

LSLAP SUMMER 2013 CRIMINAL LAW TRAINING – MAY 12, 2016

Time	Topic
8:45-11:00	Introduction to Practicing Criminal Law Basic Criminal Procedure; Caseflow Management Rules <u>What happens before court –</u> The Client Interview & Client Management Issues Reviewing Disclosure & the Contents of a Criminal File File Management Ethics & Professionalism; Relationship with Crown Counsel
11:00-12:00	A View from the Bench: Carol Baird Ellan
12:00-12:45	Lunch
12:45-2:00	<u>What happens in court –</u> How to Appear in Court Arraignment Court / Plea Negotiations Preparing for Sentencing Conducting a Sentencing Hearing
2:00-3:00	Sentencing Submissions Workshop
3:00-4:00	<u>What happens in court (continued) –</u> Preparing for Trial Conducting a Trial Ethics & Practice Management

From criminal offence to charge to court

-Process: appearance notice, PTA / UTA, summons, warrant, arrest with / without warrant

-Charge approval by Crown: summary vs. indictable; Provincial vs. Federal jurisdiction (major / minor prosecution agreements)

-Charge approval standard: substantial likelihood of conviction + public interest to prosecute

-First appearance court (IAR = Initial Appearances Room)

Jurisdiction	First Appearance Court (JJP)	Arraignment / Plea Court (Judge)
Vancouver	307	102
Vancouver DCC	1	1
Surrey	103	102
North Vancouver	IAR	002*
Richmond	101	107*
New Westminster	IAR (213)	206*
Port Coquitlam	003	001*

* These courtrooms are also used as trial courts, so do not assume the nature of the appearance just because of the courtroom.

** In Vancouver and Surrey (and possibly PoCo) arraignment hearings are conducted before the JJP. Everywhere else arraignment hearings are conducted before the Judge in Arraignment Court.

While Vancouver and Surrey has First Appearance Court and Arraignment / Remand Court every day of the week, this is not so in many jurisdictions. Refer to the Provincial Court website for court addresses, registry & JCM telephone numbers as well as information about First Appearance Court and Arraignment Court sitting days:

<http://www.provincialcourt.bc.ca/judicialadministration/courtlocationsmap/index.html>

In Vancouver and Surrey prosecutors in First Appearance Court follows their files to Arraignment / Plea Court in order to maintain continuity and to expedite resolutions. There are also specific prosecutors for domestic violence files (“k-files”) (I’m sure the same applies in other jurisdictions, but Vancouver and Surrey have a formal arraignment team and a scheduled rotation of when such and such prosecutor will be in First Appearance Court and Plea Court.)

- If you intend to instruct your client to adjourn their file to a different day of the week or a different courtroom than it is currently set, or both, you would be wise to contact the Crown first otherwise you will be mired in a never-ending loop of trying to locate the Crown with conduct of the file.
- Ideally, in Vancouver you would keep the file on the same day of the week in First Appearance Court with the same prosecutor until you have come to a resolution, at which point the file will be adjourned to that prosecutor’s assigned day in Plea Court and you can conduct your plea and sentencing at that time. In Surrey and elsewhere you’ll have to do a bit more investigative work on the schedule.

- If you intend to set a trial date, telephone the Crown a few days ahead of time all the same so they're not wasting their time reading your file and considering a resolution (this will be helpful for future dealings with the Crown when they remember that you were considerate of their time and saved them from having to read an extra file). With the new file ownership system, a trial crown has to be assigned before a trial date could be set. Telephone ahead to avoid delays.

Court Services Online – Search JUSTIN for next court appearance date and reason:
<https://eservice.ag.gov.bc.ca/cso/esearch/criminal/partySearch.do>

Understand that your client rarely fully knows what's going on or where the case is at. Never trust what the client tells you is the next court date, or the reason for it, at face value. Always double check. If you can't find the file on CSO, it means either the file has been stayed, not charged yet, or there is some sort of publication ban. You can call the court registry or Crown office to find out.

Initial Client Interview at Clinic (assuming client comes before first appearance date)

-DO NOT discuss any facts of the case. This will happen at a subsequent interview AFTER you have reviewed the Crown disclosure

-Take background information (see Client Questionnaire)

-Explain to client that Crown will review police reports, etc., and determine what, if any, charges to lay – what the police wrote on the appearance notice or PTA / UTA is what charges they are recommending to the Crown (if summons, then Crown has approved the charges listed in the summons)

-Explain to client the procedure from here:

-client (or client + student) will attend first appearance, where you will obtain disclosure, which is the package of police reports, witness statements and other evidence the Crown intends to use to prove their case. Nothing will happen at the first appearance. Client will adjourn the case 2-3 weeks so that the student can review the disclosure and meet with the client to provide advice and obtain instructions.

-student will review disclosure, and meet with client again. At the subsequent meeting student will explain to the client what he or she has been charged with, the essential elements of the offence, the possible defences, as well as what is the evidence against the client.

-it is only after the student has reviewed the disclosure and has explained the case against the client that you will want to hear the client's side of the story. This is to ensure a more focused, complete and efficient interview.

-After you've had that discussion, the client and the student will together decide whether to attempt to negotiate a guilty plea or to set the matter down for trial. The client should **ONLY** plead guilty if:

1. The client is **ACTUALLY** guilty; AND
2. The Crown can prove their case beyond a reasonable doubt.

-If you have a defence, or if you see deficiencies in the Crown case, you may wish to obtain instructions from the client to talk to the Crown to try to convince them to stay the charges.

-For a more detailed discussion on negotiating guilty pleas and doing sentencing, see the Sentencing Submissions section below.

-Get instructions from the client as soon as possible and know where you are going with the case. Note up your file in case you will be transferring the file to someone else.

Setting up for Trial

- If you are setting the matter down for trial, review the disclosure carefully to see if there is any disclosure you require which is missing. Make sure you request it from the Crown as early as possible. Do not worry about what may appear to be missing page numbers from the Report to Crown Counsel (RTCC). There are certain administrative sections and information such as witness contact information that does not get disclosed. But if you are missing a page from a witness statement, for example, or if something appears to start or end mid-sentence, you should certainly ask about that. In most cases your RTCC should start with a synopsis or narrative from the investigating officer.
- Also, each police officer involved usually has both a typewritten Report to Crown as well as handwritten notes. You should get those. The handwritten notes are usually what the police officer took note of as things happened, and the typewritten report is usually produced afterwards with the aid of the handwritten notes. Read the reports to see if the police obtained any photographs or medical reports or any other exhibits, and check to make sure they have been disclosed.
- If the police spoke with a witness, there should be a witness statement somewhere, or notes of the conversation in a notebook or RTCC – make sure that has been disclosed as well. If the witness statement was audio (or audio and video) recorded, make sure you get disclosure of both the transcript and the recording. Beware that the transcript is not the same as a summary of the statement. The summary is what the police officer thought the gist of the witness statement was. Do you trust the police to summarize important evidence for you? (If you say yes, perhaps you are better suited for solicitors' work.) The summary is not evidence and you cannot cross examine a witness based on the summary. Make sure you get the transcript.
- If a 911 call was made, there will be a recording. You may or may not want that disclosed. Note that it can take weeks for E-COMM to produce that disclosure to the Crown, even longer if you want transcripts produced.
- Furthermore, if you intend on making any *Charter* arguments, or if your client has an alibi defence (i.e. he was miles away elsewhere when the crime allegedly occurred), you are obligated to advise the Crown ahead of time. Late notice of an alibi defence may affect the weight the Court places on that defence.
 - In your *Charter* notice you are obligated to provide the Crown with sufficient particulars of your argument. That is, “s. 7, 8, 9, 10 (a), 10 (b)” isn't going to cut it. You should be able to articulate the breach of *Charter* rights as well as the evidence you want excluded as a result of that breach, and why. You should provide case cites in your notice where possible.
- Talk to the trial Crown well in advance and figure out what witnesses they're calling. Do NOT assume. Know your case and be prepared to make reasonable admissions – no need to waste everyone's time with uncontroversial things. Figure out what potential evidentiary or legal issues may arise and discuss them with Crown ahead

of time. Focus on what evidence you need to minimize the Crown's case or build your defence.

