hair and I was losing my balance. Fearing I would fall and hurt Sonia, and in an effort to calm Monika, I instinctively struck at Monika with my left hand. My car keys just happened to be in my hands. I was not even conscious that I had the car keys in my hand. It was not an aimed punch, more of a vigorous slap or flailing. I deny that I deliberately poked the keys into her eye. I do not deny that I injured her eye. It was only one blow. It knocked her down and calmed her down. Roshni run around the car and placed herself between us to be sure Monika's madness did not start again.

When the officer arrested me, he said he understood there had been a bit of scuffle over the kids and things seemed to have got out of hand, he reckoned on both sides knowing us both. It was in that context I said what the officer recorded but I said Monika was acting madly, meaning violently, not that she is mad.

Monika is lying when she says I struck her. She attacked me. She is angry that the children want to live with me and wants to prevent my access. These are calculated lies to assist her scheme. I have never struck her, even three years ago. She can be quite dishonest if she wants, as you can see from her previous convictions. I have one conviction for a fight in a bar in Yr...6, to which I pleaded guilty and received one month's detention. I do not hit women. I do not lose my temper. I did not lie for Monika at her trials, but simply gave evidence she was on medication.

## **STATEMENT OF ROSHNI**

I am the proprietor of the health club Healthy Smile and live at 678 HauzKhas with Mukesh. I have no previous convictions.

On 31 December Yr... 0, Mukesh picked up his children at 2 pm. He had been a little irritated he could not have them for the day. They spent the afternoon with us playing with the presents. He did not answer the phone in case Monika rang to complain and disturb us. On returning the children at 10 am on 1st January, Monika was hysterical. I think she was angry at the presents and the tearful hug I received from Sanjay. She complained loudly the children were late – but what did it matter, they were safe and they had a really good time. I said to Monika not to be as spiteful as she was upsetting Sanjay. Monika called me a man-eater. Mukesh said she should calm down and apologise. And she just leapt at him. She tried to scratch his face and pull his hair. I wrestled her off Mukesh who lashed out at her to get away as Sonia was still in his arms. He hit her in the head somewhere. I am sure he did not mean it. It was instinctive, an accident. He was certainly sorry for what happened in the car when we drove away.

I asked Sub Inspector Satinder to release Mukesh on bail. I said tempers had frayed, which was not surprising as I had seen Mukesh upset over the children before. I did not say he had a temper. I was careful not to blame Monika, although I should have done, as I was trying to persuade the officer not to detain Mukesh, and though it would be more helpful to talk about generally how unfortunate the incident was, rather than blame anyone.

**[EXTRACTS OF RELEVANT SECTIONS OF THE INDIAN PENAL CODE, 1860]**

**Section 96:** Things done in private defense - Nothing is an offence which is done in the exercise of the right of private defense.

**Section 97:** Right of private defense of the body and of property-Every person has a right.....to defend

First - His own body and the body of any other person, against any offence affecting the human body.....

**Section 319:** Hurt - Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

**Section 320:** Grievous hurt - The following kinds of hurt only are designated as“grievous”:

.....Eightly - Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

**Section 322:** Voluntarily causing grievous hurt - Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said “ voluntarily to cause grievous hurt”.

Explanation - A person is not said voluntarily to cause grievous hurt except where he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

**Section 325:** Punishment for voluntarily causing grievous hurt - Whoever..... voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Interlocutory Arguments**  
**CASE 3: RAJ MALHOTRA V. SHIVANI MALHOTRA**  
**Prepared by Dr Aman Hingorani**

***RAJ MALHOTRA v SHIVANI MALHOTRA***

**Note for participants**

This is an exercise in presenting and resisting an interlocutory application for a restraint order forbidding the removal of two minor children from the custody of the Petitioner-husband by the Respondent-wife.

**You will find attached:**

1. Instructions to Counsel for Petitioner
2. Instructions to Counsel for Respondent
3. Statements of the children recorded by Guardian Judge, Delhi
4. Extracts of relevant sections of Guardian and Wards Act 1890
5. Elizabeth Dinshaw v Arvand M Dinshaw: (1987) 1 S.C.R. 175
6. Ethical Exercise

Assume the hearing is taking place on the same date as the exercise.

**In the Court of the Guardian Judge, Delhi**

**Raj Malhotra**

**PETITIONER Versus**

**Shivani Malhotra**

**RESPONDENT**

**Instructions to Counsel for Petitioner**

The Petitioner is an Indian citizen, Punjabi by origin, and presently resident of New Delhi. The Respondent is a British citizen, Gujarati by origin, and resident of London. The Petitioner met the Respondent during their MBA course in London. They fell in love with each other and their marriage was solemnised according to Hindu rites and ceremonies in London on January 15, Yr...9. The parties were blessed with a son, Rohan, on March 26, Yr...8 and a daughter, Muskaan, on April 2, Yr...6.

Differences had arisen between the parties right from the beginning of the marriage, primarily due to incompatibility. The friction between the parties grew, particularly after the birth of the two children. Fed up with frequent arguments and fights at home, the parties got their marriage dissolved by a decree of divorce on January 10, Yr...2. It had been agreed between the parties that the minor children would remain in the custody of the Respondent, with the Petitioner having temporary custody of the children on the weekends from 10 am on Saturday to 8 pm on Sunday. The decree of divorce had been passed in terms of the said agreement. The decree further directed that the party seeking to take the children out of United Kingdom would have to apply for such permission from the London Court, which might grant the same on such terms so as to ensure the return of the children. The parties were directed to contribute equally for the maintenance and education of the children.

The Petitioner states that on January 3 Yr...0, his 65 year old father in New Delhi fell seriously ill and was hospitalised. Around the same time, he learnt that the Respondent had started a live-in relationship with a divorcee, Ajay Khanna, and had, since the previous week, taken the children to reside with her in Ajay Khanna's house. The Petitioner decided that he would leave London for good and return to New Delhi. He, however, did not want to leave his children behind with the Respondent and her partner; particularly since he believed that it would not be in their welfare, morally and emotionally, to witness their mother have a live-in relationship with another man. The Petitioner knew perfectly well that the Respondent would not give him the custody of the children either. So taking advantage of the weekend custody of the children, the Petitioner took the flight from London to New Delhi on Saturday, January 10 Yr...0, along with the children. The Petitioner states that given the urgency of reaching New Delhi to be with his ailing father, he brought the children to New Delhi without applying for permission to do so from the London Court.

The Petitioner has learnt that the Respondent had then moved the London Court complaining of the violation of the Court's decree by the Petitioner. The London Court has even issued a warrant of arrest against the Petitioner on the ground of unlawful taking and restraining the children outside United Kingdom. The warrant, however, has not been executed as the Petitioner is in India. The Petitioner states that thereafter the Respondent came to New Delhi and visited the parental home of the Petitioner on January 24 Yr...0,

where the Petitioner let her meet the children for several hours. The Respondent demanded that the children be returned to her. The Petitioner refused to do so.

Apprehensive the Respondent would take the children out of his custody, the Petitioner has filed custody and guardianship proceedings before the Guardian Judge, Delhi, under the Guardian and Wards Act 1890 pleading that he is the natural guardian of the children and that the children are now in his custody, and within the jurisdiction of the Indian Courts. He maintains that given the fact that the Respondent started a live-in relationship with another man in London subsequent to the passing of the decree by the London Court, it is in the welfare of the children that they should now remain in his custody. He offers that the Respondent could meet the children whenever she visited New Delhi. The Petitioner undertakes to provide for the maintenance and education of the children. In fact, the children have already been admitted to a reputed school in New Delhi and have even made friends. The Petitioner points out that his mother is a housewife and stays at home and is quite competent to look after both the children. The Petitioner express his regret for having to violate the consent decree of the London Court but contends that in such cases, the matter has to be decided not on consideration of the legal rights of the parties but on the sole criteria of what would best serve the interest and welfare of the minor children. The Petitioner prays that it would be in the interest of the children if they are directed to remain in his custody and the Respondent be restrained from taking the children out of his custody. The Petitioner has also filed an interlocutory application under Section 12 of the Guardian and Wards Act 1890 seeking a restraint order forbidding the Respondent from removing the children from his custody pending the disposal of the matter.

The Guardian Judge has granted ex-parte the interim restraint order against the Respondent till further orders. Summons was sent to the Respondent two weeks ago for last Friday, on which day the Respondent filed her Written Statement to the Petition and Reply to the interlocutory application. The Petitioner had also been directed to produce the children before the Court on that date, which he duly did. The statements of the children were recorded by the Guardian Judge in Chambers on the same date. The matter is now listed today for arguments on the interlocutory application of the Petitioner.

**In the Court of the Guardian Judge, Delhi**

**Raj Malhotra**  
**PETITIONER**

**Versus**

**Shivani Malhotra**  
**RESPONDENT**

**Instructions to counsel for Respondent**

The Respondent has received last week summons from the Court of the Guardian Judge, Delhi enclosing a copy of the application of the Petitioner seeking custody and guardianship of the two minor children, Master Rohan and Baby Muskaan, and a copy of the interlocutory application seeking a restraint order forbidding the Respondent from removing the children from the custody of the Petitioner. The summons were accompanied by an order passed by the Guardian Judge, granting such restraint order ex-parte till further orders. It was indicated in the said order that the interlocutory application of the Petitioner would be taken up for hearing on the coming Friday on which date the Petitioner also had been directed to produce the children in Court.

The Respondent immediately filed her Written Statement and her Reply to the said interlocutory application of the Petitioner under Section 12 of the Guardian and Wards Act, 1890.

The Respondent has pleaded in her Written Statement that as per the decree of divorce of January 10, Yr...2 passed by the London Court, the minor children would remain in her custody, with the Petitioner having temporary custody of the children on the weekends from 10 am on Saturday to 8 pm on Sunday. The decree further directed that the party seeking to take the children out of United Kingdom would have to apply for such permission from the London Court, which might grant the same on such terms so as to ensure the return of the children. The parties were directed to contribute equally for the maintenance and education of the children.

The Respondent states that in terms of the said decree, the Petitioner duly returned the children to the Respondent when he took them for weekend custody. The children had gone to stay with the respondent on January 10 Yr...0 and were to be returned to her on January 11 Yr...0 at 8 pm. When the children did not return, she frantically tried to contact the Petitioner, only to learn from his neighbours that he had left for India with the children. Accordingly on January 19 Yr...0, the Respondent applied to the London Court for the warrant of arrest against the Petitioner on the ground of unlawful taking and restraining the children outside United Kingdom. The said warrant still stands outstanding against the Petitioner.

The Respondent pleads that like the Petitioner, she too is the natural guardian of the children, and more important, she is the person entitled to their custody under the order of a competent foreign Court, the certified copies of which she annexed to her Written Statement. She contends that she has reason to believe that the Petitioner's father was not unwell as

stated by the Petitioner in his application and that he had cooked up the story about his father's illness merely to justify his sudden flight from London. She adds that the Petitioner has shown scant respect for the decree of the London Court and that his conduct of abducting the children does not inspire confidence that he is a fit and suitable person to be entrusted with the custody and guardianship of the children. The Respondent states that the children were born, brought up and educated in London and are still accustomed and acclimatized to the place of their birth. The children were going to school in London and are presently losing out on their studies on account of the reprehensible conduct of the Petitioner.

The Respondent admits that she is living with Ajay Khanna, but states that she ensures that the children do not witness any inappropriate or embarrassing situations. She points out that it does not necessarily outrage sensibilities in London for a divorcee to have a partner, nor does she consider it to be morally depraved. Rather, Ajay Khanna is very fond of the children and tries to give them fatherly love. Moreover, the minor daughter, Muskaan, is a growing up girl and needs the constant attention of the Respondent. It would be cruel to separate Rohan and Muskaan from each other at such tender age, more so, because they are each other's best friend.

The Respondent states that she has to report back to her job in London next week and cannot stay in New Delhi to contest the custody and guardianship case filed by the Petitioner. She further submits that if she is restrained from taking the children back to London, the Petitioner would gain an advantage by his wrongdoing and that it would encourage the tendency of sudden and unauthorised removal of children from one country to another. The Respondent offers that should the Petitioner withdraw the instant matter and let her take the children back to London, she would co-operate with the Petitioner for the withdrawal of the warrants of arrest outstanding against the Petitioner and that she would raise no objection to the restoration of his weekend custody rights which have since been terminated by the London Court.

**In the Court of the Guardian Judge, Delhi**

**Raj Malhotra**  
**PETITIONER**

**Versus**

**Shivani Malhotra**  
**RESPONDENT**

**Statement of Master Rohan, son of Mr Raj Malhotra, aged about 8 years, recorded in Chambers**

Q. I am told that you have joined a new school

A. Yes

Q. Do you like your school?

A. Yes

Q. Don't you find everything strange around you?

A. No. I like being here.

Q. Have you made any friends so far?

A. Yes. Akrit and Kashish.

Q. Who else is staying with you?

A. My Daddy's parents and my sister.

Q. Do your grandparents look after you?

A. Yes. They are always around me.

Q. But is not your grandfather unwell?

A. No. He came to the airport to receive us.

Q. Does not your grandfather go to the doctor?

A. No.

Q. Who gets you ready for school?

A. My grandmother.

Q. Who cooks your food?

A. My grandmother.

Q. Has your Daddy ever hit you?

A. No. He loves me a lot.

Q. Has your Mummy ever hit you?

A. Once, when I told a lie about having done my homework.

Q. What are your hobbies?

A. I play cricket. I do painting and swimming.

Q. Who plays cricket with you?

A. My Daddy. Ever since we came here, my grandfather also plays cricket with me.

Q. Do you know any one by the name of Ajay Khanna?

A. Yes, Ajay Uncle.

Q. Who is he?

A. He is Ajay Uncle. He is Mummy's friend in London.

Q. Is Ajay Uncle nice to you?

A. Yes. He loves me a lot and gives me chocolates.

Q. Do you spend much time with your sister, Muskaan?

A. She is my best friend. We are always together.

Q. Who do you love more- Mummy or Daddy?

A. Both.

Q. Choose one.

A. (silence)

Q. Your Mummy and Daddy are living separately?

A. Yes.

Q. Who do you want to stay with?

A. Both.

Q. No, if you have to choose one?

A. (silence)

Q. If you have to choose one?

A. Daddy always plays cricket with me. I miss that.

**Note: The child is visibly distressed at being asked his preference.**

Sd/

Guardian Judge, Delhi

**In the Court of the Guardian Judge, Delhi**

**Raj Malhotra**

**PETITIONER**

**Versus**

**Shivani Malhotra**  
**RESPONDENT**

**Statement of Baby Muskaan, daughter of Mr Raj Malhotra, aged about 6 years,  
recorded in chambers**

Q. You are a very pretty girl

A. (smiles)

Q. You go to the same school as your brother?

A. Yes

Q. Do you like your school?

A. Yes

Q. Have you made any friends so far?

A. Yes. Radhika

Q. Do you like to stay here, in India?

A. Yes. But I also miss home.

Q. Which home, here or in London?

A. In London.

Q. Who else is staying with you here?

A. My brother. Daddy and Daddy's parents.

Q. Do your grandparents look after you?

A. Yes.

- Q. Are not your grandparents keeping bad health?  
A. No.
- Q. Who gets you ready for school?  
A. My grandmother.
- Q. Who cooks your food?  
A. My grandmother.
- Q. Has your Daddy ever taught you?  
A. No. But he helps me to paint.
- Q. What are your hobbies?  
A. Painting and dancing.
- Q. Do you know any one by the name of Ajay Khanna?  
A. Yes, Ajay Uncle.
- Q. Is he nice to you?  
A. Yes, he has got me two dresses and a doll.
- Q. Do you spend a lot of time with your brother?  
A. Yes
- Q. Who loves you more – Mummy or Daddy?  
A. Both.
- Q. Who do you love more – Mummy or Daddy?  
A. Both.

Q. Choose one.

A. (silence)

Q. Your Mummy and Daddy are living separately?

A. Yes.

Q. Who do you want to stay with?

A. Both.

Q. No, if you have to choose one?

A. (silence)

Q. If you have to choose one?

A. (silence)

**Note: The children were present in the Courtroom for about 30 minutes prior to being taken to the Chambers. It was noticed that Baby Muskaan sat throughout clutching the hand of the Respondent, who was constantly comforting her.**

**Sd/-**

**Guardian Judge, Delhi**

## **Extracts of relevant sections of Guardian and Wards Act 1890**

### **7. Power of Court to make order as to guardianship-**

(1) Where the Court is satisfied that it is for the welfare of the minor that order should be made -

- (a) appointing a guardian of his person or property, or both, or
- (b) declaring a person to be such a guardian, the Court may make an order accordingly....

### **8. Person entitled to apply for order -**

An order shall not be made under the last foregoing section except on the application of-

- (a) the person desirous of being or claiming to be the guardian of the minor, or
- (b) any relative or friend of the minor....

### **12. Power to make interlocutory order for production of minor and interim protection of person and property-**

(1) The Court may direct the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper....

### **19. Guardian not to be appointed by the Court in certain cases -**

Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint and declare a guardian of the person -

- (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or
- (b) ‘ [\*\*\*] of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the minor, or
- (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

**MRS ELIZABETH DINSHAW v. ARVAND M. DINSHAW AND ANR.**

NOVEMBER 11, 1986

**(V. BALAKRISHNA ERADI AND G.L. OZA, JJ)**

The petitioner, a citizen of the United States of America residing in Michigan, was married to the first respondent, an Indian citizen, who after marriage settled down in the United States and secured employment. A male child was born to the couple in America. Differences arose between them and the petitioner along with her son took up separate residence. She filed a petition for divorce in the Circuit Court for the country of Saginaw, Michigan, which granted a decree holding that there had been a breakdown in the marriage relationship and declared the marriage as dissolved. The decree also directed that the petitioner shall have the care, custody and control of the minor child until he reaches the age of 18 years. The first respondent, the father was given visitation rights by the decree. On the subject of travel with the minor child to any place outside the United States, it was directed that only on a petition the Court shall make a determination as to whether such travel is in the best interest of the minor child, and what conditions shall be set forth to ensure the child's return. The Court also directed that the first respondent shall notify the Office of the Friend of the Court promptly concerning any changes in his address.

