CHAPTER ONE: CRIMINAL LAW

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I. INTRODUCTION

This chapter provides an instant reference for LSLAP clinicians to assist and advise clients through each step of the criminal justice process. It highlights the procedures and issues clinicians commonly face in representing clients in criminal proceedings, sets out the relevant substantive law to assist students in preparing for trial, and includes practice recommendations to assist clinicians. However, it is **highly** recommended that any LSLAP clinician proceeding with a criminal file refer to this chapter alongside the LSLAP Criminal Procedure Handbook.

A. Governing Legislation and Resources

It is absolutely essential for anyone appearing in criminal court to obtain an Annotated Criminal Code. It serves as a valuable starting point for research and is an invaluable lifesaver when the unexpected occurs in court! Common editions used by judges, Crown and defence counsel in Provincial Court are:

- Edward L. Greenspan, Q.C. and Marc Rosenberg, eds., Martin's Annual Criminal Code, 2007 ed. (Aurora: Canada Law Book Inc., 2007); and
- David Watt and Michelle Fuerst, eds., Tremeear's Criminal Code, 2007 ed. (Toronto: Carswell, 2007.

The Annotated Criminal Code includes the Criminal Code, R.S.C. 1985, c. C-46, the Controlled Drugs and Substances Act, S.C. 1996, c. 19, the Canada Evidence Act, R.S.C. 1985, c. C-5, and the Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11) [Charter], with annotations and summaries of the leading cases relevant to particular issues.

Several sourcebooks on criminal law and procedure are available from UBC's Law Library. They include:

- Bentley, Christopher, Criminal Practice manual: a Practical Guide to Handling Criminal Cases. (Scarborough, Ont: Carswell, 2000)
- E.J. Levy, Examination of Witnesses in Criminal Cases, 3d Edition. (Toronto: Carswell, 1994)
- Wellman, Francis Lewis, Art of cross-examination. With the cross-examinations of important witnesses in some celebrated cases. (New York: Collier Books, 1903)
- T. Mauet, D.G. Casswell, G.P. MacDonald, Fundamentals of Trial Techniques. (Toronto: Little, Brown, 1995).
- David Watt, Watt's Manual of Criminal Evidence. (Toronto: Carswell, 1998)

Students will also find it useful to regularly check the indices of Canadian Criminal Cases and Criminal Reports, as well as summaries of B.C. Unreported Decisions to ensure they are familiar with the current state of the law. The web site www.courts.gov.bc.ca is another excellent resource, and includes links to British Columbia's three levels of courts – Provincial, Supreme, and Court of Appeal.

II. ADMINISTRATION OF LSLAP CRIMINAL FILES

A. Who We Can Help

In general, students may represent an accused on a summary conviction offence (or on a hybrid offence if the Crown is proceeding summarily) if the accused does not have a criminal record. The most common offences we assist clients with are assault, theft under $5,000, soliciting, and possession of concealed weapons or other illegal materials. For a number of reasons, students are not allowed to represent clients accused of driving while impaired.

An LSLAP student may appear in court on behalf of a client only in certain circumstances. LSLAP students may be able to represent clients charged with summary or hybrid offences where:

1. it is a first offence;

2. the client does not face imprisonment;

3. the client meets our income criteria; and

4. the client does not qualify for Legal Aid.

Students should note the importance of determining whether the client has a criminal record, as this information is the most important factor in deciding whether an LSLAP student can represent the client. The program's mandate currently provides that students can only represent clients in criminal matters where the client has no criminal record. The program's Supervising Lawyer does have some discretion in the application of this policy, but is unlikely to vary from it.

The LSLAP program also helps clients find legal advice and representation. Where a client is not able to find legal representation, a student may provide more extensive advice, and help the client prepare his or her case.

B. What We Can Do For Our Clients

1. If the Client Meets LSLAP Requirements

LSLAP clinicians may provide assistance to clients including:

- helping the accused obtain particulars and set trial dates;

- representing an accused at trial court for some summary offences, speaking to sentence for such offences, or preparing clients for self-representation;

- contacting and negotiating with the Crown, in some cases, to agree in advance to a disposition favourable to the client; and

- applying for a diversion or peace bond for the client.

2. If the Client Does Not Meet LSLAP Requirements

LSLAP clinicians may be able to provide assistance in the following manner, including:

- finding an agent or counsel to act on behalf of the accused;

- providing summary advice and information about the nature of the offence and possible defences, as well as about the nature and procedures of various court appearances; and

- helping the accused prepare witnesses and obtain evidence.

3. The Client is a Young Person, 12 - 17 Years of Age

See **Chapter 2: Youth Justice**. LSLAP students do not represent persons less than 18 years of age.

4. The Client is Mentally Ill

See **Chapter 14: Mental Health Law**, the Mental Health Act, R.S.B.C. 1996, c. 288, and s. 16 and Part XX.1 of the Criminal Code.

C. What to Do If LSLAP Cannot Represent a Client

Clients should be encouraged to find counsel as quickly as possible. Further, clients should be discouraged from representing themselves or relying on court support staff, persons in social service agencies, or the Salvation Army.

If an accused must appear in court and has not yet found counsel, he or she should ask for an adjournment. It is common for the court to allow an adjournment for several weeks to permit the accused to obtain counsel after the first appearance.

1. Legal Aid

The Legal Services Society of B.C. is the major source of criminal legal aid in B.C. Legal Aid's purpose is to provide free representation for financially eligible clients (low-income), who are charged with certain offences. The Society will provide a retainer to a lawyer chosen by the eligible client in private practice who will provide legal assistance on a contract basis. The Society will also assist the eligible client in finding a lawyer if needed.

A wide range of booklets and pamphlets covering various legal problems and legal rights are also available from Legal Services Society offices. This material is free. Clinicians should obtain a copy of the Legal Services information package, and should read it before referring clients to Legal Aid.

a) Financial Eligibility

The Legal Services Society will grant a letter of referral to applicants who meet the Society's financial eligibility requirements.

There is some flexibility in the requirements, subject to the discretion of the person assessing the application. Clients will be required to fill out a means test indicating income, expenses, education, and employment history.

b) Eligible Offences

The Legal Services Society currently covers the following criminal offences:

- indictable offences (those punishable by imprisonment of two years or more);

- hybrid or mixed offences where the Crown proceeds by indictment;
- summary conviction offences where a conviction would probably result in imprisonment or a loss of means of earning a living; and
- offences included in the same Information or indictment as one of the offences covered above. A subsequent charge in a separate Information arising out of the same incident will not be covered.

c) Examples of Cases Not Covered by Legal Aid

The Legal Services Society does not represent clients for common offences such as shoplifting, drug possession, first drinking and driving offences, and other offences where the Crown proceeds by summary conviction unless the client is incarcerated, is awaiting trial, and has been refused bail. Due to provincial cutbacks, an accused will also not be represented by Legal Aid if they do not face jail time. By looking at the Crown's initial sentencing position that is given with the particulars, you can find out if the Crown is seeking jail time for an accused. The Legal Aid test is whether there is a likelihood of jail time.

d) Where to Go

The client should be advised to contact Legal Aid directly at (604) 601-6000. See **Chapter 23: Referrals**, or the blue pages of the phone book, for more information.

e) Obtaining Reconsideration

A client who has been rejected will be reconsidered where circumstances warrant it. Reconsideration is most likely when LSLAP is not permitted to help the client due to the nature of the charge or the client's previous record, and where the client cannot afford other legal representation. LSLAP students are strongly urged to write a letter or fill out a form letter to the Executive Director of the Legal Services Society to support reconsideration, since many clients have nowhere else to turn.

f) Assistance for Persons Not Eligible

The Legal Services Society maintains contact with lawyers who, in rare circumstances, will work on a *pro bono* basis. Generally, this will occur only in the rarest of cases, but nevertheless this option should be explored. The client may be able to obtain a half-hour consultation with a Legal Services lawyer at the time he or she submits an application for assistance, or at some other time.

NOTE: The following should be pursued **only** where legal representation for the client **cannot** be obtained through the Legal Services Society.

2. LSLAP In-House Referral to Practising Lawyers

LSLAP maintains a list of lawyers who practice in a variety of areas and to whom referrals may be made. These lawyers volunteer their time at LSLAP clinics and are familiar with the program's mandate. The list should be used whenever possible. The client should negotiate the fee for the lawyer's services at their first meeting.

3. Vancouver Lawyer Referral Service

The client may phone (694) 687-3221 to reach the service, where an operator will provide the name of a lawyer who practices criminal law. The client should then call the lawyer to make an appointment. The fee is $25 plus tax for the first half-hour session, and the client will have to negotiate the fee for subsequent sessions at his or her first meeting with the lawyer. See **Chapter 23: Referrals** for more information.

4. Duty Counsel

In provincial court defence lawyers are rostered as general defence counsel for out-of-custody accused (commonly referred to as "duty counsel"). Duty counsel will provide assistance or summary advice to unrepresented accused. For those accused who do not qualify under legal aid yet do not have the funds to hire a lawyer, this assistance can be invaluable. To direct a client to duty counsel, tell them to attend court and inform a sheriff that they need to speak with out-of-custody duty counsel.

III. INITIAL CLIENT INTAKE: DEALING WITH THE CASE IN THE CLINIC

A. Determining the Status of the File

When a client comes into the clinic and informs you that he or she must appear in court, the first thing to do is determine the nature of the next appearance.

Practice Recommendation – File Intake

Clients are often confused about the court process, and confuse an "appearance" (whether Initial Appearance, Arraignment, etc.) with an actual trial. Depending on which courthouse the appearance is scheduled in, the clinician may be able to determine what stage the file is at by the courtroom that the client is due to appear in next.

Vancouver
In Vancouver, Courtroom 100 is the Initial Appearance Room; however it is presided by a Judicial Justice of the Peace. Therefore Pleas and Sentencing must be heard in a courtroom other than Courtroom 100.

Surrey, PoCo, and other Courthouses
In Surrey and most other courthouses, Courtroom 100 is the Initial Appearance Room, where the accused appears in front of a Judicial Justice of the Peace (JJP) to obtain particulars and continue to appear there until they have obtained counsel and are ready for an arraignment. Courtroom 102 is Arraignment and Disposition Court. In Surrey, the files tend to follow a certain arraignment court Crown, so the client may have had a number of appearances between Courtrooms 100 and 102. Arraignments and Pleas must be done in front of a Provincial Court Judge, not a JJP. On Surrey files, if the next appearance is in Courtroom 100, the clinician can either instruct the client to ask Crown to put the file over for an Arraignment Hearing at a later date (typically a week or two hence), or the clinician can appear with the client and ask that the matter be remanded for arraignment. This may or may not be possible depending on the caseload of Courtroom 102 that day. If the client's next court appearance is in Courtroom 102, the clinician should telephone Crown ahead of time to discuss disposition of the file, and can attend with the client for the Arraignment Hearing and set a trial date on that day, or enter a plea and make sentencing submissions. (Surrey tends to be stricter in requiring that Crown and defence counsel have substantive discussions regarding disposition of a file prior to arraignment).

Important! Once LSLAP has agreed to represent a client, it is always wise to telephone the court registry to confirm the exact details of the client's next court appearance – date, time, courtroom, and what stage the matter is currently at.

1. Client Comes to the Clinic Before the First Appearance Date

The student should first advise the client he or she must attend court at each appearance date. The client should also be advised about the nature of the first appearance, and be told that the trial **never** proceeds at that time. If the time before the first appearance date is brief (one week or less), the client should be advised not to enter a plea, but to ask for a two-week adjournment to find counsel, to seek further legal advice, or to prepare his or her case. The student should assess the possible options for legal counsel for the accused and give general advice.

2. Client Has Already Appeared in Court

If the client has only appeared in court once, he or she has likely already been granted an adjournment to retain counsel. If the client has appeared more than twice, a judge might not grant another adjournment, and a trial date will likely be set at the next appearance (the Arraignment Hearing). The JJP or judge has discretion to allow adjournments when there are extenuating circumstances. If the file is a K-file (spousal assault) inform your client that an adjournment is unlikely after more than two appearances, since the Court makes a priority of disposing of K-files expeditiously.

NOTE: It is especially important to request an adjournment where the prosecutor elects to proceed by indictment at the first appearance. The accused may then obtain counsel from Legal Aid.

Often the client will have little understanding of where in the court process he is. If the client has their note from court regarding which room their next appearance is in you can usually tell the nature of the next appearance.

3. A Trial Date has Already Been Set

If the student cannot represent the accused and other counsel is not available, the student may assist the client prepare for the trial. If the client appears at LSLAP immediately before the trial date, he or she should be referred elsewhere and informed that LSLAP can do no more than provide summary advice on such short notice. The client should be advised that a trial adjournment is ideal if evidence is still being sought or if the client still has a chance of retaining counsel.

4. The Trial has Already Been Adjourned

Another adjournment is unlikely, and unless the client can find counsel quickly, the student should only offer general assistance for trial preparation.

NOTE: Several pamphlets available from the Legal Services Society may help a client prepare for his or her own trial. These include: "How to Prepare for Your Own Trial," "Speaking to Sentence," and "Criminal Court Procedure."

5. Client Failed to Appear

Failure to appear is an offence (Criminal Code, ss. 145(4) and (5)) usually punishable by summary conviction. If the client did not appear, there is probably a bench warrant out for his

or her arrest. You must advise your client to report to the courthouse and apply to "vacate the warrant". If the Crown opposes the warrant being vacated, the client should be prepared to surrender to the police station or courthouse in a manner advised by counsel. The client may be arrested, but may then be released on bail or a promise to appear. Provided that the client meet LSLAP criteria, it is possible that the LSLAP clinician can continue proceeding with the file after the warrant has been taken care of.

Practice Recommendation – When and How to Vacate the Warrant

It is recommended that you make inquiries and call Crown counsel before having a client turn himself in. Crown counsel can have the file brought into the appropriate courtroom on an arranged day. This will prevent lengthy delays where the client is detained and often will permit the court to arrest the client as opposed to having the client booked in. If it is not possible to pre-arrange a date the client should report to the court registry Tuesday-Thursday before 11:00 am. If the client reports on a Friday, and is arrested, he or she may spend the entire weekend in custody. Monday is the busiest day of the week so a client may be more likely to be arrested then. To avoid busy times, a client should report as soon as the Registry opens (8:30 am in most courts).

B. Obtaining Particulars

If the client does not already have a copy of the particulars, he or she should be advised to request the particulars at the next appearance date. Particulars are usually given to the defence (or the accused) on the first appearance. If the client is not going to attend court in the immediate future, a student may request particulars by filling out a form letter and faxing it to the attention of the particulars clerk in the Crown Counsel's office. The faxed request should be followed up by a phone call. When the particulars are ready, the client should be instructed to pick them up.

If LSLAP can represent the client or if advice from the LSLAP Supervising Lawyer is required prior to determining whether LSLAP can represent the client, the clinician should make a full photocopy set of all documents in the particulars package.

C. Review the Particulars

The particulars include the following documents:

1. The Information

The Information contains the specifics of the charge, including the date of the alleged offence, the name of the accused, and the specific section of the statute allegedly contravened.

Practice Recommendation – Initial Review of Particulars

The clinician should review the Information to determine what offence the accused has been charged with. If it is an indictable offence, the client should be immediately referred to a lawyer. If it is a hybrid offence, and Crown has not elected to proceed by indictment, depending on the circumstances of the offence (for example, the number of charges on the Information) the clinician should speak to the LSLAP Supervising Lawyer prior to agreeing to represent the client. If the clinician is unsure if the Crown has elected to proceed by indictment the clinician can also contact Crown Counsel to ask whether they will be proceeding summarily or by indictment.

The clinician should review all aspects of the Information to ensure that it has been laid properly. Particularly, ensure that the Information has been laid within six months of the

alleged offence on summary conviction offences. Also ensure that the date of the alleged offence and the names of the accused and complainant are correct.

An alleged offender is formally charged when an Information is laid. An Information can be laid by anyone who has personal knowledge or has reasonable and probable grounds for knowledge of the alleged offence. An Information is sworn before a justice of the peace in writing and upon oath, or for certain offences, may be sworn before a judge. The procedure and forms are the same for provincial and federal offences. In British Columbia, police swear virtually all Informations. The Crown will have received a report of the incident, and the Charge Approval Office will assess whether a charge should be laid and what the charge(s) should be. The criteria used by Crown to determine whether to proceed with a charge are:

- whether there is a substantial likelihood of conviction; and
- whether it is in the public interest to proceed.

a) Content of the Information

The Information must contain sufficient allegations to indicate that the named person committed an offence. It may contain "counts" charging the accused with separate offences. It must contain sufficient details of the circumstances of the offence(s) to enable the accused to make full answer and defence to the charge (ss. 581(1) and (2) of the Criminal Code). If the Information does not contain full particularisation to make full answer and defence to the charge, the accused may bring an application to the court to particularise the information (s. 587 of the Criminal Code). If the Information does not adequately state the charge or contains a very unclear description of the alleged offence, then a motion can be made to quash the Information. However, as noted below, this process is rarely used and the courts will generally prefer to amend the Information rather than quash it.

b) Obtaining the Information

If the Information is not contained within the particulars package, a copy may be obtained from the court registry or Crown Counsel's office any time after it is laid.

c) Striking Down an Information

Provisions exist for a motion to be made to **quash** the Information (or a count therein) before the plea or with leave of the court (Criminal Code, s. 601(1)). Although this occurs rarely, some situations in which an Information might be struck down are if it doesn't adequately state the charge, doesn't include the date of the offence, or contains an unclear description of the circumstances of the alleged offence. The court may quash it or order an amendment. Amendment powers are considerable, and the Information may be amended at any time during the trial so long as the accused is not prejudiced or misled. The court will generally amend an Information if the defects are in form only. *R. v. Stewart* (1979), 46 C.C.C. (2d) 97 (B.C.C.A.) makes it clear that courts tend to focus on substantial wrongs, not merely on technicalities. There are generous provisions in the Criminal Code that allow technical defects in form and style to be disregarded (ss. 581(2) and (3), and s. 601(3)).

