Draft

Indonesia Criminal Defense Practice Manual

Table of Contents

PART ONE: FOUNDATIONAL ISSUES

A. COUNSELING CLIENTS

The criminal defense lawyer's role is to defend, advise, counsel and represent the accused. In the criminal justice system, the government is asserting its ultimate authority to deny the accused liberty or even life. Thus, the prosecution bears the highest burden of proof in the legal system, and the prosecution must show that an accused is guilty beyond a reasonable doubt of the crimes he is charged with. The defense lawyer must hold the prosecution to that high standard and seek to protect the life and liberty of the accused.

A lawyer must counsel the accused on different strategies and arguments that can be used in the case as well as the benefits and drawbacks of each one. The lawyer works with the accused and defense witnesses to understand the accused's information and perspective and to determine an appropriate defense (e.g. alibi, self-defense, unsoundness of mind, intoxication, and misidentification). A defense lawyer may provide advice on what plea to enter, whether to accept a plea agreement, and whether the accused should testify on his own behalf. A lawyer must examine evidence, call witnesses on behalf of the defense, and cross-examine prosecution witnesses. In the case of appealing convictions, the lawyer must examine the judgment given by the trial court based on the law and the evidence and testimony before the trial court.

Lawyers, especially criminal defense lawyers serving the poor, must approach their relationship with their clients in a client-centered way. Client-centered values suggest that the primary objectives of lawyers' interactions with clients are:

- to gather sufficient information from clients;
- to give them sufficient information; and
- to encourage clients to make decisions that are in their best interests and likely to give them the greatest satisfaction.

To accomplish these goals, it is important for an accused to obtain the help of a lawyer as early as possible. There are many actions that lawyers should take to protect and aid an accused in the pretrial stages that may not be possible as the case progresses. The pretrial stage of the case is perhaps the most important part of a criminal case, and the stage at which lawyers can do the most good for their clients. Lawyers must do everything possible within their ethical and legal obligations to defend their client, including advocating on behalf of the accused and challenging procedural irregularities and inconsistencies. This may bring the lawyer into conflict with existing practices, as it is often found that common practices in the criminal justice system do not comply with the law. In order to bring about change, lawyers must be willing to speak out about injustice.

This section focuses on the need to engage clients carefully as the most central decisions are under the control of the client:

- To Confess or Not
- To Plead Guilty or Deny
- To Testify or not to Testify

Many of these concepts are also explored elsewhere in this Manual. See Pathway of the Case; Prosecution Evidence; Skills: Interviewing Clients; Skills: Developing a Defense.

Client-Centered Lawyering

Benefits of client-centered lawyering:

- Enhances client competence by treating them as co-equals in finding options, and assessing the consequences of case decisions;
- Promotes autonomy by fully informing them while encouraging and allowing them to make decisions about their cases ;
- Satisfies client needs for relatedness by using collaborative actions and building relationships emphasizing mutual trust, respect, and caring.

Client-centered values and objectives have clear benefits:

- Problems belong to clients, not their lawyers, and clients must live with the consequences of their case choices;
- Clients are better at identifying and assessing non-legal consequences in their own lives than are their lawyers, who have expertise only regarding legal consequences;
- Clients can better determine acceptable risk levels which exist in all difficult decisions because they run these risks in more personal ways and have to live with the resulting consequences;
- Clients are usually capable, interested, and willing participants in making decisions that affect their lives and situations.

Lawyers need good communication skills when interviewing clients and meeting these expectations. These include :

- Explaining what decisions are needed, and why, in clear and non-legal jargon;
- Identifying and explaining the available options for each of these decisions;
- Listening to the clients' concerns and desires;
- Encouraging and allowing them to make all decisions that have substantial legal or non-legal impact on their lives.

Special Case: Make Sure the Child Client Understands

To be client-centered with child clients, lawyers must use language that a child can understand. When the defendant is a child, there are additional barriers to understanding, including lack of sophistication and immaturity. Moreover, children are particularly vulnerable in the court system, and may feel intimidated and afraid to indicate that they don't understand the proceedings. The defense lawyer should carefully and thoroughly discuss the case with the juvenile client in meetings before court hearings to facilitate the child's understanding and ability to participate in his/her own defense.

Showing Respect for the Client in the Courtroom

Lawyers should be alert for ways they can communicate their respect for their client to the client and to the other actors in the courtroom. This includes fully informing the client of the purpose of each court appearance, what happened, and the reason for each adjournment. Lawyers should ensure that their clients can hear and understand all proceedings.

- Handcuffs should be removed during court proceedings unless there is a reasonable expectation the accused will escape or act violently.
- Under CrPC, Article 171, an Indonesian minor under the age of 15 who has never been married may testify without an oath; generally, defense counsel should object to the swearing of an oath by a client under 15 who has never been married as not having the oath could protect the client from a later charge of perjury.

Maintaining Confidentiality

One of the most important duties a lawyer owes to a client is the duty of confidentiality regarding communications, documents and files. Lawyer-client confidentiality is governed by the Advocates Law, 18-2003, Section 19. See also:

1. Indonesian Advocate Code of Ethics (Code of Ethics), Article 4(h).
2. International Bar Association, International Principles on Conduct for the Legal Profession (IBA Principles), Article. 4.1, "Confidentiality/ professional secrecy: General Principle" – A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.
3. Basic Principles on the Role of Lawyers (UN), Principle 8.

Article 108(2) of the Code of Criminal Procedure requires persons to inform if they are aware of someone being involved in a conspiracy to commit crimes against public tranquility and security or against life or property. However, if an advocate obtains such knowledge about a client through the attorney-client relationship, it would be privileged and confidential under Section 19 of the Advocates Law, and the advocate would be prohibited from revealing it.

Helping the Client Make Key Decisions

Working with Clients Who want to Confess or Plead Guilty

Lawyers may encounter clients who wish to either make an admission concerning guilt (during the Police Investigation Stage) or make a formal admission as a plea of guilt once the case has reached court. Many of these clients may initially decline representation. Even so, lawyers should attempt to engage such persons in order to help them to determine their goals, and to understand the choices before them. By choosing to represent not just "innocent" clients or those who wish to deny the charges, the advocates make a powerful statement about the rights to a lawyer, to due process, and to a fair trial.

As with any client, the client who wishes to admit guilt needs to be heard by the lawyer. Lawyers should learn as much about the facts of the case, and also about the goals and priorities of the client. Why do they want to confess or admit? Lawyers should explain the applicable law as it applies to the case, and all the possible defenses (shared property rights, personal defense or insufficiency of prosecution evidence for example) available to the client. In addition, the lawyer must explain what the consequences of giving a confession or plea guilty may be. Many clients may not be aware of lengthy prison sentences they are facing. And they may not be aware that they will be giving up their right to appeal (although a revision may still be available if a judge gives them an illegal sentence).

Caution against making an admission at the police investigative stage

A client who wishes to make an admission in the police investigation stage may not even intend to plead guilty, but instead may see it as an opportunity to get her side of the story heard, and the case dismissed early on. As a general matter this is not true, and clients should be advised against making an admission at this stage of the proceedings because at that point the advocate has usually not even had the opportunity to assess the case, which may be weak or highly defensible. The best defense against such admissions is early access to lawyers by the accused. As soon as the lawyer has contact with his or her client, he or she should advise him not to make a statement to either the police or a magistrate, except after consultation with counsel and with their advice. There are many reasons to discourage the accused from giving a statement to the police:

- To avoid creation of evidence prejudicial to him
- To avoid being locked into a particular defense-line
- To avoid the possibility of perjury charges – See, CrPC, Article 174.
- To avoid the premature disclosure of defense evidence.

While there is no constitutional or other legal right to remain silent, there is also no prohibition against lawyers advising clients to remain silent. In Indonesia, suspects or accused are sometimes beaten or tortured when they refuse to answer investigators' questions and may be sentenced more severely if they do not answer judges' questions. Those facts should be taken into consideration in deciding how to advise a client, but at the very least, advocates should do what they can, through advice and the preparation of clients,

to minimize inculpatory statements. There will, of course, be cases where an accused insists on "telling his side of the story." In that situation a lawyer should prepare the accused to make the most favorable statement possible, given the facts available to the lawyer.

Guilty Pleas

Defense lawyers will have to understand guilty pleas in order to represent clients in two very different postures.

First, there may be some clients who, after careful consideration, review of the facts and the law, and discussion with their lawyers, may choose to admit, rather than fight the charges. A lawyer must have investigated the case, considered viable defense lines and specific defenses before giving advice to the client. Where the client insists on pleading guilty, the lawyer can still aid the client in achieving his or her goals, and it is hoped, receive the fairest sentence possible. A lawyer may also ensure that a client doesn't "over confess" by admitting to a crime greater than the one he or she may have committed or by implicating others. In the end, the lawyer can also stand ready to file a revision if the sentence imposed is illegal.

Second, clients or their families may approach the defense lawyer to withdraw and overturn their previously entered guilty pleas. In both cases it is important for lawyers to understand the legal requirements and legal and practical consequences of guilty pleas.

Timing of the Plea

The opportunity to plea bargain – i.e. negotiate for a lesser charge or lesser sentence – is not formalized in Indonesian law and practice. There are, however, opportunities for clients to plead guilty through making an in-court admission.

Ingredients of a Guilty Plea

To be consistent with the law, a guilty plea should be more than just the simple admission of general guilt that apparently is common practice. The client's guilty plea should include the ingredients of the crime, the alleged facts, and the possible sentences.

- The judge should make an inquiry as to the health and understanding by the accused; otherwise the admission can later be withdrawn
- The judge must explain the facts and the law.
- The judge must elicit necessary inculpatory facts. "I am guilty" or "I did it" is not sufficient. The judge must establish a factual basis for the plea by ensuring that the defendant admits to sufficient facts to establish each of the ingredients of the crime charged.
- The guilty plea must be knowing and voluntary: Where an accused pleads guilty it is not enough for a judge just to accept the plea. It is necessary to ensure that the person understood the nature of the charge, the facts of the case and consequences of admitting guilt.

Sentencing after Guilty Plea

Sentencing after a guilty plea should follow the same procedures as sentencing after a full trial to verdict. (See Sentencing Section)

Although Indonesia does not allow for formal sentence bargaining, lawyers should still argue for their clients by presenting mitigating evidence, and statutory exceptions to prison sentences. Lawyers may also want to take advantage of a judge's willingness to issue a sentence of time already served. In that situation, a guilty plea may result in a client being released nearly immediately.

However, lawyers should be aware that some judges, police and law officers, may use this practice as a way of gathering bribes to facilitate the time served sentence. And even if no bribes are passed, the over-reliance on time-served sentences in cases of minor crimes can undermine the development of a strong criminal justice system with respect for the rule of law, presumption of innocence, and burden of proof.

Even if a client has admitted the charge, the judge is not obligated to accept the plea.

Helping Clients Remain Silent

There is no constitutional or other legal right to remain silent under Indonesian law. Certain articles in the Code of Criminal Procedure suggest, but do not specifically state, that there is no right to remain silent, *See,* CrPC, Articles 115 (counsel may watch and listen when suspect or accused is interviewed by an investigator), and 175 (if accused refuses to answer a question in court, the judge should "suggest" that he do so).

It is important to note that there is no provision that mandates that a suspect or accused speak. Article 66 of the CrPC places the burden of proof on the prosecution. Under CrPC, Article 52, a suspect or accused has the right to freely give information to an investigator or judge, which logically implies he or she may also choose not to do so. These provisions taken together arguably support the assertion of a right to remain silent. Under international standards, an accused may not be forced to testify against herself or confess to guilt, *See,* ICCPR, Art. 14(3)(g). Lawyers should always be present when a client is interviewed to prevent coercion or torture. CrPC, Articles 52, 115(1), and 117(1). It is reported that clients are often abused or tortured if they choose not to speak with the police. If such abuse takes place, advocates should take appropriate action to address it and prevent its reoccurrence. See, "Fighting Against Torture in Policy Custody" p. ??

The defense lawyer must consider the various potential benefits and drawbacks of the client speaking to an investigator or testifying at trial, and the lawyer must discuss those consequences thoroughly with the client. What is the other evidence of the client's guilt? Will such evidence be admissible? Is the client's statement to an investigator, magistrate or judge admissible? Is it in the client's best interest to make a statement to an investigator or the court? Must the client testify in order to explain an innocent possession of contraband? The lawyer should advise the client on the consequences of a statement or testimony and can

attempt to convince him or her to remain silent. The decision, though, is ultimately that of the client.

If the accused wishes to remain silent, lawyers should thus consider whether they want to give notice to the court through a motion that the accused will not give a statement to the court, relying instead on legal defenses such as insufficiency of the evidence or presented through other defense witnesses. If so, the lawyer should assert for the accused that he or she does not wish to testify.

However, even if the judge is aware that the accused wishes to be silent, the judge may nonetheless ask questions of the accused under Articles 155 and 164(1) of the CrPC. The lawyer must carefully prepare the client to remain steadfast in his or her silence. If need be, the lawyer must make and record objections to ongoing questioning of a client who is determined to remain silent.

B. THE RIGHTS OF THE ACCUSED

This section is meant as a quick reference to fundamental rights of the accused. They are explained in context throughout the rest of the manual.

The Right of Defense

1. Indonesia Code of Criminal Procedure (CrPC), Article 65 – a suspect or an accused shall have the right to seek and call a witness and/or person with special expertise to provide testimony that is favorable to him. *See also,* Code of Criminal Procedure, Articles 51, 54, 70(1), and 72, which all provide rights for purposes of an accused's defense.

1. CrPC, Article 65 – a suspect or accused shall have the right to seek and call lay and expert witnesses.

2. CrPC, Article 160(1)(c) – the head judge at trial is obligated to hear the testimony of a witness requested by the accused or her counsel.

3. 2. CrPC, Article 164(1) – Each time a witness has finished testifying the head judge at trial shall ask the accused about his opinion of the testimony.

4. CrPC, Article 164(2) – The public prosecutor or legal counsel through the head trial judge shall be given the opportunity to put questions to the witness and the accused. Under Article 165(2), the accused may also put questions to witnesses through the head judge at trial.

5. International Standards:

    a. Covenant on Civil and Political Rights (ICCPR) art. 14(3)(d) – In the determination of any criminal charge against him, everyone shall be entitled to

the following minimum guarantees, in full equality: ... To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

b. ASEAN Human Rights Declaration, Declaration 20(1).

Rights to Expression, Assembly and Association, and Free Exercise of Religion

1. Article 28 of the Const. of Indonesia – freedom of association and assembly and of verbal and written expression and the like shall be prescribed by law.
2. Article 29 of the Const. of Indonesia – guarantees freedom of religion.

Right to a Public Trial

1. Under CrPC, Articles 64 and 153(3), the accused has the right to a public trial, except in cases involving morals or where the accused is a minor.

2. International Standards:

    a. ICCPR, Article 14(1) – "In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing . . . ."
    b. ASEAN Human Rights Declaration, Declaration 20(1).

Right to a Presumption of Innocence/Burden of Proof

Because the accused's liberty is at stake the government has the burden of proof and must demonstrate that the proof is beyond a reasonable doubt. Attorneys must be vigilant in rejecting attempts to shift the burden to the accused. Many (police, judges, legal officers) presume the accused are guilty; you must remind them this is not correct according to the law. There can seem to be a conflict between the very clear presumption of innocence and the demand that the accused who denies the charges must in some way present evidence.

1. CrPC, Article 66 – a suspect or an accused shall not bear the burden of proof. In the "elucidation" of this provision, it is noted that it is intended as "a manifestation of the principle of 'presumption of innocence'."

2. Relevant International Standards:

    a. Universal Declaration of Human Rights, Article 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

according to law in a public trial at which he has had all the guarantees necessary for his defence.

b. Convention on the Rights of the Child, Article 40(2)(b): Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (i) To be presumed innocent until proven guilty according to law
c. ICCPR art. 14(2): Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.
d. ASEAN Human Rights Declaration, Article 20(1): Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.

Right Not to be Tortured

At the very least, attorneys must protect their clients against physical harm at the hands of the police and other governmental officials.