Taking advantage of the weekend visitation rights granted by the said decree, the first respondent picked up the child from his school and secretly left America for India on January 11th 1986. He had not intimated the Court about his intention to take the child out of its jurisdiction and outside the country nor had he given the slightest indication to the petitioner about his intention to leave America permanently for India. Immediately before leaving for India, the first respondent sold away his immovable property and it was only from the Airport that he posted a letter tendering his resignation from his job.

Coming to know that the minor child had not been returned to the day care centre by the first respondent, the petitioner moved the Circuit Court complaining against his violation by the first respondent of the terms of the Court's decree. The Court issued a warrant of arrest against the first respondent on the ground of unlawful taking and retaining the child outside the State, followed by the issue of a Federal warrant of arrest on the ground of unlawful flight to avoid prosecution. Since the first respondent had already come over to India with the minor child these warrants could not be executed in the United States. The Consular Officer, American Consulate General, Bombay, visited the residence of the first respondent's parents in Pune but the minor child was not present there and the grandparents reported that the child and his father had gone North, possibly to Kashmir and that they were not aware of their exact whereabouts. Thereafter, the petitioner filed a petition in this Court seeking the issuance of a writ of Habeas Corpus directing the respondents to produce in Court her minor child and to hand over custody to her as the person entitled to it under the order of a competent foreign Court.

In response to the notice issued by this Court, the first respondent appeared and produced the child in Court and filed a counter-affidavit explaining his conduct the explanation tendered by him was that his father was seriously ill and wanted his father to see the child. It was further submitted that the child prefers to stay with him in Pune and hence he

was admitted in a School there and that it will be in the interest of the child that he should be allowed to reside with him in India.

**Disposing of the petition,**

HELD: 1. Whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on consideration of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. [181F].

2. It is the duty of all Courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. The Courts in all countries out to be careful not to do anything, to encourage the tendency of sudden and unauthorised removal of children from one country to another. This substitution of selfhelp for due process of law in this field can only harm the interests of the wards generally, and a judge should pay due regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. (183B-D].Re H. (infants) 1966 ALL E.R. 886 relied upon

3. The conduct of the first respondent in taking the child from the custody of the person to whom it had been entrusted by the Court was undoubtedly most reprehensible. The explanation sought to be given, namely his father's illness, is far from convincing and does not in any way justify such gross violation and contempt of the order of the Circuit Court in Michigan. [181 E)

4. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in some school. The conduct of the father has not been such as to inspire confidence in the Court that he is a fit and suitable person to be entrusted with the custody and guardianship of the child.

5. It will be in the best interest and welfare of the child that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent Court in that country. The petitioner, who is the mother, is full of genuine love and affection for the child and she can safely trusted to look after him, educate him, and attends in every possible way to his proper up-bringing. The child has not taken root in this country and he is still accustomed and acclimatized to the place of his origin in the United States of America. [181H-182A, B]

6. The first respondent has tendered before this Court an unconditional apology. The proper step to be taken by him is to tender such an apology to the Court whose order he has violated. He has been found to be in contempt of the Circuit Court, Saginshaw, Michigan for violation of its order and that Court has consequently terminated the visitation rights conferred on the first respondent. He may prove that Court for modification of its order on tendering his unconditional apology to that Court. The petitioner should cooperate with the respondent in the matter of enabling him to have restricted visitation rights in America and should also extend her co-operation for the withdrawal of the warrants of arrest outstanding against the first respondent. [183 F- 184C]

Original Jurisdiction: Writ petition (Crl.) No. 270 of 1986

Under Article 32 of the Constitution of India

Mrs K Hingorani for the petitioner

Kapil Sibal, Karanjawala, MrsKaranjwala and CV Subba Rao for the Respondents

The Judgment of the Court was delivered by

**BALAKRISHNA ERADI, J.** Immediately on conclusion of the hearing of arguments in the above Writ Petition on June 11, 1986, having regard to the urgency of the matter, we passed the following order: –

“We allow the Writ Petition and direct that the minor boy, Dustan be restored forthwith to the custody of the petitioner i.e. the mother with liberty to the petitioner to take him to the United States. The child will be a ward of the concerned Court in Michigan and it will be open to the father, first respondent herein to move that Court for a review of the custody of the child, if he is so advised. Detailed reasons will follow. The passport of the child which is in deposit with the Registrar of this Court will be returned to the petitioner i.e. the mother of the child today itself. The concerned authorities of the Govt. of India will afford all facilities to the mother to take the child back to the United States pursuant to the order passed by this Court.”

We now proceed to state in this judgment our reasons in support of the order.

The petitioner, Mrs. Elizabeth Dinshaw is a citizen of the United States of America residing in the State of Michigan. She is employed as a case worker for the State of Michigan in Genesee County Department of Social Services, Flint Michigan. The first respondent, Mr. Arvand M. Dinshaw, who is an Indian citizen, was a student at Northern Michigan University in 1971. During that period the petitioner was also studying there. What started as a friendship between them on the campus later developed into love and the petitioner was married to the first respondent in a civil marriage before a legal magistrate in Negaunee, Michigan on February 26, 1972. The first respondent thereafter settled down in the United States more or less on a permanent basis having secured employment as an Accountant for the Controller's Office in Genesee County, and having obtained a permanent immigration Visa. A male child, Dustan, was born to the couple on August 30, 1978 in Rochester, Michigan, United States of America where they were having their marital home.

Unfortunately, differences arose between the two spouses late in the year 1980 and on December 23, 1980, the petitioner along with her son took up separate residence in a women's shelter in Saginaw, Michigan. She filed a petition for divorce on January 2, 1981 in the Circuit Court for the County of Saginaw, Michigan. By a decree dated April 23, 1982, the Circuit Court held that it had been established that there had been a breakdown in the marriage relationship to the extent that the objects of matrimony had been destroyed and there remained no reasonable likelihood that the marriage could be preserved and hence it declared the marriage as dissolved and granted a divorce to the petitioner as prayed for. By the same decree, it was directed that the petitioner shall have the care, custody and control of the minor child of the parties until he reaches the age of 18 years or until the further orders of that Court. The first respondent, the father was given visitation rights by the decree and it was provided that he shall have visitation with the minor child from approximately 5 P.M. to 8

P.M. on the Wednesday of every week during which he does not have a weekend visitation. It was further ordered that the father shall have visitation with the minor child on alternate weekends from 5 P.M. on Friday until the following Monday morning when he should return the child to his day care centre. On the subject of travel with the minor child to any place outside the United States, it was specifically directed in the decree as follows: –

“IT IS FURTHER ORDERED AND ADJUDGED THAT should the Defendant ARVAND M. DINSHAW wish to travel with the minor child outside the territorial limits of the United States. He shall bring a petition before this Court setting forth the conditions under which he intends to leave the country with the minor child. The court shall then make a determination as to whether such travel is in the best interests of the minor child and what conditions shall be set forth to ensure the child’s return.”

Taking advantage of the weekend visitation rights granted to him by the above decree, the first respondent picked up Dustan from his school on January 10, 1986 and secretly left the United States of America for India on January 11, 1986 at about 8.30 in the night. He had not intimated the Court about his intention to take the child out of its jurisdiction and outside country nor had he given the slightest indication to the petitioner about his intention to leave the United States of America permanently for India. It may be stated that immediately before leaving for India, the first respondent had sold away the immovable property consisting of a house and its premises owned by him in Seymour, Lindan, Michigan, where he had been residing and it was only from the Airport that he posted a letter tendering his resignation from his job as Accountant in the Country. In this context it is significant to recall that the decree of the Circuit Court contained the following directions:

“IT IS FURTHER ORDERED AND ADJUDGED that the Defendant shall notify the Office of the Friend of the Court promptly concerning any changes in his address. The Court further finds that the Defendant is presently residing at 14155 Seymour, Lindan, Michigan.”

It was only late in the day on Monday, January 13, 1986 that the petitioner came to know that the minor child, Dustan had not been returned to the day care centre by the first respondent. She immediately moved the Michigan Circuit Court complaining against the violation by the first respondent of the terms of its decree. A warrant of arrest was issued by the Michigan Circuit Court against the first respondent on January 16, 1986 on the ground of unlawful taking and retaining the child outside the State. This was later followed by the issue of a Federal warrant of arrest against the first respondent on the January 28, 1986 on the ground of unlawful flight to avoid prosecution. Since the first respondent had already come over to India with the minor child, these warrants could not be executed in the United States. The first respondent has his ancestral home in Pune where his parents are residing. The petitioner made frantic efforts through American Consulate General at Bombay to trace out the whereabouts of Dustan. She received a reply that the Consular Officer, American Consulate General, Bombay travelled to Pune on Friday, March 7, 1986 and though she was able to visit the residence of the first respondent’s parents and she spoke with them, the minor child, Dustan was not present there and the grand-parents reported that Dustan and his father had gone North, possible, to Kashmir and that they were not aware of the exact whereabouts of Dustan and the first respondent. The petitioner finding herself totally helpless to recover back the custody of her minor child, whom she had brought up for more than 7 years, thereafter arranged to have this petition filed in this Court seeking the issuance of writ of Habeas

Corpus directing the respondents to produce in Court her minor child, Dustan and to hand over his custody to her as the person entitled to his custody under the order of a competent foreign Court.

In response to the notice issued by this Court directing production of the child before the Court, the first respondent appeared and produced the child in Court. He has filed a counter-affidavit but significantly there is absolutely no satisfactory explanation given there for his conduct in abducting the child from America without seeking permission of the Court in that country of which the minor child, was ward. His only explanation is that his father was seriously ill and he wanted that his father in his ailing condition to see Dustan. He has further stated that his son Dustan has told him on an enquiry that he would prefer to stay with him in Pune and hence he had got Dustan admitted in St. Helena's School in Standard III. According to him he had not deliberately done anything wrong in bringing Dustan with him from the United States and that now the minor child is well settled here in India and it will be in the interest of the child that he should be allowed to reside with him in India as per the child's desire.

The conduct of the first respondent in taking the child from the custody of the person to whom it had been entrusted by the Court was undoubtedly most reprehensible. The explanation sought to be given by him namely, his father's illness, is far from convincing and does not in any way justify such gross violation and contempt of the order of the Circuit Court in Michigan.

Whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. We have twice interviewed Dustan in our Chambers and talked with him. We found him to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an American citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in school there. In our considered opinion it will be in the best interests and welfare of Dustan that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent Court in that country. We are also satisfied that the petitioner who is the mother, is full of genuine love and affection for the child and she can be safely trusted to look after him, educate him and attend in every possible way to his proper upbringing. The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of his origin in the United States of America. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child to some school in Pune. The conduct of the father has not been such as to inspire confidence in us that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present.

In *Re. H. (infants)* [1966] 1 All E.R. 886, the Court of Appeal in England had occasion to consider a somewhat similar question. That case concerned the abduction to England of two minor boys who were American citizens. The father was a natural-born American citizen and

the mother, though of Scottish origin, had been resident for 20 years in the United States of America. They were divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the two boys to the mother with liberal access to the father. By an amendment made in that order in December, 1964, a provisions was incorporated that the boys should reside at all times in the State of New York and should at all times be under the control and jurisdiction of the State of New York. In March, 1965, the mother removed the boys to England, without having obtained the approval of the New York court, and without having consulted the father; she purchased a house in England with the intention of remaining there permanently and of cutting off all contacts with the father. She ignored an order made in June, 1965, by the Supreme Court of New York State to return the boys there. On a motion on notice given by the father in the Chancery Division of the Court in England, the trial judge Cross, J. directed that since the children were American children and the American Court was the proper Court to decide the issue of custody, and as it was the duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing, the Court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America. In the appeal filed against the said Judgment in the Court of Appeal, Willmer L.J. while dismissing the appeal extracted with approval the following passage from the judgment of Cross, J.: –

“The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. The Courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child.”

With respect we are in complete agreement with the aforesaid enunciation of the principles of law to be applied by the Courts in situations such as this.

As already observed by us, quite independently of this consideration we have come to the firm conclusion that it will be in the best interests of the minor child that he should go back with his mother to the: United States of America and continue there as a ward of the concerned Court having jurisdiction in the State of Michigan. The first respondent has tendered before this Court in an affidavit filed by him an unconditional apology for having illegally brought Dustan over to India from the United States in violation of the order of the competent Court in that country. The proper step to be taken by him is to tender such an apology to the Court whose order he has violated. It was brought to our notice that by an order passed by the Circuit Court, Saginaw, Michigan on February 11, 1986, the first respondent has been found to be in contempt of that Court for violation of its order and the Court has consequently terminated the visitation rights which had been conferred on the first respondent by the decree dated April 23, 1982. It will be open to the first respondent, if he is so advised, to move the Saginaw County Circuit Court in the State of Michigan for modification of this order on tendering his unconditional apology to that Court, and if he is able to satisfy that Court that there is genuine contrition and regret on his part for the wrong

that he has done, we have no doubt that the Circuit Court will take a lenient view and pass appropriate orders working out justice between the parties keeping in mind the important aspect that it will not be in the interest of the minor child to completely alienate him from his father for-whom the child has developed genuine affection. We have also no doubt that the petitioner will not take a vindictive attitude but would forget and forgive what has happened in the past and cooperate with the father in the matter of enabling him to have restricted visitation rights in America with all necessary, proper and adequate safeguards and that the petitioner would also extend her co-operation for the withdrawal of the warrants of arrest outstanding against the first respondent in case he approaches her with such a request.

For the reasons stated above, the Writ Petition is disposed of with the directions issued by our order dated June 11, 1986. Petition disposed of.

### **Ethical Exercise**

Raj Malhotra has just learnt that Shivani Malhotra's visa is to expire in two days and she will have to leave India by then, with or without the children. The children are already in the custody of Raj Malhotra, and should the matter be adjourned, Shivani Malhotra will have to leave India without the children. Raj Malhotra knows that the Court normally adjourns the matter on the ground of personal difficulty of Counsel. He, therefore, instructs you, his Counsel, to get an adjournment of just two days in the case on the false pretext of your being unwell. He is offering to pay you a handsome amount as additional Fee for arranging just this one adjournment through a proxy Counsel. Would you secure the adjournment for Raj Malhotra?

Would your answer change, if your sympathies lay with Raj Malhotra, as you have a genuine personal conviction that the welfare of the children lies in remaining him, rather than with Shivani Malhotra who admittedly is having a live in relationship.

## **CASE 4: SINGER CONSULTANTS PVT. LTD. V. WINSOFT TELECOMMUNICATIONS PVT.LTD.**

Prepared by Dr. Aman Hingorani

### **Note for Participants**

Please note that Yr-0 denotes the current year, Y-1 the previous year, Yr-2 two years ago and so on so forth.

### **STATEMENT OF VARUN SINGER**

1. I am Varun Singer, Managing Director of Singer Consultants Pvt. Ltd. having registered office at 34 New Complex, Delhi. The company is the owner of Jubilee Plaza, 14 Old Road, Delhi, the property in question. It is one of our most expensive and exquisitely designed properties.
2. In June Yr - 4, I received a call from Ms. Neena Elizabeth who desired to take Jubilee Plaza on rent for her office. She introduced herself as the Managing Director of WinSoft Telecommunications Pvt. Ltd. and wanted to sign the lease deed as soon as possible without even visiting the property. I insisted that she views the property as per our company's policy, and she reluctantly agreed. She visited the property on or around 15 July Yr - 4 with her manager, Mr. Sooraj Krishan. They found the property to be suitable for their purposes.
3. We signed the lease deed on 12 September Yr-4, after a few rounds of negotiations, and the property was leased out to WinSoft Telecommunications Pvt. Ltd. at a monthly rental of INR 2 lakhs to be paid in advance by the 7<sup>th</sup> of every month for which the payment was due. Ms. Elizabeth also wanted parking space for two cars which was leased out to WinSoft Telecommunications Pvt. Ltd. at the monthly rent of INR 8,000/-. The lease deed contained the standard clauses of payment of security deposit equivalent to three months which was liable to be forfeited in case of breach of contract, and a lock-in period of three years during which WinSoft Telecommunications Pvt. Ltd. could not terminate the lease. We assured WinSoft Telecommunications Pvt. Ltd. that the property would be maintained by my company in the same habitable condition in which it was let out.
4. WinSoft Telecommunications Pvt. Ltd. shifted to the property by 15 September Yr - 4. On 20 September Yr - 4, I went to the property to introduce Sunny Singh, my manager, to Ms. Elizabeth. She seemed quite pleased with her new office and gave positive feedback.