Practice Recommendation – Challenging an Information

Although the court rarely strikes down an information due to technical errors, at trial Crown must prove the offence as alleged in the information. Despite the very broad power to amend an information to cure technical defects prior to the end of

the trial, amendments after the defence has closed its case are less likely to be granted. This is because once defence counsel has closed its case based on a flawed information with a view to a closing argument that Crown has not proven the information as alleged, the accused is prejudiced by any subsequent amendment of the information. Hence a possible strategy on a case where there is an error in the information is to wait out the Crown's case, close the defence case, and then argue reasonable doubt on the offence as alleged.

d) If the Information is Struck Down

If there has been no adjudication of the case on its merits, the prosecutor may lay a new Information. The prosecutor must do so within the limitation period.

e) Limitation Periods and the Information

Section 786 of the Criminal Code states that no proceedings may be initiated in summary conviction offences after six months have elapsed from the time of the alleged offence, except on agreement of the prosecution and the defendant. The date on which proceedings commence is when the Information is laid; therefore, the Information must be laid within the six-month limitation period.

Indictable offences have no specific statutory limitation period.

NOTE: A summons may be issued and served outside the limitation period.

f) Release by Police and the Information

Where the accused received an appearance notice from the police indicating the first appearance date, or where the accused has been released on a promise to appear or a recognizance (the "release document"), the Information should be laid before the date of that appearance (Criminal Code, s. 505). If the Information is not laid the court's jurisdiction over the accused lapses. An Information could subsequently be laid, however, and the accused could be required to appear by summons. It is not unusual for Crown to lay charges at a later time.

2. The Initial Sentencing Position (ISP)

The clinician should review the Crown's Initial Sentencing Position (ISP). LSLAP is unable to represent clients where Crown is seeking jail. If Crown requires further information or indicates that it wants to order a Pre-Sentence Report (PSR), the clinician should speak to the LSLAP Supervising Lawyer prior to agreeing to represent the client.

3. Report to Crown Counsel (RCC)

The Report to Crown Counsel (RCC) sets out the police officer's narrative and summary of the case. It usually has a summary of the witness statements as well as what the police officer(s) themselves observed, and police actions taken. It should also state whether the accused has a prior criminal record, and if so, ideally a printout of the CPIC search would be attached.

LSLAP can only represent clients with no prior criminal records. This does not include Youth Court convictions, prior conditional discharges, prior diversions, or Motor Vehicle Act, R.S.B.C. 1996, c. 318 (Motor Vehicle Act) offences.

Practice Recommendation – Initial Review of RCC

Review the RCC to determine if there are any potential Charter issues, or if there are disclosure issues. (For example, the RCC may refer to a witness whose statement is not included in the Particulars, or to other evidence – for instance, videotape or photographic evidence – that was not disclosed in the Particulars package.)

If there are disclosure issues, make the disclosure request to Crown in writing as soon as possible. If disclosure is not satisfied, the clinician should ensure that the appropriate boxes are checked, and the request repeated, on the Arraignment Report and Trial Confirmation Report.

If there are potential Charter issues, ensure the appropriate boxes are checked (or not checked) on the Arraignment Report and Trial Confirmation Report (as applicable). Be aware of the provisions set forth in the Constitutional Question Act, R.S.B.C. 1996 c. 68. Be particularly aware that you are required to give Crown Counsel, the Attorney General of British Columbia, and the Attorney General of Canada notice of the constitutional challenge no less than two weeks prior to trial.

When the accused first appears in court and receives the particulars, the Crown's disclosure should consist of a copy of the Information and the police report. Thereafter, the Crown has a continuing duty to disclose all material evidence to the defence, whether favourable to the accused or not, so the accused can make full answer and defence. Although Crown Counsel has discretion as to the timing of disclosure, a high duty of disclosure has been imposed on the Crown since *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.). Moreover, if the Crown does not disclose evidence in a timely fashion, the defence can ask for an adjournment to review the evidence.

To see if all Crown evidence has been disclosed, read the police notes carefully and make a record of what the police did. If there is an indication that the police obtained evidence or made a record of something – i.e. wrote down a witness statement – and this evidence has not been passed on, you should contact the Crown to ask for disclosure.

4. Release Conditions

Review the release conditions to see if there are any no-contact or no-go orders. The conditions will not always be included in the particulars but you can contact the registry to find out what the conditions are. In a case of domestic assault there will almost always be a no-contact and a no-go condition. Clinicians may encounter situations where the complainant and accused wish for contact and there is a no-contact bail order. If the complainant and accused appear at the clinic together, the complainant **must** leave and the client made to understand the consequences of breaching a bail order. A breach of a bail order may lead to the client being charged with a breach and a warrant being issued for the client.

If the accused wants their release conditions varied, the clinician must contact Crown Counsel and obtain their permission to call the file ahead for a bail variation hearing. To vary bail in Provincial Court, Crown must consent in order for the application to be heard; otherwise bail variation applications are heard in Supreme Court. Clinicians should keep in mind that they do not need Crown to consent to the bail variation; they merely need Crown to consent to having the application brought forward, though Crown rarely consents to having the application brought forward but not to the variation itself.

Clinicians should keep in mind that if there is a no-contact or no-go condition, they **must never** advise a client to contact the complainant. This is tantamount to counselling someone to breach his or her bail condition.

D. Review the Client's Options

It is important at this point to review the elements of the alleged offence with the client to ensure that they understand what they are charged with.

Practice Recommendation – Ensuring the Crown can Prove Its Case

Prior to asking a client what happened from their perspective, some counsel want to review the nature and character of the charges and the possible defences with the client. Even if the client admits their guilt, a client must be advised regarding the strength of the Crown's case. There is nothing unethical about running a defence with regards to a client who admits their guilt. A criminal defence lawyer has an ethical obligation to pursue any viable defence, even if only as a negotiation tactic on a plea bargain.

The clinician can attempt to negotiate with Crown for a better disposition of the matter for the client. With the exception of a Stay of Proceedings and a full trial, the options below (Diversion, Peace Bond, and Pleading Guilty) all require the client to take some measure of responsibility for the crime.

Practice Recommendation – Explaining a Client's Options

Be very sure that the client understands exactly what they are pleading to, and the consequences of their plea. Also be very sure that the client understands that it is ultimately their decision as to which option to apply. Ensure that the client understand the consequences and risks of going to trial, any possible defences they may have and the difficulties in raising such a defence.

Clinicians must never force a client to choose a particular option, particularly one where the accused is required to admit guilt. It is always the client who ultimately decides the course of action they wish to follow.

The client may ask the clinician what they should do or what option they should take. The clinician should always remind the client that the choice is up to them, and refrain from telling the client what to do. Explain the options open to the client again and review the risks and consequences facing the client for each option.

In certain circumstances, the course of action the client wants to take may render LSLAP unable to represent the client, for example if the client insists on illegal or unethical instructions, or where the client wishes to plead guilty for convenience.

Practice Recommendations – Common Situations and Questions from Clients

I didn't do it, but I want to plead guilty because this is taking too much time away from my job, and it is just more convenient if I plead guilty.
Clinicians have an ethical duty to ensure that the innocent do not wrongly plead guilty. Particularly, clinicians cannot represent clients in cases where they wish to plead guilty for the purposes of convenience, not because they actually admit guilt.

What do you think are my odds of winning this case?
It is also suggested that clinicians never give clients "odds" or their chances of winning an acquittal, rather point out the possible defences available to the client and the difficulties, if any, of arguing such a defence.

What if my wife / girlfriend / husband / boyfriend (complainant) doesn't come to testify?
At this point in time the client may ask what would happen if the complainant does not attend court to testify, even if summoned. Inform the client that if the key witness does not attend at court Crown may stay the charges against the client. If a Crown witness wishes not to attend to testify, they should obtain independent legal advice. If any witness has been summoned, and fails to attend to a summons,

they can be arrested and even jailed. In addition, the client should be advised that if they tell a witness not to show up they would be committing a criminal offence.

1. Stay of Proceedings

After reviewing the police report, if there is no substantial likelihood of conviction, a student can approach Crown Counsel and ask that they reconsider the charge. This can be done in writing or by telephone. Alternatively, if it appears that it is not in the public interest to proceed with the charges, the Crown may again choose to reconsider (i.e. the client is terminally ill). Stays are very uncommon but may be appropriate in some cases. Be sure to inform the client that the Crown can recommence proceedings within one year after a stay of proceedings.

2. Diversion

This option allows for a first time offender to be "diverted away" from the court system. Although referred to as "diversion," the program's official name is Alternative Measures (Criminal Code, s. 717).

The accused or the accused's lawyer may make a request to the Crown Counsel office to be "diverted"; this is a very useful program that takes the accused out of the court system. The application itself may be made before or after a charge is laid. The diversion program is primarily designed for first-time offenders who are prepared to admit their culpability and remorse in the matter.

The Crown will consider whether the offender and the nature of the offence are such that diversion is appropriate. If the Crown decides the accused is a candidate for diversion, the file will be sent to a community worker who will review the circumstances and then discuss the matter with the offender. If the offender admits his or her culpability, and the probation officer is satisfied that the accused is an appropriate candidate for diversion, the Crown will be so advised. The Crown will likely enter a stay of proceedings and the offender will likely be required to work in the community, write an essay, write a letter of apology, participate in counselling, etc. The stay of proceedings is usually entered once diversion has been completed and a letter from the Greater Vancouver Adult Community Alternative Measures Programme confirms the completion. The client should be advised that Crown would not attempt to use the offender's admission against him or her if diversion is ultimately refused. However, if a client admits guilt to the diversion office and to you, but is refused diversion, it will affect your ethical responsibilities in terms of calling the client as a defence witness.

Contact the Crown Counsel office at 222 Main Street at (604) 660-4353 for more information about the program. See **Appendix A: Diversion** for an example of an application for diversion and a clarification of the Crown's guidelines and procedures for diversion applications. Also see **Appendix B: Categorization of Offences for Diversion** for a chart the provincial Crown uses to classify offences according to their suitability for diversion. You can also talk to Crown Counsel and give him or her reasons why your client is a suitable candidate for diversion.

3. Peace Bond (s. 810)

Under s. 810 of the Criminal Code the accused enters into a recognizance with conditions such as: to keep the peace and be on good behaviour; not to contact a certain person; and not to attend a certain address or area.

In order for a Peace Bond to be imposed, there must exist **reasonable grounds** for the complainant to believe that the accused will cause personal injury to the complainant or his/her spouse or child or that they will cause damage to his or her property. Therefore, in

entering into a peace bond voluntarily, the accused is conceding that the complainant has reasonable grounds for their fear.

Occasionally, such as when the Crown wishes to impose a peace bond and the accused does not agree, there will be a full hearing on the issue. The Crown often considers peace bonds in cases of spousal assault because of a victim's reluctance to go to trial. At the hearing, the Crown must prove on a balance of probabilities that there are reasonable grounds for the fear. Hearsay evidence **is** allowed, as it goes to the informant's belief that there are grounds for the fear (*R. v. P.A.O.*, [2002] B.C.J. No 3021 (B.C. Prov. Ct.)). Since there is no criminal standard of proof, the judge must look at **all** the evidence, and not focus merely on the absence of the offending conduct (*R. v. Dol*, [2004] B.C.J. No. 2314 (B.C. S.C.)).

If a person breaches the peace bond, a criminal charge may be laid against the bonded person. Peace bonds are sometimes used as alternatives to criminal charges like uttering threats (s. 264.1), criminal harassment (s. 264), and minor assault (s. 266). The benefit to the accused is that formal criminal charges are dropped. The benefit to the complainant is that the no-contact condition of a peace bond addresses his or her concerns without raising the uncertainty and possible trauma of a trial. A client should be advised that while a peace bond is not a criminal record, it remains on his or her record and can affect future hearings and decisions concerning custody.

4. Pleading Guilty

If the client admits guilt, and it appears that the Crown will be able to prove its case, the client should be advised to plead guilty. If the client chooses to do this then the student should attend the appearance with the client and be prepared to "negotiate" with Crown Counsel for the most appropriate sentence. It is generally very good strategy to talk to Crown Counsel about a plea bargain. Most Crown Counsel will be eager to agree to a reasonable sentencing position. Even if you are unable to reach an agreement with Crown, a sentencing hearing will be scheduled at which the student can represent the client's position. If you reach an agreement with Crown, it is important to know that the Judge is **not** bound by a joint submission. See **Appendix C: Quick Reference Summary of the Provincial Court Case Flow Management Rules** for a list of issues to be considered when speaking to sentence.

Practice Recommendation – Timing of Guilty Pleas

Due to the practice of Crown Counsel transferring files among different Crown Prosecutors at different stages of the file and not having a trial Crown assigned until close to the trial date, it may be difficult for the clinician to obtain the most favourable disposition for the client at the initial appearance or arraignment stages.

It may be strategic to posture a trial and set a trial date in order for a trial Crown to be assigned. Once a trial Crown is assigned, they would likely review the file in greater detail and possibly conduct advance interviews of witnesses. They would have a better appreciation of the file (and hopefully, a better appreciation of the difficulties in prosecuting the file), and may be more agreeable to a favourable disposition of the matter for the client. In the alternative it may be strategic to have the file dealt with on a particular date in an arraignment court, depending on the particular Crown and particular judge. It is advisable to approach members of the criminal defence bar for advice on particular judges and counsel. Generally criminal defence lawyers enjoy nothing more than a good chat and to share their experiences. Also, this is precisely what experienced criminal defence lawyers do when they are unfamiliar with a particular courtroom.

Surrey Exception
Surrey Crown Counsel assigns three senior Crown Counsel to the Initial Appearance Room and Arraignment Court. On the relatively minor charges that LSLAP handles, Surrey Crown Counsel often conduct advance interviews of witnesses to better explore creative solutions to

resolve the problems between the complainant and the accused without having to resort to trial. If the situation is appropriate and the client is agreeable, it is suggested that the student seek out Surrey Crown at this early stage to negotiate a favourable disposition of the matter.

Vancouver Crown Counsel
Comparatively, Vancouver Crown Counsel appears to assign relatively less senior Crown Counsel and occasionally students to the Initial Appearance Room, who do not have the authority to negotiate a peace bond or a sentencing recommendation more favourable than that set forth in the ISP; Vancouver arraignment Crown Counsel appear more ready to set trial dates. However, Vancouver trial Crown Counsel are fairly open to negotiation as to a reasonable disposition of the matter without a trial. Though clinicians should explore the possibilities of a favourable disposition at the earliest stages, they should be prepared to set a trial date if negotiations are not fruitful.

Practice Recommendation – Guilty Pleas, Multiple Counts

It is always a good strategy to attempt to negotiate with Crown Counsel, particularly in the cases of a multi-count Information or if the client has also been charged with Failure to Appear.

On occasion Crown may agree to enter a Stay of Proceedings on a lesser charge in exchange for a guilty plea on the more substantive charge.

Review the Particulars, as in certain situations Crown does not have a very strong case on the more substantive charge, and would be agreeable to staying the more substantive charge in exchange for a guilty plea on the lesser charge, rather than be put to the burden of having to prove their case in court.

Generally, Crown is ultimately more interested in the sentence that the accused receives rather than the number of counts he or she is convicted of. However, this has a large effect on the client's criminal record, particularly if they are convicted and are being sentenced in the future.

NOTE: **Calling Ahead Files:** When it is clear that a guilty plea is the appropriate resolution, students should consider whether the plea should be entered prior to or on the actual trial date. There are some advantages to calling a file ahead:

- an early guilty plea may be effective when making a submission to a judge that your client is remorseful;
- the student can call the file ahead for disposition where the accused will often receive a more compassionate sentence;
- the student can submit to the judge that no witnesses were inconvenienced;
- an early guilty plea is a mitigating factor in sentencing; and
- if you wait for a trial to be set the judge will be seized of the case, preventing you from attempting to get your client in front of a more sympathetic judge.

Calling ahead a file for a guilty plea may not be appropriate if:

- your client's situation will improve in a few months (i.e. through alcohol rehabilitation or counselling); or

- a Crown witness may not attend at the trial date, or a witness's memory has faded, or there is some other weakness in the Crown's case that might lead to the charges being dropped.