1. Constitution of Indonesia, Chapter X, Article 27, Section 2 - Every citizen has the right . . . to live in human dignity.
2. CrPC, Article 52 – a suspect has the right to freely give information to an investigator or judge. The elucidation of this article indicates that it is meant to prohibit the application of force or pressure against a suspect or accused.
3. CrPC, Article 117(1) – The testimony of a suspect and/or witness to an investigator shall be given without pressure by anyone whomsoever and/or in any form whatsoever.
4. CrPC, Article 115(1)– When an investigator is in the process of conducting the examination of a suspect, legal counsel may follow the course of the examination by watching and listening to the examination, but in the case of a crime against the security of the state, counsel may watch, but not listen to the examination.
5. Global Standards:

    a. Universal Declaration of Human Rights, Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
    b. United Nations Convention Against Torture Article 2: 2. No exceptional circumstances whatsoever…may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.
    c. United Nations Convention on the Rights of People with Disabilities Article 15: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
    d. ICCPR Aricle 7 - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
    e. ASEAN Human Rights Declaration, Declaration 14.

Right to Remain Silent (Right Against Self-Incrimination)

As discussed throughout this manual, attorneys should provide early representation to clients to avoid coerced, false or unwise confessions. Indonesian law does not explicitly recognize the right of a suspect or accused to remain silent. Certain articles in the Code of Criminal Procedure suggest, but do not specifically state, that there is no right to remain silent, *See,* CrPC, Articles 115 (counsel may watch and listen when suspect or accused is interviewed by an investigator), and 175 (if accused refuses to answer a question in court, the judge should "suggest" that he do so). It is important to note that there is no provision that mandates that a suspect or accused speak. Article 66 of the CrPC places the burden of proof on the government. Under article 52 of that code, a suspect or accused has the right to freely give information to an investigator or judge, which logically implies he or she may also choose not to do so. These provisions taken together arguably support the assertion of a right to remain silent. Under international standards, an accused may not be forced to testify against herself or confess to guilt, *See,* ICCPR, Art. 14(3)(g) (In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … Not to be compelled to testify against himself or to confess guilt.).

Right to be Defended by an Attorney

1. CrPC, Articles 54-57, 69-70:

> Article 54 – For purposes of defense, a suspect or accused shall have the right to obtain legal assistance from one or more legal counsels during the period of and at every stage of the examination; according to the procedures stipulated by this law.
> Article 55 – In order to obtain the legal counsel referred to in Article 54, a suspect or an accused shall have the right to make his own choice of legal counsel.
> Article 56 – (1) In the event a suspect or an accused is suspected or accused of having committed an offense that is punishable by death or imprisonment of 15 years or more or for those who are destitute who are liable to imprisonment of 5 years or more who do not have their own legal counsel, the official concerned at all stages of examination in the criminal justice process shall be obligated to assign legal counsel for them.
> (2) Any legal counsel who is assigned to act as intended in Paragraph 1 shall provide his assistance free of charge.
> Article 57 (1) – a suspect or accused who is subject to detention shall have the right to contact his legal counsel in accordance with the provisions of this law.

Under CrPC, Article 203, an accused may, in misdemeanor cases, assign in writing a person to represent them.

2. CrPC, Article 114 – When a person is suspected of having committed an offense, before an examination is commenced by an investigator, the investigator is obligated to

notify him of his right to obtain legal assistance or that it is obligatory for him to be assisted in his case by legal counsel as intended by Article 56.

3. Relevant Global Standard:

ICCPR art. 14(3)(d): In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.

Right to a Fair Trial and Due Process

There is no specifically articulated constitutional or other legal right to a fair trial, but many procedural provisions taken together evince the intent to provide due process and fair proceedings:

- The right to a public trial; CrPC, Article 64.
- The right to the presumption of innocence; CrPC, Article 66.
- The right to a defense; CrPC, Articles 54-57, 69-70.
- The right to equal protection of the law; Const., Article 27.
- The right to be informed of charges in one's own language; CrPC, Article 51.
- The right to interpretation; CrPC, Article 53.
- The right to information; Advocates Law, Article 17, CrPC, Article 72.
- The right to impartial prosecutors, judges and others. CrPC, Articles 157 (dictating when judges, prosecutors and clerks of courts must withdraw from cases), 158 ("a judge shall be prohibited from displaying an attitude or issuing a statement at trial about his conviction regarding the guilt or innocence of the accused."), 220 ("No judge shall be allowed to adjudicate a case in which he himself has an interest, whether directly or indirectly.")

Attorneys should be prepared to object when their clients are being denied fair processes, such as their rights to information, access to counsel, legal detention, examination of witnesses, etc.

Advocates should request that judges withdraw from cases where the conditions in CrPC, Articles 157, 158, and 220 are met.

Also, judges must be present and attentive during all court proceedings and trial. Lawyers must politely request that the judge be physically present during the giving of evidence and during arguments. In addition, lawyers should be alert to the judge directing his or her attention elsewhere. Lawyers should not allow the prosecutor or clerk should to begin or continue proceedings in the absence of the judge or judges.

Global Standards:

a. Universal Declaration of Human Rights Section 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.
b. ICCPR art. 14(1): In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. … .
c. ICCPR art. 9(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
d. ASEAN Human Rights Declaration, Declarations 9, 12, and 20(1).

Right to Equal Protection of the Law

All citizens of Indonesia have the right to legal protections, without regard to gender, race, religion, or citizenship status.

Constitution of Indonesia, Chapter X, Article 27:

1. All citizens have equal status before the law and in government . . . without any exception.

2. Global Standards:

a. Universal Declaration of Human Rights Art. 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
b. Universal Declaration of Human Rights, art. 7 - All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
c. UN Convention on Elimination of All Forms of Racial Discrimination
d. Convention on Ending Discrimination Against Women
e. ICCPR art. 14(1): All persons shall be equal before the courts and tribunals.
f. ASEAN Human Rights Declaration, Declarations 2, 3, and 4.

Right Against Double Jeopardy

Without protections against endless retrials, the accused stands defenseless against the superior resources of the government. Unfortunately this rule is

undercut by the practice of bringing multiple simultaneous prosecutions across different townships where there is an argument the alleged criminal act occurred in multiple jurisdictions. This can happen in politicized prosecutions such as those against protesters.

1. Penal Code of Indonesia (Penal Code), Article 76 – "(1) . . . No person shall be prosecuted again by reason of an act which the verdict of an Indonesian judge with respect to him has become final. (2) If the verdict is from another judge, no prosecution shall take place against the same person by reason of the same act in the case of "acquittal, lapse of time from prosecution, sentence followed by completion of an execution, grace, or lapse of time from punishment."
2. ASEAN Human Rights Declaration, Declaration 20(3).

Right against Post Fact Prosecutions

No accused can be prosecuted for something that was not a crime at the time it occurred.

1. Penal Code, Article 1 – (1) No act shall be punished unless by virtue of a prior statutory penal provision.

Article 1 also contains a rule of lenity, in section (2), by providing that: In case of alteration of the legislation after commission of the act, the most favourable provisions for the accused shall apply.

3. Global Standards:

a. Universal Declaration of Human Rights, Article 11(2): No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the onethat was applicable at the time the penal offence was committed.
b. ICCPR, art. 15(1). No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed other than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
c. ASEAN Human Rights Declaration, Declaration 20(2).
d. Convention on the Rights of the Child, Article 40(2)(a): No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed.

Right to be Informed of Charges and Termination of Investigation or Prosecution

Right to be Informed of Charges

1. CrPC, Article 51:

   In order to prepare a defense:

   a. a suspect shall have the right to be clearly informed in language which he understands about what he is suspected of at the time an examination begins;
   b. an accused shall have the right to be clearly informed in language which he understands of what he is accused of.

2. CrPC, Article 143 – The public prosecutor shall bring a bill of indictment meeting certain specified requirements and copies of the letter bringing the action and the bill of indictment shall be sent to the suspect or his attorney-in-fact or his legal counsel, as well as the investigator, at the same time they are submitted to the court.

3. International Standard: ICCPR art. 9(2) - Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Attorneys should be aggressive in enforcing the right to be informed of the charges. Clients should not be kept in custody without knowledge of the charges. It is thus incumbent upon the criminal defense attorney learn the charges from the appropriate sources and meet with and advise the accused as soon as possible. While such conversations cannot replace the obligation of the government to explain the basis for its detention or prosecution of the accused, the conversations can alleviate the anxiety of a detainee as well as begin the necessary tasks of investigating the facts and preparing a defense theory.

Right to be Informed of Termination of Investigation or Prosecution

CrPC, Article 109 – Where an investigator terminates an investigation because of the absence of sufficient evidence or it has become clear that said event did not constitute an offense or the investigation has been terminated by virtue of law, the investigator shall inform the public prosecutor and the suspect or his family of this fact.

CrPC, Article 140(2)(a), (b), and (c) – Where the public prosecutor decides to cease prosecution because of the absence of sufficient evidence or it has become clear that said event did not constitute an offense or the case has been closed in the interests of law, the prosecutor shall set this forth in a written decision. The content of the decision must be made known to the accused and he must be immediately released if detained. A copy of the written decision must be sent to the accused, his family or his legal counsel, as well as the official house of detention, the investigator, and the judge.

Right to Bail

As general matter, criminal defense attorneys should advocate for the release of the accused as early as possible in the case, including informal advocacy to the police, representation at detention hearings, and at all stages of an inquiry and trial. *See*, Bail Section.

1. CrPC, Article 31 – at the request of the accused or counsel, an investigator, prosecutor or judge may postpone detention with or without bail money or a personal guarantee on the basis of stipulated conditions. The postponement can be revoked if the accused violates any specified conditions.

2. Global Standards:

a. Universal Declaration of Human Rights, Article 9: No one shall be subjected to arbitrary arrest, detention or exile.
b. Convention on the Rights of the Child Article 37(b): No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
c. ICCPR Article 9: (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Right to Interpretation

1. CrPC, Article 53:

(2) In examinations at the stages of investigation and adjudication, a suspect or accused shall have the right at any time to have the assistance of an interpreter.
(3) In case a suspect or an accused is deaf and/or dumb, the provision as intended by Article 178 shall apply, allowing for a skilled translator or the use of written questions, answers, and instructions.

2. CrPC, Articles 177 and 178:

Article 177(1): If the accused or a witness does not understand the Indonesian language, the head judge at trial shall assign an interpreter who under oath or affirmation will truly and accurately translate all the must be translated.

Article 178 – (1) If an accused or witness is dumb and/or deaf and is unable to write, the head judge a trial shall assign a person as translator who is skilled at communicating with the accused or witness.
(2) – If an accused or witness is dumb and/or deaf and is able to write, the head judge at trial shall address all questions or admonitions to him in writing and said accused or witness shall be ordered to write his answers; after which all questions and answers must be read out.

Attorneys need to anticipate the need for interpretation so that it can be addressed in court. Be aware that the use of interpreters provided by the court may undermine the confidentiality of communications between the client and attorney. Unfortunately, attorneys may be denied the right of speaking through interpreters with clients in custody, as police argue that the right to interpretation is limited to court activities. The new Legal Aid Law appears to provide legal basis to assert a right to interpretation in all situations involved in legal representation. See Early Access to Attorneys.

3. Global Standard:

- ICCPR art. 14(3)(a) - In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

Rights Against Unlawful Arrests, Detentions, Searches, Seizures, and Examination of Documents

These rights are discussed extensively throughout this manual, as many unfair prosecutions begin as unlawful arrests, searches, or seizures. See Path of the Case and Evidence Sections.

Arrests

1. CrPC, Articles 16-19 establish procedures for arrest, including the need for a warrant and provision of a copy to the accused or her family, and an arrest duration of no more than one day. Arrests are not to be made for misdemeanor charges. An arrest warrant can be issued when the suspect or accused is "strongly presumed to have committed an [felony] offense based on sufficient preliminary evidence." Article 17. Under Article 18(2) no warrant is required if a person is apprehended in "flagrante delicto" (during the commission of the offense, immediately after the offense was committed, or shortly after the general public has exclaimed that a

person committed the offense, or he was found in possession of goods strongly presumed to have been used in the commission of the offense).
2. CrPC, Articles 95, 96; Articles, 98-101, 123, 124, all of which address remedies for unlawful arrests, detentions and prosecutions.

International Standards:

a. ICCPR art. 9(1) - Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
b. ASEAN Human Rights Declaration, Declaration 12.

Detentions

1. CrPC, Articles 20-31, which establish procedures for detention after arrest. Warrants of detention can be served when an accused is strongly presumed to have committed offenses noted in Article 21(4) and there are circumstances that give rise to a concern that the suspect or accused will escape, damage or destroy evidence, and/or commit the offense again. Article 21(1). The warrant must identify the suspect or accused , the reason for detention, and contain a brief explanation of the criminal case, as well as the place of detention. Article 21(2). A copy of the warrant of detention must be provided to the suspect's or accused's family. Article 21(3). Under Article 21(4), detention may occur only where the suspect or accused is strongly presumed to have committed an offense that:

    a. is liable to imprisonment of 5 years or more, or
    b. is an offense enumerated in Article 21(4)(b).

2. It is important to note that under CrPC Articles 77, 79, and 124, a suspect or accused, his family, or his counsel may request that the court determine the legality of his detention. If the government, through investigators, prosecutors, or jailers, are not allowing counsel or family to have access to the accused, it is arguable that the detention is illegal under Articles 59-61, 54-57, and 69-70.

3. See also, CrPC, Articles 68, 95, 96; 98-101, all of which address remedies for unlawful arrests, detentions, and prosecutions.

See also, Early Access to Attorney, Pathway of the Case, and Bail Sections.

Searches

1. CrPC, Articles 32-37, which establish procedures or the search of a house, clothes, and person. In general, searches of houses or other places the suspect or accused resides or may have committed an offense, may be conducted pursuant to a warrant,

consent to search, or because of urgent or compelling circumstances that require immediate action and where a warrant cannot possibly be obtained. Articles 33, 34. See also, CrPC, Articles 125-127
2. CrPC, Article 37 – In general, a suspect's or accused's clothes, goods being carried, and person can be searched upon arrest.

Seizures and Examination of Documents

1. CrPC, Article 38 – Seizures may only be carried out with a warrant from a local district court, or where urgent and compelling circumstances require an investigator to act immediately and he cannot possibly obtain a warrant and, in that case, the investigator may only seize movable goods and must report immediately to the local district court to obtain approval for the seizure. See also, CrPC , Articles 128-130
2. CrPC, packages, documents, and tools, including from the post, in cases where there is apprehension of the suspect or accused during the commission of the offense, immediately after the offense was committed, or shortly after the general public has exclaimed that a person committed the offense (in flagrante delicto).
3. CrPC, Articles 39 and 42 through 46 address the procedures for seizure, recording, handling, storage, return of seized goods or documents.
4. CrPC, Articles 47-49 address the circumstances under which other goods, documents, and packages in the post may be seized, with a special warrant from the local district court, as well as the handling and recording of those seizures. See also, CrPC, Articles 131-132.

Right to a Speedy Trial

The right to liberty *and* the right to be tried without undue delay are undermined when frequent, excessive adjournments occur, especially when an accused is detained pending trial.

There is no firm legal deadline for completing a criminal prosecution. While in common, non-political matters, criminal cases in Indonesia proceed faster than in some other countries, the accused, their families and their lawyers, as well as alleged victims and the public, suffer when cases are unnecessarily or illegally delayed.

Indonesian law contains no firm deadlines regarding when trials should be held, but specific provisions of law provide the rights to prompt investigation, prosecution and adjudication, demonstrating a desire that trials occur as early as possible after arrest or detention. For example, see:

1. CrPC, Article 50, which establishes the rights of a suspect to be examined and prosecuted promptly, and for a prompt adjudication.
2. CrPC, Articles 106, 111(2), and 122, which all evince an intent for investigations to proceed promptly.

3. CrPC, Articles 138(1),139-140, and 143, which state that decisions to prosecute, the initiation of prosecution, and adjudication should happen as quickly as possible.

While delays in the prosecution may result in the right of a client to be released from detention or to claim compensation, See, CrPC, Articles 24-30, there is no provision specifically providing for dismissal of a case because of excessive delay. Still, defense advocates should urge dismissal when delays are clearly unreasonable.

International Law

1. ICCPR art. 9(3): Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.
2. See also, ICCPR, Article 14(3)(c): This guarantee is designed not only to avoid keeping people in a state of uncertainty about their fate and to ensure deprivation of liberty does not last longer than necessary in the case of pre-trial detention, but also to serve the interests of justice.

The reality of practice in Indonesia is that cases are adjourned a week or so at a time for many months as the court awaits the appearance of prosecution witnesses. Judges are reluctant to use the powers given to them by the Criminal Procedure Code to strike witnesses and, eventually, to dismiss charges. In appropriate circumstances, defense lawyers can then seek the use of court summons and witness warrants to force the appearance of prosecution witnesses to move the case forward. In the face of these delays many accused with viable defenses may plead guilty at the first available instance to be sentenced and gain certainty about their sentence.