5. I was shocked when, on 25 March Yr - 2, my company received three month notice from WinSoft Telecommunications Pvt. Ltd. terminating the lease with effect from 30 June Yr - 2. They cited limitation of space as the reason for the said termination and stated that the place was too small to cater to their current and future requirements. Further, they wanted us to adjust the rent for the months of April to June Yr -2 against the three months security amount deposited with us. This is totally unacceptable as WinSoft Telecommunications Pvt. Ltd had illegally terminated the lease within the lock-in period and, therefore, was required to pay rent for the three months.
6. Further, my company received a legal notice on 26 April Yr – 2, where WinSoft Telecommunications Pvt. Ltd raised grievances regarding maintenance of the property and alleging breach of contract by us. However, this was for the first time that I had heard of these issues at the property. The allegation is absolutely false and baseless as the property was repaired and maintained at regular intervals.
7. WinSoft Telecommunications Pvt. Ltd just left the property on 30 March Yr – 2. At their request, we had a joint inspection on 1 September Yr – 2. The premises were in good condition, just as when it was given to WinSoft Telecommunications Pvt. Ltd. The property remained unutilized and unproductive of rent right upto 1 February Yr – 1, when a new tenant approached us.
8. WinSoft Telecommunications Pvt. Ltd has unlawfully terminated the lease deed and should duly pay all the liabilities arising out of the default. It is true that there is no provision of penalty or liquidated damages in the lease deed should WinSoft Telecommunications Pvt. Ltd. terminate the lease prior to the expiry of the lock-in period. There was no need for any such provision since should WinSoft Telecommunications Pvt. Ltd. terminate the lease prior to the expiry of the lock-in period, it would assume the pre-existing liability to pay the rent for the unexpired lock-in period. That would be its debt, regardless of whether my company suffered any actual or real loss. The very purpose of a lock-in period is to ensure that the tenant stays in the property during that period or make good all losses incurred by the landlord in case it wants to vacate earlier. Otherwise, why have a lock-in period.
9. Our claim against WinSoft Telecommunications Pvt. Ltd is, therefore, for rent from April Yr – 2 onwards for the unexpired lock-in period, along with interest @ 18 % p.a. till date of payment. Moreover, as WinSoft Telecommunications Pvt. Ltd breached the contract, we have forfeited their security deposit.

## **STATEMENT OF SUNNY SINGH**

1. I am Sunny Singh, aged about 35 years, resident of Flat No. 12, Medium Apartments, Delhi. I am an employee of Singer Consultants Pvt. Ltd. for the last 8 years, working as manager of their properties.
2. Presently, I am placed as the manager of their property at Jubilee Plaza, 14 Old Road, Delhi. I have been working there since August Yr - 4. Generally, I manage around 2 properties at one time. However, as Jubilee Plaza is a huge complex, I am responsible for only one property at the moment. Jubilee Plaza is one of the high-end properties of Singer Consultants.
3. In September Yr - 4, the property was leased out to WinSoft Telecommunications Pvt. Ltd. and they shifted to the property by the middle of the month. I met Ms. Neena Elizabeth, the Managing Director of the company, and Mr. Sooraj Krishan, her manager, on 20 September Yr -4. Ms. Elizabeth was very stressed though excited about her new office. Mr. Krishan seemed like a trouble maker to me as he went on complaining about everyone to Ms. Elizabeth.
4. Around the month of December Yr - 4, Mr. Krishan told me that their business was running very well and they had decided to employ more staff. He never made any complaints regarding maintenance of the property. I also did not receive any intimation from Ms. Elizabeth about any problem. I, in fact, always received positive feedback from everyone and duly communicated the same to Mr. Singer.
5. I was astonished to hear about the termination of the lease deed from Mr. Singer. I have seen the notice and can confirm that all the allegations therein are false. There have not been any issues of water logging or poor lightning in the common area. We have not received any such complaints from any of the occupants of the property. They only want to shift to an alternative place as they have employed more staff whom they cannot accommodate at this property.

## **STATEMENT OF NEENA ELIZABETH**

1. I am Neena Elizabeth, Managing Director of WinSoft Telecommunications Pvt. Ltd. having registered office at 202 Sea Lane, Mumbai.
2. I was looking at the prospects of expanding the business of my company and wanted a spacious property to start my office in Delhi. After a long search and on strong recommendation of ABZ Property Consultants, I met Mr. Varun Singer, the Managing Director of Singer Consultants Pvt. Ltd. and owner of Jubilee Plaza, 14

Old Road, Delhi in June Yr - 4 to discuss the prospects of leasing the said premises for my office. I visited the property in July Yr – 4 and instantly had a liking for it. It had all the required facilities which I wanted and also parking space, as a bonus. We signed the lease deed on 12 September Yr - 4.

3. The monthly rent of the property was INR 2 lakhs. We also agreed to pay INR 4,000/- per car for parking space for two cars. The rent was to be paid in advance by the 7th day of every month. WinSoft Telecommunications Pvt. Ltd. paid INR 6 lakhs, the equivalent of monthly rent for three months as security deposit to Singer Consultants Pvt. Ltd. It was the responsibility of Singer Consultants Pvt. Ltd to maintain the property, for which they billed us the maintenance charges, and WinSoft Telecommunications Pvt. Ltd. has duly paid all the charges s billed. The lease deed contained a lock-in period of 3 years. The lock-in period clause did not provide for any penalty or liquidated damages in case WinSoft Telecommunications Pvt. Ltd. Terminated the lease within the lock-in period. This was done deliberately after negotiations, and with the consent of Mr. Singer and his company.
4. I was personally present for setting up the new office, after which I left for Mumbai leaving behind my employee, Mr. Sooraj Krishan, to manage and run the new office in Delhi. Within few days of my return, I received calls from Sooraj about the problem with the central air conditioning of the premises, which was not working properly. He also informed me about the poor state of the maintenance of the property which was having issues of water logging and bad lighting in the common areas. He further informed me that the maintenance department of Singer Consultants Pvt Ltd. was not sorting out the issues, even after repeated requests.
5. Our clients frequently visit the office and such poor maintenance was creating embarrassment to our company and was damaging the reputation of the business. We could not hold business meetings at the premises or accommodate employees due to these maintenance issues. So, my company decided to spend money out of its own pocket to install air conditioning unit and to carry out other repair works, which were the responsibilities of Mr. Singer and his company.
6. Being fed up with all these issues, WinSoft Telecommunications Pvt. Ltd. sent a three month notice through courier on 25 March Yr-2 to Singer Consultants Pvt. Ltd. terminating the lease deed with effect from 30 June Yr – 2. We requested Singer Consultants Pvt. Ltd. to adjust the rent for the months of April – June Yr - 2 against the security amount deposited in the beginning. The lease deed did not contain any provision of penalty or liquidated damages for terminating the lease within the lock-in period and, therefore, we are not required to pay anything to Singer Consultants

Pvt. Ltd.. Moreover, when it is they who committed breach of contract by not maintaining the property as detailed in our legal notice of 26 April Yr - 2.

7. We handed over possession of the property to Singer Consultants Pvt. Ltd. on 30 March Yr – 2, followed by a joint inspection on 1 September Yr -2. We returned the premises in the same condition in which we got it. Singer Consultants Pvt. Ltd. has not given us any proof that it has suffered any loss by the premature termination of the lease. It is true that they had no tenant upto 1 February Yr – 1, but that was because they did not even try to look for a tenant or take steps to mitigate the loss of rent. The very purpose of the three months notice was for them to find a new tenant. We paid the rent till June 30 Yr-4 though we had vacated the property on 30 March Y-4 itself.
8. I have undergone immense mental trauma and financial loss during this time while dealing with Singer Consultants Pvt. Ltd. We have already spent a lot of money on this property with negative results and do not wish to spend anything more. Since it is they who committed breach of contract by not maintaining the property, they have no right to forfeit the security amount equivalent to three months rent. This amount constitutes the rent for the months of April – June Yr -2. So, we do not owe them any money. Rather, they should consider themselves lucky that we have not sued them for breach of contract.

#### **STATEMENT OF SOORAJ KRISHAN**

1. I am Sooraj Krishan, aged about 50 years. I am resident of 3 New Apartments, Delhi. I have worked with WinSoft Telecommunications Pvt. Ltd.since its inception.
2. I was the manger of the Mumbai office of the company before coming to Delhi in August Yr – 4 to manage our youngest branch. We took the property on rent from Singer Consultants Pvt. Ltd. Before leasing out, I visited the property along with Ms. Elizabeth. The property was too small for our purposes and the rent was too high. I told this to Ms. Elizabeth, but she was in a hurry to start the Delhi branch and she got carried away with the parking space.
3. After we shifted to the property, Ms. Elizabeth realized that the property was too small to cater to our present and future requirements. Also, there was negligible

maintenance of the property. The common areas of the property always remained water logged. In fact, water entered into the office in the first week of March Yr – 4. Moreover, the problem was aggravated due to absence of proper lighting in those areas. I repeatedly made complaints to the maintenance department of Singer Consultants Pvt. Ltd. and to Mr. Sunny Singh, but to no avail. Moreover, the central air conditioning of the property did not work which added to our woes. I also spoke to other occupants and they shared similar concerns.

4. Due to maintenance issues, we received negative feedback from our clients and some of them even refused to come to the office again for meetings. I communicated this to Ms. Elizabeth and told her to get the problem sorted or else we would be forced to shut the office. We had to get the air conditioning re-installed by paying out of our own pocket. But the other maintenance issues continued.
5. It was becoming increasingly impossible to work from that office and I requested Ms. Elizabeth to send notice to Singer Consultants Pvt. Ltd. to terminate the lease and to look for alternate office.
6. We vacated the property on 30 March Yr - 2 and shifted to a new office. Singer Consultants is raising bogus claims only to extort money from us. Mr. Sunny Singh even taunted me by saying that they don't need to even look for a tenant as we would be forced to pay the rent upto September Yr – 1.

## **DEVELOPING A RESEARCH PLAN**

Adopted from Kunz, et al, The Process of Legal Research (4<sup>th</sup> ed. 1996)

### **Preliminary Questions**

Is this a civil or criminal Problem?

State or Federal?

### **Research terms**

- Think through the situation from various angles.
- Consider both factual and legal dimensions
- Generate as many search terms as possible
- Think of alternative terms for each of the search words you listed

### **Factual categories**

Who is involved?

What is involved?

When did the events occur?

Where did the events occur?

Why did the events occur?

Why did (ur will) the participants act in this way?

### **Legal Categories**

What legal theory is applicable to the situation?

What relief might the wronged party seek through the legal system?

What is the procedural posture of the situation?

## **WHERE WILL YOU START**

### General information

What area of law is this problem about? Do you know anything about the general area of law? If not, what sources would you use to find out general information about this area?

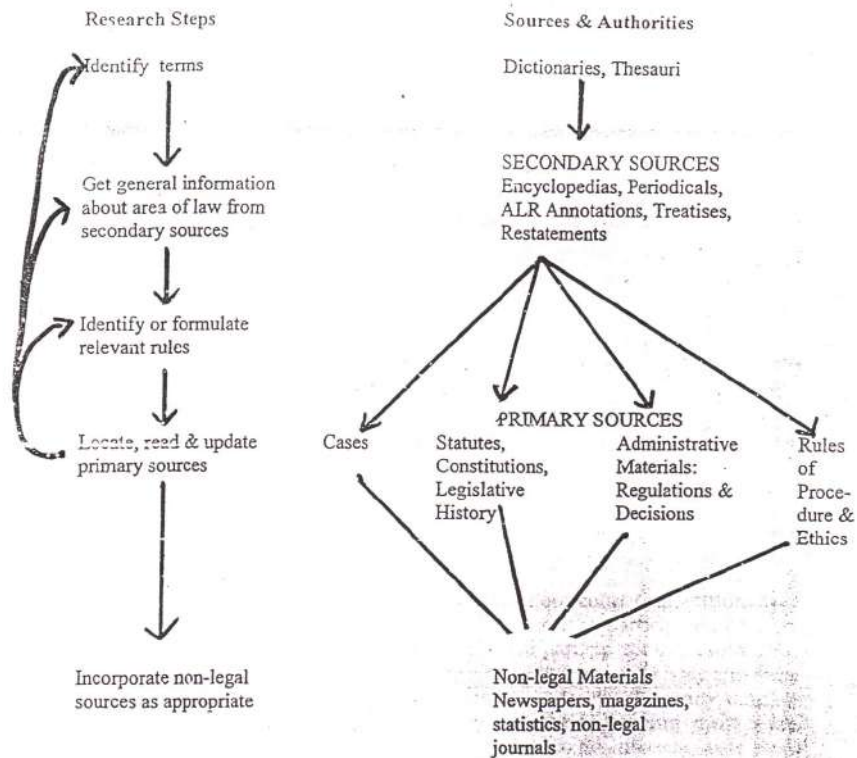
### **Primary Authority**

Is there likely to be a statute? State or federal? Administrative regulations? What sources will you check to find out??

What sources will you check to find cases on this topic?

What sources will you use to update the authorities you find?

## **LEGAL RESEARCH**



[Adopted from Kunz, et al. The Process of Legal Research (4<sup>th</sup> ed. 1996)]

## RESEARCHING FOR A LEGAL PROBLEM

Prof. Ved Kumari  
Law Centre-I  
University of Delhi

### Preliminary Steps:

**1. Identification of issues** after reading the given problem thoroughly. What is in question? What is it that the parties are in disagreement and what is needed to be decided by the court?

**2. Think-** What area of law / subject does it deal with? Which legislation may have answer to these questions?

**3: Go to the library** – take out a text book on the subject and read the relevant pages which you may think may have an answer to the questions in the problem. Note down the cases mentioned or other books and articles referred in the text or in the footnotes.

Materials that may be used in legal research may be divided primarily as legal materials and non-legal materials. Legal materials are further classified in Primary and Secondary legal materials.

Primary legal research materials include the Constitution, Statutes, and Judicial decisions.

Secondary legal research materials include books, commentaries, encyclopaedia, yearbooks, journals, Reports etc.

Locating a relevant statutory provision / judicial decision and other relevant legal material in a Library:

1. Gazette of India / Gazette of State: Contain Official notifications of Bills, Statutes, Joint Committee/ Select Committee Reports, subordinate legislation (i.e., Rules framed under various Acts) You need to know the date of notification for locating relevant document and you may consult the librarian to know which section of the gazette contains what information. Gazette of India is now available online also.
2. Acts of Parliament – Yearly publication contains Acts of Parliament passed in a given year.
3. General Statutory Rules and Orders
4. Lok Sabha Debates / Rajya Sabha Debates
5. Manuals, e.g., AIR Manual: Central statutes in force are listed alphabetically in various volumes. The text of provisions is given in the main body and the footnotes under each section give summary in a couple of lines of cases decided under it.
6. Local Laws: There are compilations of local laws (State legislations) available – take the local laws of the relevant state.
7. Reporters – e.g., AIR (for Supreme Court and High Court judgements), SCC / SCR/ SCJ / SCALE / Judgement Today, etc for SC decisions. Each Reporter contains a nominal table of cases as well as a subject index. Consult the former if you know the

name and year a case and the court that decided it. If you do not know that, consult the subject index that is arranged alphabetically statute wise as well as contain some key words. These may be freely accessed online also from the websites of Supreme Court of India, various High Courts and Indiakanon. Decisions of district courts are also now uploaded on their respective websites under the name of the concerned judicial officers.

8. Digests: 50 Years Digest (for cases from 1900-1950), Ten year Digest, Quinquennial Digest, Criminal Law Digest, Yearly Supreme Court Digest, etc. Contain summary of cases in the given period according to Subject/ Statute list arranged alphabetically.
9. Indexes: Index to Indian Legal Periodicals, Index to Legal Periodicals, Index to Foreign Legal Periodicals, etc. Contain lists of books / articles in journals published in a period – arranged author-wise or subject-wise.
10. Words and Phrases – contains meaning of various phrases used in legal language.
11. Law Dictionaries: e.g., Black's Law Dictionary. Contains meaning of specific legal words.
12. Reports of various Expert bodies like Reports of the Law Commission of India, National Human Rights Commission, Minorities Commission, Women's Commission, etc. Useful for arguing for different interpretation of law or for striking down laws etc.
13. Annual Survey of Indian Law: Contains summary and critique of important cases on main areas of law in a given year.
14. Journals –general journal, e.g., Journal of Indian Law Institute. Specialised journals, e.g., Family Law journals. Indian and Foreign.
15. Encyclopaedia : Britannica
16. Year Books
17. British Humanities Index- for articles in newspapers and other popular journals
18. Social Science Index – for criminology, sociology and political science articles etc.
19. Monographs, etc.

#### Computer Research:

**Use materials only from AUTHENTIC websites**, i.e., where the information upload is controlled by experts on the field like Universities, government, Commissions, NGOs, etc. You may find links to various websites by entering your research phrase on google and other search engines but beware that they will give you links to both authentic and non-authentic websites and you must collect the required information only from the authentic site. For example, many a times the first reference is from Wikipedia but remember that anybody may upload information on this site and hence, it may or may not be correct and authenticated information. While it is may be a starting point to gather some basic knowledge on a topic, it is not a website to be quoted and relied on any authoritative fora like courts or legal writing.

It is important to learn to phrase your query appropriately. Too general or too narrow phrases may give you access to hundred thousands of web links or no results. Some search engines gives the option of searching within results and you may filter your research through narrowing down your search within a wider category.

University of Delhi has subscribed to many IP based data bases and law journals and these may be searched from the website of Law Library on the University of Delhi website. Paid databases may be accessed from any computer on the University of Delhi premises and others may be accessed from a computer at home or other place having internet connection. CD based legal databases may be accessed from specified computers in the libraries of Faculty of Law and Law Centre-I. SCC ONLINE, MANUPATRA, Legal Pundits are good databases for accessing decided Indian Cases of higher judiciary and legal articles. INDIAKANOON gives free access to the decisions of the Supreme Court and High Courts and has an easy search engine. Jstor, Westlaw, and LexisNexis contain judicial decisions and legal articles from different parts of the world.