If a student does decide to call a file ahead, he or she should contact the Crown Counsel assigned to the case to let the Crown know of the decision. The Crown can then notify witnesses that their presence is not required. Also, Crown Counsel and the student should arrange a date to appear in court to call the matter ahead.

5. Full Trial

There may be a variety of defences available to the client. If the evidence does not support the charge that has been laid, or despite the existence of a strong case the client will not admit guilt, then a full trial should be conducted. If there are Charter issues, particularly relating to Search and Seizure, Right to Counsel, or Right to Silence, the possibility of going to trial must be considered and the risks and potential benefits of this canvassed with the client.

E. Discuss Criminal File Procedures and Policies with the Client

The clinician may wish to establish certain "ground rules" to govern the relationship between clinician and client in a criminal file.

1. The client will attend all court appearances as required.

2. Counsel represents the client, and as such it is the clinician who is in charge of the file. While the client may assist in their own defence and can give the clinician specific instructions, it is the clinician who contacts Crown and other witnesses.

3. The client cannot request another law student; the client can either be represented by the clinician they are assigned, or they can seek alternate representation outside of LSLAP.

4. Clinicians cannot follow illegal or unethical instructions, such as tampering with witnesses or counselling an adverse witness not to attend to a summons.

F. Other Issues

Some specific problems that a client may encounter are listed below. For further information on procedural matters, see **Section IV: Criminal Procedure**.

1. Client Suspects He or She May Be Charged with an Offence

The client may have been stopped by the police or observed doing "something wrong," but has not yet received a summons. To see if a client has been officially charged, you can contact the Vancouver police or the RCMP to see if a report to Crown Counsel has been made. A student can also check with the court clerk, the police, or the Crown Counsel office to see if an Information has been laid and forwarded to Crown Counsel. If there is an outstanding warrant for the client's arrest, arrangements can be made for the accused to surrender. This is a critical time to advise clients of their legal rights, including the right to remain silent. If no charge has been laid, you may make a submission to the Crown on why charges should not be laid. In such a situation, you should look for reasons why your client should not be charged.

2. Client has been Convicted and Sentenced

The client may have grounds for appeal. A convicted accused has the right of appeal against both conviction and sentence, and either appeal must be filed within 30 days of the pronouncement of the sentence (as opposed to within 30 days of the conviction). Students may assist clients retain counsel. Legal Services may do the appeal (see **Section IV.J: Appeal**). The student may assist the client with general information regarding an appeal, but as the appeal will be in Supreme Court, the Court of Appeal, the Supreme Court of Canada or the Privy Council, the student may not represent the client.

3. Client is on Probation or Otherwise Serving a Sentence

The student may be able to help the client understand the terms of a sentence, or help the client in his or her relationship with the supervising authority. If the issue the client is seeking advice on is complex, the client should be advised to seek legal counsel.

4. Dropping a Charge

a) By the Complainant

Once the Information has been laid, the prosecution of the case is in the hands of the Crown. A person who wishes to "drop a charge" may contact the prosecutor and advise the Crown of his or her wishes and the reasons behind them. However, the Crown has discretion over this matter. The Crown can only stay a charge if there is no substantial likelihood of conviction, or if it is not in the public interest to proceed with the charge.

A person who wishes to "drop a charge" should do so with advice of counsel, and should be careful with regards to what is said to Crown. The complainant could potentially cause charges to be brought against them if they tell Crown that they will not testify even if summoned, or that they initially lied to the police.

If the complainant and the accused both seek advice from LSLAP, the student must be aware that this is a serious conflict of interest. The second party must seek independent advice even if the complainant and accused are husband and wife. Under no circumstances should counsel for the accused advise the complainant, or vice versa. If the other party approaches you for advice, immediately refer them to their own legal counsel.

The Crown's current policy concerning allegations of spousal assault ("K files") is that charges will not be dropped prior to trial. There may be exceptions, but they are extremely rare. The Crown regards spousal assault as a serious problem in British Columbia and takes the position that once a charge is laid in such a case, the Crown must proceed. The official policy on "K files" was reviewed and revoked by the Attorney General's office in early 2003, giving Crown prosecutors greater leeway in determining the proper disposition of domestic-related crimes.

During his or her testimony, the complainant may tell the judge reasons for wanting to "drop the charge". The judge may question the complainant about these reasons.

b) By the Crown

(1) Before a Trial Date is Set

The Crown may decide not to proceed with a case even though an Information has been laid. If the appearance date for trial has not been set, the prosecutor can simply decide not to proceed.

(2) After a Trial Date has been Set

Once a person is compelled to appear in court and does appear, the court acquires jurisdiction. However, the court can lose or abandon its jurisdiction. The Crown may want to stay proceedings for one or more reasons; for example where there is a lack of evidence, a persuasive defence, or no public interest in proceeding. The Crown may do this by:

(a) Withdrawal

The withdrawal of a charge is a motion before a judge during the course of proceedings. The judge has discretion as to whether or not to allow it.

(b) Stay of Proceedings

A stay is directed to the court clerk by the Crown and may be entered at any time before judgment. The judge has no discretion in this matter (Criminal Code, s. 579). As long as the entry on record is made before a verdict is rendered, there is no "double jeopardy" if proceedings are recommenced.

In theory, a stay suspends the charge for one year, after which time it is considered a withdrawal. In practice, a stay may mean two things:

- The Crown is really withdrawing the charge. However, a stay is used because the Crown need not ask for the judge's approval.

- The Crown plans to start proceedings again, but, due to some disadvantageous procedural position like a missing witness, wants to resume at a later date. Prosecutors generally indicate their intentions with respect to entering a stay and it is important that the client know the true reason in order to prepare accordingly.

(c) No Crown Evidence

The accused may instead ask Crown to call no evidence, in which case the accused is acquitted due to a lack of evidence.

IV. CRIMINAL PROCEDURE

A. Informing an Accused of the Charge and Compelling Appearance

A person may learn that he or she is accused of committing a criminal offence in one of several ways. He or she may:

1. receive an appearance notice or a promise to appear;

2. receive a summons (in the mail or personally); or

3. be arrested.

Many accused who seek assistance from LSLAP will have received an appearance notice or a summons requiring them to appear in court. After an appearance notice is issued, an Information will likely be laid. By the time they attend court, an Information will likely have been sworn. An accused **must** attend court on the date required by the appearance notice or summons. If the client chooses not to attend court, a warrant for arrest will usually be issued. In very unusual circumstances, the trial may proceed in the accused's absence.

1. Appearance Notice/Promise to Appear

The attending officers at the scene of the alleged offence generally serve an appearance notice on the accused. A promise to appear is entered into when an accused has been arrested and promises to appear in order that he or she may be released from custody.

2. Summons

A summons is a written order by a justice in prescribed form requiring the accused to appear before a justice at a particular time and place.

NOTE: A summons should not be disregarded because of a misspelling of the accused's name, nor because of minor irregularities or mistakes.

The summons may be served by a peace officer personally, or it may arrive by mail. It can also be served, when the accused cannot conveniently be found, to a person living in the accused's residence who appears to be at least 16 years old (Criminal Code, s. 509(2)).

NOTE: An accused may attend court to answer to an appearance notice or summons indicating a certain charge. The accused may at that time be faced with additional charges, or with a different charge. It is the charge contained in the Information that the accused is tried for, regardless of what is contained in the summons or appearance notice. So long as an Information has been laid the Crown can proceed against the accused on that charge. The accused should not enter a plea and should request an adjournment for the trial of that other charge.

3. Warrant in the First Instance

A warrant for the arrest of the accused may be issued where the accused fails to appear in answer to a personally served summons, or a summons believed to have been personally served, or where the accused is avoiding service (Criminal Code, ss. 803(2)(b) and 510). Also, a warrant may be issued at the first instance where the Crown is seeking conditions of release. For instance, the police investigate an assault, but do not arrest anyone at the scene. Later, the Crown reviews the police report and charges the accused. The Crown may then ask that a

warrant be issued compelling the accused to appear before the Court and have conditions imposed.

4. Fingerprinting and Photographing

A person in lawful custody for an indictable offence may be fingerprinted and photographed. A person may be required to submit to being finger printed and photographed under the Identification of Criminals Act, R.S.C. 1985, c. I-1 (Identification of Criminals Act). If the Crown proceeds summarily with the charge, there is no power to arrest for the purpose of fingerprinting and photographing. Refer to the Information to see whether the Crown is proceeding summarily. Contact Crown Counsel to confirm that the Crown is indeed proceeding summarily, then notify police by letter stating that the accused need not attend for fingerprinting and photographing. The accused may be asked to appear for fingerprinting on a hybrid offence because a hybrid offence is considered indictable within the meaning of the Identification of Criminals Act as per *R. v. Connors* (1998), 121 C.C.C. (3d) 358 (B.C.C.A.), in which case you should seek permission from the Crown for the client not to attend.

B. Appearance Requirements

For indictable offences, the accused must appear in person or by a validly executed counsel designation form at each court date (unless the accused is a corporation, in which case it must appear by counsel or agent). The accused may appear by counsel or agent in a summary trial, though the court may require the accused to appear in person.

An accused who fails to attend court as required under a recognizance, appearance notice, promise to appear, or summons, may be convicted of an offence (Criminal Code, s. 145).

C. Courtroom Etiquette Generally

When a clinician attends court for a matter, they should check the court lists to confirm the courtroom the matter is to be heard in. If the court is not sitting at the time, the clinician should attempt to seek out the Crown Counsel who has conduct of the matter, and identify himself or herself.

In order to get your matter called you should indicate to the Crown Counsel that you and your client are present and ready to proceed. Crown Counsel will proceed with the shortest matters first and those matters for which the accused and their counsel are present. Do not, however, interrupt Crown Counsel when they are addressing a matter.

When the judge enters or exits the court, the clinician should rise and bow to the judge.

If the court is sitting, the clinician should enter the courtroom, bow to the judge at the door and/or the bar of the court, and be seated at the chairs located beyond the bar.

When the matter is called, the clinician should rise and approach the counsel's table. The clinician should stand on the other side of the podium from the Crown. In Vancouver, there are usually arrows indicating where counsel should sit; the rule of thumb is that Crown is seated next to the witness box while defence is seated next to the prisoner's dock.

The clinician should address the court in a loud, clear voice, keeping in mind that the microphones in most courtrooms are only for recording and not for amplification purposes. The clinician should introduce himself or herself in the following manner:

> Your Honour. My name is (Full Name), spelled (Spell Out Last Name), first initial _____. I am a law student with the UBC Law Students' Legal

Advice Program, and with leave of the Court, representing Mr./Mrs./Ms. _____ who is here in the court today."

The clinician should then invite the client to come forward and then remind the court what is to occur with the file (i.e. the matter is set for an arraignment hearing or disposition or trial, etc.).

Upon completion of the clinician's appearance, on exiting the courtroom the clinician should turn and bow to the judge at the bar of the court and/or the door. See **Appendix C: Quick Reference Summary of the Provincial Court Case Flow Management Rules**.

D. Initial Appearance

Generally, clinicians do not attend an Initial Appearance. Matters are generally set for the Initial Appearance Room where the accused has not previously appeared in court for this matter, or where the accused has not yet obtained counsel. If the client has not yet made their first appearance in court, they should be instructed to attend their Initial Appearance and obtain the Particulars and Initial Sentencing Position from Crown.

If the client has already obtained Particulars and the Initial Sentencing Position, and the clinician needs time to review the Particulars and to discuss the client's options, the client should be instructed to attend the Initial Appearance and inform Crown that they are being represented and ask that the matter be "put over" for one to two weeks. The client may also request an adjournment if there are significant outstanding disclosure issues (as these may affect how the client chooses to proceed with the matter).

If the client has instructed the clinician regarding a guilty plea, and has agreed to negotiate with Crown regarding a peace bond, diversion, or sentencing options, then the clinician should contact Crown prior to the next appearance. If the client will be pleading guilty at his or her initial appearance, the clinician should consider attending court with the client in order to negotiate with Crown and/or speak to sentence.

If the clinician has discussed the client's options and a decision has been made to proceed to trial, the client should be advised to set a trial date at the next appearance. Essentially this means that their initial appearance is also an arraignment hearing. See below for the process followed to waive the formal arraignment hearing and set a trial date.

1. Procedure at Initial Appearance

At an Initial Appearance, the accused comes forward; the prosecutor indicates the nature of the offence without reading the Information and a Justice of the Peace will make inquiries as to whether the accused has legal counsel and the intentions of the accused regarding the case. An accused should not enter a plea at an initial appearance. **An intention to plead guilty at a future appearance can be noted but no one should plead guilty until they have received competent legal advice.**

Before the accused is asked to decide how he or she will plead, counsel should ensure that the accused fully understands his or her legal rights, the consequences of a guilty plea, and the Crown's burden of proof to prove all elements of the offence beyond a reasonable doubt. Also, the clinician should discuss any possible defences, mitigating factors, and any possibility of being found guilty for lesser included offences if guilt is not established for the original charge. In some jurisdictions, the court itself may decide to proceed with the trial, thus requiring the accused to plead. If the court insists on proceeding and requires a plea, the accused should always plead not guilty.

2. Adjournment

If the accused does not have counsel and wants to obtain counsel, or if the accused wants to run a trial, an adjournment will likely be granted. The case will be adjourned until the accused has had an opportunity to discuss the case with counsel. At the next court appearance, once the accused has had such an opportunity, he or she must enter a plea. A trial date will then be set.

3. Election

Where an accused has the right to elect a method of trial in indictable matters, he or she will not normally be asked to elect a method of trial on the appearance date. However, in jurisdictions other than Vancouver, the accused may be asked to so elect, and the considerations in **Section IV.G: Elections as to Mode of Trial** will then apply.

E. Sentencing on Early Disposition (Guilty Plea)

If the accused chooses to plead guilty, the clinician may enter a guilty plea in the following manner:

> "My client waives formal reading of the Information and enters a plea of guilty."

Note that if there is a multiple-count Information, the clinician should specify as to which counts of the Information the client is pleading guilty to.

The Crown would then enter the circumstances of the offence and make its sentencing submission, or merely make its sentencing submission if there has been a trial and findings of fact made by the judge.

The defence is then invited to make its sentencing submission, generally focussing on the personal circumstances of the offender and particularly on the law as to why such a submitted sentence is appropriate given the severity of the offence.

See **Section IV.I.9: Conclusion of the Trial** for a more detailed discussion of sentencing options and factors affecting sentencing.

F. Arraignment Hearing

The purpose of an Arraignment Hearing is for the court to determine whether the matter is for trial or disposition and to estimate the time for trial. It is also an opportunity to canvass any possible disclosure or Charter issues.

1. Waiving the Formal Arraignment Hearing

Pursuant to the Chief Judge's Practice Directive of November 2003 regarding arraignment hearings, LSLAP clinicians do not generally have to appear in court to set a trial date. Instead, an Arraignment Report and Trial Date Request Form must be completed and faxed to the Crown and Judicial Case Manager prior to the appearance date. These forms should be approved by the LSLAP Supervising Lawyer and then given to the Administrator to be faxed.

NOTE: The accused **must** still attend the Arraignment Hearing.

NOTE: It is inappropriate to waive a formal Arraignment Hearing in the following circumstances:

a) where there are co-accused that LSLAP is not representing; and/or

b) where there are disclosure issues.

a) The Trial Date Request Form:

The trial date request form advises the Judicial Case Manager as to the student's availability for scheduling a trial. Prior to completing the Preferred Dates section, the student may wish to telephone the Judicial Case Manager and ask which month trials are being set for. Be prepared to provide the following information:

1. the charge (e.g. uttering threats, assault, etc.);
2. offence date (month/year);
3. time estimate for trial; and
4. whether it is a spousal assault file or not.

b) The Arraignment Report:

The Arraignment Report is used to waive the formal hearing. It should be completed as per the directions below. Ensure that the form used is the version with a notation on the bottom indicating that defence waives the formal Arraignment Hearing.

2. The Arraignment Report

If the formal Arraignment Hearing is being waived, the arraignment report must be faxed to the Judicial Case Manager and to Crown Counsel at least two days prior to the scheduled appearance. If the clinician is attending the Arraignment Hearing, the arraignment report is filed when the student reads the report to the Court.

Fill in the Court File No. and Registry Location

For a "typical" situation, the following boxes should be checked:

Box 2: Indicating that you have been advised of the Crown's sentencing position (either by way of an Initial Sentencing Report form or otherwise).

Box 4: Indicating that the accused wishes to have a trial of the matter.

Box 5: Check box 5A if there are no disclosure issues. If there are documents or evidence that have not been disclosed, check box 5B and list the requested documents.

Box 7: Fill in part (a), crossing off "a trial of the matter" and writing in "the accused's case." As a general rule, allow 1 hour for the first witness and ½ hour for each additional witness. Charter issues will also affect the time estimate – consult with the Supervising Lawyer to estimate the time required.

Box 8: If the accused, or any of the defence witnesses, require an interpreter, check this box and fill in the language(s) required.

