

INDIA

Criminal Defense Manual



International Bridges to Justice
64 rue de Monthoux
CH-1201 Geneva Switzerland
Tel: +41 22 731 2441
Fax: +41 22 731 2483
www.ibj.org
internationalbridges@ibj.org



INTERNATIONAL BRIDGES TO JUSTICE

CRIMINAL DEFENCE RESOURCE MANUAL

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INTERNATIONAL BRIDGES TO JUSTICE MISSION STATEMENT

“In recognition of the fundamental principles of the Universal Declaration of Human Rights, International Bridges to Justice (IBJ) is dedicated to protecting the basic legal rights of ordinary citizens in developing countries. Specifically, IBJ works to guarantee all citizens the right to competent legal representation, the right to be protected from cruel and unusual punishment, and the right to a fair trial.”

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ABOUT INTERNATIONAL BRIDGES TO JUSTICE

Founded in 2000, International Bridges to Justice (IBJ) is building a global movement of justice-makers to end torture in the 21st century and strengthen the rule of law across the world. IBJ collaborates with state, civil, and community-based organizations to comprehensively reform criminal justice systems that respect the rights of every individual. IBJ's works to ensure that legal counsel is provided to the accused of the earliest stages of the criminal process in the hopes of significantly reducing instances of torture. IBJ's primary focus is the empowerment and support of the drivers of the criminal justice system—public defenders. IBJ is a US 501(c)(3) organization with programs in Burundi, Cambodia, China, Rwanda, Vietnam, and Zimbabwe.

OUR VISION

We envision a world where the basic legal rights of every man, woman and child are respected in particular: the right to competent legal representation, the right to be free from torture and cruel treatment and the right to a fair trial. A world where each and every citizen is knowledgeable about his/her rights and is empowered to demand that they are upheld in practice. A world where international human rights standards and relevant local laws are brought to life in the everyday practice of justice.

OUR MISSION

In recognition of the fundamental principles of the Universal Declaration of Human Rights, International Bridges to Justice (IBJ) is dedicated to protecting the basic legal rights of ordinary citizens in developing countries. Specifically, IBJ works to guarantee all citizens the right to competent legal representation, the right to be protected from cruel and unusual punishment, and the right to a fair trial.

OUR APPROACH

IBJ works with legal aid lawyers, state institutions, legal aid organizations, community-based organizations, and other interested stakeholders to fulfill its mission. IBJ engages in a three-pillar programming approach to ensure comprehensive criminal justice transformation:

- *Defender Capacity Building* – as the drivers of the criminal justice system, we focus most of our support on the empowerment of public defenders/legal aid lawyers through skills development, training programs and materials, on-the-ground resource centers, international community-building, and technical support
- *Institutional Capacity Building* – in recognition that implementation of the rule of law requires the cooperation of all participants within the justice community, IBJ joins with defenders, prosecutors, judges, police, detention center officials, local government representatives and legal academics in Criminal Justice Roundtable sessions to build mutual respect and establish the foundation for long-term criminal justice reform.
- *Rights Awareness* - the lack of information and knowledge of legal rights by average citizens is a major factor enabling the continuation of rights abuses; thus, IBJ administers Advisement of Rights campaigns through various communication tools (e.g. posters, brochures, street law sessions) to empower citizens to advocate for their own legal rights

OUR IMPACT

Currently, we have programs in seven countries: Burundi, Cambodia, China, India, Rwanda, Vietnam, and Zimbabwe. Since IBJ's inception in 2000, IBJ has:

- Trained well over 10,000 lawyers in China, Vietnam and Cambodia
- Circulated nearly a million advisement of rights brochures and posters to the public in China, Cambodia and Burundi
- Produced a practical Defender Toolkit for over 500 Legal Aid Centers in China and Cambodia

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THE ROLE AND RESPONSIBILITY OF A LEGAL AID LAWYER

Importance of a Legal Aid Lawyer in the Criminal Justice System

The prosecutor's role is to argue the side of the state that seeks to prove that the accused is guilty of the crimes charged. The legal aid lawyer's role is to argue on behalf of the accused. The criminal justice system recognizes that in a criminal proceeding the state is asserting its ultimate authority over a single civilian. The use of this authority is carefully watched and different safeguards are in place to prevent abuse of the state's power.

- The state bears the highest burden of proof in the Indian legal system, and must show that an accused is guilty beyond a reasonable doubt of the crimes he is charged with. Subject to certain exertions wherein the law provides the burden of proof is on the accused.¹
- No burden is placed on the accused in almost all types of Criminal Cases. He need not present any evidence and he may not testify or give his own version of events. In such circumstances his failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial.²
- Many procedures are in place related to the investigation and the arrest of the accused to ensure all evidence is accurate and that the correct person is charged with a crime.
- The accused possesses rights to ensure that he is treated fairly and given an opportunity to argue his own case.
- The legal aid lawyer presents all evidence to rebut the prosecutor's arguments and challenges all questionable assertions of facts by the prosecutor to ensure the high burden of proof is met.
- The legal aid lawyer challenges procedural errors and may have charges dismissed or reduced because of unreliable evidence and testimony.

¹For example Section 139 of Negotiable Instrument Act, Narcotics Drugs & Psychotropic substances Act, 1985, Section 304B of Indian Penal Code 1860, Section 113 A & Section 113 B of Evidence Act

²Section 315 of Criminal Procedure Code, 1973.