INTERNET Resources: Some good starters depending on the field of research can be the following:

**Indian:**

A Gateway to Government of India: <http://indiaimage.nic.in/>

Indian Supreme Court Judgments: <http://judis.nic.in/supremecourt/chejudis.asp>

National Human Rights Commission of India: <http://nhrc.nic.in/>

National Commission For Women: [www.ncw.nic.in](http://www.ncw.nic.in) Child Workers in Asia Homepage

Women's Studies Network: <http://www.britishcouncil.org/india-governance-networks-wsn.htm>

**International:**

American Association of Law Schools: <http://www.aals.org>

Amnesty International: [www.amnesty.org](http://www.amnesty.org)

Asian Centre for Human Rights: <http://www.achrweb.org/theme/child.htm>

Child Rights Information Network: <http://www.crin.org>

Clinical Legal Education Association: <http://www.cleaweb.org/resources/index.html>

Human Rights Watch: <http://www.hrw.org>

International Humanitarian Law: <http://www.ihlresearch.org>

International Juvenile Justice Observatory: <http://www.oijj.org/home.php?pag=000000>

American Bar Association: <http://www.abanet.org>

Library Access system: [www.copac.ac.uk](http://www.copac.ac.uk)

Public Interest Law Initiative: [www.pili.org](http://www.pili.org)

Sanford Encyclopedia of Philosophy: <http://plato.stanford.edu/contents>

The Internet Encyclopedia of Philosophy: <http://www.utm.edu/research/iep>

UN Crime Prevention & Criminal Justice: [http://www.undcp.org/odccp/crime\\_cicp.html](http://www.undcp.org/odccp/crime_cicp.html)

UN Human Right <http://www.unhchr.ch/html/menu2/6/crc/>

World Legal Information Institute: <http://www.worldlii.org>

**Footnotes and mode of citation:** There were two kinds of footnotes - Speaking and Citation. Speaking footnotes explain and elaborate a theme in the main text that is not considered absolutely essential to the main argument but might be of interest to the reader. The citation footnotes should lead the reader to the primary material from which the data had been taken. There were three ground rules in giving citation. (1) The footnotes should use a uniform style for referring to authors, books, articles, etc.; (2) It should contain *all* the information necessary for leading the reader to the cited source; and (3) It should be precise. The actual style for footnoting for a particular journal or publisher was prescribed by them and needed to be followed. For a standard style of footnote for publication in India, the footnote pattern followed by INDIAN JOURNAL OF INDIAN LAW INSTITUTE was recommended while for international standards THE BLUEBOOK<sup>64</sup> published by Harvard Law School was useful. The easiest way to get introduced to legal footnoting was to visit the Website of Cornell Law School: <http://www.law.cornell.edu/citation/>

## LEGAL DRAFTING SKILLS

By

**Dr. Aman Hingorani**

1. **Aim** - to make sure that the document serves the purpose or fulfils the function it is intended to
2. **Making a Legal Draft- You must know**
  - the purpose the document is to serve
  - for whose benefit it is being written
  - exactly what you want to say
  - pitfalls that you want to avoid
3. **Parameters of a Good Legal Draft**
  - Should be consistent with law
  - Should be structured
  - Should be complete
  - Should contain appropriate language
  - Should be readable
4. **Drafting by relying on set formats from books and internet**

### Advantages

- helps in identifying the legal requirements
- helps in identifying gaps in your draft, thereby preventing error by omission
- gives a suitable structure to organize material
- offers apt phrases tested over time, helping in choice of words

### Disadvantages

- tends to include irrelevant matters that you did not feel the need to remove
- could land you up with odd details remaining unchanged due to poor editing of electronic templates
- might omit vital matters that were absent in format
- may be based on outdated law
- may be badly drafted or inappropriate, forcing you to spend more time tinkering with it than making a draft one afresh
- prevents you from gaining confidence to draft

## **5. Drafting as a Performance Skill**

### **Step 1: Do Case Analysis**

- Research and analyse the case
- Formulate case theory to dictate presentation of draft

### **Step 2: Determine essential content of the draft**

- Make a list of everything you want to include in your draft
- Some paras could be mandated
  - by rules
    - Statutory rules, like those contained in Orders 6 and 7 Civil Procedure Code
    - Court framed rules, like the Supreme Court Rules
  - by practice directions
  - by needs of your client
  - by your own logic
  - by what is needed to be proved in a case

### **Step 3: Create Your Skeleton Plan**

- Plan your draft first in form of a skeleton
- Your skeleton plan should indicate
  - the number paras
  - the contents of each para
  - the order in which the paras will come (facts to be stated chronologically)
- First para should introduce your case
- Number the paras consecutively
- Try to give each para a name
- Each para should consist of only one idea, with sub paras for different parts of that idea. This helps
  - in focusing on the content of each para
  - to keep to the point
  - to stop you from mixing up in one para what belongs to another

- Note in fairly full everything you want to put in that para, but concisely

#### **Step 4: Check your Skeleton Plan against Your List**

- Go back to the List created at Step 2
- Check it off ensuring that every necessary item of content has been slotted into your skeleton at an appropriate point
- Look at the completed skeleton to check that
  - every para hangs together and is in right sequence
  - that a para does not contain anything that should not really be there or which belongs somewhere else

#### **Step 5: Draft one Para at a time**

- Concentrate now only on the language rather than the content or structure
- Use plenty of space on the page
- Remember the name you have given to the para- the para should be about that topic
- Number sub paras dealing with different parts of the one idea captured in the para
- Every word counts
- Every phrase must be apt
- Language must be clear, precise, unambiguous, complete and non-repetitive
- Use plain English
- Maintain simplicity while framing a sentence
- Ensure that there are no errors of spelling, punctuation, grammar or tense
- Drafting involves trial and error, chopping and changing until what you have is right - rearrange words, alter the punctuation, divide or join sentences, add or discard brackets

#### **Step 6: Look Back Over Your Draft**

- Never assume you have finished when you reach the last para
- You must read it over and over again – you will want to make improvements/alterations or correct mistakes
- Test your drafting by reading it out aloud
- If reading is disjointed, check
  - language

- sequence of paras
- Edit, re-edit

## **6. Additional Drafting Points**

- Adapt draft according to its nature
  - Complaint- plead particulars relating, for instance, to jurisdiction, cause of action, limitation, valuation, description of immovable property
  - Writ- plead grounds as also clauses relating to, for instance, lack of alternative and efficacious remedy, absence of laches
  - Petition under specific statute - plead particulars required by that statute
- Plead legal defences, for instance, estoppel and res judicata
- State the effect of the document, rather than setting out the whole of the document or any part thereof in the draft
- Write sums and numbers in figures as well as in words
- Make the prayer clauses self-contained and comprehensive, numbering each relief separately

## **APPELLATE ARGUMENTS DEMONSTRATION EXERCISE**

### **NARCOTICS CONTROL BUREAU V ELIZABETH BROWN**

Prepared by Dr Aman Hingorani

#### **NOTE FOR PARTICIPANTS**

This is an exercise in making oral arguments on a Criminal Appeal in the Supreme Court

You will find attached:

1. Statement of facts
2. Instructions to Counsel for Petitioner
3. Instructions to Counsel for Respondent
4. Extract of the Judgment of the Special Judge, Delhi
5. Extract of the Judgment of the Delhi High Court
6. Grounds of Appeal
7. Relevant provisions of the Narcotics Drugs and Psychotropic Substances Act and the Constitution of India
8. Relevant Extract of *Emma Charlotte Eve v Narcotics Control Bureau* : 2000 (54) DRJ 610

#### **STATEMENT OF FACTS**

On 3.1.2000, Mr. Frank, Chief Customs Officer at Frankfurt Airport, Germany, seized the postal parcel No. 007 which had arrived at Frankfurt Airport with flight 2231 from Bogota, Columbia and which was destined for G.P.O., Delhi and addressed to “Elizabeth”. The said postal parcel contained 125 gms of cocaine in small sachets. The cocaine was confiscated by the Custom authorities, Government of Germany and the criminal case was registered against “Elizabeth” (untraced).

On receiving instructions that the German Government had obtained the consent of the Government of India for controlled delivery of the seized cocaine in India, Mr. Frank sent it for forward transmission to G.P.O., Delhi on 9.1.2000. This was done through Lufthansa flight 008 manned by Captain Peter, who, on landing at I.G.I. Airport in New Delhi, handed it over to Mr. Premchand of the Narcotics Control Bureau, Delhi. The controlled delivery was done with the knowledge and the supervision of the Governments of Germany and India with a view to identify the persons involved in the commission of the offence.

Mr. Premchand accordingly contacted the Chief Post Master, G.P.O., Delhi and informed him about their plan to nab the claimant of the parcel. The plan was that as soon as the claimant for the parcel would come to the post office, the Chief Post Master would telephone the NCB and its officers would rush to the post office and hand over the parcel to the postal assistant at the counter. Under the surveillance of the NCB officers and in the presence of public witnesses, the claimant would be permitted to collect the parcel from the postal assistant. The NCB officers would then arrest the claimant.

On 15.1.2000 at about 11 am, Mr. Premchand received a telephone call from the Chief Post Master, G.P.O., Delhi that a foreign lady had arrived to collect the postal parcel No. 007. Mr. Premchand with his officers acted upon their aforesaid plan and observed, in the presence of public witnesses, the handing over of the parcel by the postal assistant to the accused. The NCB officers caught the accused red-handed in possession of the cocaine and arrested her after following the procedure under the NDPS Act.

The accused, in her statement under section 313 Cr. P.C, stated that she expected a postal parcel containing some papers from her aged father in Essex. He was to send it to G.P.O., Delhi. She regularly enquired from the post office about the parcel but was told that it had not come. On 15.1.2000, she went to the G.P.O. at about 11 am. She went to the pigeon-hole where she found an intimation slip indicating that a parcel for "Elizabeth" had arrived. She took the slip to the person attending to the counter who asked her to wait for few minutes so that he could locate the parcel. After making her wait for about 15 minutes, he gave her a parcel No. 007 addressed to "Elizabeth". She took the parcel, and on opening it just outside the doorway of the post office, she saw that it contained several small sachets of white powder, and not the papers from her father. As it was not her parcel, the accused turned to go back to the counter to return it. But as she turned, few persons surrounded her, who disclosed their identity as NCB officers and, after following certain procedural requirements, arrested her. The accused repeatedly and tearfully told the NCB officers that while her name was indeed Elizabeth Brown, as reflected in her passport, she knew nothing about the postal parcel addressed to "Elizabeth" which was as common an English name as a name can be. She told them that this was obviously a case of mistaken identity and that they had arrested a wrong "Elizabeth".

### **Instructions for the Counsel for the Appellant**

You represent the Appellant, Narcotics Control Bureau, which had lodged the complaint against the Respondent, Elizabeth Brown, before the Special Judge, Delhi for illegally importing 125 gms of cocaine into India through postal parcel No. 007, and for being in possession of 125 gms of cocaine at G.P.O. Delhi on 15<sup>th</sup> January 2000 in contravention of the provisions of Section 21 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985, as amended.

The Special Judge, Delhi convicted and sentenced the Respondent to ten years rigorous imprisonment with Rupees one Lakh as fine. The Delhi High Court acquitted her. The Supreme Court granted the Appellant Special Leave to Appeal against the Judgment of the Delhi High Court. The Criminal Appeal is now listed for hearing before the Supreme Court.

The postal parcel containing the cocaine had been seized and confiscated at Frankfurt Airport. The Governments of Germany and India undertook the controlled delivery of the parcel addressed to "Elizabeth", c/o G.P.O., Delhi in order to apprehend the consignee. The Respondent was caught red-handed after she claimed the postal parcel at G.P.O., Delhi and was found in possession of cocaine. The Appellant had led evidence before the Special Judge to establish that all the mandatory requirements and procedural safeguards contained in the N.D.P.S. Act 1985, as amended, stand satisfied in the case. The Appellant's case is duly corroborated by all the prosecution witnesses.

The defense of the Respondent before the Special Judge was that the very prosecution of the Respondent under the N.D.P.S. Act 1985 was legally misconceived as the said Act does not even contemplate controlled delivery offences nor does it empower the Government of India to undertake controlled delivery operations. The Special Judge found no merit in the said defense. However, the Delhi High Court accepted it. The Appellant is seeking the setting aside of the Judgment of the Delhi High Court.

With the assistance of the documents in this case file, you are instructed to address the Hon'ble Supreme Court confined to the Grounds of Appeal listed herein after.

### **Instructions for the Counsel for the Respondent**

You represent the Respondent. Elizabeth Brown, the accused, against whom the Appellant had lodged the complaint before the Special Judge, Delhi alleging that she had illegally imported 125 gms of cocaine into India through postal parcel No. 007, and that she was in possession of 125 gms of cocaine at G.P.O. Delhi on 15 January 2000 in contravention of the provisions of Section 21 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985, as amended.

The Special Judge, Delhi convicted and sentenced the Respondent to ten years rigorous imprisonment with Rupees one lakh as fine. The Delhi High Court acquitted her. The Supreme Court granted the Appellant Special Leave to Appeal against the Judgment of the Delhi High Court. The Criminal Appeal is now listed for hearing before the Supreme Court.

It is the Appellant's case that the postal parcel containing the cocaine had been seized and confiscated at Frankfurt Airport. The Governments of Germany and India undertook the controlled delivery of the parcel addressed to "Elizabeth", c/o G.P.O., Delhi in order to apprehend the consignee. However, instead of apprehending the actual consignee, the Appellant arrested the Respondent on account of mistaken identity. The primary defense of the Respondent before the Special Judge, however, was that the very prosecution of the Respondent under the N.D.P.S. Act 1985 was legally misconceived as the Act does not even contemplate controlled delivery offences nor does it empower the Government of India to undertake controlled delivery operations.

The Special Judge found no merit in the said defense. However, the Delhi High Court accepted it. The Appellant is seeking the setting aside of the Judgment of the Delhi High Court.

With the assistance of the documents in this case file, you are instructed to address the Hon'ble Supreme Court to resist the Criminal Appeal.

**Extract of the Judgment of the Special Judge, Delhi**  
**IN THE COURT OF THE SPECIAL JUDGE, DELHI**

Sessions Case No. abc/2000

In the matter of:

**Narcotics Control  
Bureau**

**...COMPLAINANT**

**Versus**

**Elizabeth Brown  
ACCUSED**

...

**JUDGMENT**

...

4. The learned Counsel for the Accused then submitted that the very prosecution of the Accused under the N.D.P.S. Act 1985 is legally misconceived as the Act does not even contemplate controlled delivery offences nor does it empower the Government of India to undertake controlled delivery operations.
5. According to the learned Counsel, the concept of controlled delivery crystallized in the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances held in 1988 in Vienna, Austria. "Controlled delivery" means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, controlled substances or substances substituted for them to pass out of, or through or into the territory of a state with the knowledge and under the supervision of the competent authority with a view to identifying the persons involved in the commission of the offence of drug trafficking and trading. The Government of India has ratified this Convention. However, according to the learned Counsel for the Accused, this Convention does not automatically form part of Indian domestic law but has to be transformed into domestic law by Parliamentary legislation before it can be enforced. The learned Counsel has referred to the provisions of Bill No. XIV of 1998 which seeks to amend the N.D.P.S. Act 1985 so as to incorporate provisions relating to controlled delivery. My attention is drawn to the proposed amendments in Section 2 (viib), 8-A, 50 A, 54 and 76 (ca) of the said Bill. It is the argument of the accused that the very fact that the N.D.P.S. Act 1985 is sought to be amended to incorporate controlled delivery offences and to empower the Central Government to undertake controlled delivery operations, implies that the existing N.D.P.S. Act 1985 does not contemplate controlled delivery offences nor does it confer power upon the Government of India to undertake controlled delivery operations. Hence, according to the learned Counsel, even assuming the Accused did what the prosecution says she did, that act is yet to become an offence. Unless there is an existing law to penalise the commission or omission of an act, there is no question of that act being made punishable. In fact, Article 20 of the Constitution mandates that no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence.

6. The learned Counsel for the Accused further submitted that in any case, the cocaine was admittedly seized and confiscated at Frankfurt and the offence came to an end there. The cocaine did not leave Germany at the instance of the Accused but at the instance of the German and Indian Governments, and was brought to India by the German airline, Lufthansa, and was in the possession of the Lufthansa pilot Captain Peter, and the NCB officer, Mr. Premchand. In such circumstances, the question of the Accused importing cocaine into India does not arise. Nor can the Accused be said to be in possession in India of cocaine which stands confiscated in Germany and is the subject matter of the offence there. The learned Counsel has referred to the decision in *Bostan v Emperor*, 1911 CrL. L.J. 116 in support of his contention.
  7. I find no merit in the submissions of the Accused. A bare perusal of Section 21 of the N.D.P.S. Act indicates that it penalises the possession of cocaine in contravention of the Act. The Accused is found to have been in possession of the cocaine. Sections 35 and 54 raise presumptions against the Accused as to the culpable mental state of the accused and the commission of the offence from the possession of the illicit articles. The Accused has failed to rebut these presumptions. It is indeed an audacious argument to suggest that it is the Government, and not the Accused, which sought to import the cocaine into India. In any case, Section 28 of the Act provides that attempt to commit an offence punishable under Sections 21 and 23 attract the same punishment as the commission of the offence. The Accused at least attempted to import cocaine into India.
  8. The learned Counsel has relied on Bill No. XIV of 1998. It is well settled that a Bill is not a permissible aid to construe a clear statutory provision. In the instant case, the language of Sections 21 and 23 of the existing N.D.P.S. Act 1985 is unambiguous and clear, and warrants no limitation being read into them in order to exclude controlled delivery offences from the purview of these Sections. It is significant that the Preamble to the Act declares that the Act implements the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances, and Section 2 (ix) of the Act defines "International Convention" to include "any other international convention or protocol or other instrument amending an international convention, relating to narcotic drugs or psychotropic substances which may be ratified or acceded to by India after the commencement of this Act". Admittedly, India has ratified the aforesaid 1988 UN Convention which provided for "controlled delivery". It is, therefore, not correct to contend that the existing N.D.P.S. Act 1985 does not contemplate controlled delivery offences or does not empower the Central Government to undertake controlled delivery operations. The existing Act is very much a law in force, and therefore, the question of there being a violation of Article 20 of the Constitution does not arise. The proposed Bill, if and when it becomes law, would at best be clarificatory in nature to expressly provide in the N.D.P.S. Act 1985 the powers that already exist.
- ...
1. I, therefore, find the Accused guilty of the offences under Section 21 and 23 of the N.D.P.S. Act 1985 having illegally imported into India and being in illegal possession in India of 125 gms of cocaine.