3. Arraignment Hearing Procedure

If the clinician will be attending the Arraignment Hearing they must prepare an Arraignment Report and speak with the LSLAP Supervising Lawyer prior to the appearance.

Once the matter is called and the clinician has introduced himself or herself in the manner described in **Section IV.C: Courtroom Etiquette Generally**, above, the clinician essentially reads the Arraignment Report to the court. Most essential in the Arraignment Hearing is the time estimate for trial, and any disclosure issues.

The Crown will provide the court with its time estimates and the number of witnesses through its own arraignment report (a copy of which will be provided to defence counsel). It is essential for the clinician to note this information.

The judge will then estimate the time for trial, and send the clinician and client to the Judicial Case Manager (JCM) to set a trial date. It is very important that the client attends the JCM with the clinician, as the JCM will then adjourn the client to the Trial Confirmation Hearing date.

Vancouver
In Vancouver, the Initial Appearances Room is presided by a Justice of the Peace summarily. Counsel may request that the matter proceed to a "paperless arraignment" immediately, and no Arraignment Report need be filed.

Pleas
Occasionally, the judge may ask the accused to enter a plea. The accused may only enter a plea of guilty or not guilty. The accused **should not** enter a plea if there are outstanding disclosure issues. The usual form of entering a plea on behalf of a client is as follows:

> "My client waives formal reading of the Information and enters a plea of not guilty."

G. Appearance for Trial - Elections As to Mode of Trial

There are a number of different modes of procedure, although LSLAP students will only appear on summary matters.

1. Summary Offences, Provincial or Federal

The accused has no right of election. The trial is held before a Provincial Court judge or justice of the peace. There is no preliminary inquiry.

2. Hybrid Offences and Indictable Offences

If the Crown proceeds summarily, there is no right of election. If indictable proceedings are undertaken, the accused has the right to elect a mode of trial, unless the indictable offence is listed in ss. 469 or 553 of the Criminal Code.

Where the accused has the right of election, he or she will be asked to elect after the Information has been read, but before they are called upon to enter a plea.

3. Electable Offences

See ss. 536 (4), 554, 558, 565 and 471 of the Criminal Code. For an offence not listed in ss. 469 or 553, the accused may elect to be tried by:

a) a Provincial Court judge (magistrate) without a jury;

b) a Supreme Court judge without a jury; or

c) a Supreme Court comprised of a judge and jury.

If the accused fails to elect when the question is put to them, under s. 565(1) of the Criminal Code they will be deemed to have elected a trial in Supreme Court with a judge and jury.

a) Preliminary Inquiry:

A preliminary inquiry is held before a Provincial Court judge. The primary purpose of a preliminary inquiry is to determine whether or not there is sufficient evidence to put the accused on trial. If the justice determines that there is sufficient evidence then the accused will be ordered to stand trial; if the justice finds that there is not sufficient evidence, the accused will be discharged.

If the accused elects to be tried by a Provincial Court judge alone there is no preliminary inquiry held. The justice can proceed to call on the accused to make a plea, and where the accused does not plead guilty, proceed with a trial at that time or fix a date for trial. If the accused elects to be tried either before a Supreme Court judge alone or by a Supreme Court with a judge and jury, a preliminary inquiry is held only on the request of either the accused or the prosecutor (see s. 536(4) of the Criminal Code). If there are two or more accused who are jointly charged in an Information, then under s. 536(4.2), if one co-accused elects to proceed before a Supreme Court judge alone or by a Supreme Court with a judge and jury, then the other co-accused must proceed the same way.

4. Offences Triable by Magistrate Only

If the accused is charged with an indictable offence listed in s. 553, which includes theft under $5000, driving while disqualified, and other offences, the trial is held before a Provincial Court judge or magistrate. There is no preliminary inquiry.

5. Offences Triable by Judge and Jury Only

There is a mandatory preliminary hearing before a Provincial Court judge (or magistrate) for indictable offences listed in s. 469 of the Criminal Code. The trial must be held before a judge of the Supreme Court and a jury. There is no right of election on s. 469 offences or offences charged by direct indictment, but Crown can consent to the accused being tried by judge alone.

H. Trial Confirmation Hearing (TCH)

The Trial Confirmation Hearing is a procedural appearance for the court to confirm that the matter is indeed going to trial and that there are no disclosure issues and that Charter challenge notices have been given. The clinician need not attend the TCH, but must file a Trial Readiness Report (TRR) **at least 7 days** prior to the TCH. Clinicians are reminded that they must give notice of any Charter challenges **at least 14 days** prior to the trial date.

It can be many months between the fixing of a trial date and the TCH. The clinician must endeavour to remain in contact with the client during this long time period. LSLAP requires that the clinician contact the client **2 weeks** before the TCH to make sure the contact information has not changed and that the client knows when to appear in court.

If the clinician is unable to get in contact with the client before the TCH, the clinician **must** appear at the TCH. In many cases, the client will remember to be at the court that day. The clinician must then obtain the client's new contact information and book a time with the client for the trial prep.

If the clinician is unable to contact the client, and the client does not appear at the TCH, the clinician must then remove himself or herself from the record at the TCH and inform the court why. The clinician must then mail a letter to the client's last known address to inform them of the situation.

NOTE: In some cases, a clinician will be transferred a file after the TCH date, and is unable to get in contact with the client. The LSLAP Executive and the Supervising Lawyer must deal with those files on a case-by-case basis.

I. The Trial

1. Conduct of the Trial

The standard Provincial Court Trial conducted by LSLAP generally follows the following procedure:

1. If a plea has not been taken, the accused will be required to formally plea to the charge(s). ("My client waives formal reading of the Information and enters a plea of not guilty.")

2. Usually either Crown or Defence now asks for an order excluding witnesses, which excludes any witnesses about to testify in the matter from the courtroom until such time as they are called.

3. Crown will call its witnesses (called direct examination), and defence may cross-examine.

4. If the clinician chooses to call a defence, he or she can then call their witnesses, and Crown may cross-examine.

5. If a defence was called, defence counsel makes closing submissions, then Crown.

6. If a defence was not called, Crown makes closing submissions first, and then defence counsel.

7. The judge will consider the facts and law, make findings of fact and give his or her decision and reasons.

8. If the accused is found guilty, a Pre-Sentence Report (PSR) may be ordered. If one is not ordered, the judge will then hear sentencing submissions.

Students should refer to Fundamentals of Trial Techniques by Thomas A. Mauet, an excellent general guideline to conducting a trial. See **Appendix E: Trial Books**.

2. Nature of the Trial

The basic features of our trial system are:

a) an accusation against a person that he or she committed an offence;

b) the prosecution of the person in an attempt to prove the offence;

c) the defence against the charge; and

d) the conduct of the trial by means of an adversarial contest, with the judge as impartial arbiter.

The trial's function is to determine whether the charge has been proven beyond a reasonable doubt by considering relevant evidence and hearing and deciding upon arguments of fact and law. The accused is presumed innocent until proven guilty and the ultimate burden of proving guilt rests upon the Crown. The Crown must prove every element of the offence beyond a reasonable doubt.

If there are "unreasonable" procedural delays, s. 11(b) of the Charter, **which guarantees the right to a trial within a reasonable time**, may provide assistance. Consider the length of the delay, the reasons for it and any prejudice suffered by the client as a result of the delay. The accused has the right to a prompt trial, and prejudice may arise from the delay: see *R. v. Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.); *R. v. Morin* (1992), 71 C.C.C. (3d) 1(S.C.C.); *R. v. Fagan*, [1998] B.C.J. No. 2886 (C.A.).

3. Preliminaries

Preliminaries consist of the court clerk calling the court to order, Crown Counsel introducing themselves, calling the name of the case, and defence counsel introducing himself or herself. Preliminary motions are made and ruled upon. If the proceedings can be continued, the trial begins with the charge being read to the accused, who is then asked to plead. Defence Counsel occasionally waives the reading of the Information to the accused, but it may be prudent to have the Information read to LSLAP clients.

4. Guilty Plea: Consequences and Meaning

In a summary or indictable trial, the accused may plead guilty, not guilty, or one of the special pleas (see below). If the accused says nothing, a plea of not guilty is recorded.

The accused who pleads guilty admits the existence of all the essential facts and law necessary to convict him or her. It is improper to make such a plea where the accused does not fully appreciate the consequence of the plea. A conviction obtained in such circumstances may be overturned on appeal. Once the accused has entered a plea of guilty, the Crown will recite the facts supporting the guilty plea for the benefit of the Court. The defence then indicates their acceptance of the facts or can advance variations of the facts provided that such variations do not consist of a dispute regarding an essential element of the crime. If there is a material fact dispute, then the burden is on the Crown to prove that fact.

Consequences of a guilty plea may include, but are not necessarily limited to:

a) possible inability to obtain a passport or to enter the U.S.;

b) difficulty or impossibility of entering some postgraduate fields of study such as law;

c) exclusion from jobs requiring bonds;

d) possible use of the conviction in subsequent proceedings; and

e) possible deportation if the client is not a Canadian citizen.

5. Presentation of Prosecution's Case

Once a plea has been entered, witnesses will be excluded and the trial begins. The Crown may start with an opening address and then begin calling witnesses for examination and introducing

any real evidence (objects, documents, etc.). Next, defence counsel or the accused, if not represented, may cross-examine Crown witnesses. The Crown may then re-examine their witness, however, this re-examination is limited to clarifying or explaining answers given during cross-examination. No leading questions may be put during re-examination and new material can be entered only with leave of the Court. If leave is granted, and new material entered during re-examination, then the defence will be given an opportunity to cross-examine on the new evidence (See: Levy, Earl J., Examination of Witnesses in Criminal Cases).

6. No Evidence Motion

At the end of the Crown's case, the defence may make what is called a "no evidence motion," which asks the judge to discharge the case on the ground that there is absolutely no evidence of some essential element of the offence – proof of which is necessary to convict the accused. The test was articulated by Ritchie, J. in *U.S.A.* v. *Sheppard* (1976), 30 C.C.C. (2d) 424 (S.C.C): "is there any evidence upon which a reasonable jury properly instructed could return a verdict of guilty?" Arguments by the Crown and defence will be heard. If the defence's "no evidence" motion fails, the defence may then call its own evidence.

NOTE: **Insufficient Evidence Motion** (this is not actually a motion, but occurs when the defence elects to not call any evidence): An insufficient evidence motion requires the judge to put the evidence to the trier of fact (the jury or the judge) to determine whether the facts have been proven, and whether the accused is guilty beyond a reasonable doubt on these facts. Once the defence argues there is "insufficient evidence," the judge asks the parties to sum up and then renders a verdict – without the defence calling evidence. The motion should not be made unless the defence does not intend to call evidence and wants to argue that the prosecution's case is too weak to support a conviction.

7. Presentation of Defence Case

The accused may also start with an opening address before calling evidence. In most cases when LSLAP represents an accused, this submission will be brief or non-existent. All accused have the right to testify in their own defence and the right to call other witnesses. After the defence examines its witnesses, the Crown has the right to cross-examine them.

The defence may re-examine its witnesses if the Crown raises a new point during cross-examination. It is appropriate to re-examine a defence witness if matters arise during cross-examination that are essential components of the case and are clearly to the disadvantage of the accused. Some situations where this may arise are: where the witness was limited to yes or no answers during cross and it is advantageous to the defence case to give them an opportunity to clarify or expand on their answers; where questions were asked that targeted only certain parts of an occurrence, conversation, or document that are disadvantageous to the accused; or where there has been either an actual or implied inconsistency between the testimony in-chief and the testimony in cross-examination that should be either explained or put in a context consistent with the previous statement. (See Examination of Witnesses in Criminal Cases by Earl J. Levy Q.C. for a discussion of these techniques).

a) Accused Testifying

The accused may not be compelled to testify (see s. 11(c), Charter). If the accused chooses not to testify, no adverse inference may be drawn. A decision to call the accused should be made on the particular facts of each case, taking into account the strength of the Crown's evidence and the risks of exposing the accused to cross-examination.

b) Previous Convictions

In general, witnesses' character may be cross-examined if it goes toward credibility. This cross-examination is not limited to raising prior convictions. It may extend to questions respecting criminal associations, misconduct that has not been the subject of a criminal prosecution, and so on. The rules are different, however, where the witness is the accused. As a general rule, the Crown cannot put the accused's character in issue subject to certain exceptions. However, the Crown is entitled to cross-examine an accused as to prior convictions. See *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.), *R. v. Underwood* (1997), 121 C.C.C. (3d) 117 (S.C.C.), for limits on cross-examination.

c) Presence of the Accused

As a general rule, the accused must be present and remain in the courtroom throughout the trial. In some very unusual circumstances, the case may proceed *ex parte* (i.e. in the absence of the accused).

8. Witnesses

a) Advising a Witness

Unless a witness is personally served with a subpoena, he or she is under no obligation to attend the court proceedings. However, the witness should be encouraged to attend a proceeding. Once a witness is personally served with a subpoena, he or she is required to attend by virtue of s. 700(2) of the Criminal Code, or an arrest warrant may be issued. However, a witness who has been issued a subpoena is under no obligation to attend a Crown interview prior to testifying. In B.C., most subpoenas are simply delivered by mail, and not by personal service.

The student can help a witness by requesting particulars from the Crown (although it may be difficult to acquire particulars for this purpose) and cautiously advising the witness about the questions that they are likely to be asked. However, students should limit advice to a general explanation of the processes of examination and cross-examination. Witnesses may also wish to observe another trial prior to the one at which they will be testifying.

Everyone who is competent (i.e. understands the nature and obligation of the oath) can be compelled to testify, with the following exceptions:

a) the accused;

b) a jointly tried co-accused; and

c) the spouse of the accused with regard to communications made during their marriage.

However, an accused's spouse will be a competent and compellable witness for the Crown if the accused is charged with an offence listed in ss. 4(2) and 4(4) of the Canada Evidence Act. For provincial offences, a spouse may be called by either the Crown or the defence (B.C. Evidence Act, s. 6): see *R. v. Hawkins*, [1996] 3 S.C.R. 1043.

Witnesses must answer all questions put to them unless the information is considered privileged. In addition to communications between spouses, privileged information includes:

a) discussions between a client and his or her lawyer in situations when the lawyer was acting in a professional capacity; and

b) the identity of police informers when it is against public policy to disclose such names, unless disclosure is the only way to establish the innocence of the accused.

The most common situation is where one spouse is the only "witness" in an allegation of assault against the other spouse. Before giving any advice to this witness, a clinician should speak with LSLAP's Supervising Lawyer.

See **Section VI.F.6: Protection of Witnesses**, for details about how a witness can invoke the Canada Evidence Act or B.C. Evidence Act for protection against the use of self-incriminating testimony against him or her in a subsequent trial.

b) Counselling a Witness

Defence counsel should prepare witnesses for trial. A witness must tell the truth as he or she knows it, but prior rehearsal of possible questions and answers is advised. All answers should address the specific questions asked. Witnesses should be appropriately dressed.

c) Ensuring Attendance of a Witness and Documents

A witness may be required to attend a trial to give evidence and to bring documents by means of a subpoena processed through the court registry. As a general rule, subpoenas must be personally served: see Criminal Code s. 509(2). Where a subpoena has not been personally served, the Crown may seek to have the potential witness arrested and brought before the court to give evidence. The Crown must satisfy the court that, under the provisions of s. 698 of the Criminal Code, a material witness is evading service or will not attend in response to a subpoena. This is a difficult task for the Crown. Thus, non-attendance in response to a subpoena received by mail is, in most situations, merely likely to result in personal service thereafter.

d) Testimony of Witness

A witness is required either to swear an oath or to solemnly affirm that he or she will tell the truth. Section 16(3) of the Canada Evidence Act permits a witness who is able to communicate the evidence, but does not understand the nature of an oath or a solemn affirmation due to age (under 14 years) or insufficient mental capacity, to testify – as long as he or she promises to tell the truth.

Practice Recommendation – Contacting Adverse Witnesses

If, while preparing for trial, a clinician must contact a complainant or adverse witness for whatever reason, they are advised to be extremely careful in their approach.

There is no property in a witness and clinicians may contact adverse witnesses, however the witness is not required to speak with the clinician and that must be made clear to the adverse witness.

It should also be made clear to the adverse witness that the clinician is representing the client, and as such is in conflict with the witness' interests and is in no position to provide the witness with legal advice.

If a clinician chooses to interview an adverse witness, they should **never** do so alone. Another LSLAP clinician should attend and should take notes of the conversation in case a dispute develops about what was said in the interview or the circumstances in which the interview took place. They may be required to give evidence as to what happened. If interviewing the adverse witness by telephone, a witness should be present via conference call or speakerphone.

The clinician must be careful to avoid any appearance of impropriety or witness tampering, and must never, either explicitly or implicitly, advise an adverse witness to not attend court when summoned.

