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- Trial Preparation

PAPER

Trial Preparation

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Contents

Trial Preparation

The Importance of Preparation

Preparation is the key to successful trial practice. Contrary to what you may think, no element of trying a case should be extemporaneous. From the very beginning of your opening statement, to cross-examination, to the applications you make, to your closing address, everything you do and everything you say in the courtroom should be, as far as practically possible, planned well in advance.[1] In many cases the quality of preparation can be determinative of the final result.

Preparation is the groundwork of success in all advocacy. Byron and William Elliott, in *The Work of the Advocate*, note:[2]

> Neither genius nor talent, neither tact nor cunning, can equip an advocate to try a cause as it is the duty of advocates to try causes, without a foundation well laid by thorough and complete preparation.

The two most important pieces of advice given in advocacy training are to prepare early and to prepare thoroughly.[3] Preparation should be directly aimed at what you want to achieve in the case.

It is vital that you know the facts of your case in order to be able to readily challenge the prosecution's evidence. The facts must be understood in depth. If you do not have full knowledge of the facts then you will not fulfil your duties to your client.

The keystone to adequate preparation for all trials is the development of the theory of the case. In developing the theory it is important to ask yourselves the following questions: What do you think really happened, given the evidence, your instructions, and common sense? What is your best legal position? What makes your case strong, and what areas are weak? Once you have developed the theory of the case you are then ready to adequately plan for the trial.

As such, it is important to be well organised. One way is to organise all relevant documents needed for a trial in organised manila folders or binders, tabbed in sections with the use of sleeves if necessary.[4]

Paul Radich in *Introduction to Advocacy* notes that a week before trial you should have:[5]

1. All appropriate documents organised (including Briefs/Formal Written Statements & Exhibits);
2. Written briefs for all of your witnesses;
3. Anticipated your cross-examination and identified the fundamental topics upon which you wish to cross-examine the Crown's witnesses;
4. Finished your opening statement or address;

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1 J. Alexander Tanford *The Trial Process: Law, Tactics and Ethics* (3rd ed, LexisNexis 2002).

2 Byron Kosciusko Elliot and William Fredrick Elliott *The Work of the Advocate* (The Bobbs-Merrill Company, 1911).

3 Sir Bruce Robertson, Andrew Beck and Simon Mount *Introduction to Advocacy* (Douglas Wilson Advocacy Scholarship Trust, New Zealand Law Society, 2014) at 129.

4 Ibid at 130.

5 Ibid at 131-132.

5. Any authorities that you may need to refer to in the trial which should be copied, indexed and bound for easy access; and

6. Prepared some parts of your closing i.e. the law, and an analysis of the evidence.

Disclosure Materials

From the very start of proceedings and obtaining instructions, you may receive a large quantity of paper or electronic disclosure material. It is vital that you are organised. In criminal cases, the first documents that you are likely to receive will be initial disclosure. From then on you are likely, depending on the complexity of the case, to receive a substantial amount of further material. Among that material you may receive police notebook entries, police job sheets, police statements, witness statements, photographs (if applicable), copy exhibits, documentary evidence, other investigation materials and the such like. You must develop an organised system of analysing, sorting and assembling the various documents that you will receive throughout the trial process.

You also need to maintain a good chronological record identifying what you received from the Police or Crown and when. It is not unusual, particularly in large or complex cases, for issues to arise as to whether the prosecution has disclosed a particular document to the defence and, if so, when that was done. An index of what you received and when will be of significant assistance should such issues arise. It is common practice now for the Police to provide an ongoing disclosure index whenever disclosure is made, which identifies what documents have been disclosed and when. You should ensure that the Police index is accurate and that you have actually received the documents which are said to have been disclosed.

Trial File

The trial file will be your working document during the trial. Depending on the scale of the case, it may comprise a single folder or several volumes. While most trial counsel still tend to make extensive use of hard copy documents in Court, there is also no reason why, subject to your level of technological skill, some parts of your trial file may not be filed electronically and accessible to you in Court via a laptop or tablet device.

It has been suggested that there are six essential sections which you must have in a trial file. These are:[6]

1. Organisation/administration: It is important to ensure that all required material is organised in a manner which allows you to access information easily. As the trial approaches you will often need to contact witnesses and therefore you will need to ensure that you have a record of their contact details on hand. This section may also contain useful indexes of materials, identifying where important information is located.

2. Opening statement or address: In a nutshell an opening address tells the story of your case, by identifying the essential facts and issues of the case and the ingredients needing to be proved or which are disputed. It is important that you have prepared a draft

[6] Sir Bruce Robertson, Andrew Beck and Simon Mount *Introduction to Advocacy* (Douglas Wilson Advocacy Scholarship Trust, New Zealand Law Society, 2014) at 135.

opening at an early stage.[7] You also need to be alert to the different purposes of an opening statement (after the Crown opening address) and an opening address (at the commencement of the defence case) (see further below).