Put up on 28 March 2001 for hearing on the sentence.

Special Judge

26.3.2001

**Extract of the Judgment of the Single Judge, Delhi High Court  
IN THE DELHI HIGH COURT AT NEW DELHI  
Criminal Appeal No. def/2001**

**In the matter of:**

|                        |                          |                             |
|------------------------|--------------------------|-----------------------------|
| <b>Bureau</b>          | <b>Narcotics Control</b> | <b>...COMPLAINANT Verus</b> |
| <b>Elizabeth Brown</b> |                          | <b>...</b>                  |
| <b>ACCUSED</b>         |                          |                             |

**JUDGMENT**

...

3. The learned Sessions Judge did not accept the contention of the Appellant that the very prosecution of the Appellant under the N.D.P.S. Act 1985, as it then stood (that is, pre-2001 amendment) , is legally misconceived as the Act then did not even contemplate controlled delivery offences nor did it empower the Government of India to undertake controlled delivery operations.
4. This Court, in its decision in *Emma Charlotte Eve v Narcotics Control Bureau (2000 (.54) DRJ 610)* took the view that the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances 1988 does not become a law in force in India without legislative action. That was a case prior to the 2001 amendment of the N.D.P.S. Act 1985. This Court held that in the absence of there being a specific provision in the Act for dealing with an operation relating to controlled delivery, controlled delivery operations are not permissible in India. This Court further held on similar facts that the contraband in that case was sent to India not at the instance of the accused therein but at the instance of the Government of Germany.
5. I am in respectful agreement with the view taken by this Court in *Emma Charlotte Eve* (supra), more so, in view of the amendment of the N.D.P.S. Act 1985 vide the Amendment Act of 2001. The provisions of the Bill No. XIV of 1998 have been incorporated into the N.D.P.S. Act 1985 by this amendment. The provisions of the Amendment Act of 2001, when contrasted with the provisions of the N.D.P.S. Act 1985 prior to amendment, confirms that prior to the 2001 amendment, it was not permissible for the Central Government to undertake controlled delivery operation in India nor was it an offence to do an act which is now penalised under Section 8A of the Act. In the instant case, even if it is assumed that the Appellant did the act as alleged by the prosecution, the conviction of the Appellant would be hit by Article 20 of the Constitution inasmuch as there was no Jaw at the time of the commission of such act to penalise that act as an offence.
6. I accordingly allow the appeal and quash the conviction of the Appellant. The Appellant is acquitted of the offences punishable under Sections 21 and 23 of the Act.

The Appellant, who is in custody, shall be set at liberty forthwith, if not wanted in any other case. Fine, if paid, shall be refunded to the Appellant. The Appellant's passport shall also be returned to her.

Judge

27.3.2003

**In the Supreme Court of India**

Criminal Appeal No. ghi/2003

**In the matter of:**

**Narcotics Control**

**Bureau**

**...COMPLAINANT Versus**

**Elizabeth Brown  
ACCUSED**

**...**

**GROUND OFS OF APPEAL**

- I. That the Hon'ble High Court failed to appreciate that Sections 21 and 23 of the Act are in such wide terms that they take within their ambit the controlled delivery offences.
- II. That the Hon'ble High Court failed to appreciate that the Preamble to the Act declares that the Act is to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances, and Section 2 (ix) of the Act defines "International Convention" to include "any other international convention or protocol or other instrument amending an international convention, relating to narcotic drugs or psychotropic substances which may be ratified or acceded to by India after the commencement of this Act". Admittedly, India has ratified the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances 1988 which defined "controlled delivery". It follows that even prior to the 2001 amendment, the N.D.P.S. Act 1985 contemplated controlled delivery offences and empowered the Central Government to undertake controlled delivery operations. The Amendment Act of 2001 is at best clarificatory in nature to expressly provide in the N.D.P.S. Act 1985 the powers that already exist.
- III. That in view of the Preamble read with Section 2 (ix) of the Act, the Hon'ble High Court erred in holding that prior to the Amendment Act of 2001, the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances 1988 did not have the force of law in India. As the N.D.P.S. Act 1985 was the law in force, there is no question of invoking Article 20 of the Constitution.
- IV. That the Hon'ble High Court, therefore, erred in holding that the very prosecution of the Respondent under the N.D.P.S. Act 1985 is legally misconceived.
- V. That the Hon'ble High Court failed to appreciate that the Respondent had failed to rebut the presumptions against her raised by Sections 35 and 54 of the Act as to the culpable mental state of the Respondent and the commission of the offence from the possession of the illicit articles.
- VI. That the Hon'ble High Court erred in overlooking the provisions of Section 28 of the Act in terms of which attempt to commit an offence punishable under

Sections 21 and 23 attract the same punishment as the commission of the offence.  
The Respondent at least attempted to import cocaine into India.



## **NARCOTIC DRUGS & PSYCHOTROPIC SUBSTANCES ACT, 1985**

**as amended by Act No.2 of 1989 w.e.f. 29th May 1989:**

An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property, derived from, or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.

### **Section 2. Definitions,**

In this Act, unless the context otherwise requires - (ix) “ International Convention” means-

(a) ...

(b) ...

(c) ...

(d) any other international convention or protocol or other instrument amending an international convention, relating to narcotic drugs or psychotropic substances which may be ratified or acceded to by India after the commencement of this Act;

### **Section 8. Prohibition of certain operations**

No person shall-

(c) produce, manufacture, possess, sell, purchase, transport, ware house, use, consume, import inter-State, export inter-State, import into India, export from India, or transship any narcotic drug or psychotropic substance.

except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation;

Provided .....

### **Section 21. Punishment for contravention in relation to manufactured drugs and preparations.**

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing



**BILL NO. XIV OF 1998**

**NARCOTIC DRUGS & PSYCHOTROPIC SUBSTANCES (AMENDMENT) ACT,  
2001**

**w.e.f. 9th May 2001**

*An Act to further amend the Narcotic Drugs and Psychotropic Substances Act, 1985*

**Section 2.** Definitions,

In this Act, unless the context otherwise requires –

...

(viib) “controlled delivery” means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, controlled substances or substances substituted for them to pass out of, or through or into the territory of India with the knowledge and under the supervision of an officer empowered in this behalf or duly authorised under section 50A with a view to identifying the persons involved in the commission of an offence under this Act

**Section 8.** Prohibition of certain operations

No person shall-

...

(c) produce, manufacture, possess, sell, purchase, transport, ware house, use, consume, import inter-State, export inter-State, import into India, export from India, or transship any narcotic drug or psychotropic substance.

except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made there under and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation;

Provided . ....

**Section 8A.** Prohibition of certain activities relating to property derived from offence

No person shall

(a) ...

(b) ....

(c) knowingly acquire, possess or use any property which was derived from an offence committed under this Act or under any other corresponding law of any other country.

**Section 21.** Punishment for contravention in relation to manufactured drugs and preparations. I

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, sells, purchases, transports, imports inter-State or uses any manufactured drug or any preparation containing any manufactured

## **CONSTITUTION OF INDIA**

**Article 20.** Protection in respect of conviction for offences (1) No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence.....

### **Relevant Extract for purposes of Exercise**

**DELHI REPORTED JUDGMENTS 2000 (54) DRJ**

**2000 (54) DRJ**

**HIGH COURT OF DELHI CrI. A.No. 87/99**

**Emma Charlotte Eve.....Appellant**

**Versus**

**Narcotic Control Bureau..... Respondent**

**M.S.A. Siddiqui, J**

**Decided on April 5, 2000**

### **Narcotic Drugs and Psychotropic Substances Act 1985**

**Section 21 & 23 -Application of obligations under UN Convention against Illicit Traffic Narcotic Drugs & Psychotropic Substances, 1998 – The accord does not become a law in force in India without legislative action.**

**Section 21 & 23 – Dispatch of the parcel containing contraband by post- Similarity of handwriting on the parcel and the admitted handwriting of accused not proved by handwriting expert Possibility of tempering with sealed sample not ruled out Conviction, set aside.**

### **Emma Charles Eve v. Narcotic Control Bureau**

Mr. AmanHingorani, Adv. For the Appellant

Mr. Satish Aggarwala, Adv. For the Respondent

M.S.A. Siddique, J.

This appeal is directed against the judgment and the order of conviction dated 11.12.1998 passed by the Additional Sessions Judge in Sessions Case No. 74/96 convicting the Appellant under Sections 21/23 of the Narcotic Drugs and Psychotropic Substances Act (for short the Act) and sentencing her to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1.00, 000/- or in default to suffer further rigorous imprisonment for a period of six months. Briefly stated the prosecution case is that on 3.4.1996, two postal parcels bearing

Nos. R-250012 and R-250013 arrived at Frankfurt Airport, Germany, with flight No. AV018 from Bogota, Columbia destined for further transport to India. At Frankfurt Airport, both the parcels were intercepted by the Custom Officer MrRabolt, who had handed over them to the Chief Inspector Customs Mr Prior. Both the parcels, when opened in the presence of the Custom Officer, MrHilder Brand, tested positive for cocaine. Consequently, a criminal case was registered vide Reference No. 89Js 141520/96 and both the parcels containing contraband were seized and confiscated by the Custom authorities, Government of Germany. After obtaining sanction from the Chief Public Prosecutor, Government of Germany, DrLeistner, the Narcotics Control Bureau, Govt. of India (for short "the NCB") was requested for a controlled delivery. By the order dated 4.4.1996 (Ex. PW-16/A), the Government of India empowered the NCB to undertake controlled delivery of the said consignment. On 9.4.1996, the aforesaid parcels were handed over to the Captain of the Lufthansa Airlines Mr Manfred Montjoge for their delivery to MrBerned Engel, German Drug Liaison Officer posted in India. On10.4.1996, the said consignment arrived at I.G.I. Airport, New Delhi by themorning flight. MrMontjoge delivered the parcels to MrBerned Engel, who in turn handed over them to MrShailendra Sharma (PW-12) at the airport. The parcel No. 251002 destined for Goa had been handed over to the officers of the NCB, Bombay Zonal Unit and the parcel No. 251003 destined for Delhi remained in the custody of Shri Shailendra Sharma. The further case of the prosecution is that Deputy chiefPost Master, Mr R P Sharma was contacted by the Zonal Director NCB, MrMukeshKhullar and a plan was chalked out to nab the claimant of the parcel bearing No. 251003. According to the plan, the intimation slip (Ex. PW-1/D) was prepared and kept in the post restante counter under surveillance of the Officers of the NCB.

On 19.4.1996, at about 10 am, the Appellant came to the post restante counter. She picked up the intimation slip (Ex. PW-1/D) and requested Postal Assistant MrVasudev (PW-7) to deliver the said parcel to her. The intimation slip (Ex.PW-1/D) was in the name of 'Elizabeth Evans' and the appellant's passport was issued in the name of Emma Charlotte Eve. The appellant, therefore, addressed an application (Ex. PW-1/F) to the Chief Post Master, GPO explaining the discrepancy in her name and that of on the parcel. Being satisfied with the explanation offered by the appellant Deputy Chief Post Master Mr R P Sharma (PW-14) allowed the Appellant to take delivery of the parcel in question. Thereafter , the parcel, which was in the custody of Mr.Shailender Sharma (PW-12) was delivered to the Appellant by Mr. Vasudev (PW-7) in the presence of SmtSuman Kumari Yadav (PW-11), who had disguised herself as the Postal Assistant.

The appellant, after taking delivery of the parcel, proceeded to the Shiva Guest House on a three wheeler driven by Rakesh Sharma (PW-10). The officers of the NCB followed the Appellant from the post office to her guest house and accosted her to her room. On being asked by the officers of the NCB, the Appellant handed over the said parcel to them, which was found to contain 122 grams of cocaine. The said parcel was seized vide seizure memo (Ex. PW-1/H). Two representative samples of 5 gms each were drawn and kept in two separate polythene bags. The samples as well as the remaining cocaine were converted into separate parcels and they were duly sealed on the spot. The sampled powder along with the test memo (Ex.PW-9/B) was sent to the Chemical Examiner, which on examination, was found to contain cocaine vide report dated 28.5.1996. The Appellant was charged with the offences punishable under Sections 21/23 of the Act and tried.

The Appellant abjured her guilt and alleged that false case has been foisted on her. According to the appellant, on 19.4.1996, she had gone to the post office to enquire about the parcel which she was expecting from her father

- (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.”

In section 76(2) of the Act, substitution of the following clause has been proposed: -

‘(ca) the manner in which “controlled delivery” under Section SOA is to be undertaken.’

However, there is no provision in the Act relating to the concept of the “controlled delivery”. The learned Additional Sessions Judge rejected the applicant’s contention that controlled delivery operation is not permitted in India and in the absence of there being any specific provision in the Act for dealing with an operation relating to controlled delivery, the provisions of the United Nations Convention of 1988 relating to the concept of controlled delivery cannot be made applicable. Learned Additional Sessions Judge was of the opinion that since the Govt. of India has ratified the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, the provisions of the Convention are binding on India and controlled delivery is permissible in this country. I am unable to subscribe to the view taken by learned Additional Sessions Judge. Section 3 (37) of the General Clauses Act defines an “offence” to mean an act of omission made punishable by any law for the time being in force. Punishment is the mode by which the State enforces its laws forbidding the doing of something, or omission to do something. Punishment is always co related to the law of the State forbidding the doing or omission to do something. Unless such a law exists, there is no question of any act or omission being made punishable (*Jwala Ram vs State of Pepsu*, AIR 1962 SC 1246).

Thus, the question which arises for consideration is whether the obligations of the Government of India under the accord and obligations attached to the UN Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 has the force or authority of law? Article 245(1) read with the entry 14 in List-1 of Schedule-7 of the Constitution and Article 253 empower the Parliament to make laws for implementing treaties and agreements entered into by the Government of India with foreign countries. The provisions in Part IV of the Constitution contain the directive principles of State Policy. The Provision in Article 51, occurring in that part, provides, inter alia, that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. The provision in Article 37 occurring in the same part, though it declares that the directive principles in part-IV are fundamental in the governance of the country and it shall be the duty of the State to apply those principles in making the laws, states that the provisions in that part shall not be enforceable by any court. From this it follows that in the absence of any law, court cannot also enforce obedience of the Govt. of India to its treaty, agreement or convention with foreign countries or the United Nations.

From U K and was wrongly handed over a parcel, which was addressed to one Elizabeth Evans and she, therefore, refused to take delivery and immediately returned it back to the postal officer. Thereafter, she came to Paharganj and when she was about to enter the restaurant, three men grabbed her and forcibly took her to the guest house where she was staying and there she was subjected to a humiliating search, during the course of which, officials of the Narcotic Control Bureau wrongfully forced a parcel upon her. She has not examined any witness in support of her defense. The learned Additional Sessions Judge, on an assessment of evidence adduced by the prosecution, accepted the prosecution case and convicted and sentenced the Appellant as indicated above.

At the outset, I must make it clear that the present case pertains to the controlled delivery. As per prosecution case, two postal parcels bearing Nos. R-250012 and 250013 arrived at the Frankfurt Airport, Germany with flight No. AVO18 from Bogota, Columbia, destined for further transport to India. On suspicion, both the parcels containing cocaine were intercepted at the airport by the customs officer Mr. Rabolt, who handed over them to the Chief Inspector Customs Mr Prior. Consequently, a criminal case in respect of the said parcels was registered at Frankfurt (Germany) and the said parcels were seized and confiscated by the Customs Authorities. After obtaining the requisite sanction from the Chief Public Prosecutor, Govt. of Germany, Dr Leistner, the NCB was requested to undertake a controlled delivery. By the order dated 4.4.1996. (Ex.PW-16/A), the Govt. of India empowered the NCB to undertake the 'controlled delivery' and pursuant thereto, the said parcels were dispatched from Germany and received on 10.4.1996 at the I.G.I. Airport by Mr Shailendra Sharma (PW-12).

It may be mentioned here that drug trafficking, trading and its use which is a global phenomenon and has acquired the dimensions of an epidemic, is detrimental to the future of a country. Therefore, the Act was enacted with a view to combat the evil of drug trafficking and to suppress the abuse of dangerous drugs and psychotropic substances in the manner envisaged by the International Convention of Psychotropic substances, 1971. The United Nations Conventions against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances was held in 1988 in Vienna, Austria to tackle the menace of drug trafficking throughout the comity of Nations. The Government of India has ratified this convention. Therefore, the Act was amended in 1989, inter alia to provide for tracing, seizing and forfeiture of illegally acquired property. The experience gained over the years revealed that the provisions of the Act have certain inadequacies due to which the implementation of the provisions has been tardy. Certain other inadequacies in the various provisions of the Act have been noticed by the Government. The need to remove those inadequacies and rationalisation of the sentence structure was, therefore, felt. Certain obligations, especially in respect of the concept of "controlled delivery" arising from the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, to which the Govt. of India acceded, also required to be addressed by incorporating suitable amendments in the Act. With a view to achieve the said object, the Bill No.XIV of 1998 further to amend the Act was introduced in the Parliament. Learned counsel for the Appellant submitted that since the Parliament was dissolved in 1999, the said Bill could not be passed by the Parliament. Sections 2 (viib), 8-A, 50-A, 54 and Section 76(CA) of the 'said Bill' are relevant for purposes of the present case.