The judge decides whether to admit or exclude evidence, as governed by the laws of evidence, case law, the Charter, the B.C. Evidence Act, the Canada Evidence Act, and the statute creating the offence. Evidence must be relevant to the facts in issue. The facts in issue are those that go to establishing the essential elements of the offence. Evidence may be presented with respect to other issues as well, such as the credibility of a witness.

e) Admission or Confession

Where the accused made a statement outside the trial, for example while being questioned by the police, the Crown may seek to use this statement as evidence of:

- an admission or confession by the accused; or
- for the purposes of cross-examination during trial.

There are two different kinds of statements, admissions and confessions:

- An admission is a statement made to another civilian and it is generally always admissible;
- A confession is a statement made to a person in authority, usually a police officer, and there are very strict rules regarding the use of such statements at trial.

Anything the accused says to the police before or after the arrest is admissible as a confession **only** if the Crown first proves it was made voluntarily. The court in *Ibrahim v. R.* (1914), A.C. 599 (P.C.) held that the statement of an accused is inadmissible if it was "obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." This standard has been broadened to include confessions obtained through violence, oppression, and altered states of consciousness such as hypnosis (*Horvath* v. *R.* (1979), 44 C.C.C. (2d) 385 (S.C.C)).

Even if a judge rules an accused's confession is voluntary, it may still be inadmissible if defence counsel can prove, on a balance of probabilities that it was made to the person in authority in violation of their rights under the Charter. In *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207 (S.C.C.), the accused's confession was inadmissible because her waiver of her s. 10(b) Charter right was invalid due to her high degree of intoxication, which prohibited her from appreciating the consequences of the waiver. There, the court found that the police deliberately exploited this condition. In *R. v.*

Hebert (1990), 57 C.C.C. (3d) 1 (S.C.C.) the accused was enticed into making a confession to an undercover police officer posing as a cellmate. The court ruled that pursuant to s. 24(2) of the Charter, a court cannot admit into evidence any statements made in violation of an accused's intention not to speak to authorities.
Students should be careful when advising a client who may have made an admission, i.e. a statement acknowledging guilt to a person who is not in a position of authority, since it is admissible in most circumstances. The means by which the statement was obtained will affect its evidentiary weight, and possibly its admissibility. In such a situation, your client should be advised to seek advice from a lawyer.

f) Hearsay Evidence

Generally, a person can only testify to matters of which he or she has personal knowledge. A witness cannot state as fact something told to him or her out of court by a person who was not under oath. The rule against hearsay prohibits the admission of evidence that cannot be the subject of cross-examination to test its trustworthiness. The key factor in determining if a statement is inadmissible hearsay is its purpose. A statement is inadmissible hearsay if it is entered to establish the truth of the statement. However, it is not hearsay, and therefore not inadmissible if it is entered as proof of only that the statement was made.

There are some traditional exceptions to the hearsay rule, whereby such statements can be admissible. Each exception has its own requirements that must be met. However, there are two basic tests underlying each exception:

1. Necessity: whether the benefit of the evidence would be lost in its entirety if it is not entered (i.e. the declarant, the person who originally made the statement, is unavailable, or there is no other source by which the evidence can be admitted and have similar value);

2. Circumstantial probability of trustworthiness: the circumstances in which the statement was made ensure trustworthiness and reduce the danger of admitting evidence without an opportunity for cross-examination.

The traditional hearsay exceptions include:

1. confessions;

2. dying declarations;

3. declarations against the interest of the declarant;

4. records made in the course of duty if the declarant is deceased or otherwise unavailable;

5. declarations of a state of mind or bodily condition (as evidence of the state reported, but not of its cause);

6. statements of intention, see *R. v. Starr*, [2000] 2 S.C.R. 144;

7. spontaneous declarations;

8. words spoken in the course of committing an offence; and

9. statements given at trial.

In addition to the traditional common law exceptions to the hearsay rule, the Courts have developed the "principled approach" to determining the admissibility of hearsay. Under this approach, the trial judge must determine if two requirements have been met before allowing hearsay evidence to be admitted:

1. Necessity: the reception of the evidence, untested by cross-examination is necessary, since it's benefit to the proceedings would be lost; and

2. Reliability: this test is essentially the judicial determination of what would have been gained by cross-examination. The probability and accuracy of what is received is practically sufficient, although it may not be tested in the traditional manner.

For a thorough discussion of the rules of hearsay admissibility, see Watt's Manual of Criminal Evidence.

g) Leading a Witness

Counsel is generally not permitted to lead its own witness (i.e. suggest answers), with the exception of preliminary matters such as the witness's identity, residence, age, and anything else that is not in issue such as setting the stage. In any case, testimony that is adduced from leading questions tends to be afforded less weight, as the words have come from the mouth of someone other than the witness. **Leading questions are common and proper for cross-examination.**

h) Opinion Evidence

Opinion evidence is permitted where it assists the trier of fact to draw conclusions from the evidence. There are two types of opinion evidence: non-expert and expert. Non-expert opinion evidence is generally not permitted. Expert evidence is not permitted where the trier of fact is capable of reaching a conclusion without such evidence. Expert opinions are necessary where the trier of fact would be unable to draw a conclusion with respect to the evidence. Experts must first be established as such – the determination is made in a *voir dire* (a trial within a trial). For a more complete explanation of the law on opinion evidence, see *R. v. Graat* (1982), 2 C.C.C. (3d) 365 (S.C.C.) and *R. v. W.(D.)* (1991), 3 C.R. (4th) 302 (S.C.C.).

A recent amendment to the Criminal Code added s. 657.3(3), which imposes an obligation on the defence to disclose any opinion evidence it intends to call prior to trial. *R. v. Stone*, [1999] 2 S.C.R. 290 sets out the guidelines which apply to both Crown and defence in disclosing expert opinion evidence.

9. Conclusion of the Trial

a) Closing Argument and Submissions

Defence counsel and the Crown will make closing arguments that recap their view of the facts and the pertinent law. The judge or jury may then retire to consider a verdict. If the defence has called evidence, it must make submissions first. Often a case will be decided based on the credibility of the witnesses. Important rules regarding credibility that should always be considered can be found in *R. v. W.(D.)* (1991), 3 C.R. (4th) 302 (S.C.C.):

- If the trier of fact believes the defendant, he or she must acquit;

- If the trier of fact has a reasonable doubt based on the defendant's evidence, he or she must acquit;

- Even if defendant's evidence does not raise a reasonable doubt, the court must ask itself if, on the evidence before it, the Crown has established the guilt of the accused beyond a reasonable doubt.

b) Verdict

The accused may only be found guilty of the offence charged in the Information or indictment or of a lesser included offence. The accused may also be convicted of an attempt to commit the offence charged. Alternatively, the case may be dismissed.

c) Sentencing

The judge will sentence the accused after a conviction or guilty plea. However, the judge will usually ask for submissions on sentencing from both sides regarding the offence and the offender. Counsel should be prepared to address sentencing immediately following a trial. Alternatively, the Crown or defence may adjourn the matter for sentencing on application. But such an application will be granted only if there are valid reasons for counsel to ask for more time to prepare or if a pre-sentence report is requested. Crown will generally ask for a pre-sentence report (PSR) if they are seeking a custodial sentence.

Judges have broad discretion in imposing most sentences – depending on the specific offence, whether it is provincial or federal, and summary or indictable. Sentences may range from probation, a fine, imprisonment or a combination of any two of these, though not all three. Besides a jail term or fine or both, the court may order compensation (restitution), community service, or probation. Moreover, probation itself may include various conditions. A judge has the option to order an absolute or conditional discharge, which can result in no criminal record. In such circumstances, the offence must be one for which such a sentence may be ordered, and the discharge must be in the best interests of the accused and not contrary to public interest. Discharges are not available for offences where the Criminal Code provides for a minimum sentence of 14 years or more.

In cases where there are several charges, a judge may order that sentences be served consecutively (one after the other) or concurrently (at the same time). Consecutive sentences are often ordered where the accused has a lengthy prior record, seems beyond rehabilitation, and/or the offences are unrelated and of a serious nature (see Criminal Code, s. 718.3(4) and *R. v. Chisholm*, [1965] 4 C.C.C. 289). The judge also has discretion to credit an accused with any time spent in custody as a result of the charges. Generally, an accused is credited with double the amount of time spent in custody prior to conviction. However, this discretion only exists at the time of sentencing, and a judge is powerless to grant credit for remand time at a later date.

An important part of a student's role as LSLAP advisor may be negotiating a sentence with Crown Counsel, commonly referred to as plea-bargaining. In fact, some of a student's best advocacy can occur outside the courtroom – when discussing mitigating factors with the Crown. The Crown can sometimes be convinced to assume a less harsh position, or even to agree on a joint submission for sentencing. Most judges will follow a joint submission.

(1) Speaking to Sentence

Before a sentence is given, the accused, or counsel for the accused, will be permitted to "speak to sentence" and make submissions to the judge that could affect the sentence. After hearing defence submissions and Crown recommendations, the judge will give a sentence. For more on the substance and procedure of speaking to sentence, see **Appendix D: Speak to Sentence Procedure**.

It is important to consult ss. 718 and 718.2 of the Criminal Code for the principles in sentencing that the judge will consider, and address these issues when drafting your submissions. A clinician should also read up to s. 743.1 of the Criminal Code before any sentencing hearing.

(2) Considerations in Sentencing

The court considers:

- the protection of society;
- deterrence of the specific offender, and general deterrence of others;
- rehabilitation; and
- punishment of the offender.

(3) Factors Mitigating Sentence

Often the only real contribution a student can make is to help the client prepare material to mitigate the sentence that he or she will receive either upon pleading guilty or being found guilty at trial. An excellent source of information on judicial sentencing principles is the B.C. Court of Appeal's judgment in *R. v. Hinch and Salanski,* [1968] 3 C.C.C. 39 (B.C.C.A.). The case lists important factors that should be considered in determining sentence:

- degree of premeditation involved;
- circumstances of the actual commission of the offence;
- gravity of the crime committed versus the maximum punishment;
- offender's attitude after commission of the offence;
- age, mode of life, character and personality of the offender;
- pre-sentence reports, etc.; and
- previous record.

In cases of Aboriginal offenders, reference must be made to s. 718.2(e) and the principles enunciated in *R. v. Gladue*, [1999] 1 S.C.R. 688.

Students should consider these matters when attempting to present the client in the best light. The court will look upon your client as a problem;

you should therefore seek to show the court that the problem has already been cured and will not recur, and that a harsh sentence is unnecessary. With first offenders this typically involves presenting the lead-up to the offence as a unique set of unusual circumstances that caused a momentary and exceptional loss of control, and then showing what has changed in the life of the client to avoid a similar set of unusual and exceptional circumstances. This involves in part an understanding of the client's situation (see **Appendix D: Speak to Sentence Questionnaire**), and an understanding of the severity of the offence.

A speak to sentence pamphlet published by the Legal Services Society is available on the LSLAP (www.lslap.bc.ca) website and is very helpful during preparation. The pamphlet can also be found on the Legal Services Society website, www.lss.bc.ca, under "Resources".

d) Types of Sentences

(1) Absolute or Conditional Discharge

If the accused is found or pleads guilty to an offence under the Criminal Code that carries a maximum penalty of less than 14 years and no minimum penalty, the judge can order an absolute or conditional discharge if it is in the best interest of the accused and not against the public interest. The effect of the discharge is that the accused is deemed never to have been convicted of the offence.

An absolute discharge is granted immediately without terms or conditions, whereas a conditional discharge involves the imposition of certain conditions that the accused must fulfil before the discharge becomes effective. If the accused violates the terms of the conditional discharge or is convicted of another offence, the discharge may be revoked. In such a case, the accused is sentenced again for the original offence, and will then receive an additional sentence for breach of probation.

Discharges are outlined in s. 730 of the Criminal Code. *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.) provides an excellent discussion of the various criteria that are considered when an absolute or conditional discharge is an option in sentencing. Some criteria are:

- any offence other than one with a minimum punishment prescribed by law or a punishment by imprisonment for 14 years or for life;
- not limited to technical or trivial violations;
- the best interests of the accused (presupposes good character, no prior record, no need to deter or rehabilitate, and considers adverse repercussions of a conviction);
- not contrary to the public interest;
- not to be exercised as an alternative to probation or suspended sentence; and
- not to be applied routinely to any particular offence.

(2) Suspended Sentences and Probation

If the judge thinks that, having regard to the age, character and personal circumstances of the individual, the accused can rehabilitate him or herself, the judge can suspend the passing of sentence and release the accused subject to the terms of a probation order of up to three years (Criminal Code, s. 731(1)(a)). This does **not** mean that the accused has been acquitted; at the expiry of their probationary period, he or she will still have a criminal record. This is an important difference between probation and a conditional discharge.

According to s. 732.1(2) of the Criminal Code, a probation order will prescribe that the accused keep the peace and be on good behaviour and appear before the court when required. In addition, the probation order may prescribe one or more of the following conditions:

- to report to and be under the supervision of a probation officer;
- to abstain absolutely or on certain terms from the consumption of alcohol;
- to submit to a breathalyser or urine test at the demand of a peace officer;
- not to contact the person or persons that were involved with the offence;
- not to visit the place of the offence, for example the store from which the offender stole goods;
- to participate in and complete counselling as directed by the probation officer;
- to abstain from owning, possessing or carrying a weapon;
- to make restitution or reparation to any person injured by the commission of the offence;
- to remain in the court's jurisdiction and to give proper notification of change of address or employment;
- to make reasonable efforts to find and maintain suitable employment; and/or
- any other reasonable conditions designed to promote good conduct by the accused, and to prevent the commission of any subsequent offence.

A term of probation imposed in addition to a fine or term of imprisonment may not exceed a period of two years (Criminal Code, s. 731 (1)(b)).

(3) Fines

Under s. 734 of the Code, an accused may be fined in addition to, or in lieu of, another punishment for offences punishable by imprisonment of five years or less for which there is no minimum penalty.

If an offence is punishable by imprisonment of *over* five years, the accused cannot be fined in lieu of any other punishment. That is, he or she can be fined in addition to another sentence (i.e. jail term or probation), but cannot receive a sentence consisting solely of a fine. Furthermore, the sentence may not consist of all three punishments: jail term, probation, and fine.
An accused cannot be fined in lieu of imprisonment where the offence is punishable by a minimum term of imprisonment.

When sentencing, a judge is obligated to inquire as to the accused's ability to pay a fine in accordance with the terms of payment (*R. v. Natrall* (1972), 9 C.C.C. (2d) 390 (B.C.C.A.)). Consideration of the accused's means of paying a fine must be based on evidence or knowledge of such means emerging either from the case at large or from a specific inquiry (*R. v. Jung*, [1976] B.C.J. No. 147 (C.A.)). LSLAP students should have this kind of information at hand before sentencing. The usual time for payment is between three and six months, depending on the fine given. Section 736(1) of the Criminal Code allows some offenders to discharge their fines through a community service program approved by Fine Option Program if the offender meets the criteria set by Probations. Currently British Columbia does not offer a Fine Option Program for adults.

(4) Imprisonment – Intermittent or Conditional

If a judge imposes a sentence not exceeding 90 days, he or she may order that the sentence be served intermittently on certain days of the week or month. The accused is released on the other days, subject to conditions of a probation order. A judge may impose a fine or probation order in addition to a prison sentence, but cannot impose all three.

There are also provisions in the Criminal Code that allow the accused to serve a sentence in the community. This is called a "conditional sentence" (Criminal Code, s. 742.1). For the court to consider a conditional sentence, there must be no minimum term of imprisonment for the offence, the offender must not be a danger to the community, and the judge must be contemplating a sentence of less than two years. The leading cases are *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 (S.C.C.) and *R. v. Wismayer* (1997), 115 C.C.C. (3d) 18 (Ont. C.A.).

(5) Restitution and Compensation

Where an accused is convicted or discharged under s. 730 of the Criminal Code, the court may, by making a motion or by applying to the Attorney General, order the offender to make restitution and compensate a victim for the loss of or damage to property caused by the crime, and for bodily harm or threats of bodily harm. This order can only be made at the time of sentencing, if the victim applies (Criminal Code, s. 738).

(6) Electronic Monitoring Systems (ELMO)

When an accused is sentenced to a conditional sentence, he or she may be monitored electronically to ensure that he or she does not leave the court-designated place of confinement (usually the place of residence). Typically, the accused is serving a relatively short sentence (approximately four months or less) for a non-violent crime, and is confined on weekends and during the evening. It is wise to have the accused assessed by "Electronic

Monitoring Systems" before sentencing to determine if the accused is suitable for the program.

(7) Bodily Samples for the National DNA Data Bank

In December 1998, Bill C-3 received Royal Assent. The bill created a National DNA Data Bank for convicted criminals. Over the next 18 months work began to establish the National DNA Data Bank. In November 1999, Bill S-10 was introduced into the House of Commons. Bill S-10 contained amendments to Bill C-3, including: the taking of fingerprints for identification purposes and the inclusion of designated offenders convicted in the military justice system. On June 30, 2000, both Bills C-3 and S-10 were enacted.

As a result of these bills, if an offender is convicted of one of the designated offences enumerated in s. 487.04 of the Criminal Code – for example, sexual interference (s. 151) and sexual exploitation (s. 153) – a court must order the taking of bodily substances for the purposes of forensic DNA analysis. Once the substance is analysed, it is then entered into the Convicted Offender Index of the national DNA Data Bank. The data bank is used mainly for sex offenders.