Process for Summoning Witnesses

In Indonesia, investigators may issue summonses to witnesses during the investigation. CrPC, Article 112. Prosecutors may also have summonses issued to witnesses and the accused. CrPC, Article 146.

Summonses must be delivered in person at least three days before the date of attendance and at the accused's or witness' addresses or most recent place of residence. CrPC, Article 227.

Prosecution Witness Delay

The accused may suffer as cases are adjourned from week to week due to the failure of prosecution witnesses to appear. As a general rule, trials should be adjudicated promptly. See, CrPC, Article 143 (prosecutor "shall bring an action before a district court **with a request that it be promptly adjudicated.**") The head judge has the authority to order that a non-attending witness be brought before the trial court. Whether counsel makes a request

that the head judge issue such an order is a strategic issue that depends on a number of factors, including:

- whether the client is detained,
- how long any delay might be,
- whether the witness is harmful or helpful to the defense, and
- other factors.

Counsel should discuss the situation with her client and make a decision that is most in the client's interests given the circumstances.

Defense Strategies for Reducing Trial Delay

If defense counsel decides that delay will cause unacceptable harm to the client, then the defense lawyer should consider the following strategies to ensure the accused has the right to a fair and timely trial:

- The defense lawyer must inspect the witness list for the prosecution;
- Negotiate with the Law Officer to concede witnesses where that will not hurt the client's interests;
- Challenge the relevancy of witnesses;
    - Are they all eyewitnesses?
    - If they are not eyewitnesses, can they be excused?
    - Challenge the need to have all witnesses testify at this stage of the proceeding.
    - Burden during inquiry stage v. trial stage is different, so the prosecution should call fewer witnesses before the framing of the charge.
- Make an oral argument for each challenge and argue that it must be officially recorded;
- Follow up with a written argument submitted to court;
- Defense lawyers should request that all hearings and witnesses be scheduled on sequential dates. Present practice is to adjourn from week to week. If defence lawyers point out the legal requirements relating to sequential hearings at the beginning of the case, then court staff will be in a better position to list hearings and request witness attendance in a more efficient way;
- Argue for the judge to issue a summons for the witness's appearance;
- Argue for the judge to issue a warrant for the witness's appearance under CrPC, Article 159(2).

If the judge has summoned and issued warrants for the attendance of witnesses and they still fail to appear:

- Argue that the judge should dismiss or exclude those witnesses; argue that the judge has the power to dismiss witnesses as he/she has the power and duty to manage his/her court.
- If the witness is critical to the government's obligation to meet its burden of proof, argue that the judge should dismiss the charges.

If the judge fails to summon and/or issue warrants for the attendance of witnesses who fail to appear:

- File a complaint about the judge's inaction with any available governing entity.
- File a revision due to the judge's failure to issue summons or warrants.
- Petition for transfer of the case to another judge.

Ways Defense Lawyers Can Speed Trials

- Cross-examine every prosecution witness during the investigation stage to reduce the number of necessary recall witnesses.
- Only recall those witnesses who are absolutely necessary to your client's defense.

Right to Appeal/ Remedies

When clients suffer as a result of legal errors resulting in a judgment of conviction, lawyers must seek the appropriate review by a higher court, through appeal, cassation or reconsideration. CrPC, Articles 67, 233-269. Appeals must be lodged within 7 days of the rendering of the judgment or within 7 days of the accused becoming aware of the rendering of the judgment.

PART TWO: CONDUCTING THE CASE

A. EARLY ACCESS TO LAWYER & MECHANISMS OF ASSERTING REPRESENTATION

A core component of effective criminal defense is its provision at all stages of the criminal justice system. It is not enough that a lawyer is assigned only to hear the verdict of guilt or even to appear quietly in court next to a defendant as the evidence against him is gathered by law officers. It is critical that defense lawyers become involved in criminal cases in the pretrial stage. From the moment that an individual is seized and arrested by the police, he or she needs the assistance of lawyers to understand and implement his or her rights to a fair trial and to equal protection before the law. Indonesian law guarantees the right to counsel from the moment of arrest and at all stages of the examination. CrPC, Articles 54, 69.

If lawyers in Indonesia wait to aid detainees until their cases are submitted to the court by the police, they have allowed their clients to sit unaided for 15 or 30 days in police jails. At the worst this means their clients have been tortured, often resulting in involuntary and false confessions. Even at the best this means that individuals may have been denied the release of bail to which they are statutorily entitled or witnesses who may have aided their client are not contacted and disappear.

Benefits of early representation:

- Charges may be dropped;
- Clients may be released on bail or on own recognizance;
- False or induced confessions can be prevented;
- Investigations can begin early;
- Torture or other police malfeasance can be prevented;
- Clients are reassured and comforted, and trust in counsel is developed.

Indonesian Legal Basis for Early Representation

- CrPC, Article 54: For purposes of defense, a suspect or accused shall have the right to obtain legal assistance from one or more legal counsels during the period of and **at every stage of the examination.**
- CrPC, Article 69: Legal counsel shall have the right to contact a suspect **from the moment of his arrest or detention at all stages of examination**. . . .

Global Standard

- The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 3: "anyone who is detained, arrested, suspected of, or charged with a criminal offence" is entitled to legal aid "at all stages of the criminal justice process."

Right of Lawyers to Gain Access to Accused in Detention

Lawyers can visit clients in detention and have the right to contact and speak to the suspect "**at any stage of the examination and at any time for purposes of the defense of his case."** CrPC, Articl 70(1).

Defense Lawyers Must be Forceful in Gaining Access

Defense lawyers may attempt to gain access to eligible clients in detention in two situations. First, they may be aware of a detained person, but yet have an engagement letter. Many of those most likely to be arrested may be distant from family and home. Second, lawyers from legal aid groups may – and should – visit lock ups anticipating that eligible unrepresented accused will be found.

Lawyers may face resistance from police or other officials when they attempt to visit clients or potential clients early in the investigation stage of a case (or even later in sensitive matters). Police may give many excuses, including the presence of "sensitive detainees," high-level visitors, or lack of sufficient staff to organize the visit. Lawyers should be firm in seeking access to eligible clients, citing the legal right provided in CrPC Article 70 to speak with the client "at any time." If refused access, counsel should consider requesting an order

from a judge that the client's detention is illegal because the Code of Criminal Procedure contemplates detention with access to legal counsel at any time. See, CrPC, Articles 54, 69, 70, 77, 79, and 124.

Defense lawyers should approach early access and engagement in cases as a duty for them and a right for their clients. They should be aware of all legal rights and potential remedies. Lawyers may face additional obstacles when dealing with politically sensitive cases, ones which police see as being filed in response to economically powerful individuals, or where individuals allege police abuse. On a day-to-day basis, however, defense lawyers should seek the voluntary cooperation of police and clerks to gain easy access to clients and potential clients. By engaging in community legal education, partnerships with civil society organizations, and outreach campaigns, legal aid organizations and other defense lawyers can encourage swift visits from family when arrests happen, alerting staff to the existence of new potential clients.

Defense lawyers must refuse to pay bribes or "special fees" to obtain cases, gain access to clients in jail or affect the outcome of a case. Unfortunately, in Indonesia, as in other countries, lawyers indicate that they continue to need to pay bribes or unofficial 'fees'. Some have had success in meeting with relevant officials to explain the nature of legal aid and the lack of resources on the part of clients to pay bribes.

Rights of Paralegals and Others on the Legal Team to Access with the Accused

CrPC, Article 60 gives a suspect or accused the right to have visits from ". . . others he has relationships" with in order to attempt to obtain release on bail or to obtain legal assistance." This would include paralegals or others employed by legal counsel. To the extent that "paralegals" or others employed by legal aid organizations are in fact lawyers, the title paralegal should not be a bar for them having access to clients in detention. Note that non-lawyers may not actually handle cases or provide legal advice. Code of Ethics, Article 8(e). Non-lawyers also must, as agents of the lawyer, protect client confidences and privileges.

Remedies when Access is Denied

Defense lawyers must be prepared to respond quickly, respectfully and vigorously when their right to access clients is denied.

Often lawyers can resolve the matter through informal advocacy with the reluctant police officer. It can be as simple as returning the next day. This is problematic, however, if this results in the accused giving an uncounseled admission or being remanded without representation. In order to address individual cases, lawyers can also write a letter of complaint to a police supervisor or another responsible official in the township. Systemic issues must be brought to the attention of supervisors or lawyers associations.

Ultimately, however, lawyers need to be prepared to assert the rights of their clients through the use of available legal mechanisms. These are discussed more fully in the Remedies section. They include:

- Suing the police for illegal detention pursuant to CrPC Articles 95-96. However, while this may discourage future problems and result in compensation, it won't immediately address the need to access the accused.
- If refused access, counsel should consider requesting a pretrial order from a judge that the client's detention is illegal because the Code of Criminal Procedure contemplates detention with unlimited and unfettered access to legal counsel at any time, See, CrPC, Articles 54, 69, 70, 77, 79, and 124, in order to effectuate the right to a defense.

Relevant Global Standards

UN Principles on the Role of Lawyers (Havana 1990). Sections:

1. All people are entitled to a lawyer

5. Should be informed of the right to a lawyer "upon arrest or detention or when charged with a criminal offence."

6. Entitled to a lawyer with enough experience to defend them.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. Accused "shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality." Access may be in the sight, but not sound of, government officials.

Bail

First, detention is available only for offenses punishable by five years or more. CrPC, Article 21(4)(a), and for specific offenses listed in CrPC, Article 21 (4)(b). A warrant of detention, further detention, and change of the type of detention is required. CrPC, Article 21(1); Articles 22-23. However, t**he presumption of innocence demands that detention be the exception, not the rule**. As a general matter, criminal defense lawyers should advocate for the release of the accused as early as possible in the case, including advocacy to the police, representation at remand hearings, and at all stages of an inquiry and trial. Accused persons can be released with or without bail money or a personal guarantee, with stipulated conditions. CrPC, Article 31.

- International standard:

- ICCPR art. 9(3): It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement

Form of Bail

Release On Personal Promise to Return

Release does not require cash bail, though that is a possible term for release from detention. Defense lawyers should seek, in appropriate cases, that the accused be released with personal undertakings to return to court. CrPC, Article 31. House or city arrest are two forms of detention specifically provided for in CrPC, Article 22. Other creative solutions should be advocated for, such as having the accused report to the police station weekly. In that case, the accused lawyer should advise the client not to speak about the case to the police without the lawyer being present. The custom to adjourn cases from week to week during the inquiry and trial should be enough oversight of an accused.

Advocates should keep the following in mind:

- Bail should not be excessive;
- Bail does not have to be cash, but can be a promise from sureties to pay if accused absconds, or simply a promise from the accused to appear as required;

The Structure of A Bail Argument

A lawyer needs to know the law governing bail in order to make an effective bail argument. Bail should be granted when counsel can demonstrate that the accused cannot be "strongly presumed to have committed an offense based on sufficient evidence" or there are not circumstances that give rise to a "concern that the suspect or the accused will escape, damage or destroy physical evidence and/or repeat the offense. See, CrPC, Article 21(1).

The lawyer needs to (1) give the judge the legal basis for granting of bail; (2) challenge the prosecution presentation of facts; (3) present favorable or mitigating information about the accused; and (4) state clearly what the requested remedy is.

The weakness of the prosecution case. As discussed elsewhere in the Manual, point out evidentiary or procedural weaknesses in the prosecution's case. Be careful about disclosing the results of defense investigation. Also be careful not to repeat the client's statements to the defense lawyer as this threatens client-lawyer confidentiality, potentially locks you into one defense line, and is unlikely to be persuasive at this early point.

Favorable or Mitigating Information about the Accused. These facts go to the issues of escape, destruction of evidence, repeating the offense that are laid out in Article 21(1) of the CrPC. Make a persuasive statement about why the client has strong ties to the community, a good reputation, and how being in jail would negatively impact the client or the client's family. Prepare carefully for bail application and do not rely upon pre-existing forms. Make oral argument. These arguments can include:

- Marital status
- Name and number of dependents
- Present employment
- Being under the care of physician or on medication
- Physical or mental conditions affecting the client's behavior
- Education
- Lack of prior criminal record
- Consistency in making prior court appearances
- Ties to the community
- Financial resources
- Availability and nature of sureties

Request a Remedy! Make sure the judge knows what you want, and request the least restrictive release reasonable.

B. PATH OF A CRIMINAL CASE IN INDONESIA

INVESTIGATORY AND PRETRIAL STAGE – THE BEGINNING OF THE CRIMINAL PROSECUTION

Role of Defense Lawyer

The defense lawyer must be proactive during the investigation stage. Due to the new Legal Aid Law, defense lawyers should be ready to represent the accused from the moment of arrest, and to appear at all hearings. During this period lawyers should fully interview clients, insist on being present for all interviews or examinations of the client, begin investigations, and seek out prosecution evidence through requests for minutes of the examination (CrPC Articles 72 and 75), which should always be made, and by other means. See, Advocates Law, Article 17 (the advocate has the right to obtain information, data and other documents, either from government agencies or from any other party as necessary for the defense of the client's interests). Lawyers should consider how they can best ethically advocate with the police for termination of the investigation See, CrPC Article 109(2). See Early Access to Lawyer Section.

Fighting Against Torture in Police Custody

Defense lawyers must protect their clients, and all detainees against police abuse and torture. The first step is to visit police lockups routinely to meet newly arrested persons and to prevent police acting without oversights. Also, counsel should inform the police, investigators, and jail and prison officials that she wishes to be present for every interview or examination of the client.

Legal Provisions Intended to Prevent Abuse and/or Torture

- CrPC Article 114: If a suspect commits a criminal act, before an examination is started by an investigator, the investigator is obliged to notify him about his right to obtain legal assistance or that it is obligatory for him in his case to be assisted by a legal adviser as intended in article 56.
- CrPC Article 115(1): In case an investigator is examining a suspect, the legal adviser can follow the course of the examination by watching and listening to the examination. (2) In case of a crime against the security of the state, the legal adviser can be present to watch but not listen to the examination of the suspect.
- CrPC Article 117(1): Information by a suspect and/or witness to an investigator shall be given without pressure from whomsoever and/or in any form whatsoever. (2) In case a suspect gives a statement about what he has actually done in connection with the criminal act he has been suspected of, the investigator shall record it in a report in the minutest detail in the words used by the suspect himself.
- CrPC Article 118(1): The statement of a suspect and/or a witness shall be recorded in a report which shall be signed by the investigator and by the person giving the statement after they have approved the content. (2) In case the suspect and/or witness is not willing to attach his signature, the investigator shall record this in a report by mentioning the reason.

All of these provisions taken together lead to the inevitable conclusion that advocates should:

- Visit police lockups routinely to meet newly arrested persons and to prevent police acting without oversights;
- Inform the police, investigators, and jail and prison officials that she wishes to be present for every interview or examination of the client;
- Inform investigators that she wishes to be present when the client is presented with his or her written statement so that counsel may review it and advise the client on whether to sign it.

Once evidence of abuse or torture is detected lawyers must move quickly to both document it prevent it from continuing. However, care must be exercised to respect the privacy and a decision-making authority of the accused. Counsel should:

- Have pictures taken of any injuries.
- Request an examination by a doctor. See, CrPC, Article 58 (a suspect or accused had the right to be visited by his personal doctor in the interest of his health . . . .).
- Request the judge make a record of the injuries at the next hearing or at a hearing requested for that purpose.
- Report the problems to superior police officers.
- Request the assistance of ward and township administrators.
- Draft letters of complaint on behalf of client.

Legal Remedies for Police Abuse:

Clients have the right to request that a judge rule on the legality of their detention. CrPC, Article 124. It is arguable that any detention during which abuse takes place is illegal and advocates should consider requesting a determination of the legality of any detention in which abuse or torture takes place. CrPC, Article 79. If the detention is determined to be illegal, then the client should be released, even if on conditions of bail. An additional remedy is that the client may seek rehabilitation and/or compensation. CrPC, Article 95. Even if the detention is not found to be illegal, the client still may be entitled to compensation, as Article 95 provides for compensation for "the harm of having been arrested, detained, prosecuted and adjudicated, ***or subjected to other acts*** without reason founded on law or due to a mistake with regard to his identity or to the applicable law." It is clearly reasonable to argue that "other acts" includes abuse and/or torture.