- If a certain Crown witness is essential to your defence, do NOT assume that the Crown will call that person. The Crown is not obligated to call every witness on an issue and the Crown is not obligated to call witnesses not essential to proving their case (though they have ethical obligations to ensure that justice is done, not just to secure convictions). If there is a witness essential to your defence, ask the Crown (nicely) to bring the witness to Court, or get a subpoena on your own to get the witness there. Be prepared to call that witness as part of your case and expect that you may have to conduct a direct examination of that witness. Do not expect the Crown will "call the witness for the purposes of cross-examination".
- If you intend on using case law, advise the Crown well in advance. You are, of course, not obligated to disclose your defence (save and except for *Charter* arguments and alibi defences) but most of the time it's pretty patently obvious anyway. It looks bad to everyone including the Judge if you're handing the Crown a 2-inch thick case book at 9:30am. You're not going to surprise anyone with your cases – all it means is you get to sit around and twiddle your thumbs while the Crown and Judge read your cases and do research, or you'll have to come back another day – if the Crown asks, no Judge will deny an adjournment request because you dropped a casebook on them at the 11th hour.

Dealing with the Crown

- The key to dealing with the Crown is to understand that you can operate in an adversarial system and act in your client's best interests without being adversaries. If you approach the Crown in a respectful, considerate, polite, professional but firm manner, you are likely to get much farther than if you approach every interaction like you are going to war. Remember this is someone you will likely have to deal with on many occasions. This approach will not only assist you in getting the best resolution possible for your client, it will also make your day go a lot smoother.
- Communicate, communicate, communicate!
- Do not be afraid to pick up the phone. You should telephone the Crown well ahead of any court appearance. You should never appear in court without having talked to the Crown, especially not for a sentencing or a trial. Even if you intend to set a matter down for trial, call the arraignment Crown to see if they're willing to consider dropping it. Or if your instructions provide you with the wiggle room, see if you can negotiate a plea to a lesser offence. It never hurts to ask and you won't get it unless you try.
- When telephoning the Crown, make sure you have the Court file number, next appearance date and courtroom. If you have to leave a voicemail, provide them with a telephone number that you can be reached at directly, or else you'll be playing phone tag forever and ever. Know your case, know what you want out of the conversation, and have clear instructions from your client before calling.
- Do not expect to be able to talk to the Crown or negotiate a plea on the morning of a court appearance. You get your best deals by doing the work ahead of time, and giving the Crown time to consider your arguments and any case law or evidence you

provide them. It is rarely a good idea to try to negotiate a plea at 9:30am on the morning of trial.

- If you are running a “white of their eyes” spousal defence, in most cases you can call the Crown and tell them that, and also work out a plea ahead of time should the complainant show up.
- If you must send a fax, always confirm they’ve received it with a phone call.
- If you intend on using case law, give the Crown a heads up at least a week ahead of time – at the very least, send them an email or a fax with the cases names and cites that you intend to use. This is the only circumstance where using email to communicate with the Crown is okay in my view. (The Provincial Crown email is firstname.lastname@gov.bc.ca – you can also find most of them in the Law Society of BC Lawyers’ Lookup directory.)

THE TRIAL

The goal of defence counsel at trial is not necessarily to find the truth (because that might be detrimental to the client), nor to seek justice (again, “justice” isn’t always in your client’s best interest). The goal of defence counsel is to test the Crown’s case and to present evidence where appropriate, in order to either show that the evidence as a whole fails to prove the accused’s guilt beyond a reasonable doubt, or to raise a reasonable doubt as to the guilt of the accused.

The main tool at your disposal in raising a reasonable doubt is the cross examination of Crown witnesses. Your goal is not to have the *Matlock* or *Perry Mason* moment where the witness succumbs to your withering cross examination, breaks down in tears and admit that it was he and not your client who was the real culprit. (If that happens, retire from the law immediately. Your career has peaked and will only go downhill from that point). Rather, your goal in cross examination is to demonstrate that this particular witness’ evidence is less worthy of belief, by challenging the witness’ reliability or credibility, or both. You are entitled to cross examine a witness on any issue that is relevant or material to the case. You do not have to have evidence on a particular point but you do have to have a reasonable basis to believe whatever it is you are suggesting to the witness.

Reliability refers to a witness’ ability to perceive an event accurately, and later recall and describe that event with detail and precision. You may wish to ask about the scene, lighting, visibility, any obstructions or distractions which may have affected the witness’ perception, the witness’ distance to the event, etc. You may also wish to ask if the witness was under the influence of any drugs or alcohol which may have affected the witness’ ability to perceive or recall the events.

Credibility refers to a witness’ ability to perceive, recall and describe that event truthfully. You may wish to ask about the witness’ relationship to the accused or to the complainant, or explore any antipathy the witness may have towards the accused, or if the witness feels any love / hate / jealousy towards the accused or complainant. You may also wish to explore any bias the witness has for or against the accused or the complainant.

These are different but equally important concepts. For example, a well-meaning and honest-sounding, neutral 3rd-party witness can be honest but mistaken and be utterly convinced that their mistaken version is the truth, either because of issues with perception or bias based on their own life experience, for example.

Taking Notes

I cannot stress enough how critical it is to take good, detailed, complete and accurate notes. You should try to take notes of what the witness said verbatim as much as possible. Remember it is the answers that matter; the questions are irrelevant unless

the witness agrees with the proposition put to them. Also remember that in trial, nuances matter and trials turn on specific wording or phrases. When you are cross examining a witness and quoting their previous testimony, it is essential that you have good notes because you should be putting their previous testimony to them as close to verbatim as possible. In any event, you do not want the Crown to be objecting because you were misquoting the witness and possibly misleading them!

The Rule in *Brown v. Dunn*

You MUST familiarize yourself with the rule in *Brown v. Dunn*. Very simply, the rule is that if your client has a version of events contrary to what the witness is stating on the stand, you must put that contrary version to the Crown witness in order to give that witness an opportunity to respond and comment on your client's version. If you fail to comply with the Rule, your client's version may be entitled to less weight, and the Crown may ask the judge to draw an adverse inference from the fact that the contrary version was not put to the Crown witness. There is some case law that indicate that judges should rarely draw that adverse inference since that could mean putting the accused at a disadvantage due to the error of his counsel, and that the preferable way to proceed is for the Crown witness to be recalled so that he or she could be properly cross examined on those points.

Note that the obligation on the Crown with respect to cross examining the accused is different. The Rule is designed so that the witnesses called for the Crown are not surprised by the defence's version and are given an opportunity to respond. No such surprise exists for the accused, who was there throughout the Crown case and has heard the evidence called for the Crown. The accused can comment on the Crown evidence during his direct examination and there is no obligation for the Crown to cross examine the accused on any differences between his version and the version the Crown witnesses testified to.