Section 2 (viib) defined “controlled delivery” as under: -“(viib) “controlled delivery” means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substance, controlled substances or substances substituted for them to pass out of, or through or into the territory of India with the knowledge and under the supervision with a view to identifying the persons involved in the commission of an offence under this Act.”

Section 8-A has been proposed to prohibit certain activities relating to property derived from offence. The Section reads as under: -

“8A. No person shall –

- (a) convert or transfer any property knowing that such property is derived from on offence committed under this Act or under any other corresponding law of any country or from an act of participation in such offence, for the purpose of concealing or disguising the illicit origin of the property or to assist any person in the commission of an offence or to evade the legal consequences or
- (b) conceal or disguise the true nature, source, location, disposition of any property knowing that such property is derived from an offence committed under this Act or under any other corresponding law of any other country or
- (c) knowingly acquire, possess or use any property which was derived from an offence committed under this Act or under any other corresponding law of any other country.”

After Section 50 of the Act, a new Section 50-A has been proposed to confer power on the Director General of Narcotics Control Bureau or any other person authorised by him in this behalf to undertake controlled delivery of any consignment to any destination in India or a foreign country, in consultation with the competent authority of such foreign country to which such consignment is destined, in such manner as may be prescribed. For Section 54 of the Act, substitution of the following Section has been proposed:

“54. In trials under this Act, if may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of, -

- (a) any narcotic drug or psychotropic substance or controlled substance;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which has cultivated;
- (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

In Encyclopedia Britannica (Vol.12) at pages 424 and 425, under the heading Relationship with the Internal Law of States, it is stated thus:

“Relationship with the Internal Law of States: –

To understand international law it is necessary to appreciate its close relationship to the internal law of States, or as lawyers say, the municipal law of States, for its increasingly penetrating that sphere. Even the traditional international law, at a time

when it was supposed to be a law only between States, had many rules which required the cooperation of municipal courts for their realization: for example, the very ancient rules where by foreign sovereigns and their diplomatic representatives enjoy certain immunities from the municipal jurisdiction. But a very large part of modern international law is directly concerned with the activities of individuals which come before municipal courts. So that it is in municipal courts that a large and increasing part of international law is enforced.

One school of thought accepts that international law may be per se a part of the law of the land and that the municipal court therefore, in the appropriate case, applies international law directly. Another insists that a municipal court can only apply and enforce its own municipal law, and that the international law rule is binding only on the State itself, which must be legislation, transform the precept into one of municipal law. The two approaches can on occasions lead to different results, e.g., in a case involving a treaty which the government has omitted to transform into a municipal statute. But the second, or dualist, theory can hardly be applied in any case in those many countries (e.g., the Republic of Ireland, France and the German Federal Republic) where it is by the constitution provided that international law is part of the law of the land.

There are broadly, two different methods by which precepts of international law are applied in the domestic Courts of a State. By the first method it is accepted that international law is per se a part of the law of the land and that the domestic court, therefore, in an appropriate case, applied international law directly. According to the second method a domestic court can only apply and enforce its own internal law, and the international law rule is binding only on the State itself, which must be legislation transform the precept into one of domestic law. The first method is employed in those countries (e.g. the Republic of Ireland, France and German Federal Republic) where it is by the constitution provided that international law is part of the law of the land. The position before English Courts is something of a compromise between the two methods. There can be no doubt that they regard customary international law as part of the law of the land, for they take 'judicial notice' of it; that is to say they assume that the court knows the law and does not require it to be proved by calling expert evidence, as in cases involving foreign and external systems of law. The courts regard any relevant rule of customary international law as being incorporated into the domestic law."

In the case of *Xavier v Canara Bank Ltd* (1969 Ker LT 921), it was held that the remedy for breaches of International law in general is not to be found in the law courts of the State because of International law *per se* or *proprio vigore* has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken.

In *Jolly George Varghese v. Bank of Cochin* (AIR 1980 SC 410), while dealing with the effect of international law and the enforceability of such law at the instance of individuals within this country, the Supreme Court having quoted with approval the above observations of the Kerala High Court in *Xavier v Canara Bank Ltd* (1969 Ker LT 927), has enunciated the law on the point thus:

“The positive commitment of the States parties ignites legislative action at home but does not automatically make the covenant an enforceable part of the *corpus juris* of India.”

As noticed earlier, the bill No. XV of 1998 further to amend the Act has not been passed by the Parliament. In the absence of there being any specific provisions in the Act for dealing with an operation relating to controlled delivery, the provisions of 1998 UN Conventions relating to the concept of controlled delivery cannot have the force of law.

In the instant case, there is not an iota of legal evidence on record to show that on 28th March 1996, the parcel in question was posted by the appellant. Admittedly, the addressee of the parcel in question was one Elizabeth Evans and on 3.4.1996, the parcel in question was intercepted at the Frankfurt Airport, Germany. It is also undisputed that a criminal case was registered at Frankfurt, Germany in respect of the parcel in question and the same was seized and confiscated by the Customs Authorities, Government of Germany. As per prosecution case, on 9.4.1996, the parcel in question was dispatched to India by the German Authorities. That being so, the parcel in question is the property of the criminal case registered at the Frankfurt (Germany) and it was sent to India with a view to identifying the person involved in the commission of the offence. It follows that the contraband in question was sent to India at the instance of the Govt. of Germany and not at the instance of the appellant. Reference may, in this context be made to the decision of the Punjab Chief Court in *Boston v. Emperor*, 1911 CrJLJ (Vol.12) 116.

In that case, the accused tendered a parcel of opium at the Post Office for dispatch to Burma but the parcel was opened by the Postmaster at the place of dispatch on account of information received and sent on to Burma by the Postal authorities marked “doubtful” with a view to the identification of the consignee. It was held:-

“that the accused did not commit the offence of exporting opium under Section 9(e) of the Opium Act, as the parcel was seized by the authorities before dispatch and it ceased to be in the Post Office on accused’s account before it left India for Burma.”

Thus, in the instant case, it cannot be held that the Appellant had imported or attempted to import the contraband into India. Consequently, the charge under Section 23 of the Act leveled against the Appellant must fall to the ground.

## MOOT PROBLEM – 1

Mool Chand was elected as a Ward Member of Ward No. 9 of Rajpura town. (A Ward Member is a member of an elected body of a Municipality headed by a Chairperson.) Mool Chand belonged to a Scheduled Caste (SC) and the seat to which he was elected was reserved for SC. The body was chaired by Baldev who belonged to General Category. Once, Baldev wanted to meet Mool Chand to discuss issues relating to cleanliness in Ward No. 9. Therefore, on December 4, 2019 Baldev sent him a message through WhatsApp, inviting him for a personal meeting in his chamber at 11 AM. Mool Chand was busy that day and, therefore, he read the message at 11.30 AM. He immediately called Baldev to inform him that he would reach shortly. However, Baldev started shouting at him for getting late. He made casteist remarks and humiliated him. At that time, a clerk was also sitting in the chamber. Despite the insult and humiliation, Mool Chand went to the Municipality to attend the meeting. As soon as he entered into the chamber, Baldev got angry and abused him on the name of his caste. He shouted at him saying: “Get lost from my office, otherwise I will make you clean the streets.” At that time, there was no third person inside the chamber. Mool Chand left the chamber as Baldev was not listening to him. He rushed to the Police Station to register an FIR against Baldev. At the initial stage of the case, the trial court found that a *prima facie* case had been made out against Baldev. Therefore, on February 4, 2020, the court framed charges under Sections 3(1)(r) and 3(1)(s) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. The provisions read as below:

*Punishments for offences of atrocities: Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-*

.....

*(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;*

*(s) abuses any member of a Scheduled Caste or a Scheduled Tribe by caste name in any place within public view;*

Accused Baldev challenged the order of framing of charges before the Allahabad High Court. The High Court held that the casteist aspersions made telephonically or in the absence of a third person did not constitute an offence within the meaning of Sections 3(1)(r) and 3(1)(s) of the Act, because the alleged remarks were not made “at a place within public view” as required under these provisions. The court also said that the Act is a penal statute which must be strictly construed. Thus, the High Court quashed the order of framing the charges on April 6, 2020. The court also denied to provide the certificate to appeal before the Supreme Court under Article 134A of the Constitution of India. Aggrieved by the order of the High Court, Mool Chand filed a Special Leave to Appeal before the Supreme Court under Article 136 of the Constitution and the same was admitted for hearing by the court.

Memorial is required to be filed for only one party.

## MOOT PROBLEM - 2

Hummingway and Tumblrr Pvt Ltd, based in Norway is the proprietor of the trademark 'HumTum' [written in a stylised manner with the device of daisies(flowers) in the background], since 1966. It has set up a subsidiary in New Delhi for the purpose of carrying on business under the trademark 'HuMTuM', on behalf of the parent company. The company is yet to formally start its operations in India, but has applied for registration in India. The status of the application in May 2020 is that it is sent to Vienna Codification. The company secured its earliest registration for the mark in the year 1970 in the United Kingdom.

Hummingway and Tumblrr Pvt Ltd is a huge conglomerate primarily engaged in designing, marketing and selling a wide variety of premium segment fashionable clothing and ancillary products for women, men, teenagers and children. It has more than 4500 outlets in more than 190 countries of the world and its outreach is growing by the day. With the boost in e-commerce, products of the company are available in India through Amazon/ Myntra and other similar online shopping service providers.

Hiralal Megabrands Pvt. Ltd, an Indian company (based in Gujarat but having presence throughout India and the Middle-East) is engaged in the business of marketing, supplying, selling garments and ancillary products under the trademark 'Hum Tum', written in Hindi, Gujarati and English since the year 2011. It is registered in India since 2014. 'Hum Tum' is quite a familiar brand amongst the lovers of affordable clothing in India. Hiralal Megabrands Pvt. Ltd believes that the meaning of the Hindi expression 'Hum Tum' has a lot to do with the 'connect' that the mark has managed to forge with the end users. Its biggest outlet is in Saket, Delhi.

Hummingway and Tumblrr Pvt Ltd maintains that though its operations in India are yet to kickstart, news pertaining to its famous mark 'HuMTuM' is readily available and frequently accessed through search engines such as [www.google.com](http://www.google.com), [www.yahoo.com](http://www.yahoo.com) and [www.msn.com](http://www.msn.com); that fashion apparel and accessories bearing the trade mark HuMTuM are extensively supplied in India through e-commerce global stores with the result that the said mark has achieved extensive recognition amongst relevant section of the public

Hummingway and Tumblrr Pvt Ltd came across the goods of Hiralal Megabrands recently and found out that the latter was using a confusingly similar TM 'Hum Tum' for products / goods similar to his. Hiralal Megabrands was also offering goods bearing the mark 'Hum Tum' through online shopping portals such as [www.jabong.com](http://www.jabong.com), [www.amazon.com](http://www.amazon.com), [www.myntra.com](http://www.myntra.com) etc.

Hummingway and Tumblrr Pvt Ltd filed a suit for passing off, against Hiralal Megabrands after a cease and desist notice was not complied with by the latter. The district court at Delhi held that there was no passing-off made out as the TMs were quite different in appearance and that both the brands operated in two very different territories; that the defendant honestly and bonafidely conceived and adopted the trademark 'Hum Tum', being a popular expression of Hindi language; that the defendant has been continuously, extensively and uninterruptedly using the same since the year 2011; that the plaintiffs were not entitled to any relief on the ground of acquiescence and waiver.

The aggrieved party, Hummingwayy and Tumblrr Pvt Ltd has filed an appeal against the order of the District court maintaining that the judge failed to properly appreciate a few grounds like the defendants being in the same line of business as the plaintiffs and ignored a number of (other) parameters while deciding the case.

Memorial is required to be filed for only one party.

### MOOT PROBLEM – 3

The land in dispute (7000 hectares) is situated in Uttar Pradesh and it is stated by Anjali, the married daughter of the Coparcener, that this is an ancestral property coming from the time of her grandfather, Ram Singh. After the death of her grandfather, the land was inherited by his two sons, Malik Singh and Roshan Singh (her father) and their sons as well. All of them at that time formed the Hindu Joint Family governed by Mitakshara law of Hindu coparcenary of which Roshan Singh was the “Karta” and acted in such capacity till 1989. Roshan Singh executed a sale deed dated 16/11/2005, of some portions of disputed land in favour of one “Kundan Singh” and his name is mutated on revenue record along with other co- sharers.

All the members of the Joint Hindu Family consented to the sale deed executed in favour of ‘Kundan Singh’ except the daughter of the Karta. Moreover the consent of the daughter has not been even obtained due to the reason that she is neither a part of Joint Hindu Family nor a Coparcener to this context. For the same, she filed an objection dated 4/4/2013 under sec. 9(2) of the UP consolidation of Holdings Act, 1953 for the direction to effect a partition of her  $\frac{1}{4}$  th share in the property and to delete the name of ‘Kundan Singh’ from revenue record, instead add her name along with other co sharers. She does not contest the shares of other co sharers but she is pleading for her share in the disputed Agricultural Land on the basis of the Hindu Succession (Amendment) Act, 2005 as sec 4(2) was deleted and sec 6 (1)(c), created same liability on the daughter as of a son as such the provisions of HSA, 1956 will apply to agricultural lands also.

However, the sale deed was executed on 16/11/2005 in favour of Kundan Singh and on its basis, his name is mutated in the revenue records by an order dated 20/12/2005 but as per the aggrieved daughter, Roshan Singh had no right to execute the sale deed dated 16/11/2005 and the deed is void. As the name in revenue record was mutated on the basis of void sale deed and as such the name was liable to be deleted. Hence the case is contested by Kundan Singh as well on the basis that the disputed land is an agricultural land and would be governed by the UP Zamindari Abolition and Land Reforms Act, 1950 and the provisions of Hindu Succession Act, 1956 are not applicable to it. The petitioner had no right in the disputed land during the lifetime of her father, Roshan Singh and the petition of the daughter is not maintainable.

The Consolidation officer after hearing the preliminary objections raised by Kundan Singh regarding the non maintainability of the claim by the petitioner, held that the Civil Procedure Code, 1908 is not applicable except the land for which declaration has been made under sec 143 of the UP Act, and the provisions of Hindu Succession Act, 1956 are not applicable to the agricultural land. Furthermore, Roshan Singh, the father of the petitioner is still alive, so no question of inheritance of his Bhumidari holdings arose otherwise also, the petitioner being a married daughter is not an heir under sec 171 of the UP Act, as Roshan Singh was having two sons, hence the objection filed by the petitioner was not maintainable and upon such findings, the objection of the petitioner was dismissed and the land was divided amongst the on record recorded holders of the land.

The petitioner filed an appeal from the aforesaid order, Settlement Officer Consolidation affirmed the findings of Consolidation Officer and dismissed the appeal by order dated 15/3/2014, the petitioner filed a revision against the aforesaid order, Deputy Director of Consolidation, by order dated 15/6/2014 dismissed the revision. Hence this writ petition has been filed in the High Court of Allahabad challenging the order dated 15/6/2014 by the Deputy Director of Consolidation. The writ filed in the family matter is to be argued before the High Court. The matter is listed for arguments at the admission stage. Present arguments for either side

Arguments have to be advanced from only one side.

#### **MOOT PROBLEM – 4**

Plaintiff Abhishek, an acclaimed scriptwriter, conceived a plot for a reality TV programme that required competitors to survive in adverse geographical terrains for a period of three months. The first month was to be spent in a mountain, the next month in a forest and lastly,

in a desert. The reality TV programme would centre around knowledge and skills required to survive in adverse climatic conditions, quick decision making and action in case of any approaching danger, food hunt, use of natural herbs for ailments *etc.* Abhishek, titled the work as 'Back to Nature'. He was sure that if the plot could be adapted into a reality television series, it would be a major hit amongst audience. Abhishek, with no previous experience in the TV industry sought assistance from his college friend Biju, who had experience in the TV industry to discuss the possibility of meeting producers for adaptation of the work.

The meeting with Biju turned out to be a disappointment as Biju suggested that although the plot was exciting but it was unrealistic for the modern human to fend all alone in adverse geographical terrain. Biju suggested that the plot needs major changes and that he would help him make these changes. After the meeting, Abhishek, emailed the outline of the plot to Biju and waited for his response. Biju, called after a few days and said that the plot was more unrealistic than it sounded in their meeting and that Abhishek should drop the idea and work on something else. Abhishek did not pursue the matter further with Biju after this response. He decided to further the story himself and approach other producers.

After about eight weeks, Abhishek, came across a trailer on a popular TV channel 'X TV' about a new programme titled 'Man and Nature' produced by a famous production company 'ABC Ltd.' that would be broadcast soon thereafter. The show would be a reality TV series and the auditions would be held for couples who would be challenged to spend three months in two adverse geographical terrains, forty-five days in a jungle and forty-five days in a mountain with no human habitation close-by. The uncanny similarity to his work forced Abhishek to enquire about the show and his investigation revealed that ABC Ltd. bought the script from Biju. Feeling aggrieved, he tried to contact Biju but to no avail.