A criminal complaint can be filed that the officer or officers committed Maltreatment or Serious Maltreatment. The officer could be prosecuted, adjudicated guilty, and sentenced. He or she could also be banned from engaging in the law enforcement profession. Penal Code, Articles 360-61. See also, Articles 35 and 36.

Sometimes public exposure or involvement of the media can be effective in addressing issues of abuse and torture, but care must be taken to avoid exposing the accused or the defense lawyer to legal complaints of defamation or similar charges.

Initiating the Complaint

Any case can be initiated through a complaint to a competent authority, generally a junior investigator or investigator. CrPC Articles 1 102, 103, 108(1). Article 108(2) indicates that anyone who knows about a conspiracy to commit an offense against public tranquility and security or against life or property "**shall be obligated**" to report it without delay. A report in writing must be signed by the reporter or complainant. CrPC, Article 103(1). If a report is oral, the junior investigator must record it and have it signed by the reporter or

complainant and the junior investigator. CrPC, Article 103(2). The reporter or complainant must be provided a receipt for the report or complaint. CrPC, Article 108(6).

If the report is such that it may "reasonably be presumed" that an offense occurred, a preliminary investigation must begin. CrPC, Article 102. A preliminary investigation is defined as "a series of acts by a junior investigator to seek and find an event that is presumed to be an offense in order to determine whether or not an investigation may be carried out. CrPC, Article 1(5). An investigation is defined as a series of acts by an investigator in matters and by means regulated by the CrPC to seek and gather evidence with which to clarify whether an offense has occurred and to locate the suspect. CrPC, Article 1(2). Articles 5 and 6 of the CrPC define what actions junior investigators and investigators are authorized to take. Junior investigators are required to submit reports of their actions to investigators. CrPC, Article 5(2). Minutes of any actions taken by an investigator are required to be prepared. CrPC, Articles 8(1) and 75.

A complaint is not necessary if an offense is committed "in flagrante delicto," which CrPC, Article 1(19) defines as: the apprehending of a person at the time he is committing the offense, shortly after he has committed the offense, shortly after the general public has exclaimed that he has committed the offense, or where he is found in possession of a good shortly after the offense which is strongly presumed to have been used to commit the offense and which indicates that he is the perpetrator, an accomplice or an abettor. See also, CrPC, Article 102(2). This is a very broad definition and arrests made pursuant to the provision should be challenged if the alleged basis or bases for the arrest did not take place very soon after its commission.

The Investigation

The authority to begin an investigation is dependent on: (1) a complaint from which one may reasonably presume an offense was committed; or (2) commission of an offense "in flagrante delicto. CrPC, Articles, 102, 106. When an investigation is begun, the investigator must notify the public prosecutor. CrPC, Article 109(1).

Scope of Investigation

Lawyers should be aware of the required elements and form of an investigation. If a case reaches court, lawyers should be prepared to cross-examine investigators on the thoroughness and competency of their investigation. Investigators are authorized to do the following acts:

- Accept complaints;
- Seek information and physical evidence, including at the scene of the alleged crime;
- Stop and examine a suspect's identification;
- Arrest, detain, search and seize objects, documents or other evidence;
- Take fingerprints and photograph a person;

- A junior investigator may bring a person before an investigator;
- Summon a person to be heard as a suspect or witness;
- Call in an expert witness;
- Terminate an investigation;
- Take other actions authorized by law.

The defense investigation should seek to determine whether:

- Acts that should have been taken were not;
- Acts taken were not conducted legally, thoroughly or competently;
- Exculpatory evidence was overlooked or ignored;
- Witnesses or the accused were coerced or unduly influenced;
- Witnesses have some bias.

If an investigator determines that an investigation should be terminated by virtue of law, because of the absence of sufficient evidence or because the conduct reported does not constitute an offense, he must notify the prosecutor and the accused or his family. CrPC, Article 109.

When an investigator completes an investigation, he must promptly surrender the dossier to the prosecutor. If the prosecutor does not respond in some way within 14 days, then the investigation is to be considered closed. CrPC, Article 110(1)(4). The prosecutor may return the dossier to the investigator for a supplemental investigation. CrPC, Article 110(2)(3).

The Arrest

CrPC, Articles 16-19 establish procedures for arrest, including the need for a warrant and provision of a copy to the accused or her family, and an arrest duration of no more than one day. An arrest warrant can be issued when the suspect or accused is "strongly presumed to have committed an [felony] offense based on sufficient preliminary evidence." Article 17. Under Article 18(2) no warrant is required if a person is apprehended in "flagrante delicto" (during the commission of the offense, immediately after the offense was committed, or shortly after the general public has exclaimed that a person committed the offense, or he was found in possession of goods strongly presumed to have been used in the commission of the offense).

A person suspected of having committed a misdemeanor shall not be arrested, except when having twice failed to comply with a valid summons. CrPC, Article 19(2).

CrPC, Articles 95, 96; Articles, 98-101, 123, 124, address remedies for unlawful arrests, detentions and prosecutions. See, Remedies section.

International Standards:

a. ICCPR art. 9(1) - Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
b. ASEAN Human Rights Declaration, Declaration 12.

Detention

Detention is governed by CrPC, Articles 20-31 and Articles 79-83.

Once arrested, CrPC, Article 19(1) prohibits detention for more than one day without a warrant of detention, which can be applied only to a suspect or accused who has committed, attempted or abetted an offense which is liable to imprisonment of 5 years or more, or is an offense enumerated in Article 21(4)(b) of the CrPC.

To be detained, a suspect or accused must be presented with a warrant of detention or ruling of a judge that sets forth:

- The identity of the accused;
- The reason for the detention;
- A brief explanation of the criminal case; and
- The place of detention.

CrPC, Article 21(2). The suspect or accused's family must also be provided a copy of the warrant. CrPC, Article 21(3).

Investigators, prosecutors, and judges can issue warrants of detention, but they should be issued only where:

- The suspect or accused is strongly presumed, based on sufficient evidence, to have committed a qualifying offense; and
- Where there are circumstances that give rise to a concern that the suspect or accused will escape, damage or destroy evidence, and/or repeat the offense.

CrPC, Articles 20, 21(1).

Advocates should take action to have a client released from detention where:

- No warrant of detention is served on the client within 24 hours of arrest;
- Where the warrant of detention does not contain the information required by Article 21(2);
- Where the offense under examination is not a qualifying offense;
- Where the evidence is not sufficient to warrant a strong presumption that the client has committed, attempted to commit, or abetted a qualifying offense; or
- Where the circumstances do not give rise to a concern that the suspect or accused will escape, damage or destroy evidence, and/or repeat the offense.

There is also a right to claim compensation and rehabilitation for illegal detentions. CrPC, Articles 30 and 79-83.

When examinations are not completed, initial detentions may be extended for various periods of time depending on who issued the warrant of detention or warrant of further detention:

Source of Warrant	Initial Detention Period	Period of Extended Detention	Total Days of Detention
Investigator	20 days	40 days	60
Prosecutor	20 days	30 days	50
Dist Ct. Chief Judge	30 days	60 days	90
High Ct. Judge	30 days	60 days	90
S.Ct. Justice	50 days	60 days	110

In addition to the times listed in the chart above, suspects or accused persons can be detained for up to two additional 30-day periods where:

- The suspect or accused is suffering from serious physical or mental disturbance as evidenced by a doctor's certificate, or
- The case being examined carries a possible penalty of nine (9) years or more.

When any client's detention exceeds these periods without having been lawfully extended, advocates should aggressively seek the client's release as well as compensation. See CrPC, Articles 24-29, 30, 79-83.

Detention Hearings

Lawyers should use the pretrial process to oppose further detentions. CrPC, Articles 31, 77-83. Defense lawyers have the right and obligation to represent the accused at these hearings. See Early Access to a Lawyer Section.

Lawyers must challenge the request for continued detention. There are a number of factors to consider in assessing a challenge to detention:

- Be certain that the offense is a qualifying offense;
- Ask why the necessary investigation has not been completed and if the reason involves delay that could have been avoided, request the client's release;
- Request that judges review the police log books even if they are not generally discoverable by defense lawyers as they will contain information about the diligence of the investigation;
- An argument that the evidence is not **sufficient** to warrant a **strong** presumption that the client has committed, attempted to commit, or abetted a qualifying offense;

- Argue that the circumstances do not give rise to a concern that the suspect or accused will escape, damage or destroy evidence, and/or repeat the offense;
- Argue that detention is not necessary to ensure the accused's attendance during the inquiry stage and trial;
- Argue that special circumstances such as support of a family, a family or the client's health, or others warrant release;
- Possible challenge to the length of detention.

Advocates should also argue for the least restrictive type of detention reasonable, such as house arrest, city arrest or other creative restrictions that may satisfy concerns about fleeing, destruction or evidence, or recidivism and also limit restrictions on the client. See, CrPC, Articles 22 and 31.

Minutes of the Investigation

Minutes shall be prepared for each of the following acts:

- Examination of the accused;
- Arrest;
- Detention;
- Search;
- House entry;
- Seizure of goods;
- Examination of documents;
- Examination of witnesses;
- Examination at the place of the crime;
- Execution of court rulings and judgments;
- Other acts according to the provisions of the CrPC. See, e.g., CrPC, Article 102 (requires a junior investigator to prepare minutes of her preliminary investigation).

The minutes are to be prepared by the official taking the actions and must be signed by that official and "all parties involved in the acts." CrPC, Article 75. Defense counsel has a right to copies of all minutes and should **always** request them. CrPC, Article 72; See also, Advocates Law, Article 17 ". . . [T]he advocate has the right to obtain information, data and other documents, either from government agencies or any other party as necessary for the defense of the client's interests."

Role of the Public Prosecutor During the Investigation Stage

During the investigation stage, public prosecutors may:

- Issue warrants of detention or further detention, CrPC, Articles 20, 21, and 25, and seek a final detention under CrPC, Article 29.

- Return a dossier to the investigator for supplemental investigation. CrPC, Articles, 110, 138.

To the extent prosecutors become involved in cases during the investigation stage, lawyers should consider informal advocacy to encourage the dismissal of unsupported cases and to secure the release of eligible clients.

The Prosecution

Indictment

The public prosecutor has the authority to determine if a case has "met the requirements to be brought to court," which is to be done **promptly** upon completion of the investigation. CrPC, Article 138. The prosecutor has the discretion at this point to decide that the case should not be prosecuted because:

- Of the absence of sufficient evidence;
- The conduct at issue does not constitute an offense; or
- The case should be closed "in the interest of law."

This decision must be recorded in writing and a copy provided to the suspect or accused, his family or legal counsel, the detention facility, the investigator, and the judge. CrPC, Article 140(2).

Advocates may consider how best to advocate with the prosecutor at the indictment stage, especially given the limited information defense counsel may have. The lawyer is in a stronger position to negotiate when the lawyer has done investigation, knows the law, and has consulted fully with the client. Lawyers must be client-centered. They must know what their clients' goals are and what risks they are willing to take, and advise them accordingly. As appropriate, counsel should communicate and negotiate with the prosecutor for resolutions beneficial to the client. Lawyers should negotiate with the prosecutor to either dismiss the case or to proceed with less serious charges. Lawyers can encourage the prosecutor to present charges with a lower potential sentence or a charge or charges for which detention is not permitted. Note, though, there is a risk that any attempt at negotiation may be met with either requests for bribes or accusations of offering bribes, so a careful assessment must be made of the circumstances, and the language used must be thoughtfully considered.

If a determination is made that a case can be brought to court, the prosecutor is to prepare a bill of indictment "as soon as possible," CrPC, Article 140(1), and file it with the court with a request that "the case be promptly adjudicated." CrPC, Article 143(1).

The indictment must be dated, signed and contain:

a. The full name, place of birth, age or date of birth, gender, nationality, address, religion and occupation of the accused, and
b. An accurate, clear, and complete explanation of the charged offense(s), including the time and place of the offense.

CrPC, Article 143(2). An indictment that does not satisfy Article 143(2) is void "by operation of law," and advocates should seek dismissal of the indictment where that is the case. Counsel should assess:

1. Whether all of the information in paragraph (a) above is accurately included, and
2. Whether there is an accurate, clear and complete explanation of the offense:
   i. Does the indictment accurately identify the time and place, the victim, or other facts related to commission of the alleged offense?
   ii. Is the explanation clear? If it is ambiguous or difficult to understand, then it is not clear and does not satisfy this provision;
   iii. Is there a complete explanation of the offense? In particular, are there facts alleged that, if supported by evidence, would prove every element of the alleged offense? If not, the advocate should request dismissal. For example, Article 134 of the Penal Code prohibits theft, indicating that: "Anyone who takes property, partially or wholly belonging to another, with intent to appropriate it unlawfully, shall [be] guilty of theft." The indictment must allege facts which, if proven, would meet the government's burden to establish that:
      a. This particular accused took property;
      b. The property belonged, partially or wholly to another person; and
      c. The taking was done with the intent to appropriate the property unlawfully.

If the indictment does not allege facts that would show those three elements (a, b, and c), then the indictment is void and should be dismissed. If there are grounds to object to the indictment and move for dismissal, counsel should do so. See, CrPC, Article 156.

An indictment may be amended, including dismissal of it, only once and it must be done at least 7 days before the trial begins. A copy of an amended indictment must be provided to the suspect or his counsel, and the investigator. CrPC, Article 144.

An indictment may join related, and to a certain extent, unrelated cases. See, CrPC, Article 141. If the factors authorizing joinder are not satisfied, counsel should object and request that charges be severed.

Judicial Competence (or Jurisdiction)

Courts must be competent under the CrPC to entertain particular cases or issues.

District Court Competence – Pretrial Review

District courts are competent, within the context of pretrial review, to adjudicate:

- The legality of an arrest, detention, and termination of an investigation or prosecution; and
- Compensation and/or rehabilitation for a person whose case is terminated at the stage of investigation or prosecution.

CrPC, Article 77-83. With the exception of a ruling on termination of an investigation or prosecution, no appeals may be taken from district court judgments on these issues. CrPC, Article 83.

Other District Court Competence

District courts also have competence to adjudicate all cases involving offenses committed within its jurisdiction. CrPC, Article 84(1).

A district court in a jurisdiction in which an accused "resides, most recently stayed, or was discovered or detained" is competent to adjudicate a case if most of the witnesses to be summoned are closer to that district court than to the one in the jurisdiction in which the offense took place. CrPC, Article 84(2).

Offenses committed in multiple jurisdictions shall be tried individually within the jurisdictions in which the offense occurred, but may be joined when related to one another. CrPC, Article 84(3)(4).

When grounds for challenging the competence of the court in which a case is brought exist, counsel has the responsibility to object under either pretrial procedures or at trial. CrPC, Article 156; See also, Articles 147-151.

EVIDENCE AGAINST THE ACCUSED

Evidence against the accused can take many forms: oral statements made by witnesses during inquiry and trial; physical evidence (gathered or seized by police); identification (in court testimony or documentary reports on out of court identification of the accused by the complainant or other prosecution witnesses); admissions allegedly made by the accused; documents or scientific reports; and expert evidence. The lawyer can defend against such evidence in three ways:

- By challenging the procedure by which the evidence was discovered or created, thus seeking its exclusion.
- By denying the importance or inculpatory value of the evidence;
- By challenging the existence, accuracy or truthfulness of the evidence.

Much of the evidence presented against an accused will derive from police investigation or action. Such evidence must be examined carefully to make sure that it was obtained and is presented in accordance with legal requirements. This includes not just confessions, but also physical evidence or seized documents.

In order to defend against prosecution evidence, lawyers must have access to it, and sufficient time to prepare their defense. Lawyers must know and use the existing laws governing disclosure of evidence to the defense. Lawyers must make requests of police, government agencies and others to obtain access to evidence, and seek judicial remedies when these requests are not satisfied. See, CrPC, Article 72; Advocates Law, Article 17.

Lawyers should challenge evidence against the accused by seeking to exclude illegal or unreliable evidence presented by the prosecution, as well as presenting evidence that contradicts or undermines prosecution evidence.

Obtaining the Prosecution Evidence

In order to respond to prosecution evidence, the defense lawyer needs to review it as soon as possible. The defense lawyer has the right to all minutes that are required by law, CrPC, Articles 72, 75, which include, among other things, witness statements, arrest, detention, and search and seizure minutes, and minutes on the examination of documents.