J. Appeal

The accused has a right to appeal a conviction or sentence or both. Appeals must be filed within 30 days of the sentence. The accused becomes a respondent when the Crown appeals the verdict (acquittal) or the sentence. An accused who believes that he or she has a strong case for an appeal should be referred to Legal Aid or to the Lawyer Referral Service. At the same time, the accused should be told that he or she must file the necessary material within 30 days. If the accused does not eventually find counsel, he or she should attend the Court of Appeal registry at 800 Smithe Street in Vancouver and file the appropriate documents.

K. Default in Payment of Fine or Non-Compliance with Order

1. Provincial Offences

A convicted person may not be jailed for defaulting on payment of a fine, except as under the Small Claims Act, R.S.B.C. 1996, c. 430 (Offence Act, R.S.B.C. 1996, c. 338, s. 82). Failure to pay a fine can result in the Crown obtaining a court Judgment Order by filing the conviction and entering the amount of the fine. The order has the same effect as a judgment in a civil case. The Crown can collect the fine by a Garnishing Order, Warrant of Execution, or other means, just as a judgment would be enforced in a civil case. However, the Crown rarely takes these steps.

2. Federal Summary Offences

The court order for payment of a fine, or performance of community service, will normally also contain an order for a term of imprisonment that may be enforced in instances of default of payment of a fine, or non-performance of community service (Criminal Code, ss. 734(4) and (5)). This term of imprisonment may be up to six months (s. 787(2)). However, the court may grant more time for payment when a person has a legitimate excuse for defaulting, particularly if partial payment was made. On the other hand, if the person prefers to serve time rather than pay the fine, he or she may begin doing so immediately.

3. Indictable Offences

Where an indictable offence is punishable by less than five years, the court may order payment of a fine – with a maximum two-year jail term in the event of non-payment. Where the offence is punishable by five or more years, a maximum five-year jail term may accompany the order for payment of a fine in the event of default. On application by the accused or his or her representative, the court may allow further time for payment. However, if the accused appears before the court and signifies in writing that he or she prefers to be committed immediately, he or she may begin serving time immediately.

V. SUBSTANTIVE LAW

A. Provincial Offences

All offences created by provincial statute are summary conviction offences. Examples of provincial offences are those created by the Liquor Control and Licensing Act, R.S.B.C 1996, c. 268, Family Relations Act, R.S.B.C. 1996, c. 128, Employment Standards Act, R.S.B.C 1996, c. 113, and the Residential Tenancy Act, S.B.C. 2002, c. 78. Other summary conviction offences are established by municipal bylaw (i.e. parking violations and lodging-house violations).

B. Federal Offences

A federal statute may create an offence that is an indictable offence only, or is punishable on summary conviction only, or is either indictable or summary (i.e. hybrid) depending on the Crown's approach. Examples of federal offences are those contained in the Criminal Code, Controlled Drugs and Substances Act, and Income Tax Act, R.S.C. 1985 (5th Supp.), c. 1. Although the federal government regulates Criminal Code offences, the provincial Attorney General administers the law in this area. This distinction is important in determining who will prosecute the offence.

C. Penalties and Punishment

1. Provincial Summary Offences

The Offence Act establishes the maximum penalties that may be imposed upon conviction for a provincial summary offence. These provisions apply except where a provincial statute creating an offence provides for some other penalty. Under the Offence Act, the maximum fine that may be imposed is $2,000. Other possible penalties include imprisonment for not more than six months, or both a fine and imprisonment (s. 4).

2. Federal Offences

a) General

The Criminal Code establishes general penalties for summary conviction and indictable offences created by federal statutes. A specific section in the Code or other legislation may establish another penalty, and may provide for different procedure and penalties for a first or subsequent offence.

b) Maximum and Minimum Punishment

No punishment provided for in a statute is a minimum penalty unless so declared (Criminal Code, s. 718.3(2)). Where a punishment is provided, it is the maximum penalty and the court in its discretion may impose a lesser penalty.

c) Summary Conviction Offences

Unless otherwise specified, the maximum penalty for a summary conviction offence is a fine of $2,000, six months imprisonment, or both (Criminal Code, s. 787(1)). For example, a summary conviction for a first offence of possession of a narcotic has a maximum fine of $1,000, six months imprisonment, or both. Note, however, that some summary offences can be punished by up to 18 months in jail: see, for example, assault, Criminal Code, s. 264.1(2)(b). As well, be aware that time for payment of fines cannot be for less than 14 days from the sentence date.

d) Indictable Offences

Most indictable offences specify the maximum term of imprisonment. If no maximum is specifically provided for, the maximum term is five years (Criminal Code, s. 743). Minor indictable offences (i.e. theft under $5,000) carry maximum jail terms of two years. Other indictable offences carry greater maximum jail terms of five years, seven years (i.e. possession of a narcotic), 10 years (i.e. theft over $5,000), 14 years, or life (i.e. trafficking a narcotic).

e) Fines

A person may be fined in addition to or in lieu of any other punishment, where there is no minimum term of imprisonment (Criminal Code, s. 734(1)). The court cannot fine an offender more than he or she is able to pay (s. 734(2)).

An offender who does not pay an imposed fine is in default of payment and may be imprisoned as described in ss. 743(4) and (5). For summary conviction offences, where a fine is imposed, an offender who is in default of payment may be imprisoned for a term not exceeding six months (s. 787 (2)).

D. Procedure

1. General

Different law and procedure may apply depending on whether the accused faces summary or indictable proceedings, and on whether the accused is charged with a provincial or a federal offence.

2. Provincial Offences

The procedure followed for laying an Information (or charge), issuing a summons, appearing for trial, etc. is set out in the Offence Act. Where the Offence Act is silent concerning a procedural matter, the Criminal Code provisions governing federal summary proceedings apply. There is little difference between the procedures set out in the Offence Act and the Criminal Code.

However, the procedure to be followed may be altered by the provincial statute that creates the specific offence.

Notable features of Offence Act procedures include:

a) a six month limitation period for the commencement of a prosecution;

b) the right to appear by counsel or agent;

c) no preliminary hearing;

d) no election by accused; and

e) the possibility of an *ex parte* judgment.

3. Federal Summary Offences

The general procedure is set out in Part XXVII of the Criminal Code. Specific legislation may alter this procedure. For example, delinquency is a summary offence for which prosecutions and trials are summary, but there are certain modifications in the standard procedure (see Young Criminal Justice Act, S.C. 2002, c. 1).

Notable features of summary procedure include:

a) limited powers of arrest;

b) greater protective rights (bail);

c) a six month limitation period for commencement of proceedings;

d) the right to appear by counsel or agent;

e) no preliminary hearing;

f) no election by accused; and

g) the possibility of *ex parte* judgment.

4. Federal Indictable Offences

The general procedure is set out in Parts XIX, XX, and XXI of the Code. Other laws may establish additional or different procedures (e.g. ss. 48, 51, and 52 of the Controlled Drugs and Substances Act, regarding prosecution procedure in cases of possession and trafficking in narcotics).

Notable features of indictable procedure include:

a) greater powers of arrest;

b) greater likelihood of detention or committal;

c) fingerprinting, photographing, and denial of bail;

d) no limitation period to begin a prosecution for most offences;

e) mandatory requirement for non-corporate accused to appear in person; and

f) right of accused to elect mode of trial and to have preliminary hearing unless charged with an offence listed in s. 553 of the Criminal Code.

VI. CRIMINAL LAW AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. Impact of the Charter

Procedural and substantive criminal law has been shaped and expanded by the Charter since its introduction in 1982. Consideration of ss. 7 – 15 of the Charter, in addition to the remedial s. 24, is required to properly understand the constitutional guarantees that profoundly influence criminal law.

A compilation of Charter decisions is on reserve in the UBC Law Library, and includes decisions in such areas as arrest procedures, the right to counsel, the admissibility of illegally obtained evidence at trial, search and seizure, and the right to be presumed innocent until proven guilty.

The Charter provides for two types of sanctions. First, where a law is found to violate the Charter, s. 52 of the Constitution Act applies to render the law "of no force or effect". Where an individual's rights or freedoms have been infringed, not by impugned legislation, but by the acts of an agent for the state (for example, the police), the aggrieved person may apply under s. 24(1) of the Charter for an appropriate remedy. In the case of illegally obtained evidence, that evidence could be excluded by the operation of s. 24(2).

Section 8 of the Constitutional Question Act, R.S.B.C. 1996, c. 68 requires that 14 days notice be given to opposing counsel where the constitutional validity of a law is challenged, or where an application is made for a constitutional remedy. The Case Management Rules provide the opportunity to give notice at the Arraignment Hearing.

One cannot be certain of all the effects that the Charter will ultimately have on the Criminal Code. The provisions of the Code must certainly be read in light of the Charter, and indeed the Charter has already had a significant impact. There is by no means a complete body of jurisprudence on the subject of the effect of the Charter on the Criminal Code, and one should expect to see the courts continuing to shape the boundaries for quite some time.

1. Amendments to the Criminal Code

Major changes in the Criminal Code have been implemented to bring it into conformity with the Charter. Like most other legislation, the Criminal Code is the subject of ongoing discussion, and reform and amendments are frequent. When referring to any provision in the Criminal Code, ensure that it contains the latest amendments.

B. Right to a Trial Within a Reasonable Time: s. 11(b)

In addition to the right to make full answer and defence, any person "has the right to be tried within a reasonable time". When assessing what constitutes "a reasonable time", a judge will look at the actions of the accused, any prejudice to the accused caused by the delay, institutional delay, the interests designed to be protected, and the relative seriousness of the charge, in order to determine whether the administration of justice would be brought into disrepute (see *R. v. Askov*, *supra* at 25, *R. v. Morin*, above at 25, and *R. v. Fagan*, above at 25).

C. Finding Legal Counsel and Other Assistance Where Person is Arrested and Detained: s. 10(b)

If an LSLAP client has been arrested and detained, it is usually a signal that the offence is serious, and the client should be referred to professional counsel. Nevertheless, it is important to have some knowledge of Charter issues relating to arrest and detention.

Under s. 10 of the Charter, everyone has the right on arrest or detention:

- to be informed promptly of the reasons why;
- to retain and instruct counsel without delay and to be informed of that right; and
- to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

NOTE: Detention can occur at the scene of the offence.

The wording of the Charter suggests that the right to counsel is not absolute, but rather that it is available only to a person who is under arrest or in detention. The Charter right to counsel is thus triggered where a person is arrested or detained (*R. v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.)). Where a person has the right to retain and instruct counsel, a correlative obligation on the detaining authorities exists to provide the arrested person the opportunity to use a telephone for that purpose, if one is available (*R. v. Clarkson* (1986), 25 C.C.C. (3d) 207 (S.C.C.)). Furthermore, there is no justification for delaying the opportunity to contact counsel until arrival at the police station if there is a telephone available at an earlier occasion.

Under s. 10(b), the arresting officer has a duty to cease questioning or otherwise attempting to elicit evidence from the detainee until the detainee has a reasonable opportunity to retain and instruct counsel, unless the detainee volunteers information (*R. v. Manninen* (1987), 34 C.C.C. (3d) 385 S.C.C.)). The arrested person has both the right to Legal Aid counsel and the right to be informed of this right: see *R. v. Brydges*, [1990] 1 S.C.R. 190 and *R. v. Prosper* (1994), 33 C.R. (4th) 85 (S.C.C.).

Issues may arise at trial when an accused gave a statement to the police or provided bodily samples of some sort. In such cases, defence counsel should seek to have the evidence excluded under s. 24(2) of the Charter.

D. Search and Seizure: s. 8

1. Search of Premises

In general, police must have a search warrant to search a person's premises (see *R. v. Feeney,* [1997] 2 S.C.R. 13). However, there are exceptions under the Criminal Code and other empowering acts such as the Controlled Drugs and Substances Act (s. 11(7)), which permit a peace officer to enter any place "other than a dwelling house" without a warrant. Sections 8 and 24(2) of the Charter do permit a search without a warrant in certain situations.

When determining whether the accused's s. 8 Charter right to be secure against unreasonable search or seizure has been violated, the court must assess whether, in a particular situation, the public's interest in being left alone by government is subordinate to the government's interest in intruding on an individual's privacy to advance its goals – notably law enforcement. A valid search and seizure requires prior authorization by a judicial justice of the peace, who must be satisfied that reasonable grounds exist to believe that an offence has been committed, and that evidence of that offence will be found in the place being searched.

As a general rule, a search of premises must be based on reasonable grounds. If a search is conducted merely on a suspicion, the search will likely constitute a violation of s. 8 of the Charter. In the case of *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207 (S.C.C.), the search was held to be unreasonable even though a warrant had been issued, because the basis for the warrant was a prior unreasonable and unlawful search of the premises, based merely on suspicion.

A warrantless search is presumed to be unreasonable and the onus is on the party seeking to justify the search and seizure to rebut this presumption: see *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.). The Supreme Court, however, has recognised several situations where authorities may conduct a search without warrants. For example, where evidence of the offence is in plain view, or the occupant of the premises has consented to the search. In *R. v. M.R.M.*, [1998] 3 S.C.R. 393, the court ruled that students had a "significantly diminished" expectation of privacy when attending school. Consequently, it would "not be reasonable for a student to expect to be free" from all warrantless searches while at school. Likewise, in *R. v. Simmons* (1988), 45 C.C.C. (3d) 296 (S.C.C.), the Supreme Court noted that searches at border crossings could still be valid even if they did not meet the high standard required for other searches.

A search warrant must be valid on its face (i.e. the correct address, the date and time of the execution, etc.), and an occupant of the premises to be searched has a right to view the search warrant before the search is conducted. A search may be refused if there is something wrong with the warrant. If the police nonetheless insist, there may be a civil right of action against them.

2. Search After Valid Arrest and Search of Person

An officer has a specific right to search someone if the officer has good cause to believe the person is or has committed, or is about to commit, an offence – provided the search is limited to finding weapons to preserve the officer's safety. An officer has a general right to search someone only as an incident to an arrest. A person may also be searched where he or she is found in a place being searched under a search warrant, or if the police officer has reasonable and probable grounds to believe the person has a weapon or is unlawfully keeping liquor. For further information relating generally to search of the person, see *R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.), *R. v. Ferris*, [1998] B.C.J. No. 1415 (C.A.), *R. v. Mann*, [2004] 3 S.C.R. 59; regarding customs searches, see *R. v. Simmons* (1988), 45 C.C.C. (3d) 296 (S.C.C.) [*Simmons*]. The Supreme Court in *Simmons* held that there is a lower standard relating to the test of reasonableness of grounds when imposing a search of a person at the border.

The proper search of person is often an issue at trial when the case against an accused is based on the results of a search of him or her (for example, narcotics found, possession of a weapon or stolen property). Be alert to issues of search because you may consider challenging the admissibility of this evidence under s. 8 of the Charter.

E. Lawful Arrest

An unlawful arrest may vitiate the authority of a search or may be the basis of a Charter argument that the client was arbitrarily detained contrary to s. 9 of the Charter.

1. Police Powers

The police may arrest without warrant any person who has committed an indictable offence or who they believe on reasonable and probable grounds has committed or is about to commit an indictable offence (Criminal Code, s. 495(1)). The police officer's belief must be more than a mere "suspicion".

Where the police believe on reasonable and probable grounds that a person has committed or is about to commit a summary offence, a hybrid offence, or an indictable offence listed in s. 553 of the Criminal Code, that person cannot be arrested without warrant unless:

a) the public interest requires it; and

b) there are reasonable and probable grounds to believe that the person will fail to attend court (Criminal Code, s. 495(2)).

"Public interest" includes the need to establish the person's identity, the need to secure and preserve evidence, and the need to prevent the continuation or repetition of an offence or the commission of another offence.

A suspect who is not arrested should be released with an appearance notice. Note that there are some instances where even though an arrest was unlawful, the person's detention will not be deemed arbitrary. Sections 8, 9, 10, and 11 of the Charter outline the relevant constitutional law.

Regular citizens also have a right to detain people they see committing a crime. Under s. 494(1) of the Criminal Code, anyone can arrest a person without warrant if they find the person committing an indictable offence, have reasonable grounds to believe the person has committed an indictable offence, or if they see a person being pursued by anyone who has lawful authority to arrest the person. Section 494(2), meanwhile, gives store detectives the authority to arrest shoplifters. Under this section, a property owner or an agent working on the owner's behalf may arrest without warrant any person who is committing a criminal offence in relation to the owner's property.

2. The Criminal Code: The Law of Arrest and Release

Some of the relevant sections of the Code are:

a) ss. 25 – 27: use of force, liability for excess force, use of force must be reasonably necessary;

b) ss. 494 and 495: arrest without warrant by private citizen, police officers;

c) ss. 496, 497, 498 and 499: appearance notice, release from custody;

d) s. 501: appearance notice, promise to appear, recognizance;

e) ss. 503 and 515: judicial interim release (bail);

f) ss. 145, 498 and 510: failure to appear; and

g) ss. 511 – 514: warrant to arrest.