3. Evidence-in-chief/Prosecution evidence: It is important to organise the witnesses in a logical order with materials relating to each witness in a separate divider. In large cases, you may wish to organise the Crown witnesses in accordance with the Crown's witness list, but this can cause practical problems if the proposed Crown witness lists are changed shortly before trial. Another approach in large cases may be to organise the witnesses alphabetically. In each divided section there should be the typed, signed and dated formal written statement(s) of each witness, the documents that the witness will produce if applicable, and any other documents relevant to that witness (for example, Police notebook entries or jobsheets recording Police dealings with that witness).[8]

4. Cross-examination: Place your cross-examination notes in a divider between the notes and documents for each witness to be called by the prosecution. Use your theory of the case when planning cross-examination which will subsequently support your closing submissions. Some counsel like to write out cross-examination questions for each witness. However, if you follow such an approach, it is important that you are not subsequently hampered by an over-reliance on a written "script" of questions. There may be questions which arise from the evidence as it unfolds and written questions may inhibit responsive questioning. A better form of preparation for cross-examination may be to have a list or bullet points of topics which you will need to cover with the witness, with sub-headings cross-referencing the material which you are likely to wish to use in cross-examination.

5. Defence evidence: Defence instructions, briefs of evidence and relevant documents should be organised in a corresponding manner to the prosecution evidence. You may wish to store your defence materials in a separate folder so they are easy to access when required and may be referred to by you in the course of your cross-examination of Crown witnesses.

6. Closing address: You should have a draft closing address prepared early. This will assist you during the trial to focus on the essential aspects of the case upon which you will wish to rely in closing. It will also make finalisation of your closing address after all the evidence has been adduced much easier – you will be in a position to amend, annotate or supplement your draft closing address during the course of the trial as you see fit.[9]

However, I also suggest some additional sections in your trial folder can be useful, depending on the circumstances and the nature of the trial*:*

1. Charging documents and Police or Crown Summary of Facts/copies of client's previous convictions, etc: These are of course the fundamental documents which give rise to the trial in the first place and set out the charges your client faces;

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7 Ibid at 141.

8 Ibid at 142-143.

9 Ibid at 148-149.

2. Memoranda, Court minutes and rulings, submissions: It is useful to have all relevant pre-trial and callover memoranda, together with any Court rulings or minutes, and any legal submissions which may be relevant to the conduct of the trial, in chronological order in an easily accessible place;

3. Correspondence relating to trial issues: In the days and weeks before a trial, there can be extensive correspondence and email exchanges between counsel and other parties relating to the evidence, the scheduling of witnesses, materials to be provided to the jury, matters which are not in dispute, the mechanics of the trial, and the such like. It may be useful to have this material in a chronological order in one place, in case issues later arise at trial;

4. Law: It can be helpful to have copies of any relevant statutory provisions or authorities, to which you anticipate that you may need to refer, in a section of your trial folder; and

5. Miscellaneous: It is very common during the course of trial to acquire additional material, notes or communications which do not logically fit into any existing section of your trial file. Keep them together in chronological order here. You never know when an issue may arise during (or after) the trial in which these documents may be important.

Trial Notebook

The trial notebook is another method of staying organised during the trial. It is vital to keep adequate notes during a trial. This will assist you in identifying topics for cross-examination and submission as they arise. In longer cases a sequential notebook can often be of assistance in reminding you when a particular piece of evidence was given and assist you to locate the relevant evidence in the transcript of the evidence.

It is suggested that an exercise book is more effective than a notepad or refill pad in ensuring you keep all your notes together and that no notes are lost.

A notebook is also useful when you need to note down points that you need to cover or research.[10] It can be useful to keep a few clear pages at the start or the end of the notebook for recording these additional matters or points that you will wish to cover in your closing address. That way, such matters will be in one place, rather than spread throughout the notebook.

You should also use your trial notebook to record the Court sitting days and times.

Defence Witnesses

It is essential to discuss with your client as early as possible the possibility of calling witnesses at trial. This is important to do at an early stage as it gives you enough time to locate potential witnesses. This also helps ascertain whether the witness is in the locality and if not how they can be contacted. Finding out that there is a defence witness shortly before the trial is to commence may result in an inability to contact the witness in time before the trial.[11] Similarly, there is the obvious benefit that a potential defence witness will likely have a much better recollection of events at an early stage in the

[10] Ibid at 152-153.

[11] New Zealand Law Society *How to run a District Court Jury Trial* (April 2008).

proceedings. Obtaining a written record of that evidence at an early stage means that the witness will be able to refresh their memory from that record at a later stage.