Counsel also has the right to obtain information, data and other documents, either from government agencies or any other party as necessary for the defense of the client's interests. Advocates Law, Article 17. Advocates should request and obtain these materials without delay. The lawyer should file a written request letter for all relevant material to which she is entitled.

In the face of demands by clerks for bribes to get copies of court documents, lawyers should consider using camera phones to make copies of necessary documents. Lawyers should make a contemporaneous record of any inappropriate behavior and should consider the possibility of making a formal complaint.

The police investigation file or dossier is effectively converted to the prosecution file when the investigation is completed.

Scientific Reports and Expert Witnesses Statements

The CrPC does not specifically address prosecution expert witness reports or statements. However, Article 180 clearly anticipates and allows for a defense objection to court expert witnesses and counsel should request reports and statements of prosecution experts under that article, Article 72 and 75, and Article 17 of the Advocate's Law.

Evidence

Under the CrPC, Article 184(3) "matters that are generally known" need not be proven.[1] Legal means of proof shall be:

- The testimony of lay and/or expert witnesses;
- A document;
- An indication;
- The testimony of the accused.

The failure to include physical evidence such as stolen goods, weapons, drugs, and other items is an apparent oversight, and Article 181 of the CrPC suggests that such evidence is a legal means of proof.

The testimony of one witness, including the testimony of the accused, is not sufficient to support the guilt of an accused. It must be supported by at least one other means of proof. CrPC, Article 185(2).

Article 160(c) of the CrPC allows the accused to request witnesses, which the court is then "obligated" to hear. Article 184 essentially allows or does not prohibit:

1. Fact Witnesses

Fact witnesses are called to present evidence on matters that they directly observed. They include witnesses to the incident, and to support defenses such as alibi. Their testimony must be prepared to anticipate the same objections the lawyer would make to prosecution witnesses.

2. Character Witnesses

The accused may wish to call witnesses to testify on the accused's good character. Special care must be taken in this situation because if the accused presents good character evidence, the prosecution can usually rebut with bad character evidence, which would otherwise not be relevant.

3. Expert Testimony

[1] This is a broad and vague rule subject to abuse that could be harmful to an accused. If there is any doubt that the "fact" at issue is not generally known, counsel should insist that a foundation be established that the evidence is, in fact, generally known, and object to admission if a satisfactory foundation is not established. For example, that the sun rises in the east might not need an evidentiary foundation, but if the prosecution tries to insist that a suspect fleeing evidences guilt that should be objected to because while guilty persons may sometimes flee, they often don't, and suspects often flee for other reasons, such as fear of corrupt or violent police.

Experts may be called to testify by the defense. CrPC, Article 65.

4. Exhibits

There are three different kinds of exhibits that a lawyer may present at trial: physical evidence; documentary evidence; and illustrative evidence. They are discussed in turn below. Lawyers must review the law and practices on how to admit exhibits into evidence.

4.1 Physical Evidence

This includes objects such as weapons, drugs, clothing, stolen property, etc. An example of physical evidence the defense might offer would be the clothing of the accused:

- To show evidence of torture;
- To contradict allegations of involvement in a fight;
- To undermine an identification.

4.2 Documentary Evidence

Written or photographic evidence can be admissible to prove the information contained in it or to impeach the testimony of a witness. Such items include:

- Written Documents;
- Photos and videos;
- Business or medical documents;
- Governmental Records;
- E-mails and computer printouts;
- Screenshots of internet posts.

4.3 Illustrative Evidence

Visual evidence is more powerful and more likely to be remembered than oral testimony. Some items are properly considered as documentary evidence in that they are admissible on their own to prove or disprove facts relevant to the charges. Many are used to be persuasive or to reinforce the testimony of a witness. These can include:

- Photos;
- Charts to summarize testimony or evidence;
- Diagrams;
- Maps;
- Drawings made by witness while testifying;
- Demonstrations made by witness while testifying.

5. The Testimony of the Accused

The Right To Remain Silent

As discussed throughout this manual, attorneys should provide early representation to clients to avoid coerced, false or unwise confessions. Indonesian law does not explicitly recognize the right of a suspect or accused to remain silent. Certain articles in the Code of Criminal Procedure suggest, but do not specifically state, that there is no right to remain silent, *See,* CrPC, Articles 115 (counsel may watch and listen when suspect or accused is interviewed by an investigator), and 175 (if accused refuses to answer a question in court, the judge should "suggest" that he do so). As noted earlier, it is arguable that such an instruction implicates CrPC, Article 153 by applying a coercive element that causes involuntary testimony. If a client, after appropriate advice, chooses to remain silent, counsel should object to this instruction and argue that the court should draw no inference from the client's silence.

It is important to note that there is no provision that mandates that a suspect or accused speak. Article 66 of the CrPC places the burden of proof on the government. Under article 52 of that code, a suspect or accused has the right to freely give information to an investigator or judge, which logically implies he or she may also choose not to do so. These provisions taken together arguably support the assertion of a right to remain silent. Under international standards, an accused may not be forced to testify against herself or confess to guilt, *See,* ICCPR, Art. 14(3)(g) (In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … Not to be compelled to testify against himself or to confess guilt.).

If the accused wishes to remain silent, lawyers should consider whether they want to give notice to the court through a written notice or by oral argument that the accused will not give a statement to the court. Such notice could state that the accused is relying instead on legal defenses such as insufficiency of the evidence or a defense presented through other defense witnesses or other evidence. Defense lawyers need to be prepared to argue against the drawing of an adverse inference. The clear burden of proof is on the prosecutor to prove each and every ingredient of the charges in a criminal matter.

The lawyer should advise the client on the consequences of testifying and can attempt to convince him or her to remain silent. The decision to testify is ultimately that of the client. The defense lawyer must consider the various potential benefits and drawbacks of the client making a statement to the court, and discuss those consequences thoroughly with the client, including, among others:

- What is the other evidence of the client's guilt?
- Will such evidence be admissible?
- Is the client's statement to the judge admissible?
- Is it in the client's best interest to make a statement to the court?
- Must the client testify in order to explain an innocent possession of contraband?

However, even if the Judge is aware that the accused wishes to be silent, the Judge may nonetheless ask questions of the accused under CrPC, Article 164, 165. The lawyer should explain this to the client, and help the client implement the decision to remain silent. The lawyer should request the right to consult with a client during the proceeding. If needed, the lawyer should make and record objections to any ongoing questioning of a client who is determined to remain silent.

Preparation of the Accused for Testimony

A lawyer must advise a client on the impact and consequences of his or her testimony. A lawyer should advise the client, explaining the evidence, the law, and the burdens, and why the client should tell the truth.

The client can only make the decision about whether to testify after he has been fully advised by his lawyer concerning:

- the risks of testifying;
- the risks of remaining silent;
- the legal implications of the accused's expected testimony (sometimes the accused wants to tell a story that admits to the charges without intending to; or tell a story that implicates others important to the accused);
- what is likely to happen - such as others being arrested, or the accused receiving a higher or lower sentence.

The lawyer should also go through the examination procedure and discuss the form of the testimony or, if appropriate, the way the lawyer will protect the client's right to remain silent. This may include practice sessions with the client, including having another lawyer play the role of the public prosecutor in cross-examination.

Lawyers are allowed to refresh the memories of clients by showing them documents, maps, photographs, and other items. In preparation, the lawyer must practice the manner and purpose of refreshing the client's memory.

The Process of Admitting Evidence

Before evidence can be used at trial, it must be admitted. While the CrPC contains no explicit rules regarding admissibility, some provisions and logic suggest that judges should determine the admissibility of evidence. Lawyers should request that judges consider the following issues. Is the evidence:

- Material: does it relate to a substantive legal issue in the case?
- Relevant: does it support a claim one of the parties is making?

- Trustworthy: can it be relied upon or is it the result of mistake, bias, or unreliable or illegal processes?
- Is it in admissible opinion or conjecture under CrPC, Article 185(5)?
- Is it privileged or confidential under CrPC, Article 168-170?
- Is it given without an oath, in which case it can only be supplemental evidence and not direct evidence of guilt under Articles 161 and 171?

Additionally, counsel can argue that even relevant evidence should be excluded if its probative value is outweighed by its prejudicial value, it could be confusing or misleading, or its admission would cause undue delay.

Tips for Evaluating Materiality and Relevancy

Materiality and relevancy deal with the content of the evidence, not the manner in which it is offered. The questions to ask when evaluating materiality and relevancy are: What is the evidence being used to prove? Is this an important fact? Will the evidence tend to make the fact more or less likely to be true?

Material evidence is evidence that relates to one of the particular elements necessary for proving a case. For example, in a murder case, evidence that the accused threatened the victim on the morning of the killing is material because it relates to the issue of the accused's intent to kill. As a general guideline, relevant evidence is the tendency of an item or piece of evidence to prove or disprove one of the elements of a case's required proof. Does the evidence make the fact to be proved more or less likely? That same evidence of the accused's threat is also relevant to that element as it tends to some extent to prove intent. However, evidence that the accused threatened someone else twenty years earlier is probably not relevant, as it is not probative of a material issue in the present controversy. A lawyer must be careful not to "open the door" for unfavorable evidence by, for example, having the accused testify that he has never threatened anyone.

The Burden to Prove Admissibility of Evidence Lies with the Proponent of the Evidence

Indonesian law does not specifically address this issue, but most jurisdictions follow a rule, clearly logical, that the proponent of any piece of evidence bears the burden of demonstrating its admissibility. A lawyer must be ready after interviewing the accused, conducting investigations and fully reviewing the evidence, to make objections to any improper evidence offered by the prosecution or inquired into by the judges. The defense lawyer must ensure that the court makes a determination that evidence is admissible BEFORE considering its reliability, weight, or credibility.

Making Objections

Objections Should be Made to Preserve Issues:

No matter what remedy is being sought, lawyers should raise objections during the case proceedings in order to avoid waiving issues that may be available on appellate review.

Two Reasons for Objections

There are two aims for objections. The first is to exclude improper evidence from the trial process so that the fact finder does not consider it. The second aim is to make a record for the appellate court that is clear and legally sufficient. Always keep in mind these two aims.

Things happen quickly during the trial process, and it is always good to have a second lawyer or paralegal present, or at least an assistant who can help you with multiple tasks (organizing files, keeping track of evidence and objections).

Timeliness

An objection should be timely made; that is, contemporaneously with the alleged error. A failure to make a timely objection may result in the judge allowing in objectionable material. Better to prevent the presentation of irrelevant material than to ask a judge to "forget it" afterwards.

Specific

The objection should clearly state the legal basis for the objection. If there is more than one basis for objecting, all objections should be clearly stated. You should raise statutory, constitutional, and case-law based objections. This will be more persuasive for the trial judge and help you lay the foundation for a higher review proceedings.

Ruling

Be certain to get a ruling from the court on your objection, and make certain the record reflects the basis for the ruling on the objection.

Continuing Objection

If the same issue is going to occur multiple times in the trial, you may want to ask for a continuing objection to a piece of evidence/question so that you do not have to keep interrupting the process for an issue the court has resolved. You would do this by asking "Your honor I would request for the record that I have a continuing objection to this (testimony/line of questioning/piece of evidence - choose the one that is appropriate). If the court allows me a continuing objection, I will not have to keep repeating the same objection each time this happens". If the court allows the continuing objection, it does not mean that you have won the objection, only that you do not have to keep repeating your objection to preserve the record.

Offer of Proof

If you are trying to offer proof of a fact and there is an objection to your evidence that is sustained, be sure to make an offer of proof on the record. In an offer of proof, you clearly state for the record what the evidence was you offered, and why you believe it should have been admitted. Keep in mind you are making the offer of proof for the appellate court, and

the written record is all they will have to know what happened. If something important happened in the courtroom that is not reflected in the written record, be certain to include a description of that thing in your oral recitation of the offer of proof. For example, if someone in the courtroom made a threatening gesture to your witness while they were on the witness stand and it prevented you from getting the evidence you needed from the witness, you would have to make a statement for the record about what happened in order for the appellate court to know it occurred and the effect it had on the witness.

Fault (Opening the Door)

If you are the one that originally introduces objectionable evidence, the court may well allow the other party to respond to the objectionable evidence and introduce similar evidence. This is because a court may say that although the evidence was objectionable, you were the one that brought it in or "opened the door" to that particular piece of evidence.

Necessity of Objection

You also need to make a subjective determination of not only whether you **can** object, but also whether you **should** object. If the evidence is objectionable but not particularly damaging to your case, you may make a tactical decision not to object. For example, if a particularly vulnerable witness says something objectionable, you may decide not to object if the evidence is not very damaging as you might be perceived by the fact finder as bullying the witness. This is a strategic decision that you must make very quickly, and is the kind of thing an experienced lawyer can help newer lawyers with. It will also depend on the judge, the local customs and community, and your own good judgment. But any time you decide not to object for those reasons, you are also potentially subjecting your client to additional criminal responsibility so it is important to make the best decision possible about what is in the client's best interest.[2] You should also carefully consider whether to object to the other party's opening or closing statement. If the statement is obviously inappropriate and contrary to law, you may choose to object. If, however, it is only a small matter that is at issue, you may decide not to object (also keeping in mind the issue of Opening the Door - if the prosecutor has raised an issue in his statement, maybe you think it is better to respond to it in your statement rather than try and exclude it from the court).

Some examples of the basis for objections

- Form of the Question. Leading questions are prohibited. CrPC Article 166;.
- The answer is not responsive to the question. If a witness gives an answer which is not relevant to the question asked, a defense lawyer should ask that it be disregarded and not recorded.
- Lack of Foundation for the answer. Defense lawyers should demand that law officers establish the basis of knowledge for testimony for a fact witness. Thus, in order to

[2] Practice Note: When you make a tactical decision, it is good to document your reasons for the decision at your earliest opportunity. Many things occur during a trial and it is often difficult to remember and recreate the reasons for the decisions you made without some contemporaneous documentation.

avoid hearsay, a witness should be asked about his or her personal knowledge of the subject of the testimony; otherwise, the testimony will likely be objectionable opinion or conjecture. CrPC, Article 185(5).

- Privileged information. Certain professionals are ethically forbidden from disclosing the confidences or secrets of their clients. CrPC, Article 168-170.
- Inappropriate opinion or conjecture. CrPC, Article 185(5).
- Prejudicial effect of the evidence outweighs its probative value.

Defense Theory of the Case

Defense counsel, in consultation with the client and others, should develop a theory of the case, which is a statement or summary of the case that organizes all of the facts, law, reasons and arguments so that they will, in a common sense and emotional way, lead the fact finder to conclude that the defendant has been wrongfully accused (is either not guilty or is guilty of some less serious crime) and/or is less culpable and should receive a more lenient sentence. This theory should guide every decision made on behalf of the client:

- Your pre-trial and trial preparation;
- Which witnesses to request – CrPC, Article 160(c);
- The content of any direct and cross-examination;
- The content of the opening statements and closing arguments at trial;
- The language and images used throughout the proceedings.

The theory is developed based on the facts developed through investigation, the law applicable to the case, and an understanding of the elements of persuasion.

It is critical to conduct a thorough investigation of the case and review and analyze the facts exhaustively in order to develop a persuasive and effective theory of the case. The investigation should include information from:

- Client interviews;
- Interviews of other witnesses, including, where appropriate, experts;
- Documentary evidence from the investigation, prosecution, or other government or private entities;
- The scene or the crime;
- Forensic evidence.

It must include development and presentation of facts that either negate an element of the crime charged, support a legal defense, or both. It should also include credible ways of addressing the strengths of the prosecution's case or the "bad facts."

An individual fact can be interpreted in many different ways depending on the context within which it sits – and the facts grouped around it. For example, if you walked into a building and the first thing you saw was a man, with his back to you, punching another man

and knocking him unconscious, you might be shocked that "he had attacked" the other man without provocation. However, if you had walked in seconds earlier, you would have heard to man who is now unconscious scream, "I am going to kill you now!" The single punch now has a very different meaning. Counsel should brainstorm the facts with others to analyze their possible meaning and import, particularly when considered with the law applicable to the case. The factual basis for your theory of the case must mesh logically with the law of the case, but must also be such that it will be persuasive.

