

HANDOUT 4: Legal Counsel

Professional Responsibility

In a criminal case it is the lawyer's responsibility to represent the government or his/her client to the best of his/her ability. Even someone who has been charged with a very serious offence is entitled to a defence. Counsel encounters a range of clients and cases and this enables them to expand their understanding of society's relationship with the legal system. They develop techniques that help them to interact with the public.



Crown Counsel

Each lawyer needs to achieve a certain standard of conduct and a strong work ethic. Being well prepared and diligent in the preparation of a case is crucial. A lawyer needs to be sensitive to the client's circumstances, problems and financial resources. Confidentiality in communications between a lawyer and a client is expected and required. Also lawyers must be sure that they do not act for a client where there may be a conflict of interest. For example, a conflict could arise if a lawyer was a good friend of the opposing party or if a lawyer acted for both parties in a real estate transaction.

In criminal cases it is the duty (guaranteed by the *Charter*) of Crown to disclose all evidence to the defence whether or not it is favourable to the Crown's case. It is not the job of the Crown to win the case but to present a fair and impartial case to the judge or jury. However the Crown is not obligated to introduce that favourable evidence nor does it have to put forward a statement of the accused that offers an excuse. In the latter case the Crown will not introduce the statement thereby forcing the accused to testify and present his/her own excuse. This way the Crown can cross-exam the accused and test his/her credibility and veracity.

Defence counsel in criminal cases do not make judgments about the accused and are really defending the liberty of everyone when representing an accused party. The accused is entitled to a full answer and defence to the charge. Defence counsel's role is to access the Crown's case, access the evidence an accused may wish to bring out at trial and then try to determine what the trier of fact (the judge or jury) may find to be creditable and believable in the circumstances. In most cases the Crown has a prima facie (sufficient) case which it can prove so the accused must call some evidence to refute the facts or otherwise s/he will be found guilty. Sometimes the evidence the accused wishes to put forward may be unacceptable and unbelievable. It is the duty of defence counsel to warn the accused what might happen if s/he presents that evidence.



Defence Counsel

Rules of Evidence

Evidence is introduced to prove a material fact at issue in a legal proceeding. Direct or circumstantial evidence can be introduced. The purpose of the rules of evidence is to have a judicial system that is exact and fair in its procedure.

Direct Examination

This is the questioning of a witness by the counsel who has called this witness to the stand to testify. No leading questions are allowed in direct examination. A leading question is a question that suggests its own answer. The purpose of direct examination is to allow the witness to tell his/her story in his/her own words. That is the best evidence. In practice some flexibility is given but only with questions that are not essential to the issue being tried. Generally try to avoid making who, what, where and why questions leading questions.



Example of an allowable question: Where were you on Monday, January 4, 2000 and what did you observe? Example of a question not allowed: Did you see the accused go up to the bank teller and demand the money?

Cross-Examination

Cross-examination is the questioning of a witness by counsel for the other side. Leading questions are allowed as the purpose of cross-examination is to check the witness's facts. It tests the witness's memory of events and it can bring out vital information that did not come out in direct examination. Testimony may not be believed if the cross-examination reveals problems or discrepancies in the witness' story.



Example of an allowable question: I put it to you that you could not possibly have seen a robbery because at the time you were in the manager's back office absorbed in a discussion about your mortgage, were you not?

Credibility and Character

Credibility questions are allowed as long as they are relevant to the case. They go to the issue of whether or not the witness is believable, reliable and trustworthy. Example of an allowable question: You told the police officer a different story than what you have told the jury here today, didn't you?

Character questions are allowed if relevant to the case. Crown cannot lead evidence about the character of the accused unless the accused has made his/her character an issue. However, where the accused has prior convictions the Crown can prove those convictions by showing the accused official documentation. Example of an allowable question: Were you convicted of robbery on January 29, 2001?

Types of Evidence

Direct Evidence

Proves a fact directly which is in issue in a legal proceeding such as the complainant testifying that the accused is the person who assaulted him/her.

Circumstantial Evidence

Circumstantial evidence is evidence that is not direct. It establishes a link between certain facts that leads to only one conclusion. An example would be if no one actually witnessed a theft but shortly thereafter the accused was found in possession of the item taken and the accused fingerprints were found in the store near where the item taken was displayed. Used together with direct evidence or on its own it can lead to a finding of guilt or fault.

Hearsay Evidence

Information that is given to a witness by another person that witness did not see or otherwise experience first-hand is called, "hearsay evidence". It is not admissible in court because the witness does not have personal knowledge of the original event.

The evidence may be unreliable and it may be highly prejudicial or damaging to the case of the accused. The truthfulness of the statement cannot be tested by cross-examination as the person who said it is not the person giving the evidence. Sometimes there are exceptions. Examples of hearsay evidence: A friend told me that the accused admitted to hitting the victim first. Another example is if Mary told me that Joe was the person who stole the car.

Admissibility of Evidence

Opinions

Witnesses cannot give opinions. Witnesses cannot say things that are not based on fact because that would be prejudicial to the accused. Example of a statement that is not allowed: I think Michael is a dishonest person.

Qualified Opinions

Witnesses can give qualified opinions if they are experts in a particular field such as teaching. A teacher would be qualified to give an opinion about a student's performance. Example of an allowable opinion: Elise is an exceptional student.

Objections

When either counsel thinks a question is not within the rules of evidence, s/he may stand up and object. The reason for the objection has to be clearly stated to the judge and usually the judge will allow the other counsel to say why s/he thinks the question is allowable. Then the judge will make a ruling on the objection either by saying that the objection is sustained or that it is overruled.

If the objection is sustained, the lawyer who is asking the question will have to rephrase the question or abandon it. If the objection is overruled then the lawyer can ask the question again. Practically speaking the jury has already heard the question but it does prevent the question and the answer from becoming part of the evidence. Often the judge will have to tell the jury to disregard the evidence if it is not admissible.