The district court did not grant any relief to Abhishek stating that there can be no copyright in a plot as much as there can be no copyright in an idea. Abhishek then made an appeal to the High Court citing that it was not merely an idea as an idea is something vague. His plot was real, and he even emailed the outline of the plot to Biju.

Memorial is required to be filed for only one party.

## MOOT PROBLEM – 5

This case involves a human tragedy of Shakespearean proportions: a young man overcomes huge physical disabilities to reach Olympian heights as an athlete; in doing so he becomes an international celebrity; he meets a young woman of great natural beauty and a successful model; romance blossoms; and then, ironically on Valentine's Day, all is destroyed when he takes her life. In the early hours of 14 February 2013 the respondent, Mr. Jerome (at times the accused hereafter), shot and killed the 29 year old Miss Maria (at times the deceased hereafter) at his home in a secured complex known as Silver Woods Estate in Mumbai, Maharashtra.

The accused was born with deformed legs, consequently before his first birthday, both of his legs were surgically amputated below the knee and, since then, he has had to rely on prosthetics. Despite such a severe physical handicap, he made his way bravely into the world and, had a spectacular athletic career. He competed by using prosthetic legs at the international level in both disabled and able-bodied athletic events. He won numerous international medals, including gold medals at the Paralympics. The accused represented India in both the Olympic and the Paralympic Games of 2012. His athletic achievements not only brought him international fame but also into contact with charities, and he was awarded an honorary doctorate for his humanitarian work in the world of prosthetic.

The accused met the deceased, who was a successful model on 4<sup>th</sup> November, 2012. Romance quickly blossomed and they became intimate. As so often happens with romantic relationships, they had petty conflict and tensions as evidenced by a transcript of text messages that had passed between them. But despite these hiccups, the deceased at times slept over at the accused's home. She did so on the night of 13 February 2013. In the early hours of the following morning, screams, gunshots, loud noises and cries for help were heard, emanating from the accused's house. Within minutes, a Mr. Raj and a Dr. Dilip, the latter a medical practitioner, arrived at the accused's home. There they found the accused in a highly emotional state, kneeling alongside the deceased who was lying on the floor at the foot of the stairs leading to the sleeping quarters of the house. She had been carried there by the accused from an upstairs bathroom where the shooting had taken place. She had been shot several times and was mortally wounded. The severity of her injuries was such that she was not breathing and Dr Dilip was unable to find a pulse. In due course FIR was registered against the accused under section 302 of the Indian Penal Code for murder. The State's prosecutor attempted to persuade the trial court that the accused had threatened the deceased during the course of an argument, that she had locked herself into the toilet cubicle in the bathroom to escape from him, and that he had thereupon fired the four fatal shots with a 9mm pistol through the door of a toilet cubicle in the bathroom adjacent to his bedroom and killed her.

The accused, on the other hand, alleged that he had awoken from his sleep in the early hours of the morning. It was very warm and so he sat up, although it was dark in the room, he was aware that the deceased was awake in the bed next to him as she rolled over and spoke to him. He got out of bed, brought the two fans from the balcony into the room, closed and locked the sliding doors, and drew the curtains. It was very dark in the room, the only light being from a small LED on an amplifier at the TV cabinet. He then heard the sound of a

window opening in the bathroom. The bathroom is situated not directly adjacent to the bedroom but down a short passage lined with cupboards. He immediately thought that there was an intruder who had entered the house through the bathroom window, possibly by climbing up a ladder. He quickly moved back to his bed and grabbed his 9mm pistol from where he kept it under the bed. As he did so, he whispered to Maria to 'get down and phone the police' before proceeding to the passage leading to the bathroom. He was not wearing his prosthetic legs at that stage and, overcome with fear, he started screaming and shouting both for the intruder to get out of his house and for Maria to get down on the floor and to phone the police. When he reached the entrance to the bathroom, he stopped shouting as he was worried that the intruder would know exactly where he was. As he neared the bathroom he heard the toilet door slam. Peering around the wall at the end of the passage, he saw that there was no one in the bathroom itself but that the toilet door was closed. He alleged that at that point he started screaming again, telling Maria, who he presumed was in the bedroom, to phone the police. He then heard a noise coming from inside the toilet and promptly fired four shots at the door. After that he retreated to the bedroom where he found that Maria was no longer there. It then dawned on him that it could be her in the toilet. In panic he went back to the bathroom and tried to open the door, but found it to be locked. He then started screaming for help and put on his prosthetic legs. He unsuccessfully tried to kick open the door but on seeing the key lying on the toilet floor, he unlocked the door and found Maria slumped with her weight on the toilet bowl. She was not breathing. He held her and pulled her out of the bathroom before telephoning the other two residents of the estate, Mr Raj and Dr Dilip, followed by the calls made to the paramedic organizations for ambulance and the estate's security by the accused.

The accused pleaded in the trial that he cannot be held guilty of murdering Maria because he had no subjective intention to cause her death as he had not known Maria was in the toilet. On the contrary the accused believed that, at the time he fired shots into the toilet door, the deceased was in the bedroom while the intruders were in the toilet. This belief was communicated to a number of people shortly after the incident. The counsel for the accused emphasized the accused's physical disabilities, the fact that he had not been wearing his prostheses at the time and that he had thus been particularly vulnerable to any aggression directed at him by an intruder. His counsel argued that it had to be inferred that he must have viewed whoever was in the toilet as a danger hence there was a genuine belief of an imminent attack upon him.

The Court of Session convicted him for culpable homicide not amounting to murder holding that there was no intention to kill the person behind the door. He had shot the deceased believing that she was an intruder. The accused's had erroneous belief that his life was in danger therefore cannot be found guilty of murder. Aggrieved by the decision of the trial court the State has made an appeal to the High court.

Memorial is required to be filed only for one party.

## **MOOT PROBLEM - 6**

*People's Republic of TULIP* and *Republic of DAFFODIL* are two countries in the existing international legal order. For years, the *People's Republic of TULIP* was colonised by the *Republic of DAFFODIL* before it got its independence in 1955. While *DAFFODIL* is the founding member of the United Nations, *TULIP* became a member state in 1956. The historical episode of colonialism and the ethnic demography of the *People's Republic of TULIP* significantly influence its municipal and international policies.

Post decolonization, the incidents of violence between the majority ethnic community, comprising 75% of the total population and the non-ethnic community, comprising 25% of the total population of the *People's Republic of TULIP* became frequent. Often the violence against the non-ethnic community was projected as a peripheral issue by the government. According to a report prepared by a civil society organization the incidents of violence in the *People's Republic of TULIP* have proliferated after people from the non-ethnic community took up arms to resist the atrocities being committed against them. Over the years the resistance got organized in a group named, '*armed group V*'.

Frequent reports of conflict and the growing number of casualties attracted international attention. The situation was discussed at the United Nations Security Council (UNSC) in 2010. In its statement at UNSC, the government of the *People's Republic of TULIP* blamed the *Republic of DAFFODIL* for assisting the '*armed group V*'. In response, the representative of the *Republic of DAFFODIL* stated that they have not interfered in the internal matters of the *People's Republic of TULIP* and are committed to follow the principles of the United Nations Charter.

In light of the growing concerns, UNSC established an International Commission of Inquiry with a mandate to investigate the situation. International Commission submitted its report on 12 March 2011. In its report, the International Commission pointed out that murder, extermination, torture, enslavement and sexual violence against members of the non-ethnic community is rampant. The report further stated that while the members of the '*armed group V*' were trained, funded and armed by the *Republic of DAFFODIL*, '*armed group V*' did not act on the 'instructions, direction or control' of the *Republic of DAFFODIL*.

In a press conference on 13 March 2011, the Foreign Minister of the *Republic of DAFFODIL* rejected the findings of the report. He also stated that since '*armed group V*' was not acting under the 'direction or control' of the *DAFFODIL*, it cannot be held responsible for the acts of '*armed group V*' under international law. Responding to a question during the press conference, the Foreign Minister said that unless the official armed personnel of the *Republic of DAFFODIL* is directly involved in any attack, the question of breach of Article 2(4) of the UN Charter does not arise. In a press conference on the same day, the official spokesperson of the *People's Republic of TULIP* noted that any attack by the '*armed group V*' would be attributable to the *Republic of DAFFODIL* as the members of the group are being trained, funded and armed by it.

On 11 August 2011, an armed attack on a government building in *People's Republic of TULIP* killed 200 people. The '*armed group V*' took responsibility for the attack.

In a public statement on 12 August 2011, the President of the *People's Republic of TULIP* referred to the report of the International Commission of Inquiry and noted that the *Republic of DAFFODIL* is responsible for the acts of the '*armed group V*'. He also noted that the incident of 11 August 2011 amounts to use of force under international law by the *Republic of DAFFODIL*, and violates the sovereignty and territorial integrity of *TULIP*.

On 20 August 2011, the *People's Republic of TULIP* filed in the Registry of the International Court of Justice (ICJ) an application instituting proceedings against the *Republic of DAFFODIL* seeking reparations for the damages caused by the violation of international law. Subsequently, as per the rules of the ICJ the Registrar entered the case into the Court's General List as, *Case Concerning Armed Activities in TULIP (People's Republic of TULIP v. Republic of DAFFODIL)*. The proceedings before the ICJ have begun.

Note: Both, *People's Republic of TULIP* and *Republic of DAFFODIL*, have made declarations under Article 36(2) of the Statute of the International Court of Justice accepting the jurisdiction on the condition of reciprocity over all international disputes.

Memorial is required to be filed for only one party.

# Ethical Dilemmas in the Lawyer–Client Relation: Concerns and Solutions

Asian Journal of Legal Education  
7(1) 25–34, 2020  
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[in.sagepub.com/journals-permissions-india](http://in.sagepub.com/journals-permissions-india)  
DOI: 10.1177/2322005819893279  
[journals.sagepub.com/home/ale](http://journals.sagepub.com/home/ale)



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## Abstract

Lawyer–client relationship is the most important aspect of professional life of lawyers. When lawyers enter into professional relation with their clients they become bound by several ethical and professional duties. These duties are a mixture of status and contract emerging out of the nature of the relationship governing lawyer and client. Observing these duties is indispensable under the rules governing standards of professional conduct for lawyers. Lot has been written about these duties and the need to observe them, but the untraded area in the literature remains some of the challenges that arise in course of observing these duties due to some equally competing issues. The lawyers often face these challenges in their professional life, but little guidance is available to address them effectively. In this context, the aim of this article is to trace some of these competing issues and challenges and discuss the legal and regulatory framework that help to address them. The article begins by exploring the issues that arise at the very formation of the lawyer–client relationship. In the second part, the article examines the issue of lawyer’s scope and authority to make decisions in legal transactions for their clients. Also it covers the issues involving extent of lawyer’s authority to take decisions on behalf of mentally impaired or minor clients. Finally, the article looks into the issues that come up during the discharge of the lawyer–client relationship. The article concludes on the note that to ensure an effective and satisfactory lawyer–client relation it is an imperative that lawyers are sensitized with these issues and the principles they can look at for their resolution.

## Introduction

On the morning of 8 May 2019, the entire legal fraternity of India wakes to learn in shock and mourn that one of its great son Professor N.R. Madhava Menon has set on his heavenly journey renouncing this world forever. It was an irreparable loss because rarely a great talent and persona like him is born. A person coming from a very humble background, reached to the zenith of the Indian legal fraternity with his sheer hard work, impeccable personal discipline and professional commitment. There is hardly any field in Indian legal profession where he has not left a mark by his scholarship and contribution. He has been a phenomenal law teacher, a serious academic scholar, a visionary administrator and reformist and

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a noteworthy leader in the field of continuing legal and judicial education. But of all the achievements he commands, he will always be especially remembered for his contribution in the reform of Indian Legal education. The highlight of his professional career came with his role in founding the National Law Schools at Bangalore and Kolkata which today has received global admiration. As a law teacher he has dedicated his life in improving the quality of the legal professionals in India. Till the day of his demise, he has worked tirelessly to develop programmes which would provide opportunity and training to law students and lawyers to improve their professional competence and quality. The author had a long association with Prof. Menon and appreciates Asian Journal of Legal Education's initiative to publish a special issue dedicated in the memory of this celebrated personality. Availing this opportunity and to pay personal tribute to this great law teacher this article contributes on a theme very dear to Prof. Menon, professional responsibility of lawyers. The article addresses some fundamental issues involved in the lawyer–client relationship.

A lawyer–client relationship may be established when a client approaches a lawyer for some legal advice or service and the lawyer accepts to provide the same. But when a lawyer enters into a relation with his client to provide his legal service, she becomes bound by several ethical and professional duties. These ethical duties are a mixture of status and contract emerging out of the nature of the relationship governing the lawyer and client. That is to say that some elements of this relationship are based on the contractual relation that the lawyer is entering with his client to provide his legal service. Others are based on his obligations emerging from the fiduciary relation that a lawyer has with his client and the same cannot be entirely waived by the lawyer or his client. Observing these duties is indispensable under the rules governing standards of professional conduct of lawyers. Lot has been written about these duties and the need to observe them, but the untraded area in the literature remains some of the challenges that arise in course of observing these duties due to some equally competing issues. The lawyers often face these challenges in their professional life, but little guidance is available to address them effectively. This article aims to trace the issues and challenges that arise in course of a lawyer–client relation by exploring the rules governing the standards of professional responsibility. It also discusses the guidelines for lawyers based on the existing legal and regulatory framework to resolve these challenges. The article however does not intend to indulge into the issues arising from the fiduciary nature of the lawyer–client relationship, for example, '*conflict of interest*' and '*confidentiality*'. It only aims to address the range of issues that emerges from the contractual nature of this relationship.

The article begins by exploring the issues that informs the very formation of the lawyer–client relationship. It then examines the issues emerging in connection to decision-making in a case and with special reference to mentally impaired or a minor client. Finally, it examines the issues in termination of lawyer–client relationships and the duties of lawyers towards clients at the end of the lawyer–client relationship. The article concludes by highlighting the importance of the knowledge of the rules that governs these issues to ensure an effective and satisfactory relation between the lawyer and clients.

## **Ethical Dilemmas of Lawyers During the Formation of The Lawyer–Client Relationship**

Majority of lawyer–client relationships begin in a very straightforward manner. A client comes to a lawyer's office, explains about his legal issues or requirement, reaches an agreement and formally engages the lawyer to deal with his legal issues. There are no mandatory rules that are required to be completed with appointment of a lawyer. The existing Bar Council of India Rules governing 'Standards

of Professional Conduct and Etiquette’ for advocates in India<sup>1</sup> (will be referred hereafter as BCI Rules) does not specify any requirement for forming a lawyer–client relationship. Rule 11 of the BCI Rules provides:

An advocate is bound to accept any brief in the Courts or Tribunals or before any other authorities in or before which he proposes to practise at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.

According to this rule an advocate will accept engagement from a client for payment of an agreed amount of fee consistent to the amount she charges for the nature of legal service to be provided. This is generally the manner by which a lawyer–client relation will be established. There is no other requirement to be fulfilled by the advocate. So an oral agreement concluded between a lawyer and client for providing legal service in lieu of an agreed fee can establish a lawyer–client relation.

However, this rule gives rise to a question that whether a lawyer is under a general professional obligation to accept every client who approaches him or a limited discretion is allowed to him to refuse a case. According to Rule 11 of BCI Rules in a special circumstance a lawyer has discretion to not take a case. But what amounts to a special circumstance is not defined in the rules. In circumstances where a lawyer in India can decline to accept a case is an issue that remains open to interpretation. In this regard the American Bar Association Model Rules of Professional Conduct (2004) can offer some guidelines. American Bar Association Model Rules of Professional Conduct (2004) has a comparable provision.<sup>2</sup> The said rule states that a lawyer can decline from accepting a case of client who has approached him for his legal service for a ‘good cause’.<sup>3</sup> Therefore, the term ‘good cause’ used in American Rule of Professional Conduct can be considered as comparable to ‘special circumstances’ under the BCI Rules. The term ‘good cause’ is explained as

If the lawyer could not handle the matter competently...or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client–lawyer relationship or the lawyer’s ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

Accordingly, the probable interpretation of ‘special circumstances’ for a lawyer to decline a case under the BCI Rules can be regarded as grounds (a) where a lawyer cannot offer competent representation due to lack of his specialized skills or knowledge; (b) where acceptance of a case would be unreasonably burdensome for the lawyer and (c) where representation would result in an improper conflict of interest.

### ***Refusal to Accept a Case that Requires Knowledge of an Area of Law in Which a Lawyer Has No Experience or Knowledge or Time***

Rule 11 of BCI Rule states that a lawyer is bound to accept a case unless there is a special circumstance which justifies her recusal for accepting a case. The issue that rises is whether a lawyer’s refusal of a case on the ground that he cannot offer competent representation due to lack of his specialized skills or

<sup>1</sup> Part VI, Chapter II of the Bar Council of India Rules framed under the Advocates Act, 1961.

<sup>2</sup> Rule 6.1 of the American Bar Association Model Rules of Professional Conduct (2004).