Based on research, recognized elements of effective persuasion are:

- Primacy and recency – people tend to remember best what they hear first and last;
- Universal themes – for example, a parent's love, greed, jealousy;
- Clear, logical organization – people's attention spans are short and they tend to organize information into stories based on short groupings of facts;
- Strategic organization of facts – the order and/or juxtaposition of facts changes their impact. For example, Suppose, the puncher above came into your office and said he'd just punched someone and knocked them unconscious and then immediately started telling you about how his day had gone, in chronological order, finally, at the end advising you that the person he'd punched had threatened to kill him. You'd probably not even hear much about the chronological events of his day as you wondered why he had punched someone. If, though, he steps into your office and say, "Somebody just threatened to kill me and I punched him and knocked him unconscious," the story is more clear, easier to understand and more impactful.
- Show, don't tell – psychologically, people accept their own conclusions more readily than ones they are told to reach. Me saying, "my client is poor," is very different from me saying, "My client lives on the street, often goes days without eating, and has not seen a doctor for ten years." If you hear the first one, you may or may not agree with my characterization – and really have no basis for doing so – but if you hear the second description, you will almost surely conclude, on your own, without me saying it, that my client is poor.
- A picture is worth a thousand words – images can be very powerful and moving, and are often easier to understand when presenting complicated or complex information. This suggests that counsel should, purposefully and strategically, both (1) use actual images, and (2) use language that paints word images (which generally means fact-based, vivid language, not conclusions).
- Use memorable language – rhymes, alliteration, trilogies, well-known phrases.
- Storytelling – research shows that humans tend to organize facts into stories that "make sense" to them. Thus, it is not surprising that books and movies are so popular.

The defense case or position is essentially the telling of the client's story. Stories resonate with people because they are interesting and moving, and because, as research shows, humans tend to organize information they receive into stories that "make sense" to them.

Good, powerful, and moving stories use many of the same elements that are recognized as being persuasive. A defense theory should be organized into a moving and persuasive story. The story can be developed by:

- 1. Writing out your theory of the case (not your legal theory, but your overall factual case theory).
- 2. Writing down who your characters are and the most persuasive way to characterize them (villain, hero, dupe, helper, manipulator, etc.).
- 3. Outlining the sequence (scenes and chapters) of the story.
- 4. Writing down the supporting facts, witnesses and evidence.
- 5. Writing down the language and images that drive the theory and convey your characterizations.
- 6. Deciding how you will use the facts, language and images in implementing each litigation skill you will use – opening, direct examination, cross-examination, closing, the use of exhibits, etc.

Components of the Defense Case

Remember that there is a presumption of innocence and the government bears the burden to prove the defendant's guilt. It is not necessary to put on a defense case, but may sometimes be advisable. Here is a brief overview of possible components of an accused's case.

Ordinary Examination/Trial Procedures

Upon receipt by a district court of a letter bringing a criminal action, and after being satisfied that the case is within its competence, the head of the court shall assign a judge for trial of the case, and that judge shall determine the trial date and order the prosecutor to summon the accused and witnesses to attend the trial. CrPC, Article 152.

Summonses for Trial

To be valid, a summons must be conveyed to the accused:

- At his address or, if unknown, his most recent place of residence;
- Through detention officials if he is detained;
- Through the village head whose jurisdiction includes the accused's address or last known residence if the accused in not present there;
- By being posted on the billboard in the building of the court competent to adjudicate the case if the accused's address or last known residence are unknown.

Service of the summons is effected by a written receipt. CrPC, Article 145.

Summonses for both the accused and witnesses, which must be served at least three days before the trial date, shall contain:

- The date, day and hour of the trial and the case for which the summons is issued.

CrPC, Article 146.

During trial, the head judge leads the examination. At the beginning of trial, the head judge shall open the trial and declare the trial open to the public, unless the case is concerned with morals or the accused is a minor. The trial is to be conducted in the Indonesian language that the accused and witnesses understand, and the head judge must ensure "nothing shall be done or that no question shall be asked which would cause the accused or witness to give his answer involuntarily." CrPC, Article 153. Failure to satisfy these conditions makes any judgment void, "by operation of law." CrPC, Article 153(4).

Note that it is arguable that if an accused chooses to remain silent at trial that any threat of a more serious sentence, a charge of obstruction of justice, or other similar threats or coercion, would constitute doing something that causes the accused to answer involuntarily under CrPC, Article 153, and would render the judgment void by operation of law. But see, CrPC, Article 175 (calling for the judge to suggest that a defendant answer questions when he or she refuses to do so).

Other initial procedures related to the legality of summonses and the presence of the accused and witnesses are addressed in Articles 154-55, and 159 of the CrPC.

It is important to note that if counsel has not raised pretrial objections to a judge or judges' ability to be fair, or to the competence of the court to adjudicate the case, then she should do so on this initial day of trial or at any point during the trial that is warranted by new information. CrPC, Articles 156, 157, 158, and 220.

Delivering an Effective Opening Statement

Your opening statement is first trial opportunity to establish the theory of your case, and to present a persuasive and compelling story introducing your witnesses and evidence. The purpose of an opening statement is to tell the court something about the case they will be hearing. It is important to confine an opening statement to facts that will be proved by the evidence – an opening statement should never be argumentative.

The trial begins with the opening statement of the party with the burden of proof. Most commonly, defence counsel's objective in making an opening is to:

- To provide an overview of the defence theory of the case, including:
    - Using the persuasive techniques discussed in the earlier section entitled, "Defense Theory of the Case;"
    - Highlighting important testimony or evidence;
    - Using the language and images that support the case theory;
    - Identifying weaknesses in the prosecution case;

- Emphasizing the prosecution's burden of proof;
- Stating inferences counsel seeks the judges to draw.

[9.6.4] Further Practical Tips for Delivering an Effective Opening Statement

- Begin in the prescribed formal way: "May it please the Court;"
- Be as brief as possible;
- Look at the judges: take them into your confidence and do not just speak blankly into courtroom space;
- Begin by telling the judges something important about the case that they will remember: Highlight a fact or piece of evidence important to the case theory;
- Establish your case theory and leave the court with a strong, central theme of your defence;
- If you want to introduce co-counsel or explain how the trial is going to work, do it after you're well into your opening;
- Speak in simple language using short, ordinary words;
- Use the words you choose to create images in judges' minds;
- Present your position without quarreling with your opponent;
- Create empathy for your client: Draw the judges into your client's story of defense;
- Make a point by repeating it in different ways; and
- Use visual aids and portions of statements as appropriate.

Procedures Regarding Witnesses

The head judge is obligated to hear the testimony of any witness referenced in the letter bringing the action and/or any who were requested by the prosecutor or the accused or her counsel. CrPC, Article 160(1)(c).

Witnesses are to be called into the courtroom one by one in the order determined by the head judge after hearing from the prosecutor and the accused or her counsel, except that the first witness to be called shall be the victim. CrPC, Article 160(1)(a)(b). Witnesses are not permitted to speak with one another during trial. CrPC, Article 167(3).

Though a court may deem it necessary for a lay or expert witness to take an oath or affirmation after testimony, it is generally required that the oath or affirmation be taken before testimony. CrPC, Article 160(3)(4). If a witness refuses to take an oath, he or she may be detained for up to 14 days; if the witness continues to refuse to take an oath, the testimony can only reinforce the court's conviction, but not sustain it. CrPC, Article 161.[3] Minors who are not yet 15 years of age and have never been married, and those who are "insane or mentally ill" may be examined without an oath. CrPC, Article 171.

[3] This means it cannot as one of the two means of proof that support a conviction. CrPC, Article 185(2)(3)(7).

If a witness testifies during an investigation and either dies or for another valid reason cannot be present at trial, then that witness' testimony during the investigation shall be read in court; if the investigatory testimony was given under oath, then it shall be considered equal in value to testimony given under oath at trial.[4]

If a witness' testimony at trial differs from testimony found in the minutes, counsel should, of course, cross-examine the witness about the discrepancy if it is in the client's interests to do so. CrPC, Article 163 requires, under this circumstance, that the judge remind the witness of the discrepancy and request testimony explaining the differences, which shall be noted in the minutes.

Witness Exclusions or Privileges

Generally, the following witnesses may not testify or may be withdrawn as witnesses:

- Family related to an accused by blood or kinship to the third degree;
- A sibling of an accused, a sibling of the mother or father of an accused, those who are related by marriage and the children of siblings of the accused to the third degree;
- The husband or wife of an accused, despite having been divorced.

However, those noted above may testify under oath if:

- The witness so desires, and
- Both the prosecutor and accused explicitly agree.

Without the agreement of the prosecutor and the accused, those witnesses may testify without taking an oath if they wish to do so. Presumably, though the CrPC does not explicitly say so, their testimony without an oath could only support reinforcement of a court's judgment and not serve as one of the required elements of legal proof. See, e.g., CrPC, Article 161(2).

Witnesses who, because of their occupation, dignity or office are obligated to maintain confidentiality, may ask to be excused from testifying about matters "entrusted to them." CrPC, Article 170(1). The judge shall determine the validity or invalidity of any such request, CrPC, Article 171(2), but counsel should be prepared to make this objection when such a witness is called to testify and the testimony is not in the client's interests.

Examination of Witnesses at Trial

[4] Counsel should have been present for any testimony given by a witness during the investigatory stage, but if she was not present, counsel should object to this testimony being given value equal to that of testimony given at trial because the truth of the investigatory testimony was not tested through cross-examination, which the accused has a right to at trial. CrPC, Article 164.

The head judge or any member judge may request that a witness provide any and all testimony deemed necessary to find the truth. CrPC, Article 165(1). At the conclusion of each witness' testimony, the head judge shall ask the accused his opinion of the testimony. Counsel should consider the best strategy for using this opportunity to advance the defense theory of the case, either by mitigating damaging testimony or promoting favorable testimony.

The public prosecutor and the accused or his counsel may put questions to a witness, CrPC, Article 165(2). The head judge may reject a question put by any of them, but must state reasons for rejecting the question. CrPC, Article 165(3). Leading questions may not be addressed to the accused or any witness. CrPC, Article 166. Judges, the prosecutor and the accused or his counsel may confront witnesses with one another to test the truth of each of their testimonies. CrPC, Article 165(4).

Article 173 of the CrPC allows a judge to hear testimony "on certain matters" outside the presence of the accused, but the accused be informed of all that happened in his absence. Counsel should object to this process because it denies the accused the full benefit of his right to a defense and cross-examination because he is not available to assist his counsel in that defense.

If a witness' testimony is suspected to be false, the head judge shall seriously warn him to testify to the truth and advise him of the penalties for perjury. If the witness insists upon the testimony, the judge on her own, or on the request of the prosecutor or the accused or his counsel, may issue an order of detention of the witness and a prosecution for perjury. CrPC, Article 174(1)(2). When defense counsel suspects false testimony, a strategic consideration is whether to request that the judge warn the witness and advise him or her of the penalties for perjury, as such a request may place an emphasis for the judges on the lack of credibility of that witness.

Under Article 175 of the CrPC, if the accused refuses to answer a question addressed to him, the head judge at trial "shall suggest that he answer." Counsel should object to this suggestion as a violation of Article 153 of CrPC in that it is an action taken that causes the accused to answer involuntarily.

Expert Witnesses

Defendants have the right to "seek and call" expert witnesses. CrPC, Article 65. The court may also call expert witnesses when "it is necessary to clarify the nature of an issue arising at trial." Defense counsel may object to the results of this court expert's testimony and if the head judge finds the objection well-founded, he shall order the research on which the testimony was based to be repeated. The new research is to be done by both the original

agency that performed it, but with different personnel, and by a second agency. CrPC, Article 180.

Handling Expert Witnesses

Use of a Defense Expert

When the facts of a case warrant it, a defense lawyer may request an expert witness to either testify on her client's behalf or to rebut what the prosecution says. CrPC Article 65. Counsel should select the expert carefully by researching his education, background, experience and prior court testimony. Counsel should carefully consult with the possible expert on the issue at stake and not request the witness' testimony unless it persuasively advances the theory of the case. There should be a clear understanding of what the expert's testimony will be, and advocates must educate themselves on the issue in question so that they understand what questions to ask and what the testimony means.

Cross-Examination of the Prosecution or Court Expert

A lawyer must prepare to cross-examine a prosecution witness by consulting, when possible, with a defense expert, or reviewing treatises and scholarly article in the area. It is especially important to review articles or treatises the expert has written if at all possible. The practicality of such a challenge is dependent upon having access to experts, technical manuals, scholarly treatises, or scientific journal articles. Without this preparation, attacks on expert opinions can be futile.

Cross-examination can include the same general areas that would be applicable for any witness:

- bias,
- prejudice,
- fraud,
- mistake,
- lack of opportunity to observe,
- lack of recollection,
- prior inconsistent statements.

But a lawyer must also anticipate challenges specifically related to the expert opinion itself:

- Does the expert's education, training, or experience establish a generally accepted scientific basis for the expert opinion?
  Example: The expert has a Ph.D. in Philosophy and claims to be able to tell if someone is lying by observing a glowing light surrounding her body, which the expert can see by looking inside his hat.

- Is the expert, based on education, training, or experience, truly an expert in the area about which testimony is being offered?

Example: The expert claims to have conducted an autopsy on the victim and determined that the time of death was at 2:30a.m. on Tuesday. However, the expert's medical school diploma is from a school in Cambodia that is not recognized by any government or academic institution and for many years his only work has been with sheep.

- Did the expert use techniques recognized within the field of expertise? *Example*: The expert has a degree in medicine from a well-respected university in Europe. He claims that by examining the victim's facial expression after death he can say that the victim died of poisoning.

- Did the expert correctly execute tests and follow accepted procedures?
  Example: The expert used a special kit designed and manufactured in the United States to determine that the substance seized from the accused was heroin, however, the instructions on the kit say: "Do not expose to temperatures exceeding 25 C°" and the testing was done during the middle of the day in April in a laboratory in Jakarta that is not air conditioned.

Problems in Chain of Custody Relevant to Expert Testimony

Physical evidence is typically held at the police station or in a court location. Lawyers should cross-examine the investigating officer and others on the procedures for safeguarding evidence. Protections against switching real evidence for fake evidence must exist, otherwise there can be no guarantee that evidence has not been tampered with. Such tampering can be either to ensure a conviction or (after bribes have been paid) undermine a prosecution. If the answers are unsatisfactory lawyers should renew motions to exclude both the physical evidence and the expert testimony that is based upon unreliable physical evidence.

Expert testimony may also be presented through documentary forensic evidence. That is medical and scientific evidence prepared as part of the investigation and prosecution of the case. Defense lawyers must be prepared to challenge such evidence as being inadmissible if it is not complete enough or if it relies upon facts not otherwise described.

Testimonial Evidence

The testimony of one witness alone, including the testimony of the accused, is not sufficient to prove the guilt of an accused. It must be supported by at least one other legal means of proof. CrPC, Articles 185(2)(3), 189(4).

An opinion or conjecture, derived from thoughts alone, does not constitute legal proof and defense counsel should object to its elicitation and admission, See, CrPC, Article 185(5) and urge the court not to rely upon it.

The testimony of a witness who is not under oath may not constitute a "means or proof" for purposes of satisfying the requirement that at least two means of proof must be present to

support a conviction, but if may serve as "supplementary proof" if it is consistent with the testimony under oath of another witness. CrPC, Article 185(7). This provision does not allow consideration of testimony not made under oath to be supplemental to documentary or physical evidence and, where it is in a client's interest, advocates should object to allowing such an evidentiary consideration.

The testimony of the accused is what she says at trial, but testimony by the accused outside of trial may be used to "help find evidence during trial, provided [it] is corroborated by a legal mans of proof" regarding the charges at issue. CrPC, Article 189(1)(2). The testimony of the accused "may be only be used with respect to himself." CrPC, Article 189(3).

Testimonial Credibility

"In judging the truth of the testimony of a witness, a judge must seriously take into account:"

- The consistency between the testimony of witnesses;
- The consistency between the testimony of witnesses and other means of proof, such as documents or indications;
- The possible reasons for a witness' testimony (motivation or bias);
- "The way of life and the morality of a witness and any and all matters which normally may influence whether or not testimony can be believed."[5]

CrPC, Article 185(6).

Advocates should consider the above factors in making arguments to the court on the credibility and weight to be given any witness' testimony, promoting favorable testimony and diminishing the credibility and weight of harmful testimony as the circumstances of the factors above dictate.