Obviously, this also defeats potential adverse cross-examination from the Crown: the defence witness may be asked during their cross-examination when they were first approached to provide evidence. Again, a statement taken from a potential defence witness closer to the time of the incident is more likely to be reliable and accurate than if a statement is taken months after the incident.[12]

Whether to Call a Particular Witness & Early Briefing

In briefing your witness at the beginning stages, you must explain to the witness the circumstances in which they have been contacted and that you wish to obtain a statement or brief of evidence from them (a statement in the witness' own words). Also ask the witness to provide any further documents which may be useful to your client's case. It is important to ask the witness whether they have any previous convictions or have previously been in trouble with the Police. If so, ascertain the nature of those convictions/charges. Furthermore, check whether the witness has made any statement to the Police or otherwise been spoken to by the Police. You may not always have received in disclosure material a copy of any such statement or record made by a Police officer. Obviously, if they respond in the affirmative, you should obtain a copy of the statement.

It is vital to always brief your witness on what to anticipate during examination-in-chief, cross-examination and re-examination. You should advise them to always tell the truth and to listen to the questions carefully. There will be instances when the witness may not know the answer to the question. Advise them to simply say so, if that is the case, rather than to guess or make up the answer.

It is, of course, not for counsel to suggest answers to the witness or to tell the witness what to say if asked a particular question. However, part of your preparation and briefing of the witness should involve you asking the witness questions that you anticipate might be asked by your opponent. That will enable you to consider whether there are any dangers in calling the witness and enable you to give informed advice to your client about whether or not to call the witness. It may also give the witness an opportunity to understand the nature of any cross-examination and discuss with you any concerns they might have about their answers.

You can indicate to your witness that when they are re-examined they should try and give complete answers to the questions asked in the same way as in examination-in-chief.[13] You need to explain to the witness the difference between examination-in-chief/re-examination, in which you cannot ask them leading questions, and cross-examination.[14] You will no doubt have some indication of what kind of questions the other party is likely to ask and what the cross-examiner will be trying to achieve. It is important to inform your witness of what those questions may be.[15]

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12 Ibid.

13 Sir Bruce Robertson, Andrew Beck and Simon Mount *Introduction to Advocacy* (Douglas Wilson Advocacy Scholarship Trust, New Zealand Law Society, 2014) at 145.

14 Ibid at 283.

15 Ibid at 282.

During this stage you should also inform the witness that they must remain outside of the courtroom until they are required to give evidence. It is also a good idea to prepare the witness for their courtroom appearance, such as where they will sit, whether they wish to take the oath or make an affirmation, the manner in which they should address the Judge if asked questions and so forth.[16] This may be a daunting experience for your witness(es), therefore if you take time to prepare them efficiently then they can anticipate what they are likely to face – which will inevitably assist your case. Obviously, this is especially important if your witness is anxious or nervous about giving evidence.[17]

Classes of Witnesses

Defence witnesses can generally be grouped into one of the following classes:[18]

The Defendant:

Defence counsel should, of course, advise their client on the issue of whether or not to give evidence and the risks associated with being cross-examined. In some cases clients will be firm in not wanting to give evidence, or alternatively in wanting to give evidence. No matter what position a client takes, it is up to the lawyer to ensure that the client is fully informed as to the benefits and risks of giving evidence and is making a reasoned decision after they have been advised of all relevant factors. There is nothing wrong with providing firm advice to the client of your assessment as to whether it is in their interests to give evidence. However, the final decision whether or not to give evidence is, of course, a matter for the client. The client does not need to make the final decision about whether or not to give evidence until after the close of the Crown case and any subsequent legal applications.

Nevertheless, it is important to discuss the decision with your client prior to trial and, if possible, to obtain your client's preliminary instructions about whether or not they intend to give evidence. It goes without saying that you should obtain a full brief from your client as to their evidence in the same way that you would brief any other witness.

It is also important that your client understands that, if they initially advise you that they do intend to give evidence but subsequently change their mind, and you have cross-examined a Crown witness in a manner which indicates that either your client will give evidence or that you have certain instructions about the facts of the case, the Judge might adversely comment to the jury on the fact that your client did not give evidence.

Despite judicial warnings to the jury about the onus of proof, it is virtually inevitable that the complexion of a trial changes once a defendant decides to give evidence. The jury then has what is likely to be its best opportunity to form judgements about the character, personality, honesty and reliability of the defendant.[19] Any former trial prosecutor will be able to describe cases in which a defendant made their case worse by electing to give evidence. Equally, although no defendant is

16 Ibid at 144-145.

17 Ibid at 205.

18 New Zealand Law Society *How to run a District Court Jury Trial* (April 2008).

19 Sir Bruce Robertson, Andrew Beck and Simon Mount *Introduction to Advocacy* (Douglas Wilson Advocacy Scholarship Trust, New Zealand Law Society, 2014) at 125.

ever legally obliged to give evidence, there are some cases in which, at a practical level, it may be very important that they do so (e.g. reasonable belief in consent in a sexual violation case?).