Sections 7, 10, and 24 of the Charter have some measure of effect on arrest procedure, particularly in relation to the conduct of arresting officers and the admissibility of evidence: see *R. v. Stevens*, [1988] 1 S.C.R. 1153. Generally, there is also well-developed case law on arrest procedure. Note in particular: *Christie v. Leachinsky*, [1947] A.C. 573 (H.L.). See also s. 29 of the Criminal Code.

3. Seizure

Under weapons, liquor, and drug law, the police have authority to seize these articles. Under the drug laws, any other thing by means of which the police believe an offence was committed may be seized (see also Offence Act, ss. 23 - 24.2).

In addition, s. 8 of the Charter makes specific reference to security against "unreasonable search or seizure". However, even if an unreasonable seizure occurs such that s. 8 is violated, evidence obtained may still be used in the event that its exclusion would not bring the administration of justice into disrepute under s. 24 of the Charter. In *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.), evidence obtained as the result of a seizure constituted a serious violation of s. 8. The court excluded the evidence under s. 24 on the basis that admitting the evidence would bring the administration of justice into disrepute.
Courts have also found that a person's reasonable expectation of privacy is higher in their home than in their vehicles. Therefore, courts are less likely to allow evidence seized from someone's home then from their vehicle.

Section 24 of the Charter has been invoked to exclude evidence because the evidence was obtained by an unlawful seizure. In *R. v. Dyment* (1988), 45 C.C.C. (3d) 244 (S.C.C.), it was held that a search of a person's body is more serious than that of an office or home, and consequently, a blood sample that had been illegally obtained was not admissible.

A court may still decide that, although the seizure was unlawful, the violation of s. 8 is not serious enough to warrant exclusion. The court may find in fact, that by **NOT** admitting the evidence, the administration of justice would fall into disrepute.

4. Evidence Obtained Illegally

Section 24 of the Charter restricts, to some extent, the admissibility of evidence that has been illegally obtained, where admission of the evidence would bring the administration of justice into disrepute. The court will examine three factors to determine whether the administration of justice would be brought into disrepute. The court will examine whether trial fairness is compromised by the accused being forced to provide evidence against himself or herself (for example, incriminating statements); the seriousness of the Charter violation; and the effect on the administration of justice by the exclusion or inclusion of the evidence. The court established guidelines to set out what is meant by proceedings that "might bring the administration of justice into disrepute" (Charter, s. 24(2)); see also *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.). The decision whether to admit evidence is a matter of law and can be appealed.

F. Right to Remain Silent: s. 7

1. General Right of Silence

Clients should be advised of the importance of being silent when confronted by the police or in hearings. A person should only speak when it is necessary to do so. Many accused are convicted on the basis of what they say.

There is a basic right to remain silent when encountering police officers that applies before and after arrest. A suspect is not required to identify him or herself unless the peace officer has reasonable and probable grounds to believe that an offence has been, or will be, committed (see exceptions below). A police officer has no right to take a person to the police station for questioning unless that person has been arrested or goes voluntarily.

An accused has the right to remain silent when questioned after arrest. This silence is not to be used in court to imply guilt – an accused is protected from self-incrimination by silence. The police should inform the accused of the right to remain silent and that anything he or she does say may be used as evidence. However, failure to give this information does not necessarily mean that whatever the accused says cannot be used as evidence.

An accused should be further advised that **when they are being interrogated any conversation with police can only hurt them.** Police will usually ask police for "their side of the story". What police are looking to obtain are admissions like "I was there but I didn't do that". This would be a confession about the accused's presence at the scene, which otherwise the Crown might not be able to prove.

It is best for an accused to say nothing to the police until after consulting a lawyer. This applies even when an accused plans to plead guilty, because there may be a valid defence to the charge that the accused does not know about. For further information, see *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.).

2. Exceptions to the General Right of Silence

a) Motor Vehicle Drivers

Pursuant to s. 73 of the Motor Vehicle Act, the driver (not passenger) of a motor vehicle must stop when asked to do so by a readily identifiable police officer and give his or her name and address and that of the vehicle's owner.

b) Pedestrian Offence

A person who commits a pedestrian offence must state his or her name and address when asked by a police officer or that person may be subject to arrest (City of Vancouver, By-law No. 2849, *Street and Traffic By-law* (10 May 2005)).

The decision of the Supreme Court of Canada in *Moore v. The Queen* (1978), 43 C.C.C. (2d) 83 (S.C.C.) suggests that the same is true for offences committed while riding a bicycle. While the police have no power to arrest a person for this type of summary conviction offence, they may do so lawfully if it is necessary to establish the identity of the accused.

c) Federal Statutes

Various federal statutes have provisions requiring that questions be answered: see Canada Evidence Act; B.C. Evidence Act, R.S.B.C. 1996 c. 124; Excise Act, R.S.C. 1985, c. E-13; Income Tax Act; Immigration and Refugee Protection Act, S.C. 2001, c. 27; and Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

3. Exception to Right Against Self-Incrimination: Breathalyser Sample

Where a police officer, on reasonable and probable grounds, believes a person is driving while impaired, that officer may require a sample of breath to be produced. The sample must be given within two hours of the commission of the alleged offence (Criminal Code, s. 258).

See **Chapter 11: Motor Vehicle Law** for more information.

4. Refusal to Answer

Refusal to answer questions may result in a person's arrest where he or she might otherwise be released.

5. Use of Silence Against Accused

It is a fundamental principle of criminal law that no adverse inference can be drawn from an accused remaining silent. However, in extremely rare circumstances, if a person is enmeshed in a set of circumstances that calls for an explanation and none is given, it is possible for a court to call for an adverse inference (See P.K. McWilliams, Canadian Criminal Evidence (Aurora, Ont.: Canada Law Book, 1998). See also *R. v. Smith* (1897), 18 Cox C.C. 470 per Hawkins J. at p.47; *R. v. Noble* (1997), 114 C.C.C. (3d) 385 (S.C.C.); and *R. v. Govedarov* (1974), 16 C.C.C. (2d) 238 (Ont. C.A.), affirmed on other grounds, 25 C.C.C. (2d) 161). In certain situations, an adverse inference can be drawn if the refusal to explain or deny an accusation was reasonably contemporaneous with the time of the alleged offence, or the silence occurs in a circumstance where a denial would reasonably be expected. This caveat, however, should not be provided to clients as advice on dealing with police.

6. Protection of Witnesses

If, during a judicial proceeding, a witness, including the accused, is asked a question that requires an answer that might be used in a civil action against him or her, the question – although "self-incriminating" – must be answered. To prevent the statement from being used in subsequent and separate proceedings, the witness must invoke either or both of s. 5 of the Canada Evidence Act and s. 4 of the B.C. Evidence Act before making a statement.

In addition, s. 13 of the Charter addresses the issue of self-incriminating evidence given by a witness at a judicial proceeding. Although a witness is required to actively seek the protection of the provincial and federal evidence legislation before giving testimony, it appears that under the Charter this may not be necessary and a witness need not actively object to the questions, since the protection appears to be automatic. Problems with the interpretation of the phrase "incriminating evidence" (i.e. whether this refers to inculpatory or exculpatory evidence) lead some to suspect that courts may not interpret the protection provided in the Charter under s. 13 to be as broad as that in the Evidence Acts.

In the B.C. Court of Appeal decision *Johnstone v. The Law Society*, [1987] 5 W.W.R. 637 (B.C.C.A.), the Court held that any evidence a witness gives in another proceeding may be used for the purpose of cross-examination as to credibility, particularly with respect to prior inconsistent statements, which was followed in *R. v. Kuldip* (1990), 61 C.C.C. (3d) 385 (S.C.C.). However, this was severely curtailed in *R. v. Noël*, [2002] 3 S.C.R. 433, which found that despite the intention of allowing the evidence, the admission of highly incriminating evidence can dangerously prejudice the trier of fact. Therefore, it would appear that after some initial weakening, the Supreme Court of Canada has recognized a need for a stronger interpretation of s. 13 of the Charter.

VII. CRIMINAL RECORDS

A. What is a Criminal Record?

The answer is not straight forward as different people will use the term "criminal record" to mean different things. Informally, a "criminal record" often refers to criminal convictions. This would include suspended sentences, fines imposed after criminal convictions and any form of incarceration

such as house arrest (conditional sentence) or jail time. This would *not* include discharges, stays of proceedings or withdrawn charges.

A criminal record is also used to refer to the information contained in the Canadian Police Information Centre (CPIC). CPIC is a central computer database that links police from across Canada by allowing each department to enter and access information on a person's criminal history. This would include the history of any criminal proceedings against a person. As a result, discharges, stays of proceedings, peace bonds and withdrawn charges may appear on a person's CPIC record until they are purged or pardoned (see Part B below "How Long Do Entries Stay on My Criminal Record?").

However, individual police departments keep a great deal of other information regarding a person's criminal history that is not entered into CPIC. This could include criminal charges outstanding against a person or complaints made to police.

B. How Long Do Entries Stay on A Criminal Record?

Entries have a period of access after which they are purged from a person's CPIC record. Generally the periods of access are as follows:

Absolute discharge: One year after sentencing
Conditional discharge: Three years after sentencing
Stays of Proceedings: One year after it is entered
Criminal Convictions: In most cases, until the person turns 80 and has been crime free for the previous 10 years. This period may be longer for more serious crimes.

Diversions or charges that are not approved should not be entered into CPIC and a person can apply to have them erased from local police records (see **Section VII.C.2: Elimination of Records**, below). The Vancouver Police Department will often not release this information, even if no application has been made to have it removed.

C. What Information Can a Third Party Find Out About?

In almost all cases, a third party can only find out about a person's record with their consent. This makes it very important that people read and understand what they are consenting to have disclosed. Often employers will simply ask; "Do you have any criminal convictions for which you have not received a pardon?" In this case, all other information does not have to be disclosed. If a more thorough check is done, the information that is disclosed depends totally on the agreement signed by the individual. It should be noted that the B.C. Human Rights Code makes it illegal to discriminate based on a criminal record that has been pardoned. It is also unlawful for a prospective employer to discriminate based on a criminal conviction that is unrelated to the employment being sought.

Once the period of access for an entry has ended or it has been pardoned, the information is not disclosed. However, employment in "vulnerable sectors" can lead to the disclosure of certain information even after the period of access has ended. The most common examples of "vulnerable sectors" are work with children or seniors. For this type of employment, convictions, peace bonds or conditional discharges pertaining to the offences listed in schedule I of the B.C. Criminal Records Review Act, R.S.B.C. 1996, c. 80 may be disclosed.

1. How Will A Criminal Record Affect My Ability to Travel?

Each individual country controls entry to its territory and the impact of a criminal record will vary depending on where a person is trying to travel (and often the person working at customs!). Canada and the US share a great deal of intelligence, such as CPIC, and American authorities will use this information when deciding whether or not to admit a person. A criminal conviction could be grounds to deny entry. While discharges are not convictions under Canadian law, American authorities may not make this distinction. Also, information

that is purged from CPIC, which was accessed by the American database prior to it being purged from CPIC, may not be erased from American databases. Thus, a criminal history could affect a person's ability to travel, but the exact impact will depend entirely on the policies of the host country.

2. Elimination of Records

Criminal records can be erased under the Criminal Records Act, R.S.C. 1985, c. C-47. For summary conviction offences, the applicant must wait until two years after expiration of the sentence. For indictable offences, the applicant must wait until five years have passed. For mixed offences, the procedure depends on the course of proceedings the Crown elected to take.

Clients should be informed that only their official file in Ottawa is sealed following a successful application and that their "record" remains with the RCMP. The client should know that his or her position is not quite the same as it would be if the offence had never been committed.

The application for removal is made to the local Parole Board office in Abbotsford, which can be reached at (604) 870-2468. The Parole Board office has the necessary forms. The forms are also available at the People's Law School, which is located at 150 – 900 Howe Street, Vancouver. Their personnel will help the applicant fill out the application. Application forms are also available from branches of the Salvation Army.

If the Crown never approved the charges, an accused can have the records destroyed immediately. In this case, advise the client to contact the police agency that made the arrest.

If a client does not actually have a criminal record, but has received a discharge or diversion, he or she can apply to have this cleared by writing to:

Director of Identification Services, RCMP
Attention: Purge Unit
P.O. Box 8885
Ottawa, ON K1G 3M8

The applicant will have to provide his or her name, date of birth, date of discharge or diversion, and court information number, if available. Note that this procedure is much simpler and faster than a regular pardon application.

VIII. APPENDIX INDEX

APPENDIX A: DIVERSION

An application for diversion is a request to Crown Counsel not to process the accused through the criminal justice system, but instead to "divert" the accused. The accused must admit guilt for the offence, and must be prepared to make restitution and be willing to do any or all of the following: community service, counselling, write an essay, and/or letter of apology.

An application for diversion should be made by letter to the Crown. If the accused already has a trial date, the letter should be directed to the prosecutor for the courtroom in which the trial is set. If a trial date has not yet been set, the letter should be directed to "Charge Approval" at "Crown Counsel". You may wish to phone to find out which Crown Counsel is responsible for charge approval. In Vancouver, call (604) 660-4353.

The Attorney General's guidelines stipulate that diversion should be considered only where the accused has no previous record, where there is no minimum penalty for the offence, and where the maximum penalty for the offence is less than five years. However, diversion may be available in other cases with exceptional circumstances.

A diversion letter should detail:

a) **the circumstances of the offence, including a clear admission of all the essential circumstances of the offence;**
b) **the background of the accused;**
c) **the effect that a criminal record would have on the accused; and**
d) **the accused's feelings of remorse or repentance for the offence.**

When the request arrives at the Crown Counsel's office, Crown reviews the letter of request and reads the police report in relation to the incident. If the application meets the essential conditions set out above, the letter of application for diversion is forwarded together with the police report to a community worker. The probation officer contacts the accused for an interview to assess the motive for committing the offence, the likelihood that he or she will do it again, the possibility of restitution, attitude to community work service, and the remorse that is felt. The Crown usually accepts the community worker's recommendation.

The diversion process does not affect the ordinary procedure for remand and fixing a trial date. There is nothing inconsistent with fixing a trial date and writing a letter of application for diversion. Some judges think they should not grant adjournment "for the purpose of considering diversion", since they think that the diversion process has nothing to do with the court process. Therefore, do not give a pending application for diversion as a reason for requesting an adjournment or remand.

Applications for diversion should be made as soon as possible and at the very latest one month before the trial. After that time, Crown is faced with having to de-notify witnesses, and is unlikely to consider an application for diversion so close to the trial date. Try to do it as soon as possible. The Crown advises about its position on a diversion application in about two days for an urgent request or, more generally, in about 10 days.

You must ensure your client understands the concept of diversion and is prepared to speak openly and honestly to a probation officer. The client must clearly admit the offence and express remorse for its commission. He or she may also be required, and should offer to in the diversion letter where applicable, to write a letter of apology, undergo anger or stress management counselling, or make restitution. These options could be considered in the letter or during meetings with the Crown.

SAMPLE DIVERSION LETTER:

WITHOUT PREJUDICE

Crown Counsel
Provincial Court
222 Main Street
Vancouver, B.C.
V6A 2S8

Dear Crown Counsel, [or Alternative Measures Crown Counsel (if No Trial Date is set)]

Re: Mitch Dermu
Information 69567
Trial Date May 27th, 20..., Courtroom 511
Request for Diversion

My client, Mr. Dermu, has instructed me that he wishes to apply for diversion. He admits responsibility for the theft under $1,000.00 as per Information 69567.

Mr. Dermu's Background

Mr. Dermu is 29 years old and resides at 930 Cambie Street, Vancouver B.C. He was born on April 10th, 1979, in Toronto, Ontario. Mr. Dermu has recently completed his second year of medical school at the University of British Columbia. He led an active, vigorous lifestyle until January 2006, roughly one year prior to the date of the offence, when he was diagnosed with Lupus. In addition, some medical reports indicate that psychological problems, i.e., worrying about his illness, has caused deterioration of his condition and depression. He lives on his student loans, with $750 per month, paying $380.00 a month for rent and utilities.

Circumstances of the Offence

Mr. Dermu advised me that on the date of the offence he had just come from an 11:00 a.m. appointment with his eye doctor, Dr. Norman Wentlock-Smith. On his way home, Mr. Dermu wanted to buy some things for dinner. He went into the Super Value, where he has been a regular customer, intending to purchase some milk, bread, eggs, bacon, and salad ingredients. Mr. Dermer admits he left the store on this occasion knowingly without paying. He was afterwards apprehended by store security. He offered to pay for the goods, but of course by that time it was too late.

Mr. Dermu has never been convicted nor even charged for an offence. He is normally a law-abiding citizen. Mr. Dermu was humiliated by his arrest and is ashamed of his behaviour. He has clearly indicated his remorse to me. He is well aware of the criminal consequences of his actions, and will never commit such an offence again.