Examination of Witnesses

Direct Examination of Witnesses

The key question in deciding whether to call a defense witness is the extent to which that witness' testimony supports the defense theory of the case, either by directly supporting

[5] This is another rule problematic due to its breadth and vagueness. Defense advocates should be careful to object to the placement of undue weight on testimony that is based on factors that don't really support its reliability. For example, a judge might say, "Well the witness saw it with her own eyes," indicating a heavy reliance on eyewitness testimony, which research has shown can be quite flawed.

that theory or by undermining the prosecution's case. The answer to that question is dependent on other considerations:

- Is this witness' testimony the only means of establishing a fact or facts critical to the defense theory?
- Is the witness credible? What might be the witness' motivation to testify, or is there any basis for bias? Is the witness subject to harmful cross-examination because of prior inconsistent statements, a history of lying, their character or reputation? (See, CrPC, 185(6)).

General objectives of direct examination:

- Know what facts you want to establish through the witness in support of the defense theory. This will come from your investigation.
- Start your examination by establishing your witness' credibility (what makes this witness believable?)
- Guide the testimony through all the facts that you want the witness to mention in a clear and persuasive sequence – normally this is in chronological order, but it need not be if another order is more powerful or persuasive. Use chapters and clear transitions from topic to topic. Things you need to establish include placing the witness in a location where they could perceive important evidence, as well as the ability of the witness to actually perceive and recall the evidence.
    - For example:
        - The witness was located where they could see or hear the incident;
        - The witness had the ability to see or hear the incident;
        - The witness actually heard or saw the incident;
        - Any other details that show why the witness has a good recollection of the incident.

How to achieve these objectives:

1. Prepare the witness: prepare your witness – it is imperative that you both know what needs to be said. However, do not commit yourself to particular questions, and don't let the witness develop pre-empted answers;

2. by encouraging the witness to provide the following information:
    - Who the witness is;
    - What information the witness knows;
    - Details on when, where and how the events in question took place;

- Where, how and when the witness learned the facts;

Form of the questions:

- Ask short open-ended questions**;**
- The evidence must come from the witness **not** from the lawyer;
- Open ended questions start with: *who, what, when, where, why* and *how*;
- Weave your questions into your theory of the defense;
- Occasionally you may encourage the witness by asking questions like "what happened next?" You may also direct the attention to a particular event in preparation of your question. For example,
    - "I will call your attention to Saturday, March 4th, 2017 here in Jakarta. Do you recall where you were on that day?"
    - "Did you see my client on that day?"
    - "Can you describe where you were and where he was?"
- Make sure you only ask one question at a time (compounding questions creates confusion, both for the witness, for the court, and for the record)

What to avoid:

- Avoid asking questions the witness may not answer truthfully;
- Avoid spending time on unnecessary details;
- Avoid questions about details you will not be able to prove;
- Avoid questions that bring forth unbelievable statements.

Cross-Examination of Witnesses

After each examination in chief, the accused or his lawyer may cross-examine the witness. Leading questions are not permitted during trial. Because of this, counsel in Indonesia is not able to use leading, close-ended, one-fact questions to control adverse witnesses, mitigate the impact of the prosecution evidence, or advance the defense theory of the case. An alternative is to frame questions on cross as narrowly as possible to elicit only the testimony that supports the defense case or mitigates the government's case theory. A skillful cross-examination can minimize the strength of the government's case, bolster the defense case, and set up final arguments about the weight and credibility to be given evidence and its sufficiency.

Preparation for responding to ordinary witness testimony must begin before that witness testifies at trial. The defense lawyer must review all witness statements in the court file,

conduct the necessary investigations, consult with the accused, and prepare expected areas of cross examination.

As with direct examination, the key question in deciding whether and on what to cross-examine a witness is the extent to which that witness' testimony supports the defense theory of the case. The answer to that question is dependent on other considerations:

- Is this witness' testimony the only means of establishing a fact or facts critical to the defense theory?
- Is the witness credible? What might be the witness' motivation to testify, or is there any basis for bias?
- Will the witness actually provide the desired testimony?
- Has the witness made prior statement inconsistent with her testimony at trial? This is a very good and common area of cross-examination and it is critical for defense advocates to obtain the minutes of all witnesses' statements.
- Might the witness testify to other facts more harmful than the desired testimony?

General objectives of cross-examination:

- Know what facts you want to establish through the witness in support of the defense case. This will come from your investigation. Limit your examination to those facts or any needed impeachment of the witness' credibility.
- Start your examination by obtaining the favorable facts likely to come from the witness.
- Reserve any confrontational impeachment of the witness for after eliciting favorable testimony. Witnesses can be impeached with prior inconsistent statements, reasons for bias, prior misconduct, bad character or reputation, or other factors calling into question their credibility.
- Use chapters and clear transitions from topic to topic.

How to achieve these objectives:

1. Anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal as well as the evidence they are likely to give;
2. Create any necessary cross-examination plan for each anticipated witness;
3. Be alert to inconsistencies or possible variations in witness testimony and highlights these to the court;
4. Review prior statements of witnesses and any prior relevant testimony of the prospective witnesses;
5. Where appropriate, reviews relevant statutes and local police regulations for possible use in cross examining police witnesses;
6. Be alert to issues relating to witness credibility, including bias and motive for testifying and highlights these issues through cross-examination.

7. Though questions can't be leading, ask open-ended questions that are narrow, one-fact questions**;**
    - Open ended questions start with: *who, what, when, where, why* and *how*;
8. Weave your questions into your theory of the defense;
9. Don't ask broad questions like "What happened next?" They give the witness too much leeway to make damaging statements and exercise control of the testimony. On cross-examination, counsel should exercise as much control of the witness' testimony as possible.
10. Make sure you only ask one question at a time (compounding questions creates cofusion, both for the witness, for the court, and for the record)

What to avoid:

- Avoid spending time on unnecessary details;
- Avoid questions about details you will not be able to prove
- Avoid questions about facts that don't advance your theory of the case or which the witness is no likely to provide. Get the facts you need and stop the examination.

Indications

An indication is defined as "an act, event or circumstance which because of its consistency, whether between one and the other, or with the offense itself, signifies that an offense occurred and who the perpetrator is." CrPC, Article 188(1). Article 188 provides that indications may arise only from: (a) the testimony of the witness or accused; and (2) a document. Where helpful to the accused, defense counsel should object to indications arising from physical evidence other than a document. Counsel should also argue favorably or unfavorably on the weight to be given to "indications," depending on the logical strength or weakness of the inference to be made based on the indication.

Physical and Documentary Evidence at Trial

The head judge at trial shall show any and all physical evidence to the accused and ask him whether he recognizes the goods. CrPC, Article 181(1). This provision is subject to those provisions in CrPC, Article 45, which govern what may be done with seized goods, either during the investigation or once the case is in court. It allows for the auctioning of certain seized goods, providing both that: (a) "where possible, a small portion of the goods . . . shall be set aside for evidentiary purposes, and (b) the money from the sale of the goods shall be used as evidence. The accused or his attorney must witness the auction. CrPC, Article

45(1)(2)(3). Seized goods that are contraband or banned from circulation shall be confiscated to be used in the state interest or destroyed. CrPC, Article 45(4).

Articles 45 and 181 together present potential problems that advocates should be aware of and prepared to object to:

- The possible loss or destruction of physical evidence the authenticity of which may not be able to be tested either before or at trial. For example, the possible destruction of drugs before the defense has had the opportunity to have them tested.
- Possible problems with the chain of custody of physical evidence. Who had access to the evidence when and did the nature of the evidence change during the chain of custody?

Counsel should object to the destruction or loss of any physical evidence prior to defense examination of that evidence, before review of the evidence by an appropriate defense expert, or prior to completion of the trial, depending upon the circumstances.

Discrediting Physical Evidence

Physical evidence must be authenticated, that is, shown to be what the proponent claims it is. Authentication can be accomplished through witness testimony or, if the evidence is the type that can easily be tampered with (i.e. blood samples), authentication can be accomplished by offering evidence that establishes an unbroken chain of possession from the time the evidence was collected to the time it is offered in court. Advocates should object to the admission of any evidence that is not properly authenticated by one of those two means. If the objection is not sustained, counsel should cross-examine the sponsoring witness on any aspects that call into question the authenticity of the evidence and argue against placing undue weight on the evidence in assessing the guilt of the accused.

Exclusion of Physical Evidence from Consideration

If goods to be used as evidence are the result of an illegal search and/or seizure, counsel should request that they be excluded from evidence entirely. In order to prepare her argument, the defense lawyer must review the relevant Indonesian Law and requirement for the conducting of searches. Articles 32 through 49 of the CrPC govern the search and seizure of goods and documents. Counsel can make this request in pretrial review proceedings, arguing that the illegal search and/or seizure resulted in an illegal arrest and/or detention. Advocates could also make the request after cross-examination of the investigator as to the nature of the search and seizure.

If necessary, the head judge may also show physical evidence to a witness. CrPC, Article 181(1)(2). If necessary for evidentiary purposes, the head judge shall read out or show a documents or minutes to the accused or a witness and ask for the testimony related to it. CrPC, Article 181(3).

Documentary Evidence

Documentary evidence must be authenticated, that is, shown to be what the proponent claims it is. Authentication can be accomplished through witness testimony that shows the document is what the proponent of the evidence claims it is, and that it is reliable (not subject to having been forged or changed). Defense lawyers should be ready to object to evidence being improperly admitted through a document, rather than through a live witness.

Dealing with Specific Types of Evidence at Trial

Identification Evidence

Overview: Every criminal charge requires, at least implicitly, that the identity of the perpetrator be proved in order to for the prosecution to meet their burden of proof. The prosecution can do that in two ways: through in court identification or through testimony about an out of court identification. Whether or not the accused has given a confession or has "admitted" in an interview with the lawyer, the lawyer should examine all available evidence in the court file, including the identification report, and the results of any investigation to determine if the identifying witness could be mistaken, is lying, or has been misled by a faulty police procedure.

In Court Identification

The lawyer should be ready to discredit any testimony about the accused being the perpetrator by creating cross-examinations around:

- Opportunity to observe
- Ability to observe
- Ability to recall
- Bias or reason to lie
- Police induced misidentification

The ability to observe is different from the opportunity to observe. The opportunity to observe means that the witness was at a location where he could have seen the events. The ability to observe means not only could the witness have observed events, but also that he actually did observe it and the observation was not impaired (by darkness, poor vision, an obstruction, distance or other things).

The ability to recall relates to the accuracy of the witness's memory. Questions on this issue could relate, among other things, on whether the witness's memory is consistent with the other uncontested facts of the case. If the witness's memory can be proved faulty on other matters, you can argue the identification of your client should also be viewed with distrust.

Out of Court Identification

In those cases where the police or other government actor arrest the accused and then display him or her to the complainant for an identification, defense lawyers may wish to argue that the actions of the police led to an improper or mistaken identification by the complainant. These arguments need to be developed through examination of the police paperwork, cross-examination of the police, observing magistrate, complainant, and potentially through testimony by the accused.

Potential areas of cross-examination include:

- Mistake: lack of opportunity to observe during incident, bad lighting, short period
- Unfair identification proceeding: police induced identification, dissimilarity between accused and other people in line-up
- Bias: Connection to police or complainant, animosity towards accused

Confessions

Overview: Like in many countries, including some developed ones such as Japan and the United States, Indonesian prosecutions often may rely upon confessions of uncertain reliability and voluntariness. This is not surprising. As one researcher wrote, "One aspect of the law that encourages the forcing of confession is that even if an accused person retracts a confession, it can still stand as proof of a crime if a court believes it is true and that it was made voluntarily."[6] Lawyers at the Justice Centres must thus be vigilant in their protection of clients against the creation and use of induced confessions. There is a large amount of international research on why individuals might falsely confess.

- *False Confessions or Admissions*, The Innocence Project, https://www.innocenceproject.org/causes/false-confessions-admissions/;
- *Police Interrogation and Suspect Confessions: Social Science, Law and Public Policy,* Richard Leo, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937980
- False Confessions, Kassin (The Vera Institute), https://www.vera.org/research/saul-kassin-false-confessions
- *Mental Health and False Confessions*, Follett, et al; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028918

Definition: A confession is a statement in which the accused admits criminal liability for the act.

[6] Nick Cheesman, Thesis, p. 143 citing *Union of Burma* v. *Ah Hla* (a) *Maung Hla & 2*, 1958 BLR (HC) 29. See also: *Union of Burma* v. *Aung Tun* (a) *Aung Myint*, *Aung Tun* (a) *Aung Myint* v. *Union of Burma*, 1958 BLR (SC) 1.

Lawyers must determine what kind of inculpatory statement is being presented: non-judicial admission or judicial confession.

Non-Judicial Admission:

On occasion the prosecution will attempt to introduce inculpatory statements allegedly made by the accused to non-governmental witnesses (complainants and other witnesses). These statements are not subject to hearsay exclusions because it is an admission by a party. If these statements are not subject to some of the protections offered in judicial confessions against involuntariness and procedural rights, a lawyer can and should develop attacks on their reliability, accuracy, and relevance through investigation of the witness' character and motives. To the extent that they may have been induced by torture, threats of violence or induced by promises of leniency or non-prosecution, the lawyer should undermine their value. Const., Article 27(2) (Every citizen has the right to live in human dignity); See, "Fighting Against Torture in Policy Custody" p. ??

In some countries, prosecutors rely upon alleged admissions made by the accused to other prisoners in jail. There is a substantial body of information available to attack the reliability of "jailhouse" admissions (admissions of guilt by an accused allegedly made to a cellmate or other inmates in the jail).[7]

[7] Pew Trust, *Jailhouse Snitch Testimony, A Policy Review*, http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf; Sklansky, *The Progressive Prosecutor's Handbook*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2916485

Non-judicial confessions, like judicial confessions, cannot be sole basis for conviction. CrPC Article 189(4) provides that confessions are not conclusive proof of the matters admitted but they may operate as estoppels. The prosecution must present some independent evidence providing basis for the existence of a criminal act.

If a lawyer prevails in excluding a statement to investigators as substantive evidence to prove the crime charged, the lawyer should be prepared to oppose the consideration of that statement for purposes of impeachment, based upon the same arguments about illegal

Judicial Confessions

Judicial Confessions are accused's statements made to a Judge. Much of the work of defense lawyer is spent preventing, trying to exclude from evidence or discrediting alleged confessions by the accused. In this next section we discuss how confessions are created, how they are used, and then consider how they may be challenged.

The best defense against a confession is preventing it from being it made in the first place! That it is why it is important for defense lawyers to assert their representation of the accused as early as possible during the investigation stage and to prevent the accused from making confessions. Once they are made, it is very hard to "unmake" them. See Counseling the Client Section.

Covey, Abolishing Jailhouse Snitch Testimony, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589608; *Secret Snitches: California case uncovers long-standing practice of planting jailhouse informants, ABA Journal,* http://www.abajournal.com/magazine/article/secret_snitches_california_case_uncovers_long_standing_practice_of_planting; *Corruption bias: defendant entitled to attack jailhouse informant's track record in past cases with extrinsic evidence;* http://www.pdsdc.org/professional-resources/criminal-law-blog/criminal-law-post/pds-criminal-law-blog/2015/04/27/corruption-bias-defendant-entitled-to-attack-jailhouse-informant-s-track-record-in-past-cases-with-extrinsic-evidence; *Defense Responses to Jailhouse Informant Testimony*, http://www.thejuryexpert.com/2014/02/defense-responses-to-jailhouse-informant-testimony/

Arguments Against Confessions

Listed below is an outline of possible legal and factual arguments to exclude or discredit an alleged confession by the accused.

1. The Confession is the Result of an Illegal Arrest or Detention

The Indonesian constitution and statutes protect the accused against illegal arrest or detention. Under global standards, an accused is protected against illegal search and seizure, and any evidence derived from such an illegality would be invalid.

In this argument, the Indonesian lawyer would have to argue that the police's failure to follow the law governing arrests and detention makes all subsequent statements by the accused invalid and involuntary (see below). The desired remedy would be the exclusion of the proffered statement. Cite to Const. of Indonesia, Article 27, Section 2 - Every citizen has the right . . . to live in human dignity; CrPC, Article 52 – a suspect has the right to freely give information to an investigator or judge. The elucidation of this article indicates that it is meant to prohibit the application of force or pressure against a suspect or accused.

Global standard:

- ICCPR art. 9(1): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. The Confession was Involuntary

It is established in Myanmar that involuntary statements cannot be used. Involuntary statements include those as a result of torture, but also those that are due to improper inducement, threats or promises.