It is obviously important that you obtain written instructions from your client as to the decisions they generally make about the conduct of their case. However, it is crucial to obtain written instructions about the decision whether or not to give evidence both before the trial (if possible) and definitely at the end of the Crown case. It is common for issues concerning counsel's advice about whether or not to give evidence to be raised by a convicted person on appeal. This is particularly so where a decision not to give evidence has been made by the defendant. Convicted persons may later regret that decision and seek to blame their trial counsel or suggest that their counsel prevented them from giving evidence when they wished to do so. Do not hesitate to ask the Judge for a brief adjournment at the end of the Crown case to discuss matters with your client if necessary. In a perfect world, the written instructions might be witnessed by a third person. However, for obvious reasons, that is not always practical or possible.

Unless there are exceptional circumstances, it is expected that a defendant who wishes to give evidence will do so first, before any other defence witnesses.

Some suggest that when a client wishes to give evidence they should be advised to avoid excessive eye contact with the jury as some jurors may misconstrue that as aggressive or arrogant behaviour. However, if a defendant appears to be actively avoiding looking at the jury completely, there is a danger that they may appear shifty or be perceived to be not telling the truth. You will of course have had an opportunity to assess the demeanour and confidence of your client and to have determined whether or not they are an articulate person. This will have been factored in to your advice to them about giving evidence and, if they have chosen to do so, you will need to advise them as you see fit as to how they should dress and behave in the witness box.[20] As a general rule however, do not attempt to make your client appear to be something that they are not. A client who acts unnaturally or appears to be adopting a persona when giving evidence is not likely to be perceived in a positive light.

Witnesses as to the Facts:

This category of witness needs little in the way of expansion. The general comments above, regarding the decision whether or not to call a witness and the importance of early briefing if possible, apply to these witnesses (as to any witness).

Expert Witnesses:

The purpose of expert evidence is to provide the fact-finder with information based on specialised knowledge or skill. Expert evidence is "the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence in the form of opinion"[21] and is, of course, admissible as an exception to the prohibition on leading opinion evidence provided in s 23 of the Evidence Act 2006. Opinion is defined under the Evidence Act as "a statement of opinion that tends to prove or disprove a fact".[22] Pursuant to s 25 of the Act, expert opinion evidence is no

20 Ibid at 125.

21 Evidence Act 2006, s 4.

22 Ibid.

longer inadmissible simply because it goes to the ultimate issue in the case or relates to common knowledge.

Expert witnesses are of course useful (and may be essential) when dealing with specialised topics which are outside the general knowledge of the jury. If the other party intends to call an expert it may be important to call your own expert witness or, at least, have your expert review the other party's evidence.[23] In briefing an expert, ensure that you cover all the topics you wish them to address, explain court procedures (in case of a first-timer) and ensure you are familiar with their brief and the opposing expert evidence.[24] You need to appropriately qualify your witness as an expert in the relevant field and be able to identify when they are moving outside their area of expertise, which may make it necessary to brief another expert.

Ensure that any expert you intend to call is familiar with the Code of conduct for expert witnesses in civil proceedings ***(annexed)***, which the Courts have indicated should also be understood and adopted by expert witnesses in criminal cases.[25] Also remember that you are required to disclose any expert evidence to the prosecution at least 10 working days before the commencement of the trial.[26]

Veracity and Propensity Witnesses:

In some instances, particularly where your client has no previous convictions and is of previous good character, you may wish to lead evidence as to their veracity and/or propensity. Do not underestimate the value a jury of laypersons might place on having some evidence of the previous good character and integrity of your client placed before them. Familiarise yourself with the law relating to the veracity and propensity rules in the Evidence Act.[27] Remember that veracity evidence needs to pass the "substantially helpful" test before it will be admissible, whereas propensity evidence does not. Always keep in mind that introducing evidence of your client's veracity and/or propensity ("character") will allow the other party to cross-examine your client about those issues and the Crown may be permitted to call evidence in rebuttal to contradict the character evidence adduced by the defence.

Alibi Witnesses:

As you will know, alibi evidence is evidence tending to show that, by reason of the presence of the defendant at a particular place or in a particular area at a particular time, he or she was not (or was unlikely to have been) at the place where the offence is alleged to have been committed at the time of its alleged commission.[28] Remember that the defence has an obligation to provide notice of the particulars of alibi evidence to the prosecutor within 10 working days of the defendant

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23 Sir Bruce Robertson, Andrew Beck and Simon Mount *Introduction to Advocacy* (Douglas Wilson Advocacy Scholarship Trust, New Zealand Law Society, 2014) at 295.

24 Ibid at 295.

25 *Lisiate v R* [2013] NZCA 129.

26 Criminal Disclosure Act 2008, s 23.

27 Sections 37-43.

28 Criminal Procedure Act 2011, s 111.

receiving a notice from the Court under s 20 of the Criminal Disclosure Act 2008 advising the defendant of defence disclosure obligations.[29]

It is up to the client to decide (after considering your advice) which, if any, witnesses should give evidence at trial.[30] It may be a good idea to place your strongest witnesses first and last and your weakest witnesses in the middle, to allow favourable evidence to follow.[31] As defence counsel you must ensure that your client knows the advantages and disadvantages of both giving evidence and not giving evidence. Furthermore, it is important to keep in mind that the Crown may seek to impugn any witness. As above, you should carefully assess whether the witness may potentially damage your case under cross-examination.