This offence is completely out of character for Mr. Dermu and it occurred during a time of crisis in his life. Consequently, factors such as deterrence, protection of the public, and retribution are of minimal significance in this case. On the other hand, the effect that a trial and conviction will have on Mr. Dermu' physical and psychological health could be catastrophic.

I therefore submit that Mr. Dermu be considered as a candidate for the diversion program. He advised me that he is prepared to [undertake a community service project, attend counselling sessions, write an apology letter, etc. – insert appropriate measure here] that could be arranged through the program.

Mr. Dermu is to appear for trial on [month day, year] at [time], courtroom 511, Provincial Court, 222 Main Street, Vancouver, B.C. Thank you for consideration of this letter.

Sincerely,

Garvin Cameroone
Law Student

APPENDIX B: CATEGORIZATION OF OFFENCES FOR DIVERSION

<table>
<tr>
<th>CATEGORY 1
(NO DIVERSION)</th>
<th>CATEGORY 2
(NO DIVERSION)</th>
<th>CATEGORY 3
(POSSIBLE DIVERSION)</th>
<th>CATEGORY 4
(DIVERSION CONSIDERED)</th>
</tr>
<tr>
<td rowspan="2">

first and second degree murder, attempted murder
conspiracy to commit murder
manslaughter
sexual assault with a weapon, or threats to third parties, or causing bodily harm or aggravated sexual assault
sexual offences involving breach of trust, or children
robbery
aggravated assault
criminal harassment
arson with disregard for human life
break and enter or unlawfully in a dwelling house involving injury or attempted violence
hostage taking
extortion
criminal negligence
impaired or dangerous driving causing death or bodily harm
sabotage
using a firearm in the commission of an offence
kidnapping
unlawful confinement
prison breach
escape lawful custody, involving violence
living on the avails of prostitution, procuring etc.
obtaining or attempting to obtain sexual services of children (s. 212(4))
counterfeiting, bribery
obstructing justice
perjury
mischief causing danger to life
pornography offences

</td>
<td rowspan="2">

abduction (parental)
impaired driving and driving while over .08
dangerous driving and driving while disqualified
impaired or dangerous driving involving a high speed chase
spousal assault and violence against women in relationship (VAWIR)
assault of P.O.
arson (except as in cat. 1)
break and enter of dwelling house
carry a concealed weapon, possession of a restricted weapon; careless use, storage or pointing a firearm
escaping lawful custody
uttering threats to cause death or bodily harm
possession of an explosive substance
possession of forged currency and passports
public mischief
criminal contempt
indecent act (targeting children)
failures to appear and unlawfully at large
sexual assault (except as noted in cat. 1)
theft, possession of stolen property, forgery, fraud, false pretences, uttering, unlawful use of a credit card, unauthorised use of a computer (involving public funds or documents, internal theft, organised crime activity, position of trust or vulnerable victim)
hate bias offences
assault causing bodily harm

</td>
<td rowspan="2">

break and enter other than a dwelling house
theft over $ 5000 (except as noted in cat.2)
possession of stolen property over $5000 (except as noted in cat.2)
forgery, fraud, false pretences, uttering, unlawful use of a credit card, in amounts over $5000 (except as noted in category 2)
unauthorised use of a computer (except as noted in cat. 2)
assault s. 266 (except VAWIR)
mischief over $5000
indecent act (except for offences targeting children as noted in cat.2)
possession of house/car breaking instruments
take auto without consent
trespass at night
soliciting for the purposes of prostitution (exception: demonstrated nuisance in the community than to be treated in cat. 2)

</td>
<td>

theft under $5000 (except as noted in cat. 2)
possession of stolen property under $5000 (except as noted in cat. 2)
false pretences, uttering, unlawful use of credit card, for amounts under $5000 (except as noted in cat. 2)
causing a disturbance
mischief under $5000

</td>
</tr>
<tr>
<td>CATEGORY 5

All provincial statute offences</td>
</tr>
<tr>
<td colspan="3"></td>
<td>CATEGORY 6

All federal statute offences</td>
</tr>
</table>

APPENDIX C: QUICK REFERENCE SUMMARY OF THE PROVINCIAL COURT CASE FLOW MANAGEMENT RULES

The rules were designed to provide "simple, effective and efficient management of all proceedings of a criminal nature in order to secure a just and timely determination of every case before the Court". At present, the Rules are being applied in Vancouver Criminal and South Fraser Judicial Districts. You must familiarise yourself with the Rules so that you conform to the numerous **deadlines** and **procedures** that they enforce.

RULE		DEADLINE
2 – Effect of Non-compliance	Grants judicial discretion to dispense with or vary the rules in any particular case.	
5 – Initial Appearance	If you met client prior to Initial Appearance, submit an Arraignment Report (two copies: one to Court, one to Crown) (Form 2) containing: 1. Confirmation of representation 2. Dates you are NOT available for the Arraignment Hearing/Trial. **NOTE:** YOU need NOT attend the Initial Appearance in person (the Accused MUST attend).	
7 – Arraignment Report	Submit **TWO** copies of the Arraignment Report **Form 2**: One to court registry; one to Prosecutor.	Before Initial Appearance where possible, otherwise **MUST** be submitted before Arraignment Hearing
8 – Arraignment Hearing	This rule states that defence counsel must attend unless you have a dispensation from the judge. However, the Chief Judge's Practice Directive of November 25, 2003 allows the formal Arraignment Hearing to be waived and a trial date set via fax.	
9 – Trial Readiness Report	Attendance at the Trial Confirmation Hearing is discretionary. However, you **MUST** submit (via facsimile) a Trial Readiness Report, **Form 4**, either at the time of the Trial Confirmation Hearing or **SEVEN days in advance** if you are not planning to attend.	**Seven** days prior to Trial Confirmation Hearing.
11 – Adjournment of Trial or Preliminary Inquiry	Submit Application for Order to Adjourn Trial or Preliminary Inquiry using **Form 5**.	At least **TWO** days before Application is to be heard. (i.e. two days prior to the Initial Appearance or Arraignment Hearing, etc.)
12 – Notice by Counsel	If you either transfer a file to another student it is **YOUR** responsibility to notify the court. If you wish to remove yourself and LSLAP from the record you must do so on the record at the next court appearance.	

APPENDIX D: SPEAK TO SENTENCE PROCEDURE

You may not decide a guilty plea is appropriate until the day of trial when all Crown witnesses are present. Confirm that the Crown can prove its case before entering a guilty plea. Be forthcoming about why your client committed the offence, why he or she is not going to re-offend, and what an appropriate sentence would be. Keeping this in mind, the following procedure is appropriate:

- Approximately one half-hour before the appearance or trial is to start, the student should arrive at the courthouse to verify the courtroom and time and presence of the client. Once the courtroom is opened, the student should enter with the client and find Crown Counsel.

- Introduce yourself to Crown, tell him or her which matter you are appearing on, and advise him or her that the matter is up for disposition by way of a guilty plea.

- Sit with the client in the main gallery and wait for the court to be convened and the subsequent calling of your case.

- When the case is called, bow at the bar and approach the bench through the bar to counsel table.

- Remain standing and introduce yourself to the judge:

  "Your Honour, my name is [Full Name], [Spell Last Name], first initial [First Initial of First Name]. I am a law student with the UBC Law Student's Legal Advice Program, and with leave of the court I appear on behalf of the accused, Mr/Mrs/Ms [ ] who is standing here beside me."

  Judge will give permission (this may consist of a nod only). Then you say:

  "This matter is for disposition today by way of guilty plea."

- Then the judge will use one of two methods to take the plea, either the formal method or the informal.

A. Formal Method

The judge will say "very well," then will address the clerk and ask him/her to read the charge to the accused. The clerk will read the charge and the judge will say "Mr/Mrs/Ms [ ], having heard the charge, how do you plead, guilty or not guilty?"

The accused will reply, "Guilty, your honour."

B. Informal Method

The judge will address counsel directly, "Does your client waive the formal reading of the charge and enter a plea of guilty?"

You answer, "Yes, your honour."

The judge will then invite you and your client to have a seat at the table.

- Next, the judge will invite the Crown to put the circumstances before him/her, and the Crown will give a summary from the particulars of what occurred.

- When the Crown has finished, you will be invited to make submissions on behalf of your client.

- At that point, you stand up and make your submission. Try not to read your submissions, but to use them as speaking notes.

Submissions:

1. A detailed background of your client, including age, address, past and current family and employment situations, memberships and any pertinent personal information, such as relatives who live outside of the country, effects of a criminal record, need for the ability to be bonded, provocation, etc.

2. Personal and employment hopes and client's aspirations.

3. Discuss circumstances that minimize the seriousness of the offence.

4. Address the reason the client committed the offence and why those factors have been eliminated or addressed by the client.

5. Request for sentence. Students should thoroughly review ss. 718 to 736 of the Criminal Code and *R. v. Fallofield*, [1973] 6 W.W.R. 472 (B.C.C.A.).

Students should be realistic and assess whether there is a specific concern that must be addressed in the sentence. For example, asking for an absolute discharge when there is clearly a need for a no-contact order is not practical. Also, if there has been damage as a result of the offence, the judge will likely order restitution. Students should also explore the possibility of joint submissions if there is agreement between the defence and Crown regarding sentencing. Judges rarely contradict joint submissions.

After Submissions:

- When you are finished, sit down. (Remain standing if the judge asks you any questions about your submissions.)

- The judge will then ask the Crown, "Do you take any position regarding counsel's submissions?"

- Crown will probably either say no or will agree.

- The judge will invite the accused to stand up and will then give the sentence.

NOTE: A speak to sentence should always be prepared beforehand, and its contents will vary depending on the circumstances of the accused.

It will make a slight difference in your presentation whether there is a trial or it is a guilty plea. Individual counsel may prefer to write the submission out in full, while others may find that they work better from a point form outline. Always ensure that you are well prepared, and completely familiar with the background, aspirations, and circumstances of the client and the offence. A useful checklist to use when gathering the client's information is included following a sample of a speak to sentence.

SAMPLE SPEAK TO SENTENCE:

Your Honour, I respectfully submit that Mr. Rabbit be given a discharge under s. 730 of the Criminal Code.

My friend has adequately summarized the circumstances of the offence itself, but I would like to point out the events leading up to the assault.

On the 1st of April 1997, Mr. Rabbit was in a hurry. He had to deliver some important documents to the Leaky Tunnel Inquiry Board, and was running behind schedule, and feeling unusually agitated and stressed. Rightly or wrongly, he felt that the victim, Mr. Hogg, stole his parking space, and in the process, bumped Mr. Rabbit's car. When confronted, Mr. Hogg leaned through his car window and repeatedly insulted Mr. Rabbit. These actions provoked Mr. Rabbit, and it was then that he lost his temper and responded in far too drastic a manner by assaulting Mr. Hogg. He regrets losing his temper, and realizes that he was wrong. I would ask the court to consider that the level of provocation involved. In addition, I ask the court to contemplate the fact that the injuries suffered by the victim were not severe, and that Mr. Rabbit himself suffered injuries as a result of this incident.

Peter Rabbit is 50 years old and resides at 999 Oak Tree Lane, a den in the West End, Vancouver. He has lived there with his common law spouse and many children since about 1991. Mr. Rabbit also supports his elderly mother in Briar Patch, Australia and every second year he travels there to visit her.

Mr. Rabbit was born in Australia and lived there until relocating to Vancouver in 1977. He comes from a large family and enjoyed a good upbringing, and he has assured me that he never experienced any conflict with the law before coming to Canada. In Australia, he successfully completed high school and a two-year technical college program in tunnel construction, and obtained qualifications to become an engineer's assistant. After graduating, he worked for the family business, operating construction camps involved in the construction of tunnel developments and pathways in and around Briar Patch, Australia. This position involved considerable interaction and negotiation with others, and technical skill. He has continued in this mode of employment for his entire life, even after moving to Canada.

Currently my client is employed by Wolf Construction in Vancouver, where he looks after warranties of construction and leaky tunnels. He has informed me that this is a people-oriented job, which involves the fielding of client complaints and the resolution of logistical problems. The position requires immense patience and Mr. Rabbit has informed me that he has never lost his temper in his work environment.

Mr. Rabbit has never been convicted of a criminal offence, or charged with one. He is an individual with a good reputation in the community, and this offence is completely out of character for him. I would like to call the court's attention to the principles outlined in s. 730 of the Criminal Code, as enunciated in *R. v. Fallofield* [1973] 6 W.W.R. 472 (B.C.C.A.). First, it would not be in the public interest to punish Mr. Rabbit for this one isolated incident, which does not suggest that he poses any serious threat to the public. Considerations such as deterrence and protection of the public are not significant here. Second, it would definitely be in Mr. Rabbit's best interest not to have a criminal record. His career involves responsibility and trustworthiness, and requires that he be bondable. In addition, a record would greatly hinder his ability to travel overseas to visit his elderly mother in Australia.

Mr. Rabbit fully admits his guilt and regrets this event ever occurred. He has indicated to me that he would gladly take on some form of community service work to atone for his mistake. For these reasons I respectfully ask that the court consider a conditional discharge.

Thank You

SPEAK TO SENTENCE QUESTIONNAIRE

Client Information

Fill in the blanks that fit your situation. Cross our anything that does not fit your situation.

Personal

1. I am _____ years old.

2. I ama) single b) married c) widowed d) divorced

   I have been married for _____ years.

3. I live at _____ (give address).

   a) in an apartment I rent
   b) in a house that I rent
   c) in a house I own

   I have lived there for _____ years.

   I live with
   a) my wife
   b) my husband
   c) my children

4. I support
   a) my children
   b) my parents
   c) my _____

5. a) I am in excellent health.
   b) I have a _____ condition, (name the sickness).
   c) I have a disease called _____
   d) I must take medicine regularly. It is called _____

6. I am a member of _____ (club, church).

   I have been a member for _____ years.

7. I do volunteer work for _____

8. In my spare time I _____

Education

1. I completed grade _____ at school and then I went to

   a) university, for _____ years.
   b) vocational school, where I got my _____ ticket.
   c) other (describe) _____.

2. I have these special training certificates:

   a) first aid c) practical nursing e) air brakes g) others
   b) welding d) lifeguard training f) hair dressing

3. I am now taking training in _____ at _____.

Employment

1. I have a job at _____ (name of employer)

   Where I have worked for _____

   I work
   a) days _____ (fill in hours)
   b) evenings _____
   c) weekends _____
   d) shift work _____

2. I am looking for a job at the moment.

   I have left applications at _____ (name the places).

   And Manpower at _____ is helping me find a job (fill in the address).

3. I am taking retraining at _____

4. I start a new job at _____ (name the employer)

   on _____ (give the date).

Criminal Record (ONLY mention your record if it is brought up in Court)

1. I have/do not have a previous criminal record.

2. The offences were _____ (name the offences).

3. They happened in 20__ and _____

4. The biggest sentence I received was:

   a) _____ in jail (fill in sentence)
   b) _____ fine
   c) _____ probation.

APPENDIX E: TRIAL BOOKS

A trial book is an organized binder that has in it everything a student needs to present a case at trial. It can be broken down into roughly eight sections separated by tabs. The sections are:

1. **The Information**

2. **The Particulars**

   If necessary, this section can be broken down into two parts, one containing the particulars and one containing any supplementary statements. Always have the statements in the particulars handy, with photocopies for the judge, should the statements be called into evidence.

3. **Statements**

   Always have the witness statements handy, with photocopies for the judge, should the statements be called into evidence

4. **The Crown's Case**

   This will contain the cross-examination of the Crown's witnesses. Due to its nature, it cannot be prepared by any standard formula. A useful source of information may be found in The Art of Cross Examination (Wellman, 1896).

5. **The Accused's Case**

   This contains the student's examination in chief of the accused and any other witnesses the defence may be using. It is prepared to reflect the student's preparation of those witnesses.

   The examination in chief should be set out on the left side of the binder (the right side should be reserved for any notes on the Crown's cross examination) and should contain the following steps:

   a) Setting the stage

      A selection of fairly innocuous questions intended to relax the accused/witness and focus his or her attention to the matter at hand. These questions will lead up to the departure point.

   b) The Departure

      These questions are based on the incident at issue. They are very similar if not exactly as prepared by the student and client/witness before the trial. This section of the trial book should outline **all** relevant material for the accused's case listed in a checklist format. As the accused/witness covers the requisite material, the student should check it off.

   c) Backfill

      If the accused has omitted any important part of testimony, the student should improvise questions to prompt the witness to fill in the relevant information.

NOTE: The student must be careful to never lead the witness, and all questions should be designed so that the witness can tell the story in his/her own words.

6. **Submissions/Closing Arguments**

   Include here any submissions to be presented to the court (except Speak to Sentence), including the Closing Arguments. Closing Arguments should be summed up as follows.

   a) Reviewing all the evidence, both pro and con.

b) Reconciling the evidence by weighing the evidence and credibility of the case.
c) Reviewing the law.
d) Applying the law to the evidence.

7. Case Law and Authorities

Always have ready three copies of every authority that the student intends on using – one for the student, one for the Crown, and one for the Judge.

8. Speak to Sentence

The student should always be prepared to speak to sentence in the instance the accused is found guilty.