Cross Examination on a Prior Inconsistent Statement

You are entitled to put a prior inconsistent statement to an adverse witness. It is for the trier of fact to decide if there was actually an inconsistency, and if that inconsistency is on an important point such that it affects the witness' credibility and reliability, or if the inconsistency is on a relatively minor point such that it could be explained by the passage of time and does not affect the assessment of the witness' testimony. There are times when you may not want to put a prior statement to a witness, even when there are huge inconsistencies – for example, if the previous version is way worse and way more aggravating than the version the witness testified to in court. You run into the danger that the witness may adopt the prior version and then you're going to feel really stupid. You put a prior inconsistent statement to a witness in the following manner:

“Sir, you gave a statement to the police on December 4, 2010?” (“Yes”)

“I am showing you a 4-page statement. This is in your handwriting? This is your initials at the bottom of each page and your signature at the end of the document?”

(or if it was a transcript) “You gave a statement to the police that was audio recorded and later reduced to a written transcript? It starts with ‘This is Cst. Jones of the Vancouver Police Department on December 4, 2010 in relation to file number 10-12930’ and ends with ‘This statement concludes at 16:23 hours’? You have seen this transcript previously and reviewed it prior to coming to court today? It is a true and accurate transcript of the statement you provided to the police?”

“When you gave your statement to the police, you were being truthful?”

“You were being accurate?”

“You were being detailed?”

“You gave a complete statement? You told the police everything that you remembered had happened? You were careful not to leave anything out?”

“You were trying to be helpful to the police? You wanted to help the police catch the person who did this?”

“You knew it was important to tell the truth and you did tell the truth?”

“You knew it was important to give the police every detail you remembered because the tiniest detail could be critical to the investigation?”

“You said in Court today ‘[whatever the evidence was that is contradicted by the prior statement]’? That was the truth?”

“I refer you to page 3, line 8, where you said ‘[read out what is in the transcript or statement verbatim, including any ums and ahs]’ You said that? That was the truth?”

NOTE: do NOT ask why or give the witness an opportunity to explain the inconsistency. Just move on to the next inconsistency or move on to your next area of questioning.

If the previous version is better for your client, you may, however, wish to try to get the witness to adopt the previous version as the truth.

“You gave the statement shortly after the events? It’s been a year since the incident? You’d agree that your memory was better right after the incident? So in fact [previous version] was actually what happened?”

Also note: the prior statement does not become evidence, and in fact nothing in the disclosure package becomes evidence unless it is entered by counsel at trial. The judge only gets to see the Information ahead of the trial. There is some case law that says that

where a witness was thoroughly cross examined on the prior statement, counsel can put the statement in as an exhibit in order to assist the judge in assessing the witness' credibility. This should be rarely done since it rarely helps you.

No Evidence or Insufficient Evidence Motions

In all criminal cases, it is the Crown's obligation to prove beyond a reasonable doubt:

1. Time & Date of the offence
2. Location and Jurisdiction of the offence (it happened in Vancouver, British Columbia)
3. Identity of the accused
4. Actus reus
5. Mens rea

If the Crown failed to lead *any* evidence on any of the foregoing, you should make a no evidence motion. The test is whether, "there is any evidence upon which a reasonable jury, properly instructed, could convict the accused". If the no evidence motion fails, the defence may elect to call evidence.

You may make an insufficient motion if you believe that the Crown has failed to bring sufficient evidence to prove a specific element of the offence beyond a reasonable doubt. If that motion fails, you cannot call evidence.

Note that there are provisions in the *Criminal Code* which permits the Crown to amend the Information to conform with the evidence at any stage of the trial. There are also provisions in the *Criminal Code* which essentially says that strict proof of the date or location is not required as long as it does not prejudice the accused.

The Defence Case

Calling your client is often fraught with danger. If your client has a prior record, you may wish to make a *Corbett* application to exclude portions of his record from consideration prior to calling your client. See *R. v. Corbett*. Prior convictions for crimes of dishonesty (e.g. theft, fraud, etc.) are admissible for the purpose of assessing credibility only. You should be prepared to argue that other convictions lack probative value and are too prejudicial as it may lead the trier of fact to consider inadmissible character or propensity evidence.

The Crown cannot lead evidence of your client's bad character unless it is to rebut an allegation of good character by your client. Therefore, things your client should never, ever, not in a million years say on the stand include anything that start with "I wouldn't do x" or anything about what a good person they are and how they help old ladies cross the street and have never done a single bad thing a day in their life. You need to explain to your client that whether he is a good person generally or not is completely irrelevant at trial – the question the judge has to consider is whether the Crown has proven beyond a reasonable doubt that the had committed the crime charged.

Entering Exhibits

It's important that you lay the proper foundation so that any exhibit you wish to enter are admissible and given proper weight. Remember that the exhibit should be entered through the witness who made (or found) the exhibit so they can properly authenticate it. You are most likely to be entering in photographs. The photograph should be entered through either the person who took the photograph, or the person who is depicted in the photograph.

"You have previously provided me with a photograph. Did you take this photograph? When did you take this photograph? And this is a true and accurate depiction of the scene as depicted on the date you took the photograph?"

"Your Honour, I ask that this photograph be entered as the next exhibit."

"You have provided me with a photograph of some injuries. Who is depicted in this photograph? When was this photograph taken? And is this a true and accurate depiction of your injuries as of the date this was taken?"

"Your Honour, I ask that this photograph be entered as the next exhibit."

Closing Submissions

You should write your closing submissions first. That way, you have an idea of what evidence you need to support the arguments you want to make. Remember the three main sections of your closing submissions: the facts, the law, and most importantly, applying the law to the facts that the judge should find. The judge can accept all, part, or none of a witness' testimony.

If your client testified, the judge should instruct themselves on the instructions as set out in *R. v. W.D.* (probably the most often cited case in Canadian jurisprudence): first, if you believe the testimony of the accused, you should acquit; second, if you do not believe the testimony of the accused but is left in reasonable doubt by it, you should acquit; third, even if you are not left in reasonable doubt by the testimony of the accused, you should consider whether, based on all of the evidence that you do accept, the Crown has proven its case beyond a reasonable doubt.

Different people have different styles, but I tend to follow the format of *W.D.* in my closing submissions: why the judge should believe my client or find a reasonable doubt from the testimony of my client, stressing that he had withstood a vigorous cross examination and did not resile from his version of events and was not contradicted in any material way, and why his testimony has an air of reality such that it ought to be believed, and go on to argue why the judge ought not believe the evidence of the witnesses for the Crown, with particular emphasis on prior inconsistent statements and any bias or motivation to lie.

SENTENCING SUBMISSIONS

Introduction

Making sentencing submissions, and being able to do it well, is one of the most important things you will learn to do as a criminal lawyer.

You should only ever plead a client guilty if two factors coincide:

1. Your client is actually guilty and admits the essential elements of the offence; and
2. The Crown can prove their case beyond a reasonable doubt.

If your client does not admit to committing the essential elements of the offence, you are ethically barred from assisting your client in pleading guilty. Your client must never plead guilty because it is the more convenient thing to do, but only if your client admits guilt.

If the evidence suggests the Crown cannot prove their case beyond a reasonable doubt, then it's just dumb to plead the client guilty, but there is no legal bar to you walking your client to his or her grave. It would, however, be ethically negligent and contrary to your obligations to act in your client's best interests to do so.

Before you plead a client guilty, a Court must be satisfied by the prerequisites set out in *Code* s. 606 (1.1). If an accused is represented by counsel (you), the Court generally will accept that counsel has satisfied themselves that the prerequisites have been met and not make further inquiries. Therefore, it is your obligation to ensure that:

1. the plea is being made voluntarily;
2. the client understands that the plea is an admission of the essential elements of the offence;
3. the client understands the nature and consequences of the plea; and
4. the client understands that the court is not bound by any agreement made between the accused and the prosecutor.