Preparation for Cross-examination of Prosecution Witnesses

Trial lawyers must decide which, if any, prosecution witnesses to cross-examine, what questions to ask and the manner of asking the questions. It is important to remember at every stage that the decisions you make should be directed by and consistent with the theory of the case.[32]

The better you know your case, the better prepared for cross-examination you will be.

In planning what questions to ask during cross-examination it is important that you focus on the defence that you are running and the essential features of that defence. You should plan your cross-examination so that it will proceed in a logical and orderly manner.

In preparing your cross-examination, you must remember that where there is conflict between the evidence of defence and prosecution witnesses it is your duty under s 92 of the Evidence Act 2006 to challenge the prosecution witness with the contrary version of events so that the prosecution witness is given the chance to comment and respond.[33] Obviously, it will subsequently be of significant advantage to the defence case if the witness concedes the point in issue. However, even if the witness does not concede the issue, the cross-examination also allows defence counsel to highlight points for the jury that are consistent with the defence theory of the case and which undermine the prosecution case.

A failure to cross-examine a Crown witness on a matter later put in issue by the defence may result in a Crown attack on your client's credibility if they give evidence, or in adverse comment from Crown counsel or the Judge in the closing address or summing up.

As a general rule, if the witness does not say anything damaging to your client or your case then you are unlikely to need to cross-examine the witness. In planning your cross-examination, always consider the risk that you may receive answers which strengthen the Crown case or weaken the defence case.

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29 Criminal Disclosure Act 2008, s 22.

30 Criminal Procedure Act 2011, s 159(1) provides that a prosecutor or defendant may at any time obtain from a judicial officer or a Registrar a summons calling on any person to appear as a witness at any hearing in relation to a charge.

31 Sir Bruce Robertson, Andrew Beck and Simon Mount *Introduction to Advocacy* (Douglas Wilson Advocacy Scholarship Trust, New Zealand Law Society, 2014) at 146.

32 New Zealand Law Society *How to run a District Court Jury Trial* (April 2008).

33 Ibid.

As noted earlier, different counsel will employ different approaches in preparation for cross-examination. Some counsel will, at least until they gain more experience, wish to write out a list of questions to be asked. If you do so, try to remember at all times what you are hoping to achieve and do not become a slave to your questions. Generally, more experienced counsel tend to use notes setting out topic headings or bullet points to be covered, or diagrammatic "mental maps" which can be used to guide cross-examination.

Defence Documents and Exhibits

From a defence perspective, documents and exhibits will be placed before the Court in one of three possible ways:

1. By putting the document or exhibit to a prosecution witness in cross-examination and, if the material is adequately proved, producing it as an exhibit at that point;
2. By producing the document/exhibit in the course of defence evidence; or
3. By agreement with the Crown.

You need to ensure that, whenever you intend to produce a document or photographs, you have sufficient copies for the Judge, Crown counsel, any other defence counsel and the Jury. Generally, one copy between two jurors is acceptable. The original document, which will end up being the Court exhibit, will generally be the one to be put to or used by the witness in the witness box.

If you intend to use or show a document to a witness in cross-examination, you have an obligation to show that document to every other party to the proceeding.[34] However, you do not have to disclose the document to the prosecution *before* the point in the proceedings at which you wish to use the document.

Should you intend to be putting a significant number of documents or photographs to prosecution witnesses in the course of the trial, you may wish to consider collating the material into a defence bundle of documents which witnesses, counsel, the Judge and the jury can use in the course of the trial. However, if you wish to do so, you will generally have to consult with the Crown and the Court as to the content of that bundle before or at the start of the trial. If, for tactical reasons, you do not wish to disclose a document in advance of cross-examining a witness, you may decide not to utilise a defence bundle or you may simply not include the particular document(s) in such a bundle.

Discussions with the Crown

It is important that you should communicate with the Crown prosecutor assigned to your case. Crown prosecutors should be ready and willing to discuss matters with defence lawyers prior to the trial. During these discussions defence counsel are not required to tell the Crown prosecutor what their defence is or whether any witnesses will be called.[35]

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34 Evidence Act 2006, s 90.

35 New Zealand Law Society *How to run a District Court Jury Trial* (April 2008).

Nevertheless, it is still important to co-operate with the Crown to avoid the unnecessary proving of facts that are not in dispute. This is usually able to be resolved prior to the trial[36] and is, of course, encouraged under the provisions of the Criminal Procedure Act 2011. However, any such agreements or concessions about the evidence are subject to your client's instructions. It remains the right of a defendant to put the Crown to proof on every aspect of the case if he or she so chooses.

The primary objective of having discussions with the Crown prior to trial is to reach some form of agreement as to evidence to be read, admissions and disputed matters[37] or to obtain agreement as to the limits of the evidence to be led at trial. Whether the need for any of the Crown witnesses to attend Court and give oral evidence can be dispensed with, or whether their formal written statement can be read to the Court is important. It saves the Court's and jury's time and any inconvenience to the witness if you do not need to cross-examine a witness and their evidence will have little or no impact on a jury.[38]

Further, in some cases, if it is clear that you are not going to be able to achieve anything positive for your client by cross-examining the witness, having the formal written statement read rather than requiring the attendance of a witness (who may be particularly hostile or who may damage your case further under cross-examination) may reduce the impact of that evidence. Again however, remember that you have an obligation to cross-examine a witness if you are going to seek to contradict their evidence.

The Court will enquire whether the Crown and defence have reached an agreement as to all issues to be raised at trial. The elimination of irrelevant matters, identifying the primary issues and coming to an agreement on the facts of the case, generally works to the advantage of both the Crown and defence.

Generally, there will also be discussions between the Crown and defence counsel as to what, if any, materials might be distributed to the jury at the start of the trial to assist with the jury's understanding of the case.

Discussions with Counsel for any Co-defendants

Where there is more than one defendant in a trial they will almost inevitably be represented by separate counsel. It is important to always remember to have a copy of any statement made by a co-defendant. Sometimes the Police will only supply you with a copy of your own client's statement in disclosure material and not that of the co-defendant(s).[39]

Liaising with counsel for any co-defendant is important and can result in many obvious advantages. It is a significant advantage to know where counsel for the other co-accused is heading: do they intend to denounce or attack your client as part of their defence?

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36 Ministry of Justice "Guide to Jury Trial Practice" (2003) Criminal Practice Committee at http://www.justice.govt.nz/services/information-for-legal-professionals/practice-notes-and-guides/guide-to-jury-trial-practice#12.

37 Ibid.

38 New Zealand Law Society *How to run a District Court Jury Trial* (April 2008).

39 New Zealand Law Society *How to run a District Court Jury Trial* (April 2008).

The Court in *Rhodes* held that where one of two or more accused intends to attack the character of another accused, advance notice has to be given to the co-accused who is to be the target of such evidence.[40] The authority for this proposition comes from the celebrated judgment of Devlin J in *R v Miller*.[41] In discharging the jury and ordering a new trial, Temm J noted in *Rhodes* that:[42]

> I think it desirable to add that counsel at the Bar should "always wield his sword like a warrior, never like the dagger of an assassin". It is not uncommon for one of two or more accused to put the blame for the crime in question upon one of the others in the dock. But that should always be done fairly and openly, face-to-face, so to speak. To creep up on a co-accused and stab without warning is as unfair in the courtroom as it is anywhere else.

Counsel must also be aware of the evidential consequences which will arise where a defendant elects to give evidence. Any evidence given will be admissible not only for or against the defendant giving evidence but for or against all other co-defendants. Calling a defendant in a multi-accused case gives the Crown the opportunity to cross-examine that defendant for the purpose of implicating the other co-defendants.[43]

Editing Statements

As part of your trial preparation you should carefully review any statements made to the Police by your client or co-defendant, particularly if they are recorded interviews. In some instances a defendant's statement or interview will need to be edited in the interests of justice or because it contains irrelevant, prejudicial or otherwise inadmissible material.

Similarly, where the Crown has obtained a mode of evidence order that a witness's evidence-in-chief be given by the playing of an evidential interview, the interview may also require editing to exclude prejudicial, irrelevant or otherwise inadmissible material.

It is common for edits to be agreed to by the parties prior to trial but in some instances the Court may need to determine the issues.

In *R v McCallum* Hardie Boys J in delivering the judgment of the Court affirmed that there is a discretionary jurisdiction to edit statements of defendants and that the discretion is one to be exercised sparingly.[44]

Eichelbaum J in *Re An Application by Clarke*[45] and Williamson J in *R v Wallace*[46] referred to a number of factors which are relevant to the exercise of the discretion to allow edits to a statement. Whether or not a Court will allow the statement to be edited will depend on all the circumstances

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40 *Rhodes* [1991] 7 CRNZ 641 (HC).

41 *R v Miller* [1952] 2 All ER 667.

42 *Rhodes* [1991] 7 CRNZ 641 (HC).

43 New Zealand Law Society *How to run a District Court Jury Trial* (April 2008).

44 *R v McCallum* (1988) 3 CRNZ 376 (CA).

45 *Re An Application by Clarke* (1985) 1 CRNZ 683 (HC).

46 *R v Wallace* (1989) 5 CRNZ 199 (HC).

of the particular trial. Relevant considerations include the stage of the trial, the allegations made by the prosecution, the defence to be presented and the contents of the statements involved.[47]

The Court will also take into account the following matters:[48]

a) The nature and extent of the editing sought;

b) The risk of throwing suspicion on others not otherwise at risk;

c) The possibility of a change in the statement being edited or that it might be more difficult to follow after editing;

d) The risk of unfair treatment to other defendants who, although unnamed, are nevertheless identifiable;

e) The risk that there will be an editing-out of details which otherwise add to the credibility of the statements against the defendant who made them; and

f) The potential difficulties of cross-examination should the maker of an edited statement later choose to give evidence.

Difficult issues arise in the context of the editing of statements of co-defendants. A trial involving co-defendants can involve a complex web of competing interests and to edit a statement may reduce prejudice for one defendant but may have a damaging effect to another defendant, or the Crown, or both. Fairness extends not only to all defendants but also to the Crown. The Court must balance the relevant factors in support of editing against the alternative, namely leaving the statement unedited. In the latter case, the Court will need to give a firm direction to the jury that an out-of-Court statement made by one defendant is evidence solely against that defendant and the jury must not use that statement against co-defendants. Where the all-around justice of the case demands editing of a statement then the Court must exercise its discretion accordingly.[49] In a case where significant illegitimate prejudice will be caused to one defendant by the content of another defendant's statement which is not to be edited, the Court may be required to consider whether it should order severance of trials as between the defendants.

Where statements or interviews have been edited, by agreement or by order of the Court, it is important to check the accuracy of the edited statement or interview. It is easy for errors to be made in the editing process.

Preparing your Client for Court

Prior to any trial, counsel should have already discussed a number of matters with their clients. The most vital step in preparing a client for Court is advising them of the trial process. Some important matters you should discuss include:[50]

- *Attire*: It is important that a client looks presentable during the trial. It is not necessary to expect a client to wear a suit, but smart and clean clothing should be encouraged.

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47 *Re An Application by Clarke* (1985) 1 CRNZ 683.

48 *R v Hanifah* [2002] 3 NZLR 555.

49 *R v Hanifah* [2002] 3 NZLR 555.

50 New Zealand Law Society *How to run a District Court Jury Trial* (April 2008).

- *The layout of the Court:* This is to ensure that a client knows where to sit and also where the jury and Judge will sit.
- *The Court processes:* You should explain how the case will commence, jury selection, addresses and the order of evidence, etc.
- *Demeanour in Court*: The jury members will be observing your client throughout the trial. Even if your client is not called to give evidence, their presence and manner provides the jury with silent information[51] about them. It is therefore important to advise the client as to their demeanour and reactions to either evidence or witnesses during the trial.
- *Instructions during the trial*: A client will be provided with paper during the trial to take notes and pass it onto counsel, if necessary. However, it is important to remind the client that this can become distracting, if done constantly.
- *Bail and custody status during the trial:* Even if clients are on bail prior to trial, it should not be taken for granted that they will remain on bail during the trial. It is common for clients to be held in custody in the Court cells during the adjournments and lunch breaks and it is possible (although less likely if they are currently on bail) that they could be remanded in custody overnight during the trial. Even if granted overnight bail through the trial, the defendant will generally be detained for a period before and after the jury arrives and leaves the Court to avoid any potential contact. Discuss the question of continued bail throughout the trial with the prosecutor before the start of the trial and see the trial Judge if necessary. Clients are generally held in the custody of the Court during the jury's deliberations.
- *Attendees:* Family and friends of the client are generally able to attend the trial for support. This can be favourable in some instances to show the jury that your client still has family support. However this will obviously vary from case to case. Large numbers of gang members attending Court in support of your client is generally not a good look! Remember to advise your client that, depending on the nature of the case and any chambers matters, there may be periods where the client's family and friends will be required to leave the courtroom. Obviously, if a supporter is to be later called as a witness in the trial, they will not generally be permitted to be in the courtroom prior to giving evidence.

It goes without saying that it is fundamental that a client knows what evidence will be given against them and where your client wishes to give evidence that you must thoroughly prepare them beforehand.

Accompanying your Client to Court

In some instances counsel may decide to take their client to court before the trial is to commence and show them where their courtroom for the trial will be. It is also permissible to allow your client to sit in the witness box and go through a practice run. Counsel can also take the opportunity to go over their examination-in-chief with their client and the type of questions they may likely be

[51] Sir Bruce Robertson, Andrew Beck and Simon Mount *Introduction to Advocacy* (Douglas Wilson Advocacy Scholarship Trust, New Zealand Law Society, 2014) at 125.

required to answer during cross-examination. This will help your client feel more comfortable and help decrease their stress levels which will already be heightened on the day of the trial.[52]

Counsel should also inform their client of the time they must be at Court before trial is to commence. Further, once at Court the client should be directed to go with a Court security officer into custody. As above, counsel should inform their client of this process and of the fact that they may be in the custody of the Court for the duration of the trial.[53]

Counsel should also discuss the sitting times of the Court. As above, in most cases the client must remain in the custody of the Court during lunch breaks. There are some Judges who are willing to grant bail during that time. Despite this, a client should be informed that it is necessary to re-apply for bail at the end of each day. However this is dependent on the Judge or the Court. Some Judges are prepared to grant bail for the duration of the trial, while other Judges are not willing to grant bail. This is more likely to be the case where the defendant is in the middle of giving their evidence or being cross-examined, or after both sides have given their closing addresses and the Judge must adjourn overnight to sum up.[54]

Views

Section 82 of the Evidence Act 2006 provides for views.

> **82 Views**
>
> (1) If, in any proceeding, the Judge considers that a view is in the interests of justice, the Judge may—
>
> (a) hold a view; or
>
> (b) if there is a jury, order a view.
>
> (2) A view may be held or ordered on the application of any party or on the Judge's own initiative.
>
> (3) If there is a jury, a view may be ordered to be held at any time before the jury retires, and the Judge may order a further view of the same place or thing during the jury's deliberations.
>
> (4) If there is not a jury, the Judge may hold a view at any time before judgment is delivered.
>
> (5) Information obtained at a view may be used as though that information had been given in evidence.
>
> (6) Every party, including the defendant in a criminal proceeding, and lawyers for the parties, is entitled to attend a view, but any party, or that party's lawyer, may waive that entitlement.

52 New Zealand Law Society *How to run a District Court Jury Trial* (April 2008).

53 Ibid at 6.

54 Ibid at 7.

> (7) In this section, view means an inspection by the Judge or, if there is a jury, by the Judge and jury, of a place or thing that is not in the courtroom.

Section 82 applies to both civil and criminal trials.

Purpose

A view is essentially an inspection but may involve demonstration[55] of, for example, machinery to assist the finder of fact.

Principles

Importantly, the information obtained at a view may be used as though that information had been given in evidence.

McGregor (1996) 16 CRNZ 606 (CA):

> [24] A consideration of the cases in New Zealand, United Kingdom and Australia indicates that there are two purposes for which a Judge might order a view in a particular case. First, so as to orient the jury within the overall framework of a case. There the purpose of the view is to enable the trier of fact to understand the questions that are being raised, to follow the evidence which is given and to apply it. …
>
> [25] The second purpose is where the Court is provided with an opportunity to observe and to assess a particular situation. This was the position in *R v Lee* referred to earlier where there was a challenge by one of the accused to the contention of a Crown witness as to what could be observed from a particular point. When this second aspect is considered necessary it is essential that there be clear definition as to why the exercise is being undertaken and what it is intended to achieve.

Example cases – whether photographs are an effective substitute for a site inspection.

The judge retains the discretion to hold a view "in the interests of justice."

Conducting a view

It falls within the power of a Judge to give directions as to the procedure to be followed and matters to be investigated (and how) on a view.

Some factors to be mindful of are:

a) requiring the jury to be kept together at all times to ensure that no jurors see some things that others do not.

b) the minimisation of inappropriate communication between jurors and other persons involved in a trial.

[55] *R v Burr* [2015] NZHC 1623

c) ensuring that the Judge is present throughout the entire view,

d) ensure that any discussion between witnesses and jurors be controlled and entirely filtered through the Judge.

A view should not be taken in the absence of any of the parties.

Late Evidence

There may be occasions when you have prepared everything for the trial and are ready to go when you suddenly learn at a very late stage that there is new evidence. The Crown should, in those instances, provide you with a brief of the proposed new or additional evidence as soon as possible. Alternatively, the Crown may provide you with a supplementary brief for an existing witness but it is significantly different from the original brief. If you are taken by surprise and the matter is likely to prejudice your client's defence, the Court has the power to adjourn the trial or discharge the jury and postpone the trial on the application of the defendant.[56]

Alternatively, you may seek to persuade the Court that the trial should proceed but the prosecution should not be permitted to lead the new evidence. In some circumstances, the Court may require the prosecution to elect whether to proceed to trial without the evidence or require the prosecution to seek an adjournment.

[56] Criminal Procedure Act 2011, s 113.

Appendix

Schedule 4 r 9.43
Code of conduct for expert witnesses

Duty to the court

1. An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
2. An expert witness is not an advocate for the party who engages the witness.

Evidence of expert witness

3. In any evidence given by an expert witness, the expert witness must—
   a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it:
   b) state the expert witness' qualifications as an expert:
   c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise:
   d) state the facts and assumptions on which the opinions of the expert witness are based:
   e) state the reasons for the opinions given by the expert witness:
   f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:
   g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.
4. If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.
5. If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

Duty to confer

6. An expert witness must comply with any direction of the court to—
   a) confer with another expert witness:
   b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses:

c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.

7. In conferring with another expert witness, the expert witness must exercise independent and professional judgment, and must not act on the instructions or directions of any person to withhold or avoid agreement.