<sup>3</sup> Comment 2 to Rule 6.1 of the American Bar Association Model Rules of Professional Conduct (2004).

knowledge can be justified as special circumstance. It is a duty of a lawyer to provide competent representation to a client. According to various authorities a competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.<sup>4</sup> A lawyer may not possess the required necessary special training or prior experience to handle legal problems of a particular type with which the lawyer is unfamiliar. To competently manage a case by a lawyer what is required is having strong grip over some fundamental skills, such as the analysis of precedent, the evaluation of evidence and legal drafting. The most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. According to the American Bar Association Model Rules Professional Conduct (2004) in Rule 1.1 a lawyer is permitted to refuse to take a case in an unfamiliar field if the lawyer lacks *'thoroughness and preparation reasonably necessary for the representation.'* Further to resolve this ethical dilemma of lawyers the BCI is negotiating a new code of ethics<sup>5</sup> suitable to contemporary era, states in its Rule 4 that *'An Advocate may decline a specialist brief if he/she considers himself not competent to accept the brief.'*

### ***Refusal to Accept Case Because It will be Unreasonably Burdensome for Lawyer Due to His Lack of Time***

Another important issue that looms large is whether a lawyer can refuse a case as he cannot offer competent representation because he lacks thoroughness and preparation as he cannot devote necessary time. The American Bar Association Model Rules Professional Conduct (2004) in Rule 1.1 allows such an excuse of lawyer. Similarly, Rule 8 of this new BCI code of ethics provides *'An Advocate shall accept only as many briefs as he/she is sure he/she can attend to, and shall refrain from accepting briefs in which he/she is likely not to be available owing to his/her preoccupation in other matters.'* Thus an inference of these rules state that an advocate may decline to accept a case on new field or an area he has no experience. It also allows an advocate to refuse brief due to heavy workload and paucity of time. These grounds may be justified as special circumstance to refuse a case.

But there is no such comparable provision in the existing BCI Rules therefore a lawyer requires accepting a case in a totally new field or a specialized domain of practice and to meet requirements of competent representation he has to engage along with another lawyer who has reputation of having established competence in the particular field of practice. The BCI current rules are obliterating whether a lawyer has competence to manage a particular type of case or lacks experience in specialized area of practice. It also ignores the fact that whether a lawyer can compensate her inexperience or lack of knowledge in particular field of law through study or affiliation with another lawyer. This is a cause for undue hardship for both lawyer and client and requires more clear interpretation like its American counterpart. A lawyer needs to be allowed to turn down a request for legal representation if she lacks time, expertise, or interest in the matter. Rule 11 of the BCI Rules must be read as an exception to lawyer's duty to not decline a case if an Advocate lacks expertise or time to attend a case as a justified refusal as *'special circumstance'*.

<sup>4</sup> The comments to Rule 1.1 of American Bar Association Model Rules of Professional Conduct (2004).

<sup>5</sup> Bar Council of India Draft Code of Ethics, <http://www.barcouncilofindia.org/bci-seeking-viewssuggestions-on-the-draft-code-of-ethics/>

## ***Refusal of a Request for Legal Representation of Unpopular Clients or an Unpopular Cause by a Lawyer on Account of Conflict of Interest***

As per rule 11 of BCI Rules an advocate is bound to accept a brief for any client who has approached him for legal assistance and is willing to pay him fees except when there are special circumstances that can justify such refusal to accept the case. The understanding is that a lawyer cannot pick and choose his clients. Furthermore, Rule 15 of the BCI Rules states

It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.

But contrary to this, lawyers often make decisions to engage or not to engage for any particular client and craft their practice domain based on their personal interest and aspirations. As a matter of general prudence lawyers do use their discretion to choose to accept or decline a case. One of the acceptable grounds of refusal to represent is where exists a conflict of interest. The BCI Rule 33 states '*An advocate who has, at any time, advised in connection with the institution of a suit, appeal or other matter or has drawn pleadings, or acted for a party, shall not act, appear or plead for the opposite party.*' The term is understood as a situation where representation does jeopardize a client's interest or violates client's right of undivided loyalty of his lawyer. Where a lawyer can identify and analyse that such circumstances exist which can lead to a conflict of interest the lawyer can withdraw from the case or refuse to represent.

But there is caveat to this in the rules of professional ethics and lawyers cannot pick and choose their clients. An ethical issue that arises in light of this caveat is whether a lawyer is free to adopt a professional decision to not represent an unpopular client or a cause which interferes her personal moral stand on ground of conflict of interest. In the recent past in India advocates have passed resolution to not represent Ajmal Kasav or Afjal Guru because her own personal biases may affect her ability to properly represent the case. But according to Lord Denning '*...No matter how great a rascal the man may be. No matter how undeserving or unpopular his cause. The barrister must defend him to the end provide isd only that he is paid a proper fee or in the case of a dock brief, a nominal fee.*'<sup>6</sup> The Supreme Court<sup>7</sup> has fortified the legal position about advocates' responsibility to not refuse cases because the case or the client in unpopular. In its judgement passed in 2011 dealing with the issue of Coimbatore Bar Association's resolution that no member of the Coimbatore Bar will defend the accused policemen in the criminal case against them, the apex court observed

Professional ethics requires that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the Statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations in India are null and void and the right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of the Gita.

<sup>6</sup> R. v. Worsley, (1967) 3 W.L.R 1666.

<sup>7</sup> A.S. Mohammed Rafi v. State of Tamil Nadu, (2011) 1 S.C.C. 688.

This decision of the Apex Court of India creates an embargo on lawyer's decision to choose not to represent an unpopular client or an unpopular cause in account of personal moral stand.

## Ethical Dilemmas in Relation to Lawyers' Authority to Make Decisions for Clients

It is generally considered that lawyers are agents of the client and the client is bound by the action of his lawyer. Commentaries on Professional Responsibility of lawyer–client control reflect that a tension exists between the client and lawyer about the control and decision-making powers relating to the case and its representation. Professor Nancy B. Rapoport mentions that

In the world of 'who knows the most,' the client (and the party on the other side) will always know the most about the facts of the case; then comes her lawyer (and the lawyer on the other side);... Depending on the personalities and skill levels of a client and her lawyer, there can be tension between how the lawyer wants to present the case and how the client wants it presented.<sup>8</sup>

Although the rules governing professional responsibilities set out the division of authority between the client and the lawyer, there is no clear line of demarcation.

The lawyer–client relationship is one of the oldest examples of an agency relationship. The agency law for lawyers imposes the obligation of informed consent. The requirement is that a lawyer has an affirmative duty to consult her client and a duty to advise her client '*promptly any information which it is important that the client receive*'.<sup>9</sup> The modern rules of professional responsibility have increased emphasis on the importance of both and explanation of relevant information by creating a uniform '*informed consent*' standard.<sup>10</sup> A client's agreement constitutes informed consent if a lawyer has communicated adequate information and explanation about the reasonable course of action. However, lawyers are provided with a limited exception where she can take decisions and act even without an informed consent by the client. This limited authority is regarded as an appendage of the typical nature of the client–lawyer relationship and is considered to be in the interests of the client, to give the fullest beneficial effect to his appointment of the advocate.

According to Rule 1.2 of the American Bar Association Model Rules Professional Conduct (2004) '*...a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued*. But Rule 1.2 allows a lawyer a limited '*implied authority*' and states that '*A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.*'

<sup>8</sup> Nancy B. Rapoport, *The Client Who Did Too Much*, 47 AKRON L. REV. 121–33 (2014).

<sup>9</sup> *Baker v. Humphrey*, 101 U.S. 494 (1879).

<sup>10</sup> Rule 14 of the BCI Rules

An advocate shall at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosure to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgement in either engaging him or continuing the engagement.

Similarly, English law recognizes the principle that by appointing an advocate to conduct her case the client gives an ‘*implied authority*’ to adopt such actions that is necessary for conducting her case. According to Halsbury’s Laws of England<sup>11</sup>

...at the trial of an action, counsel’s authority extends when it is not expressly limited, to the action and all matters incidental to it and to the conduct of the trial, such as withdrawing the record, challenging a juror, calling or not calling witnesses, cross-examining or not cross-examining witnesses, consenting to a reference to arbitration, a compromise, or a verdict, undertaking to appear, or, on the hearing of a motion for a new trial, consenting to a reduction of damages.

However, the ‘*implied authority*’ of counsel in English law is confined to matters falling within the subject matter of the suit. In the absence of express authority, the counsel cannot enter into a decision with reference to a collateral matter. Halsbury’s Laws of England, 4th ed. Vol. 3, paras 1183 provides that

A compromise by counsel will not bind the client, if counsel is not apprised of facts the knowledge of which is essential in reference to the question on which he has to exercise his discretion, for example that the terms accepted had already been rejected by the client. Where counsel enters into a compromise in intended pursuance of terms agreed upon between the clients, and, owing to a misunderstanding, the compromise fails to carry out the intentions of one side, the compromise does not bind the client, and the court will allow the consent to be withdrawn.

The BCI Rules don’t refer to details regarding the authority and control of lawyer–client relationship. Supreme Court of India’s decision in *Byram Pestonji Gariwala vs Union Bank of India*<sup>12</sup> case is a relevant legal authority on this issue. The court has held ‘*that client’s consent is not needed for a matter which is within the ordinary authority of counsel., his consent will be inferred, and he will not be heard to say that he did not understand what was going on.*’ However, the court has also drawn certain limitations on this authority of lawyers and the limitation rule propounds that ‘*it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances.*’

### **Lawyer’s Authority to Settle Client’s Case**

According to the rule laid down by Supreme Court in *Byram Pestonji case*<sup>13</sup>

lawyers as agents have limited authority to settle clients cases because of the implied authority vested by his appointment as a counsel. But the court also states that ‘it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demand’.

The English law on this issue is clear that lawyers don’t have authority to settle a client’s case without her proper consent.

<sup>11</sup> Lord Hailsham, *Halsbury’s Laws of England*, 4(3), Butterworths, 1181 (1975).

<sup>12</sup> *Byram Pestonji Gariwala vs Union Bank of India*, (1992) 1 S.C.C. 31.

<sup>13</sup> *Id.*

## Representing Client of Special Categories, that is, Minor, Mentally Unsound or Juvenile

Lawyers often represent clients who are minor, mentally disabled or juveniles. Sometimes they receive this case personally from these clients or their wards or otherwise they are called by the legal aid authorities<sup>14</sup> or courts to represent them. Such clients may have diminished capacity or intellectual impairment to provide appropriate instruction to the lawyer. *Who can give instruction to the lawyer on behalf of such clients? And also what decisions can lawyers take for such client?*

As per Indian law every civil suit or proceeding filed by or against a minor or mentally disabled person 'shall be in her name' by a 'guardian' or a 'next friend' of such suitors.<sup>15</sup> Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian, provided that the interest of such person is not adverse to that of the minor.<sup>16</sup> Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian. Every application to the court on behalf of a minor or a mentally unsound person shall be made by his next friend or by his guardian for the suit.<sup>17</sup>

Plea of minority or mental unsoundness exonerates a person from criminal liability.<sup>18</sup> However a 'Juvenile' may require assistance of a lawyer to defend him in an enquiry before the Juvenile Justice Board.<sup>19</sup> However Section 46 of the *Juvenile Justice (Care and Protection) Act, 2000* states that

Any competent authority before which a juvenile or the child is brought under any of the provisions of this Act, may, whenever it so thinks fit, require any parent or guardian having the actual charge of or control over the juvenile or the child to be present at any proceeding in respect of the juvenile or the child.

Under India law in any civil proceeding a guardian or next friend has the authority to instruct a lawyer on behalf of minor or a mentally unsound person as her authorized representative. There is no such express provision in the juvenile justice law and juvenile can give express instructions to her lawyer. However, if the lawyer deems fit, he can consult whenever any parent or guardian having the actual charge of or control over the juvenile.

However, it is important to note that both civil and criminal proceedings involving a 'minor', 'mentally disabled' or 'juvenile' is in their name. So the parent, guardian or next friend acts as her representative or authorized agent have implied authority by law to instruct in the legal proceeding on her behalf. So looked from a lawyer-client relationship perspective the 'minor', 'mentally disabled' or 'juvenile' is the client or 'principal' who appoints the lawyer, but the lawyer requires consulting or taking instruction from such parent, guardian or next friend. Rule 19 of BCI provides that 'An advocate shall not act on the instructions of any person other than his client or his authorized agent.' It is interesting to consider whether the lawyer can totally ignore the interest and instructions of any of a 'minor', 'mentally disabled' or 'juvenile' client. Furthermore, it is also a contentious issue whether a lawyer has an implied authority

<sup>14</sup> See the National Legal Services Authority (Legal Services to the Mentally ILL Persons and Persons with Mental Disabilities) Scheme, 2010. Under the scheme lawyers are required to provide Legal aid to mentally ill persons under Section 91 of Mental Health Act, 1987. Similarly, under other schemes NALSA may appoint lawyers to provide legal representation to the children across the country.

<sup>15</sup> See Order XXXII Rule 1, 3 and 15 of the Code of Civil Procedure, 1908.

<sup>16</sup> See Order XXXII Rule 4 of the Code of Civil Procedure, 1908.

<sup>17</sup> See Order XXXII Rule 5 of the Code of Civil Procedure, 1908.

<sup>18</sup> See Section 83, 84 & 85 of Indian Penal Code, 1860.

<sup>19</sup> Sampurna Behrui v. Union of India, (2011) 15 S.C.C. 232.

to act in cases of reasonable and calculated actions for the protection of interest or welfare of such clients.

Rule 1.14 of the American Bar Association Model Rules Professional Conduct (2004) relates to lawyer's relationship with clients having diminished capacity. This rule encourages a lawyer to maintain a 'normal' lawyer client relation with clients having diminished capacity. But rule also permits the lawyer to assume more paternalistic role to protect the clients from some harm. In such case the lawyer may ask the court to appoint a third party who would make some legal decision on behalf of the client. There is no similar comparable rule in either BCI Rules or BCI Draft Code of Ethics. But the rule also like Indian law emphasizes that when the lawyer is dealing with a client with diminished capacity is preferred that the client is represented through a GAL (*guardian ad litem* or guardian). Although in United States in recent past Scholars have attacked this on the grounds, for example, too paternalistic approach, best interest of child is neglected and the true voice of the child becomes redundant. But Prof. Frances G. Hill argues in the face of such criticism that GAL compared to attorney-client model has some affirmative strength.<sup>20</sup>

However, in India the Ministry of Women and Child Development, Government of India, in its advisory capacity has framed model guidelines for lawyer on handling complaints by children under the *Prevention of Children from Sexual Offences Act, 2012* keeping in view with the 'Best Interest' of the child. These guidelines can be used for guidance by lawyers in dealing with representation of a juvenile client. The guideline states that the lawyer shall represent the child in accordance with the child's welfare and best interests. Where a child by virtue of his/her age, maturity or disability, unable to express a view as a general rule, the lawyer shall act in terms of the child's instructions, conveying them to the Court by direct evidence if possible, call such witnesses as are required to carry out those instructions and examine and cross-examine and make submissions on behalf of the child.

## Ethical Dilemmas During Discharge of The Lawyer-Client Relation

Generally, the relationship between a lawyer-client terminates with end of case or the work that the client has entrusted to lawyer (unless there is a retainerhip agreement). However, termination can also happen by way of discharge of the lawyer by his client<sup>21</sup> or lawyer's withdrawal from case<sup>22</sup>. On termination of the lawyer-client relationship, lawyer has the duty to promptly return the client all the documents and files, certified copies of the order or judgement (if agreed),<sup>23</sup> along with the detailed statement of accounts relating to client's money received by the lawyer, receipts and if any remaining unused money of the client. However, BCI Ethics rules are not candidly specifying what documents are required to be returned to the client on termination. The Supreme Court however has observed all documents and files relating to the case available with the lawyer have to be returned to the client promptly on termination of lawyer-client relationship. It is understood that lawyer will deliver all documents and files received from his client. But one issue raised is that when a client has not paid the bill at the end of the representation, can the lawyer keep a client's documents until the client pays? The

<sup>20</sup> Frances Gall Hill, *Clinical Legal Education and the 'Best Interest' Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering Pedagogy*, 73 IND. L. J. 605 (1988).

<sup>21</sup> R.D. Saxena v. Balaram Prasad Sharma, (2000) 7 S.C.C. 264.

<sup>22</sup> Rule 12 of BCI Rules along with formal acceptance of the same by order of Court.

<sup>23</sup> *Supra* note 22.

law in this regard is settled and the Supreme Court's opinion in *R.D. Saxena v. Balaram Prasad Sharma*<sup>24</sup> is applicable. The Apex Court has held that

if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client. It is time to hold that such obligation is not only a legal duty but a moral imperative.

The Apex Court has further elaborated on the termination of the lawyer–client relation that a lawyer must withdraw if a client desires to fire her. A client always has a right to change lawyers and need not give any reason. According to the court

A litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not capable of espousing his cause efficiently or that his conduct is prejudicial to the interest involved in the lis, or for any other reason. For whatever reason, if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client.<sup>25</sup>

Finally, the lawyer's must remember that even with the termination of the lawyer–client relation, the lawyer's duty of confidentiality towards his client's case and communication is a continued and eternal obligation and is never terminated once a lawyer–client relationship is established.

## Conclusion

An effective justice delivery system requires talented, dedicated and qualified legal professionals who serve the bar. As torch bearers of justice, it is a heavy burden from the day a legal practitioner earns the privilege to be called an officer of the court. Every legal practitioner must be cognizant of the responsibilities that come with being admitted to profession and with each appointment and level of office. With this objective in mind this article has attempted to expose lawyers to some of the most fundamental ethical issues and standards of professional conducts that occur frequently in course of dispensing their professional responsibilities and interaction with clients. The article likes to conclude that it is inadvertent that the members and entrants of this profession must be informed about these challenges and sensitized about the rules that aid their resolution. This awareness will help them to serve the clients better and shape their professional life in a more efficient manner.

## Declaration of Conflicting Interests

The author declared no potential conflicts of interest with respect to the research, authorship and/or publication of this article.

## Funding

The author received no financial support for the research, authorship and/or publication of this article.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*