See *Code* s. 606(1.1)

If your client throws up red flags – for example, seems shifty / squirrely or changes instructions more often than he or she changes their socks – you will want to protect yourself. Best practices include asking the Court to make the inquiry on the record under s. 606 (1.1) and making your client answer the questions. You may also wish to get written instructions.

Your client **MUST** always confirm the guilty plea on the record either by the clinician stating the guilty plea and the client agreeing, or by the client entering the actual guilty plea.

Sample written instructions:

I, John Smith, instruct my LSLAP representative Jane Doe that with respect to Vancouver Information 211626-3C, I wish to plead guilty to:

Count 2 – mischief in Vancouver on 3 May 2010

Count 3 – assault in Vancouver on 3 May 2010

I wish to enter these guilty pleas freely and voluntarily. The essential elements of the offences have been explained to me, and I understand the evidence and the nature of the charges against me. I admit the essential elements of the offences. I understand the nature and consequences of pleading guilty and I understand that the court is not bound by any agreement made between my representative and the prosecutor.

Dated in Vancouver, British Columbia this 16th day of May, 2012

John Smith

Witnessed By:

Jane Doe
LSLAP Student

Withdrawing Guilty Pleas

Sometimes a client may come to you and they have already entered a guilty plea but have not yet been sentenced. They may wish to withdraw their guilty plea. This is a potential minefield, especially if they were represented by counsel when the plea was initially entered. You MUST consult with the supervising lawyer immediately if you come across such a client.

Negotiations with Crown

The key to dealing with the Crown is to understand that you can operate in an adversarial system and act in your client's best interests without being adversaries. If you approach the Crown in a respectful, considerate, polite, professional but firm manner, you are likely to get much farther than if you approach every interaction like you are going to war. Remember this is someone you will likely have to deal with on many occasions. This approach will not only assist you in getting the best resolution possible for your client it will also make your day go a lot smoother.

Communication, communication, communication! The biggest request I've heard from Crown Counsel is that LSLAP students should phone them earlier and more often. Call well in advance of the next scheduled date, especially if it's a trial or trial confirmation hearing coming up. Know your case, know what you want to get out of the conversation,

and telephone the Crown. Make sure you include in your message your name and phone number, the accused's name, court file number and next appearance date and courtroom. I suggest giving them your cell phone or clinic number or a number they can reach you at directly. It's a waste of everyone's time to give Crown the LSLAP switchboard number as you'll be spending your entire summer playing phone tag with them. Know that Murphy's Law applies to faxes sent to the Crown – the more important and time-sensitive the fax, the more likely it is for the fax to go missing between the fax machine and the Crown counsel. Always, always, always follow up with a phone call if you must send a fax. I advise against using e-mail for plea negotiations.

In both Vancouver and Surrey the Crown strenuously urges students to consider resolution at the front end whenever possible, and presumably the Crown has similar views in other jurisdictions. Again, DO NOT AUTOMATICALLY SET A TRIAL DATE WHERE THERE IS ANY POSSIBILITY OF A RESOLUTION. Understand that an Initial Sentencing Position is exactly that – an **initial** position. While a number of Crown will still take that same sentencing position closer to trial, it is no guarantee. The Crown is not bound by their **Initial** Sentencing Position once a trial date is set, and while if circumstances change their sentencing position can go down, it can also go up and it is a risk that the client and the student will have to consider when setting trial dates.

Conversely, just because a Crown has written an Initial Sentencing Position, it does not mean you cannot negotiate a lower sentence at the front end for your client with the arraignment Crown. Just because you don't like what's on the ISP does not mean you should go to trial. Talk to the front end Crown and if you get what you like, great; if not, you can always take your chances with the plea court judge.

It never hurts to ask for diversion (also known as alternative measures). In Vancouver (and possibly elsewhere) there is now an expanded diversion policy and I've gotten comments from the Crown that LSLAP should seek diversion more often. Remember that you can get diversion at any stage, including on the trial date, but your chances of getting diversion decreases exponentially the closer you are to the trial date. The best chance of getting diversion is at the front end. Remember: Diversion requires that the client accept responsibility for the offence and express remorse for his or her actions. The probation officer will have a copy of the Report to Crown Counsel and will go over it with the accused. If the accused fails to accept responsibility for what happened, they will be rejected for diversion.

In both Surrey and Vancouver the Crown interviews spousal assault complainants at the front end to determine the viability of any prosecution, which hopefully will lead to resolution at the front end and reduce the practice of "white of their eyes" defences. It does require patience as it make take a bit of time for the Crown to get the complainant in for an interview, but often that patience is rewarded with a positive resolution for the client.

In all cases but especially with first time, minor spousal assault clients, or first time theft under clients where there is a clear identifiable addiction issue, it is strategically

beneficial to have the client arrange for and attend counseling on their own as soon as possible. At the end of the day, the resolution the Crown is looking for will likely include some counseling in order to prevent future offences. If the client is sufficiently self-aware of their problem and has taken steps to address it, it is a significant mitigating factor that the Crown and the Court will consider and it will more likely than not get you a much, much better resolution for the client.

Get instructions from your client and know where you're going with your case as far ahead of time as possible, and communicate with Crown counsel. Crown counsel have busy court lists, especially front end arraignment Crown, and if you are considerate, polite and respectful of their time and help cut down unnecessary work for them you are far more likely to get what you want, than if you walked in to court at 9:30am demanding the moon when they've already interviewed all their witnesses and prepared for trial.

As an aside, if you are proceeding to trial, talk to the trial Crown well in advance and figure out what witnesses they're calling. Do NOT assume. Know your case and be prepared to make reasonable admissions – no need to waste everyone's time with uncontroversial things. Figure out what potential evidentiary or legal issues may arise and discuss them with Crown ahead of time. Focus on what evidence you need to minimize the Crown's case or build your defence. Finally, if you intend on using case law, advise the Crown well in advance. You are, of course, not obligated to disclose your defence (save and except for Charter arguments and alibi defences) but most of the time it's pretty patently obvious anyway. It looks bad to everyone including the Judge if you're handing the Crown a 2-inch thick case book at 9:30am. You're not going to surprise anyone with your cases – all it means is you get to sit around and twiddle your thumbs while the Crown and Judge read your cases and do research, or you'll have to come back another day – if the Crown asks, no Judge will deny an adjournment request because you dropped a casebook on them at the 11th hour.

Joint Submissions

A joint submission is an agreed upon joint proposal to the sentencing judge after meaningful discussion by Crown and defence. It is not a "joint submission" where Crown and defence coincidentally are seeking the same sentence without any prior meaningful discussions, though there is case law that says where Crown and defence takes the same sentencing position, the sentencing judge should give it the same level of deference as a joint submission.

Crown counsel has policies which guide them as to when they can enter into a "joint submission", which is basically their way of telling the judge that the sentence may appear low, but Crown has taken careful consideration of all of the relevant factors, some of which are not before the judge, and they are telling the judge as officers of the court and as ministers of justice that the sentence is fit and appropriate for reasons that may not be obvious to the judge, and they are staking their personal reputation on that submission. Given that policy guideline, Crown tend to be very careful before calling something a "joint submission", and you will want to be very clear in your discussions with the Crown about whether or not the sentencing proposal will be a joint submission.

If it is a joint submission, make sure you work out all of the terms of the sentence, including the conditions of the probation order as any dispute could arguably make it no longer a joint submission.