An involuntary confession is irrelevant and inadmissible:

- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

This is consistent with international standards:

- ICCPR art. 14(3)(g): In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … Not to be compelled to testify against himself or to confess guilt.
- ICCPR art. 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Torture by Police can invalidate a subsequent Judicial Confession

Allegations of torture need to be investigated and framed carefully due to their controversial impact. The historic rule is that the prosecution needs to disprove that the confession was induced by torture once it is raised. Although there were rulings shifting the burden to the accused, these rulings were made by military dictatorship era courts, and thus should be viewed as an aberrance or departure from Myanmar law.

Burden of proof:

- Indonesian law does not address this, but generally, the prosecution has the burden to show lack of "any inducement, threat or promise" once this defense has been raised by the accused.

Issues of Involuntariness are not limited to physical torture.

A statement can be involuntary, even if the accused was not actually tortured. The elucidation to CrPC, Article 52 refers to the application of "force or pressure," so any inducement, threat, promise or coercion could qualify. An accused should only have to show fear was justified, not that he was actually physically tortured.

4. The Confession is Unreliable

As you make constitutional, statutory, or procedural arguments, do not forget that a judicial confession or non-judicial admission are subject to the same attacks about reliability as any piece of evidence. These in turn may buttress the other arguments. Possible arguments: the client is illiterate or not conversant in the language of the confession; facts in the confession don't match other evidence.

5. There is no other evidence proving the crime.

Corpus Delecti (body of the crime in Latin) stands for the principle that an accused cannot be convicted on his or her words alone. See also, CrPC, Article 189(4). There must be some other evidence to show that a crime occurred.

6. Confession did not include all ingredients of the crime.

While an accused may admit to being present or to having committed some acts, the confession may lack a necessary ingredient, such as intent or knowledge.

Use of Co-Accused Confession

A lawyer should raise the same challenges to the consideration of a co-accused statement as he or she would against the consideration of his or her own client's confession.

Please note that the uncorroborated in-court **testimony** of an accomplice CANNOT, by itself, be sufficient to convict. CrPC, Article 185(2).

Closing Arguments (Closing Summation)

General

A closing argument occurs at the end of a trial after the presentation of all evidence. In Indonesia, after the prosecutor submits the requisitory charges, the defense submits its closing argument. The prosecutor may reply to that argument, but the defense always has the right to speak last. CrPC, Article 182. Defence counsel should use this opportunity to persuasively argue the defense theory, with all the conclusions necessary for the result the defense is requesting.

During the summation, all of the evidentiary pieces should be brought together and the case should be presented in a strong, fluid, and persuasive manner. All points that help prove the elements establishing the theory of the case must be fully explained. The closing should be performed in a simple, yet precise way.

Useful Practical Tips:

- It is important to anticipate the arguments that may be made by the other side: prepare to rebut those arguments before they are made;
- Avoid attacking the other side's attorney: judges will not likely appreciate this type of argument. Under no circumstances engage in a personality battle with the opposing party or counsel – it is inappropriate and unprofessional;
- Use demonstrative evidence purposefully to make key points in your case (The use of demonstrative evidence greatly increases the effectiveness of the closing argument); and
- It is important not to cover all the evidence presented during trial: if the entire case is presented during closing, this becomes boring and one runs the risk of losing the judges. Instead, point out the highlights of the testimony and key evidence from the trial that support the defense theory.

- Lawyers should also be prepared to remind judges that they are sworn to uphold the law and only render a guilty verdict if the prosecution has proven each ingredient of a crime through two legal means of proof. Judges cannot use concerns about public opinion or public morals to accept an otherwise defective or inadequate prosecution.

In closing, counsel should finish his/her submissions by asking the judge to acquit the accused.

Final Decision and Sentencing

After final arguments, the head judge at trial declares the examination closed and consultations among the judges begins. The ideal is for a judgment to be reach by unanimous agreement, but if not, then by a majority vote. If a majority cannot agree, then the judgement is to be that of the judge most favorable to the accused. CrPC, Article 182.

The judgment can be rendered on the same day trial ends or on another day with notice to the prosecutor, accused or legal counsel. CrPC, Article 182(8).

If the court if of the opinion that the guilt of the accused has not be legally and convincingly proven, then it shall acquit the accused. CrPC, Article 191(1). If the court believes the act charged has been proven, but does not constitute an offense, then it shall dismiss the charges. CrPC, Article 191(2). In either case, the accused shall be released without delay if detained, unless there is another legal reason to hold him. CrPC, Article 191(3). A written report on the execution of the release order shall be delivered to the head of the court within 72 hours. CrPC, Article 192(2).

If the court believes that an accused is guilty, it shall impose a penalty. CrPC, Article 193. In Indonesia, the final arguments on guilt and innocence and sentencing arguments are not automatically dealt with in separate hearings. This can leave the defense lawyer with the task of both making a final argument for acquittal and requesting leniency in sentencing at once. Lawyers should ask for the opportunity to separate the verdict and sentencing. This can be either done through separate arguments on the same day, or, if need be and the client requests, an adjournment to a subsequent day. Separating the arguments for verdict and sentencing would also prevent the prosecution from introducing improper and prejudicial criminal history information in the verdict phase of the case.

Defense Arguments on Sentencing

This section reviews the law relevant to sentencing. In addition to knowing and using the law, lawyers must also develop their skills in presenting their sentencing arguments.

In a sentencing an offender for a crime and in order to determine an appropriate sentence, the sentencing judge may consider information from a number of sources, and taking into consideration a number of factors. Defence counsel should be aware of the kind of factors that courts will consider.

Aggravating and Mitigating Circumstances

In general, before a court imposes sentence, both the prosecution and defence are given an opportunity to address the court on sentence. The prosecution usually argues in aggravation of sentence while the defence will argue in mitigation. Numerous factors are placed in front of the court and this can include the following:

- The accused's criminal history (previous convictions);
- The charge and nature of the crime;
- The prevalence of a particular crime in a particular area or community;
- The interests of the victim;
- The interests of the offender;
- The interests of the community;
- The accused's personal circumstances (educational level, children, marital and employment status),
- Did the accused express of remorse;
- Whether the crime was premeditated and if it was, the level thereof;
- The seriousness of the crime;
- Circumstances surrounding the crime (for example was the accused provoked or not, if there are more than one accused a particular accused's level of involvement);
- Case authority related to similar offences;
- Evidence submitted by way of pre-sentencing reports (if applicable).

The judge will also consider input from the prosecution and defence in determining the sentence.

It is advisable, where applicable, to make the following further points during a closing argument in a sentencing hearing:

- A detailed personal history of the accused which may include, among other things, positive personal success, volunteer work and/or community service (this process if often referred to as "*humanizing the accused*");
- Possible alternatives to incarceration such as community-based probation, house arrest and/or placement in a half-way house (referred to as 'non-custodial' sentence options);
- Specific community service;
- Psychiatric/Psychological counseling;
- Victim restitution with a statement of remorse for the offence committed;
- The possibility of rehabilitating the accused;
- Specific employment options/coupled with a detailed work history;
- Any other mitigating circumstances to counter the prosecution's evidence in aggravation of sentence.

The goal of the defence lawyer should be to provide the court with any and all positive or other mitigating information about the accused that would assist the court in its sentencing determination.

Counsel should note that in the case of juveniles and/or younger accused, the case against imprisonment (especially long term imprisonment) is stronger than it would be for an accused of normal adult age. It is therefore imperative that where counsel represents a

juvenile or young accused counsel engages with the prosecution and court during sentencing proceedings to explore sentencing options *other* than direct imprisonment.

Whether orally or in writing, the lawyer should include:

- A persuasive summary of the evidence;
- A review of the relevant court rulings and statutes;
- An analysis of the facts relevant to sentencing;
- Evidence that mitigates the impact of the crime; and
- A request for the most reasonably favorable sentence.

Additional Sentencing Sections to Be Added

C. REMEDIES: APPEALS, CASSATION AND RECONSIDERATION

Ordinary Remedies

High Court Competence

A high court may adjudicate "cases that have been decided by a district court within the high court's jurisdiction for which an appeal has been lodged." CrPC, Article 87. It is important to note that the lodging of an appeal must be perfected within 7 days after the judgment is rendered or the accused becomes aware of the judgment. CrPC, Article 233(2). Failure to timely lodge the appeal results in a waiver of the right to appeal. CrPC, Article 234(1).

Supreme Court Competence

"The Supreme Court shall be competent to adjudicate all criminal cases for which cassation has been sought." CrPC, Article 88. A petition for cassation review must be lodged, with the clerk of the court which judged the case in the first instance, within 14 days after the petitioner becomes aware of the judgment for which review is sought. CrPC, Article 245. Failure to timely file a petition results in a waiver of review. CrPC, Article 246(1).

The grounds for cassation review are:

- That an applicable rule of law has not been applied or has been applied improperly;
- That the method of adjudication was not conducted in accordance with law; and
- That the court entering the judgment exceeded its competence.

CrPC, Article 253.

Extraordinary Remedies

Cassation In the Interest of the Law

CrPC, Article 259 – The Attorney General may submit a petition for cassation in the interest of law with respect to all judgments which have become final from courts other than the Supreme Court.

Reconsideration of a Final Judgment

CrPC, Article 263 – A convicted person or his heirs may submit a request to the Supreme Court for a reconsideration with regard to a judgment which has become final and binding, except a judgment of acquittal or a dismissal of charges. See also, Articles 264-267.

Suing the Police

In the context of an ongoing criminal case, the remedy sought in response to illegally acquired evidence is for it to be excluded from the trial. However, an accused who has suffered an illegal arrest, detention, search, seizure, prosecution, adjudication, "or other acts," can seek compensation and rehabilitation. CrPC, Articles, 95, 96, 98-101, 123, 124.

1. CrPC, Articles 95, 96; Articles, 98-101, 123, 124, all of which address remedies for unlawful arrests, detentions and prosecutions.

it suit for compensation may joined with the criminal case, CrPC, Article 98,(1) so long as it is timely. See, CrPC, Article 98(2). The rules of civil procedure apply to claims for compensation. CrPC, Article 101.

PART THREE: SPECIAL POPULATIONS

Lawyers should be aware of their special responsibilities to guarantee access to justice for vulnerable populations. This part of the Manual focuses on some special populations that may present unique needs and may face additional burdens as accused in the criminal justice system. Lawyers may wish to reach out to experts to ensure they are being client-centered and comprehensive in their representation of these groups.

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013

Principle 10. Equity in access to legal aid

Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally

displaced persons. Such measures should address the special needs of those groups, including gender-sensitive and age-appropriate measures.

JUVENILE CLIENTS – To Be Added

A. WOMEN AS ACCUSED

While the Indonesian Constitution, under Article 27, sections (1) and (2), guarantees that "all citizens have equal status before the law and in government" and that "every citizen has the right to work and live in human dignity," women do not have the full benefit of those protections in Indonesian society or under Indonesian law.

Women make up a relatively small percentage of the accused. But lawyers should understand the particular circumstances that cause women's involvement in the criminal justice system—poverty, mental and physical illness, trauma, gender-based discrimination, and ethnic and religious discrimination. Lack of access to steady employment and economic opportunity has led to increasing numbers of women being arrested for non-violent offenses like prostitution, drug or property crimes.

Women often suffer abuse once arrested, and police may discourage women from offering a defense by claiming that doing so will result in a more severe sentence. Women accused report inappropriate touching by police officers during transportation between detention centres and courts, as well as being intermingled with male detainees. Judges may chastise women in the courtroom for "bringing shame" on themselves.

Indonesian law contains provisions that conflict with women's rights or discriminate against them. For example, while men may practice polygamy, women may not. Also, in Indonesia, abortions are legal under limited circumstances, but difficult to obtain. Thus, many abortions that might be legal under international standards are criminalized in Indonesia.

Until 2004, the rape of a wife by a husband was not a crime. In 2004, Law No. 23 "Regarding the Elimination of Violence in [the] Household" was enacted. It prohibits violence against any person within the scope of a household, including sexual violence. Article 5. Article 8 specifically prohibits "forced sexual intercourse," and makes that offense punishable by no less than 4 years and not more than 15 years, unless certain injuries occur, in which case the authorized punishment is not less than 5 years nor more than 20 years. Articles 47 and 48. Other sexual violence is punishable by not more than 12 years. Article 46.

Prostitution

Women often come to court facing charges of prostitution. Some women turn to sex work after being displaced by family for consensual and non-consensual pre-marital sex, after

domestic violence, land disputes, or being excluded from other regular employment.[8] Sex work may seem to be the only way for them to support themselves and their families. Sex workers report being entrapped by informants and police officers engaging women for services before arresting them. Since prostitution is illegal, sex workers have no legal remedy if police or clients are violent, refuse to use a condom, or do not pay.[9]

Media reports include stories of women falsely accused because they are in the "wrong place" at the wrong "time" or have money that they cannot sufficiently account for to police. Police may make accusations hoping to receive bribes. Periodic public morality campaigns result in mass arrests in areas known for prostitution or drug use. In those situations, judges are reluctant to do anything but convict the accused. Judges may rely upon a woman's general reputation rather than the specific evidence in front of the court to find guilt. Although reportedly the possession of condoms is no longer admissible to prove the charge of prostitution, this is not being observed in practice. Abortion is legal, but difficult to obtain in a legal manner, and women caught carrying condoms are vulnerable to accusations of prostitution.

Women may choose to admit guilt even when the charges are not true. They may do so to speed up the trial proceedings and avoid the difficulties associated with detention, transport and courtroom conditions.

Other Charges

In addition to the charges of prostitution, women can be also vulnerable to the same sodomy offenses and "in the shadows" offenses discussed in the section on LGBT clients. Section 377 deems these relations criminal acts of "carnal intercourse against the order of nature." Women in same sex relationships undergo an immense amount of stigma, which often affects their employment opportunities.

Defending Against the Monogamy Law Charges

(To be added later.)

Battered Spouse Syndrome

Sometimes women that have been the subject of physical and emotional abuse strike back at their attackers, and then are themselves charged with a crime. These women frequently suffer from "battered persons syndrome," and there is a substantial amount of research

[8] Bhattacharjya, M., Fulu, E., Murthy, L., Seshu, M. S., Cabassi, J. & Vallejo-Mestres, M. (2015). *The Right(s) Evidence: Sex Work, Violence and HIV in Asia.* UNFPA, UNDP, Asia Paci c Network of Sex Workers, SANGRAM. Retrieved from http://asiapaci c.unfpa.org/sites/asiapaci c/ les/pub-pdf/Rights-Evidence-Report-2015- nal_0.pdf

[9] DVB, Sex worker law in reformists' sights, but can govt deliver? 24 April 2017 http://www.dvb.no/news/75176/75176

about the effect of this syndrome and its use as a potential defense in court.[10] This can be relevant in preparing a specific defense such as "right of private defense."

Lawyers Must Work for Gender Equality in Criminal Justice

A recent assessment of women's access to justice made specific recommendations that should be pursued by criminal defense lawyers:

- Work with men and women - court clerks, lawyers, law officers, advocates, police officers, relevant medical personnel, civil servants and judges – is needed to increase gender sensitivity and accurately define their roles in improving women's access to justice and preventing violence against women and girls.
- Introduce or continue to improve secure conditions for women in courtrooms, detention centres, police transport vehicles, jail cells and prisons.

Lawyers must work to improve the conditions for individual female clients, for female lawyers, and for women as a class so that they can fully exercise their constitutional rights to a defense, and to work and live in human dignity, as well as their statutory rights to "justice and gender equality, non-discrimination, and victim protection." Law No. 23 of 2004, Article 3.

They should consider collaborating with programs like ????? See Resources below.

The Relevant Law

Constitution:

- Constitution, Article 27 guarantees citizens "equal status before the law and in government. . . ." as well as "the right to work and live in human dignity."

Law No. 23 of 2004 "Regarding the Elimination of Violence in [the] Household."
Regulation of the Chief of Police of the Indonesian National Police Force, No. 3 of 2008.

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[10] Walker, *Battered Woman Syndrome,* http://www.psychiatrictimes.com/trauma-and-violence/battered-woman-syndrome; *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*, USDOJ Report (1996); https://www.ncjrs.gov/pdffiles/batter.pdf; Field, et al, *Women Accused of Homicide: The Impact of Race, Relationship to Victim, and Prior Physical Abuse*, http://www.scirp.org/journal/PaperInformation.aspx?paperID=78345; Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, Out of the Battered Woman*, 81 N.C.L. Rev. 211 (2002), http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1105&context=faculty_scholarship.

Global Standard

- CEDAW Article 5. The state must "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices."
- CEDAW Article 15(1). States must grant "women equality with men before the law,"
- CEDAW Article 2(c). States must "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination."