Answers to Questions Posed During the Webinar

1. How do you insulate yourself from any prospective Law Society complaint if you use your discretion by not making an argument which has 10-30% chances of success?

Response provided by David Layton:

The test for incompetence is very demanding. The decision not to bring the application would have to constitute a marked departure from the standard expected of a competent lawyer in the same circumstances.

Obviously, this standard of review is very context specific. But unless for some reason the decision not to proceed with the application amounts to something akin to gross negligence, the mere fact that it stood a 10-30% chance of success likely wouldn't be enough to attract discipline from the Law Society.

2. What are some of the biggest things counsel can do that would annoy a judge or draw negative attention to the counsel?

Response provided by Judge Sutherland:

I am always heartened when counsel ask what they can do to impress judges and not annoy them. I have my own checklist but to answer this question I also reviewed surveys of judges and articles written by judges on this topic. I could go into more detail and would be happy to do so if requested, but for the sake of brevity I will speak in general terms.

What annoys judges:

1. **Being unprepared !!!**

There is unanimity here. From the Supreme Court of Canada to Provincial Courts, judges at every level cited this as the number one annoyance. As the Honourable Justice Major formerly of the Supreme Court of Canada said:

> "*Prepare and then prepare some more. Know your case inside and out-strengths and weaknesses.*

This applies to any type of court appearance at any stage. You may be constrained by the state of disclosure but know that disclosure, and go down any investigative avenues that disclosure calls for.

If you are told something by your client, seek to confirm it from objective sources if possible. I know it frustrates my colleagues when an assertion is made, for example by an accused, about something important and no attempt is made by counsel to confirm it (for example a residence, job, terminal medical diagnosis etc.)

I will also add as an annoyance under this heading – being disorganized! Preparation will usually take care of this.

2. **Not Following Courtroom Etiquette and Lacking Civility**

This shows disrespect for the court and the judicial process.

For details on why this annoys judges and how to conduct oneself professionally and civilly in the courtroom, read the short paper on Professionalism that you would have received as part of the Webinar.

3. **Making the Judge Do Counsel's Work for Them**

This is a subset of being unprepared. Well prepared counsel will have worked through the details regardless of the nature of the appearance. This is helpful. Unprepared counsel create work. This is unhelpful. Let me provide a couple of real examples.

- Counsel ask that time served prior to sentencing be deducted from a sentence. However a precise calculation has not been done. Instead counsel go through a chronology of the accused's time in and out of custody leaving it for the judge to do the math.

- The accused pleads guilty to eight offences on five different Informations. Counsel ask for a cumulative sentence of 12 months jail less time served and leave it at that.

  The law is clear that every offence must have a sentence attributed to it. In this scenario counsel seem happy to have the judge figure out without assistance what the sentence should be for each offence and how the time served should be apportioned.

  In my experience this type of scenario usually happens at the end of a busy remand day when powers of concentration are slipping away. Counsel should have worked through this in advance and made submissions with their suggestion.

4. **Planning and Context: Wasting Valuable Court Time**

Planning: Identify the issues before trial. When you conduct your case have a plan that relates to those issues. Similarly, when conducting the examination of a witness whether in cross or chief, have a well thought out objective that will relate to your closing submissions on those issues. Using the trial as a substitute for preparation doesn't work. It is obvious when this is happening even if you don't think it is. The word "meandering" comes to mind as a telltale sign.

It is also a source a frustration where counsel spend time on details and evidence that do not pertain to the issue(s). As a very small example, I always wonder why counsel tell me an accused's date of birth when conducting a bail hearing or sentencing. Court time is limited - just deal with evidence that is relevant to the issue.

Context: When making submissions in any type of proceeding, state your position first – then launch into why your position should be successful. Your position gives the court context which

makes the rest of your submissions much easier to follow. This applies to trials too where counsel are agreed on what the issues are. Let the court know at the start.

Madame Justice Pardu of the Ontario Court of Appeal gives this example of helpful context:

> "*There are two grounds advanced for the exclusion of the accused's statement, firstly, that it was not voluntary, and secondly that it was obtained as a result of a violations of the accused's s.10(b) Charter right. Five points of evidence raise doubts about the voluntariness of the statement".*

3. To what extent does privilege survive the client's death on a criminal matter?

Response provided by David Layton:

100%, barring the application of an exception to the privilege such as innocence-at-stake, future harm, crime-fraud, etc.

4. In coming months, there will inevitably be arguments relating to delay arising from the court shutdown which arguably was unnecessarily broad because of the lack of technological preparedness of Court Services and Corrections BC. What ethical issues arise from arguing the inadequacy of the court's response, and making that argument in the very court being criticized.

Response provided by Michael Klein:

With respect to a delay arising from the pandemic, consideration has to be given to the words in *Jordan* concerning exceptional circumstances. In my view, I think exceptional circumstances will be interpreted broadly as a result of recent events. The fact that the Court did not have technological preparedness in anticipation of a pandemic may be considered reasonable. Therefore, notwithstanding the lack of technological preparedness, I am not sure that a delay argument will be viable in these circumstances.

With regard to ethical issues, I do not see any. An accused is free to make any submission they like as long as it is not frivolous nor made in an unethical manner. With regard to making the argument in the very court being criticized, that has occurred in the past when there were inadequate Court resources being allocated to various courts throughout the country. In that regard, please see *R. v. Askov.* *T*here is clearly a distinction between an ethical argument and a difficult argument.

5. Do you think it is appropriate to advise a client who says he is refusing to self isolate that you are obliged to report that?

Response provided by Michael Klein:

This question is difficult to answer because it poses so many variables. First, what is the communication between solicitor and client? Is it a privileged communication? If not, there may be no duty of confidentiality as between lawyer and client. Second, what does it mean to "self-isolate"? There are circumstances in which a lawyer is obliged to inform authorities if they come into information that there may be serious harm inflicted by a client. I am not sure that this rises to that level.

In general, I would think it is case specific. In these extraordinary times, the Law Society of British Columbia is inviting lawyers to consult on these sorts of ethical issues. It would be my strongest urging that if counsel are presented with what they perceive to be an ethical dilemma, they should consult with the Law Society of British Columbia in order to obtain some guidance about the best way to address the circumstances that arise.

6. How do you deal with Judges who make sarcastic remarks at the expense of the defense counsel?

Response provided by Judge Sutherland:

It can be tough when sarcastic comments are made as they can easily be taken as criticism of counsel and taken personally. I rarely make sarcastic comments in court and I know other judges who rarely do too. I suspect it is individual to particular judges.

If you do have a sarcastic judge though, I would encourage you to muster the discipline to put aside the hurt of the sarcasm and focus on what it is the judge is trying to say. In other words, focus on the message and not the delivery. The judge is communicating, albeit through sarcasm, that they are concerned with an aspect of the evidence, or a submission counsel is making etc. I suggest you treat it like you would a question from the bench, as if the judge said: "What do you say about this aspect of your argument…..". Then, address the concern by explaining why you are making the argument-the logic, common sense, and relevance behind it.

In the alternative, if you can't find any constructive value to the case in the judge's comments, ignore the sarcasm, remain professional in your conduct, and keep your eye on your objective for the case. The risk in voicing your indignity for the judge's comments is that you may get into it with the judge thereby distracting both of you from what is important – the merits of the case. Further, I'm not sure how such an exchange would be perceived by the client.

If the judge's sarcasm may have significance down the road, take comfort in knowing the proceedings have all been recorded.

7. What about several cases I have had where upon acquittal Crown Counsel says they knew they could not obtain a conviction. Or other Crown who say they maintained the prosecution to "send a message to the community"?

Response provided by David Layton:

a. The standard for deciding whether to prosecute a matter is set out in the BC Crown Counsel Policy Manual: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1.pdf

b. As you no doubt know, there must be a substantial likelihood of conviction and the prosecution must also be in the public interest. However, if the public interest in bringing the prosecution is very high, a lower evidentiary threshold can be applied: i.e. reasonable prospect of conviction.

c. Also note that the charge approval decision made by one prosecutor cannot be overturned by another prosecutor simply because the latter prosecutor would have decided the matter differently. The policy manual states:

> The discretionary decisions of Crown Counsel are entitled to reasonable deference and should not be overturned or second-guessed by other Crown Counsel, including Regional Crown Counsel, Directors, or their respective deputies, unless they are wrong in fact or law, unreasonable, or contrary to the public interest. On any review of a Crown Counsel's discretionary decision-making, a standard of reasonableness applies.

8. Sometimes defence lawyers are given information from their client about which they doubt the accuracy. I often hear lawyers say "Mr. ____ advises that _____". How do you balance between not misleading the court and not making your client sound like they're lying?

Response provided by Michael Klein:

In addressing this issue, the first thing I would say is that preparation is key. If your client is giving you some information and you are concerned about the accuracy of it, then you should take all reasonable steps to ascertain the accuracy of that information. If you cannot, then I think you must have a discussion with your client, indicating that you have concerns about accuracy, and that you would then be obliged to not make that submission or that you must advise the Court that you are unable to ascertain the accuracy. There is no balance between misleading the Court and "not making your client sound like they are lying". Your primary obligation is to not mislead the Court. You have a duty of candor to the Court. If you require further time to ascertain the accuracy of the information being provided to you by the client, you should take that time and make those inquiries. At all times, counsel need to be explicit with the Court about the accuracy of information and should not rely upon the Court "reading between the lines" in anticipation that the Court may thus conclude that the information is of unknown reliability.

9. How do you take instructions from a client who has a mental disorder and may be floridly psychotic at the time you need instructions?

Response provided by Michael Klein:

With regard to taking instructions from a client who is "floridly psychotic", the short answer is that you cannot take instructions. Those instructions are inherently unreliable. You should advise the Court that you cannot take instructions. You can advise the Court that you have concerns about an underlying mental illness. There may be delays inherent in that way of proceeding but if Counsel have no confidence in the instructions that they are receiving because of a severe mental illness, they cannot take instructions. This issue really goes to the fitness to stand trial. Counsel should err on the side of caution and not make a medical diagnosis. If a concern is raised, a psychiatric assessment is necessary to ascertain the mental functioning of the client. A fitness hearing may have to be conducted.

10. What is the appropriate course for a lawyer where the case against the client is overwhelming and nothing about their instructions presents a defence but they insist on a trial? How does one conduct a trial without a defence without souring the judge on our client? Further to that question, given that the burden is Crown's, should counsel be removing themselves from the record or simply requiring crown to prove it's case and doing as counsel did in Seipp at the end of the day?

Response provided by Michael Klein:

Clients are entitled to a trial. There may be cases in which the evidence against the client is overwhelming. If the client insists on proceeding, then it is the lawyer's duty to defend the client as best they can.

This may mean that the defence counsel, in an ethically responsible and professional manner, challenge the case for the prosecution. I doubt that the trial judge, as a general proposition, would "sour" on the client. The client may lose the mitigating aspect of a guilty plea but as we know, the right to a trial is sacrosanct and the insistence upon having a trial is not an aggravating factor on the ultimate imposition of sentence should conviction ensue.

Circumstances may be such that Counsel are concerned that their client is not taking their advice. If the solicitor-client relationship has broken down as a result, then Counsel should remove themselves from the record. As we discussed in the seminar, the Seipp situation might have been avoided by having a conversation with the client. If the Court asks counsel about whether or not they agree that all of the evidence points to a verdict of guilty, Counsel should not conjure up something but rather, may simply state that they have no submissions. Again, the emphasis should be on a solicitor-client communication. Every effort should be made to avoid this situation arising. At all times, Counsel must conduct themselves in an ethical and professional manner which includes clear and candid solicitor client communication.

11. What justification would the court have for asking defence counsel whether the elements of an offence have been made out? Is determination of the question not the judge's role?

Answer provided by Judge Sutherland:

When a court asks defence counsel at the conclusion of a case whether the elements of the offence in their view have been made out, or, for example Crown Counsel whether they are still proceeding on a certain charge, the court is trying to determine what is at issue at that stage. It's not an abdication of the court's responsibility to make the determination. On the contrary, the court is usually just trying to determine if that is a decision it needs to make.

Matters that remain at issue at the end of the trial are ones the court will need to address. As discussed during the Webinar, we've all experienced how cases evolve at trial – new issues can arise, evidence that seemed unimportant at the beginning gains heightened importance and vice versa, and things that were at issue at the beginning are no longer at issue at the end. Sometimes the manner in which the case evolves, including counsel's response to the evolution as evidenced through their examinations in chief and cross examinations leaves the court wondering whether something is still in issue. That is when you will see the court pose such a question just to get clarification of whether the court will need to address it in it's judgment.

12. Are written instructions on every file realistic with a high volume legal aid practice? Or does it pertain more to serious files? Should you be doing that for every theft under or breach?

Response provided by David Layton:

There are lawyers who take written instructions on every file. But I believe that the practice may be more common in some other provinces than it is in B.C.

If written instructions are not taken, the lawyer should take contemporaneous notes of the advice given and the client's decision. Such notes are almost certainly sufficient to protect the lawyer if the client later alleges incompetence in a complaint to the Law Society or, what is more likely, brings an appeal based on allegations of ineffective assistance of counsel.

13.What about the scenario where the client wants to plead to get out when you see no evidence of guilt?

Response provided by David Layton:

If there is truly no evidence of guilt, the lawyer should be able to convince the Crown to stay or withdraw the charge.

I don't see anything wrong with a client deciding to plead guilty even though there appears to be a pretty good defence, provided he or she is not privately maintaining innocence to the lawyer.

Response provided by Michael Klein:

If the client says they are innocent to counsel, and unless that changes to the satisfaction of counsel, then counsel cannot take instructions to plead guilty.

14. What of a situation where counsel claim attorney-client privilege for not only their client but also a witness for the defence, preventing Crown from asking questions about communications where the witness was present with counsel and the accused?

Response provided by David Layton:

Once the witness takes the stand, litigation privilege should disappear: *R. v. Mitchell*, 2018 BCCA 52.

15. I had a case where a husband and a wife were jointly charged with assaulting their daughter when they disciplined her for sexting. Both swatted her on three occasions on her backside, clothed, after giving her a choice to choose her punishment. We had a trial and the issues were exactly similar. The clients were financially challenged and did not want separate counsel. Would that be considered putting running the risk of a conflict of interest?

Response provided by Michael Klein:

I urge everyone to read *Canadian National Railway Co v. McKercher LLP 2013 SCC 39*. There is discussion about conflicts of interest. Every case is different. It is difficult to comment on any particular set of facts without being fully apprised of all information. It is definitely not impossible to represent two people in the same manner. However, counsel must be alive to the issue that a conflict may arise. It should also be remembered that actual conflicts are not the only consideration but the potential for conflicts to arise must also be contemplated.