The case law in British Columbia is that while a sentencing judge is not bound by a joint submission, he or she should give it serious consideration and should only reject it "if it is clearly contrary to the public interest and would if accepted bring the administration of justice into disrepute": *R. v. Peters*, 2008 BCCA 446; see also *R. v. Bezdan*, 2001 BCCA 215, *R. v. Young*, 2008 BCSC 1574.

If a judge rejects a joint submission, "it is preferable for the judge to make plain the reasons for the concern with the joint submission so that counsel can place any additional relevant material on the record for a possible appeal. However, the fact that the judge does not, before giving reasons for sentence, state concerns he has with respect to the joint proposal does not mean that an appeal court must find the sentence to be unfit and reduce it to that proposed in the joint submission": *R. v. Pretty*, 2005 BCCA 52 at para. 2.

Reports

Code s. 721 authorizes the Court to order a Pre-sentence Report, which generally takes 6-8 weeks for an out of custody accused. The Court can order a psychological or psychiatric component to the PSR, which usually adds about 4 weeks to the time to prepare the report. The Court can also order a *Gladue* component to the PSR, which deals with aboriginal offenders and the sentencing factors the Court must consider, including their background, family history and any special programs available to address an aboriginal offender's cultural and religious needs. The Court can further order a Technical Suitability Report, which is a report by the probation officer to determine whether or not the accused has a land telephone line suitable for electronic monitoring of his or her curfew. A TSR is generally not something you need to worry about given the seriousness of cases LSLAP deals with.

A PSR is supposed to be a report by a neutral third party about your client's background, family, education, employment record, physical and mental health, addiction issues, social activities, potential and motivation: *R. v. Donovan* (2004), 188 C.C.C. (3d) 193 (N.B.C.A.). A PSR should *not* recommend what sentence should be imposed: *R. v. Bartkow* (1978), 1 C.R. (3d) S-36 (N.S.C.A.), and should not discuss uncharged criminal conduct: *R. v. Roussel* (1996), 112 C.C.C. (3d) 538 (N.B.C.A.).

Beware of PSRs. They can be a potential minefield. Your client will be interviewed by a probation officer about their background, as well as their attitude about the offence and any proposed interventions. You can probably do as good a job, if not better, than the probation officer in relating to the Court your client's background, especially if you take care to confirm what your client tells you with other external sources (such as family members, employers, teachers, etc.).

Problems sometimes arise when your client is discussing the offence. Your client may not be remorseful. Your client may blame the victim. Worst yet, your client may deny the essential elements of the offence. All of those things will not make for a very good day in court. So, agree to PSRs with caution. If a PSR is ordered, make sure you prepare your client. Instruct your client to tell the truth, but that they must admit to the elements of the offence (if they don't, why the hell did you plead them guilty anyway?), and that if they can do so truthfully, it is a very, very, very good idea to be remorseful and to have learned their lesson and have a plan for not committing a similar crime (or any other crime) in the future. If they can't, then don't say anything at all.

On the other hand, you should consider asking for, or agreeing to, a psych PSR where your client has an obvious mental health issue. Though beware that this may lead to Crown seeking a *Rogers* order or *Rogers*-type conditions: see *R. v. Rogers* (1990), 61 C.C.C. (3d) 481 (B.C.C.A.).

A Rogers order is used in cases where the Court has determined the accused requires psychiatric treatment or monitoring. As R. v. Rogers set out, it is contrary to the Charter to require an offender to submit to psychiatric treatment or to take medication. So the Court has essentially devised a "carrot-and-stick" scheme where the offender has liberty to live his or her life as long as he or she consents to and takes treatment and medication as directed and is able to maintain him or herself in such condition so they are not dangers to themselves or anyone else and unlikely to commit further offences. Should the offender withdraws consent or stops taking treatment or medications, then the offender is required to report daily to a probation officer.

Disputed Facts

See *Code* ss. 723 – 724. The party that wishes to rely on a relevant fact has the burden of proving it on a balance of probabilities, and hearsay evidence is admissible. The Crown has the burden to prove an aggravating factor beyond reasonable doubt if the defence disputes the existence of that fact.

If you are doing a sentencing after trial, the judge will have made findings of fact and the court can accept as fact any information disclosed at trial: see *Code* s. 724. If you are doing a negotiated plea with Crown, and there are parts of the facts your client disagrees with but ultimately admits to the essential elements of the offence, you will want to discuss those disputed facts with the Crown ahead of time and not spring it on them at the last second. If you don't come to a resolution on the facts, the Crown is entitled to call evidence at the sentencing hearing to prove those disputed facts or disputed aggravating factors, which may necessitate an adjournment. Catching the Crown by surprise in this manner will also probably make it a lot harder for you to make a deal with that Crown in the future if they think you acted in an unprofessional or unethical manner in ambushing them, or if they think they would not be able to take your word at face value.

Sometimes your client faces a multiple count information. It is common practice to negotiate a plea whereby your client pleads guilty to some of the counts and the Crown

stays proceedings on the balance of the counts. Note the difference between the situation where the Crown drops some of the counts but all of the facts go in (in other words, your client accepts the entire narrative of what happened but the Crown agrees to go easy on your client so he or she isn't getting convictions on a whole stack of counts, but those facts are still used as part of sentencing and can even be used as aggravating factors), and the situation where the Crown drops some of the counts because your client disputes the facts underlying those specific counts and the Crown agrees not to pursue a conviction on those counts, nor use the underlying facts as factors in sentencing. You will want to be very clear on the basis upon which the Crown is staying counts. Do not assume. Talk to the Crown about this ahead of time and be very clear what your instructions are.

Victim Impact Statements

See *Code* s. 722. Victim impact statements should describe the harm done to, or loss suffered by the victim due to the offence. It should not recommend a sentence or use any psychiatric diagnostic terms: see *R. v. Brenner* (2000), 146 C.C.C. (3d) 59 (B.C.C.A.).

Sentences Available

You will have to look at the charge to determine which sentences are, or are not available. Within the realm of LSLAP, the following are the possible sentences and combination of sentences that you will have to consider:

- Absolute Discharge (where no minimum sentence and maximum is less than 14 years)
- Conditional discharge + probation (where no minimum sentence and maximum is less than 14 years)
- Suspended sentence + probation (where no minimum sentence)
- Fine (where no minimum sentence)
- Fine + probation (where no minimum sentence)

Arguing for a Conditional Discharge

See *Code* s. 730. A conditional discharge is available for an individual charged with an offence other than an offence with a minimum sentence or where the maximum sentence is fourteen years or life. The requirements are set out in s. 730, that a discharge be in the offender's best interest and not contrary to the public interest. That test was previously set out in *R. v. Fallofield*, but as a Crown counsel pointed out, if you cite *Fallofield* it just makes you look like a rookie. Do not confuse a conditional discharge with a conditional sentence order (*Code* s. 742.1). A CSO is a jail sentence served in the community, and is definitely a criminal record. Confusing the two will also make you look like a rookie and give your client a rather nasty surprise.

Effect of a Conditional Discharge

The effect of a conditional discharge is that the accused is on probation for a period of time, and if the accused successfully completes the period of probation with no breaches or further criminal offences, the conviction is discharged and the offender can

say he or she has no prior convictions. It is important to note however that an absolute or conditional discharge still requires a finding of guilt.

In the offender's best interest

If you do a half decent job in getting the client's background (see background sheet), and can moderately coherently communicate that to the sentencing judge, you will more likely than not be able to satisfy the "in the offender's best interest" criteria of the test. Most people need to be without a criminal record for education, employment, travel, and many other reasons. I have yet to encounter a client where it would be in his or her interest to get a criminal record.

If your client has a prior discharge, or a dated criminal record, you have more work ahead of you to convince a judge that a discharge is in your client's best interest. There is case law that says a prior discharge does not preclude your client from receiving another discharge, especially if the cases are far apart in time and are unrelated offences. If your client's prior discharge is fairly recent or if it is for a similar offence as the present one before the court, good luck but I wouldn't hold my breath.

If your client has a dated criminal record, you may wish to argue that it's a much different situation for employment or education purposes if the client has a dated criminal record, than if he or she has a recent conviction; as such it is still in the client's best interest to receive a discharge on the present matter.

Not contrary to the public interest

Where I find a lot of students' submissions lacking is in satisfying the "not contrary to the public interest" criteria. Do NOT simply state, "a conditional discharge would not be contrary to the public interest." Justify your statement and tell the judge why it would not be contrary to the public interest for your client to receive a discharge. To meet that test, you need to consider the purpose and principles of sentencing as set out in *Code* ss. 718 to 718.2.

Rehabilitation

What caused your client to commit the offence? What steps has he or she taken to address the root causes of his or her criminality? What steps will he or she take to address those causes? What probation conditions are you proposing which will address rehabilitation?

A more youthful first time offender is more likely to be rehabilitated. On the other hand, if you have an older client, you can argue that he or she has spent the past 50 years of his or her life without any trouble with the law, this is clearly a one time aberration caused by a moment's indiscretion brought on by a highly stressful situation (for example), and that a moment's bad judgment ought not sully someone for life who otherwise has lived as a law abiding, contributing member of society for 50 years.

Specific Deterrence

A rehabilitated accused is arguably a deterred offender. You can argue that by rehabilitating this offender, by addressing the root causes of what led him or her to the moment where he or she committed the offense, it means the accused would not be in the same situation again or would react differently if faced with the same situation and therefore the aims of specific deterrence can be met by rehabilitating the offender.

Furthermore, you can argue that having to go through the court process and being sentenced sends a message to the accused about the consequences of committing crimes and our client never wants to find himself or herself back in these courts again and therefore he or she has been specifically deterred.

You can also suggest punitive probation conditions which will address the principle of specific deterrence.

General Deterrence and Denunciation

You can argue that by convicting the accused, society has already stigmatized him or her as a person who has committed a serious offence, and has denounced his or her offence. A public charge and conviction for a serious offence brands a person for life, constitutes serious punishment, and is an important part of the way society brings offenders to account for their misconduct: see *R. v. Sidhu*, 2007 BCSC 876, para. 40 (the case was in the context of whether or not to grant a conditional sentence order, but the sentiment is the same). Therefore, by having the accused publicly before the court enter his or her guilty plea and having to go through the court process and being sentenced not only meets the goals of specific deterrence, but it also sends the message to the community that those who commit criminal offences will be caught, prosecuted, convicted and sentenced, thus meeting the goals of general deterrence and denunciation.

If your client has taken steps for rehabilitation on his or her own prior to sentencing, or if your client has changed his or her life, gone back to school, found a job, etc., you can argue that those are significant mitigating factors but also factors that the court can consider in assessing the principle of general deterrence. The court giving credit to an offender who has taken steps on his or her own to rehabilitate himself or herself and to make reparations for their crime sends a message to the community that the court is capable of mercy, that just because you committed a crime does not mean your future is forfeit. It sends a message to the community that the court will look favourably upon those who help themselves and it will encourage those in the community who have problems to not give up hope and spiral downwards, but to seek help and to better themselves.

You can also suggest punitive probation conditions which will address the principle of general deterrence.

Letters of Reference or Support

Letters of reference or support should be from people who know the client, either personally, professionally or otherwise. The letter should contain who the writer is, the relationship between the writer and the client and how long the writer has known the client. The letter should also indicate that the writer is aware of the client's charges before the court and the circumstances of the allegations, as well as the client's circumstances.

Ideally, the writer should comment on their knowledge of the client's character, and that the allegations are something which is out of character and surely a one-time occurrence for the accused (that's good, of course, only if this is actually a one-time occurrence. If the client has a prior history of doing what's alleged or he or she is pleading guilty to a series of offences, this just shows a complete lack of insight on the part of the writer and probably will cause the letter to be given little weight).

Finally, ideally the writer would write that they are prepared to support the accused as they serve their sentence and rehabilitate themselves and reintegrate back into society as a law abiding, contributing member of the community.

The writer should sign the letter of reference and include a contact telephone number. You must always telephone the writer to confirm the contents of the letter and that they wrote the letter in order to prevent forgeries or frauds upon the Court.

Make 3 copies of any letters (or in fact, any documents you wish to hand up). Provide the Crown with a copy as early as possible. Submit the original to be marked as an exhibit on sentencing (if necessary) and provide the judge with a bench copy that they can highlight and scribble on.

Similar to letters of support, it is often beneficial to have people in the community who supports your client to be in the courtroom at the time of the sentencing. Be sure to get their names and relationships to your client so you can point them out to the judge. Even better is if they have written a letter of support and come to court to back it up.

Sentencing Plan

Any sentencing plan should address the principles of sentencing: rehabilitation, deterrence, denunciation, reparation and reintegration into the community. Accordingly, you should consider what was the root cause of the client committing the offence. With a good enough counseling or rehabilitation plan, you can likely argue that the goals of specific deterrence can be met by rehabilitating your client and successfully reintegrating him or her back into the community.

Does your client have a drug or alcohol addiction problem? Did the crime occur while the client was drunk or high, or was the offence committed to fund the client's addiction? Would the client benefit from going to an in-patient recovery house?

Or is this a case where the client acted out of anger? Anger management counseling or respectful relationships counseling may be what the client requires.

Conditional discharges, suspended sentences and probation are rehabilitative sentences, but can have a punitive component. See *Code* s. 732.1 for the statutory compulsory and optional conditions. Curfew or house arrest is an optional punitive condition that the court can impose in a probation order: see *R. v. M.(D.E.S.)* (1993), 21 C.R. (4th) 55, 80 C.C.C. (3d) 371 (B.C.C.A.). Of course, a punitive aspect to the probation conditions may go a long way to address the denunciation and deterrence (especially general deterrence) factors a court is to consider in imposing sentence.

Sample probation conditions to suggest (you may wish to hand a typed up copy to the judge, a copy for the clerk to follow along will get you much brownie points with the court staff, and of course a copy for the Crown. Go over the proposed conditions with your client first so there are no surprises and make sure your client can indeed comply with the conditions you propose.)

Term: How long should the accused be on probation? (maximum of 3 years: see *Code* s. 732.2(2)(b)) – most run of the mill cases will call for a probation order of one year, but mitigating and aggravating circumstances may call for a shorter or longer term of probation.

Compulsory conditions:

- keep the peace and be of good behaviour
- appear before the court when required to do so by the court

Optional conditions:

- notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation
- report to a probation officer within two working days (or by 4pm the next day) and thereafter when required by the probation officer and in the manner as directed by the probation officer
- reside as directed and not to change that address without the prior written permission of your probation officer
- no contact, directly or indirectly, with the complainant or other witnesses (fill in names)
- no go to offence location (fill in address) or “any residence, place of education or place of employment known to you of (fill in names)” or “any (fill in store name) in the Province of British Columbia” (for shoplifting cases)
- seek and maintain full time education or employment, and to furnish written proof of your efforts to seek education or employment upon request of your probation officer
- attend, participate in and complete counseling as directed by your probation officer, such counseling to include anger management counseling / drugs and alcohol counseling / substance abuse management / respectful relationships counseling; (optional – if drugs & alcohol) such counseling may include in-patient treatment at a residential treatment facility
- (fill in number, up to 240) hours of community work service to be completed by no later than (fill in deadline, usually at least one month prior to the end of the probation term)
- provide to your probation officer a letter of apology to (fill in name) by no later than (fill in deadline)
- abstain from the possession or consumption of alcohol or other intoxicating substances
- abstain from the possession or consumption of drugs as defined in the *Controlled Drugs and Substances Act*
- do not possess any knives except during the immediate preparation and consumption of food
- do not possess any weapons as defined in the *Criminal Code*
- do not possess any tools or any instruments suitable for breaking into houses / cars / mailboxes (optional, if client has work that requires tools – “except traveling directly to or from and while at your place of lawful employment”)
- (usually for fraud or ID theft charges) do not possess any identity documents, credit cards, financial documents, negotiable instruments or mail in any name but your own
- (usually for fraud or ID theft charges) do not possess any mail box keys
- (if theft or PSP of motor vehicle or drive while prohibited) do not be found in the driver’s seat of any motor vehicle without the registered owner being present or unless you have the prior written permission of the registered owner

-(if it is a family matter – e.g. spousal assault) no contact except in accordance with a family court order imposed by a court of competent jurisdiction

Curfew vs. House arrest:

Curfew is exactly that, a certain period of time during the day when the accused has to be within his or her residence, subject to certain exceptions. House arrest is where the accused is to be within his or her residence at all times, 24/7, subject to certain exceptions.

Curfew:

-(for the first x months of your probation order) you are to be within your residence between the hours of ___pm one day and _____am the next day, seven days a week, except for medical emergencies to you or your immediate family, or except for travel directly to and from and while at your place of employment or education (or while attending counseling) for which you have received the prior written permission of your probation officer

-you are to present yourself at the door of your residence at the request of any police officer, peace officer or bail supervisor for the purposes of ensuring your compliance with your curfew condition

-you are to personally answer your telephone during the hours of your curfew for the purposes of ensuring your compliance with your curfew condition

House arrest:

-(for the first x months of your probation order) you are under house arrest. You are to be within your residence at all times, except for medical emergencies to you or your immediate family, or except for travel directly to and from and while at your place of employment or education (or while attending counseling) for which you have received the prior written permission of your probation officer

-you are to present yourself at the door of your residence at the request of any police officer, peace officer or bail supervisor for the purposes of ensuring your compliance with your house arrest condition

-you are to personally answer your telephone for the purposes of ensuring your compliance with your house arrest condition

Ancillary orders:

-DNA – see s. 487.051 *Criminal Code* – you should know if it is a mandatory or discretionary order and if it is discretionary, be prepared to argue against it

-firearms prohibition – see ss. 109, 110 *Criminal Code*

-victim fine surcharge – \$50 per count proceeded with summarily, or 15% of any fine in addition to the fine. Ask the court to waive it for financial hardship if your client cannot afford it, otherwise ask for time to pay and specify the number of week or months the client needs. – see s. 737 *Criminal Code*

-NOTE: conversely, if your client can afford it and if the circumstances of your client and the case calls for it – such as if a conditional discharge will be a hard sell and you need something more to help address specific & general deterrence and denunciation, you may suggest to the Court that a conditional discharge combined with an increased victim fine surcharge (see *Code* s. 737 (3)) meets the principles of sentencing and is a fit and appropriate sentence. Take care to argue that in light of the client's financial circumstances, \$x is a lot of money to him or her and will make his or her life more difficult but it'll also be a tangible reminder to him or her the costs of committing crime and will stop him or her from committing further offences in the future.

-forfeiture of offence-related property or proceeds of crime

-restitution – see ss. 738 – 741.2 *Criminal Code*. **NOTE:** restitution can be a standalone order or as part of a probation order. A standalone restitution order is preferable in a vast majority of cases. If restitution is a probation condition, and your client fails to pay restitution within the time specified, this constitutes a breach of probation and can lead to a further criminal charge. A standalone restitution order basically acts as a civil judgment and can be enforced by the person to whom is ordered by way of civil enforcement proceedings: see *Code* s. 741 (1)

-*Sex Offender Information Registration Act (SOIRA)* – see s. 490.012 *Criminal Code*

Sentencing Submission Script

1. Crown calls the case
2. Introduce yourself – go up to counsel table and motion for your client to stand beside you – “Your Honour, my name is Jane Doe, last named spelled D-O-E. I am a law student with the UBC Law Students’ Legal Advice Program and with the court’s leave I represent John Smith, who is present before the court.” – Make sure your client is beside you.
3. Why are you here? – “Your Honour, this matter is before the Court today for guilty plea and sentencing, and we are ready to proceed.”
- 4A. Enter the plea (both you and client stay standing) – “John Smith is before the Court on Information 211626-3C. Count 2 charges him with committing mischief in Vancouver on 3 May 2010. Do you understand the charge?”

Client – “Yes.”

Student – “We will waive formal reading of the count and Mr. Smith, do you wish to plead guilty or not guilty on Count 2?”

Client – “Guilty.”

Student – “And with respect to Count 3, which charges him with committing an assault in Vancouver on 3 May 2010, do you understand the charge Mr. Smith?”

Client – “Yes.”

Student – ‘And with respect to count 3 we will waive formal reading of that count as well and Mr. Smith, what is your plea, guilty or not guilty?’

Client – “Guilty.”
- 4B. If you want to cover your derrière on the record, you can instead state, “I ask that the charge be formally read to Mr. Smith and that the Court makes inquiry and satisfy itself that the requirements of s. 606 (1.1) has been met.” The Court will then read the charge to the accused and ask the client to enter his or her plea, plus the questions required by s. 606 (1.1). This should only be done in rare cases where the client is shifty, changing instructions and throwing up red flags and you need to protect yourself in case the client tries to withdraw his or her guilty plea in the future.
5. (You and your client can sit down at this point in time). Crown will read in the facts, state Crown’s sentencing position and make submissions as to why their position is fit and appropriate in the circumstances. The Crown may enter victim

impact statements per *Code* s. 722 at this time. If your client has a criminal record, the Crown will hand to the judge a copy of either the CPIC printout or the Conviction Summary Report. You should have gone over the record with the client ahead of time and you can state at this time “The record is not disputed, Your Honour.” If your client disputes his or her record (either the date, the fact of the conviction, the charges or the sentence he or she received), this should have been sorted out with the Crown much ahead of time.

6. Your submissions – it depends on your style and each case and each submission is different, but it should have the following contents and in approximately this order. You should stand when making submissions and your client can remain seated:
 - (a) Defence sentencing position – tell the judge right away what you want
 - (b) Issues on sentencing – if there is a particular contentious issue the judge needs to consider, tell the judge at the beginning. For example, “In this sentencing the issue for Your Honour to consider is whether or not it would be contrary to the public interest for Mr. Smith to receive a conditional discharge. My position is that it is not contrary to the public interest and I will tell you why later in my submissions.”
 - (c) Note the presence of any supporters in the courtroom. Now would also be an appropriate time to hand up letters of reference or support. Advise the judge that you will be reviewing the letters later in your submissions.
 - (d) Facts – do you agree or disagree with the facts underlying the charges as alleged by the Crown? Is there further information or facts you wish to submit?
 - (e) Circumstances of your client – you should tell the judge everything that’s on the background questionnaire.
 - (f) Mitigating and aggravating factors – provide the judge with a “ledger” of mitigating and aggravating factors. Be realistic. If there are negative or aggravating factors, concede it but balance them with the positive or mitigating factors. It doesn’t bode well for your credibility to deny or minimize the obvious, and you’ll do a better job for your client if you recognize, accept and concede the obvious things on the negative side of the ledger – the aggravating factors or seriousness of the charge, etc., but then contrast them with and highlight the mitigating factors and the positive side of the ledger.
 - (g) Apply the purpose and principles of sentencing as set out in ss. 718 – 718.2 to the facts of the case and the circumstances of the accused, keeping in mind that sentencing is an individualized process and that the Court must exercise the principle of restraint – a sentence must be the least restrictive required in order to meet the principles of sentencing and must be proportionate to the gravity of the offence and the degree of responsibility or moral culpability of the accused.

- (h) Go through your proposed conditions and why. Link the condition you're proposing back to a specific principle of sentencing.
 - (i) Summarize & conclude and tell the judge again what you're asking for and why in summary.
 - (j) State your position with respect to any ancillary orders (including asking the victim fine surcharge to be waived) and justify why.
 - (k) Review the DNA provisions of the *Criminal Code* and be prepared to argue against the order if it is a secondary designated (discretionary order) DNA offence.
 - (l) Conclude with something along the lines with "Subject to any questions the Court may have, those are my submissions." and sit down.
7. Crown may reply to your submissions.
 8. There is no right of sur-reply but if something new comes up in the Crown's reply that you need to address, stand up and wait for the judge to recognize you. **NOTE:** This is **NOT** an opportunity for you to re-hash your submissions. Use this sparingly and only if absolutely necessary.
 9. Per *Code* s. 726, the Court is required to ask the accused if there is anything he or she wishes to say. You should prepare your client for this ahead of time. If your client says anything at all, it should be an expression of remorse and a commitment not to commit crimes in the future. Sometimes it's best if your client says nothing at all, especially if your client cannot be genuine.
 10. The judge may stand down or reserve their decision to another day, or the judge may pronounce sentence at this point. Your client should stand when the judge pronounces sentence. You should stand as well. Make sure you take good notes of the probation conditions in case there is any dispute or confusion in the future.
 11. If your client gets a probation order or if they were given time to pay a fine, your client will have to report to the court registry and sign some paperwork before they can leave the courthouse. It usually takes a few hours for the paperwork to be ready. You do not have to wait with them.

SENTENCING FACTORS – CONDITIONAL DISCHARGES

1. The public interest factor is broader than the need for general deterrence. The need for deterrence can be fulfilled by the fact that the Accused was arrested, compelled to retain counsel and appear in Court and must face the notoriety that comes with an appearance and the fulfilment of judicially-imposed judicial interim release and probation requirements.

R. v. Zadoronzniak, 2008 SKQB 313, para. 57

2. One element that the Court must consider is the necessity or otherwise of a sentence which will be a deterrent to others who may be minded to commit a like offence.

R. v. Sanchez-Pino (1973), 11 C.C.C. (2d) 53 (O.N.C.A.), paras. 17-18

3. Where general deterrence is the paramount sentencing consideration, discharge is not a sentencing option, while when general deterrence is not the primary concern, there may be circumstances where the mitigating factors negate any increase in sentence brought about by general deterrence, thus leaving the discharge available.

R. v. Foianesi, 2011 MBCA 33, para. 10

4. General deterrence is brought to the forefront of the sentencing principles where the crime is particularly heinous (murder, home invasions, crimes involving children or the vulnerable, etc.) or where though a crime may not be heinous, it is so prevalent in the community that it must be deterred in order to bring it under control. The frequency or prevalence of a particular offence will bring general deterrence into play where it might not otherwise have been an important consideration.

Foianesi, paras. 12-13

5. General deterrence, as the principal objective animating the refusal to impose a conditional sentence, should be reserved for those offences that are likely to be affected by a general deterrent effect. Large-scale, well-planned fraud by persons in positions of trust would be one of those offences, while an unplanned, unpremeditated assault arising out of a momentary lapse in judgment in a situation of great stress and frustration is not an offence that is likely to be affected by the general deterrent effect.

Wismayer, p. 15

6. Furthermore, a conditional discharge can be tailored to serve the purpose of general deterrence.

R. v. McSween, 2002 NSSC 225, paras. 25, 28-29, 31

7. A suspended sentence is not necessarily a greater deterrent than a conditional discharge; sufficient deterrence should arise from apprehension, arrest and trial and the public disgrace and jeopardy they occasion.

McSween, para. 31

8. Discharges are available in the right circumstances for serious criminal misconduct and are not restricted to trivial cases or to strict liability offences where there was no real criminal intent.

McSween, para. 32 citing *R. v. Daley* (1997), 162 N.S.R. (2d) 222 (S.C.)

9. Denunciation as a principle of sentencing was never intended to be a reflection of the personal disapproval of the presiding Judge: it is and always has been a concept rooted in community values, a statement by the Judge on behalf of the community of its condemnation of the accused's conduct. Parliament reflects the views of the Canadian people, who elect its members. Parliament enacted the discharge provisions of the *Code* in order to reflect the sentiment of the Canadian people that in some cases, the principles of sentencing including deterrence and denunciation can be achieved without branding someone with a criminal conviction.

R. v. Spoonmore, [1997] B.C.J. No. 3061 (B.C.P.C.), paras. 19-20

10. By convicting the accused, society has already stigmatized him as a person who has committed a serious offence, and has denounced his offence. A public charge and conviction for a serious offence brands a person for life, constitutes serious punishment, and is an important part of the way society brings offenders to account for their misconduct.

Sidhu, para. 40

11. The Court is required to impose a sanction that is strictly appropriate to the degree of culpability of the accused and to the seriousness of the offence, which incorporates a principle of "restraint"; what is required is the "imposition of a just and appropriate punishment, and nothing more."

R. v. M. (C.A.), [1996] 1 S.C.R. 500, para. 80, *Code*, s. 718.1

12. In considering the "not contrary to the public interest" factor, the Court is required to consider whether the resulting conviction will impact the accused's occupation.

Foianesi, para. 21, citing *R. v. Etienne* (1989), 49 C.C.C. (3d) 572 (B.C.C.A.)

McSween, paras. 21, 36-40, 47

R. v. Carson (2004), 185 C.C.C. (3d) 541 (O.N.C.A.), paras. 38-39

Client Interview / Sentencing Questionnaire

**Age? Birthdate? Born where?
How long residing in LM?**

**Family: Marital status? #Kids? – age & gender
(if separated, access / custody status?)**

**# brothers / sisters? Supportive?
Parents around? Supportive? Still together?
(parents' separation or death may be a mitigating factor if it negatively affected client's upbringing, etc.)**

Any childhood difficulties? (abuse, neglect, illness, etc.)

Address:

How long resided there? With whom? Rent / Own? How much rent / mortgage?

Education? Where? What grade of high school finished?

Any post-secondary, trades, tickets, classes?

Employment? Employer name? Job title / description? Pay?

How long employed? Hours & days of work? (important if Crown or defence is seeking curfew)

On social assistance? If on Disability, what is the disability and how long have client been disabled?

Any drugs / alcohol or other addiction issues?

Which drugs?

How long addicted?

How long clean?

Any attempts to get clean? Any attempts at a recovery house or counseling?

When? How long was client clean for? When did client start again & why?

Any mental health issues?

Any medical issues?

Any meds taken regularly?

Any criminal record?

For sentencing ONLY – do not ask at initial interview

Any explanation for offence? Any expression of remorse or regret?

Letters of reference?

Sentencing plan