- It is the responsibility of a legal aid lawyer to inform the accused about his legal rights and defends those rights if they have been violated.

The Legal Aid Lawyer as the First Line of Defense

It is important for an accused to obtain the help of a legal aid lawyer as early as possible. There are many actions that a legal aid lawyer should take to protect and aid an accused at an early stage of the trial which may not be possible as the case progresses.

- The legal aid lawyer should inform the accused of his rights in the beginning (such as the right to remain silent).
- The legal aid lawyer should seek the temporary release of the accused through bail, thereby enabling the accused to better assist in the preparation of a defense.
- The legal aid lawyer should address arguments on the charges before the court and argue before the trial court to get them dropped or reduced.

In addition, the legal aid lawyer must counsel the accused on different strategies and arguments that can be used in the case as well as the benefits and drawbacks for each one.

- The legal aid lawyer works with the accused and defense witnesses to understand the accused's version of events and to determine an appropriate defense (e.g. alibi, self-defense, unsoundness of mind and intoxication and misidentification).
- The legal aid 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.
- The legal aid lawyer must examine evidence and plea before the trial court to call witnesses on behalf of the defense, as well as cross-examination of prosecution witnesses. In case of appealing convictions the legal aid lawyer must examine the judgment given by the trial court based on the evidence and testimony before it.

Legal aid lawyers are societies last line of defence against the incursion of the state against a clients civil liberties and constitutional rights. The legal

aid lawyer 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.

Ethics and Professional Responsibility

The legal aid lawyer has several basic duties to his client and his role as a legal aid lawyer.

- The legal aid lawyer serves as the counsellor and advocate for the accused.
- The legal aid lawyer should seek to reform and improve the administration of criminal justice and seek to correct inadequacies or injustices in the substantive or procedural law.
- The legal aid lawyer should act with diligence and promptness when representing the accused.
- The legal aid lawyer should conduct a prompt investigation into the facts relevant to the case and the penalty in the event of conviction, including securing information in the possession of the prosecution and law enforcement authorities.
- The legal aid lawyer's duty to represent the accused's interests is balanced by his duty to act in an ethical and professional manner.
- The legal aid lawyer does not have to follow any instructions from the accused that would be illegal or unethical.
- The legal aid lawyer must avoid conflicts of interests with the accused and all other parties involved in the case. This also means that the legal aid lawyer may not represent co-accused if their defenses will be adverse to one another.

Professionalism

It is important for the legal aid lawyer to act in a professional manner at all times when dealing with the judge and the prosecutor. The legal aid lawyer has a duty to provide effective representation to the accused at all times. Unscrupulous or unethical behavior damages the reputation and credibility of the legal aid lawyer. As the representative of the accused, such acts also damage the reputation and credibility of the accused.

RIGHTS OF THE ACCUSED AND EXCEPTIONAL CIRCUMSTANCES

BACKGROUND

The accused in India are afforded certain rights, the most basic of which are found in the Indian Constitution. The general theory behind these rights is that the government has enormous resources available to it for the prosecution of individuals, and individuals therefore are entitled to some protection from misuse of those powers by the government.

Most of the rights discussed below have been developed through many years of case law and as a result some of the rules have become quite complex. This section should be viewed as an overview of the most significant rights of the accused.

The principal rights discussed in this section are as follows:

- The prohibition against unreasonable searches and seizures.³
- The privilege against compulsory self-incrimination.⁴
- The right to a fair and speedy trial.⁵
- The right to the assistance of counsel.
- The prohibition against cruel and ill treatment.

Rights with Police

There are several provisions of the Constitution of India, The Criminal Procedure Code, 1973, and The Indian Evidence Act, 1872 that govern a suspect's rights prior to trial. The U.S. Constitution provides similar provisions though the 1st, 5th and 6th Amendments.

Miranda Rights

In a landmark case decided by the United States Supreme Court, *Miranda v. Arizona*, the court ruled that when a suspect is taken into police custody,

³ 100 & 102

⁴ Art 20(3) of The Constitution of India

⁵ Art 22(1) of The Constitution of India

prior to any interrogation by the police, the suspect must be provided with a warning advising the suspect of his constitutional rights secured through the 1st, 5th and 6th Amendments. These are often called the “Miranda Rights” or the “Miranda Warning.” If the police fail to give these warnings or the suspect doesn’t knowingly and voluntarily waive these rights, any statements the suspect makes cannot be used at trial.

The rights are as follows:

- You have the right to remain silent.
- Anything you say can and will be used against you in a court of law.
- You have the right to a lawyer.
- If you cannot afford a lawyer one will be appointed for you.

Miranda rights are only required to be read to a suspect, when the suspect is in the custody. A suspect is in custody if his liberty is constrained in such a way that a reasonable person would not free to leave. The rights are also only required to be read to a suspect when a suspect is interrogated by the police. Interrogation need not be direct questions. It occurs when the police make statements that could reasonably be expected to elicit an incriminating response. The *Miranda* decision also mandated that if a suspect is being questioned by the police, and the suspect requests a lawyer, the police must stop the questioning until the suspects lawyer arrives. If a suspect invokes his right to remain silent all questioning related to the particular crime must stop.

In the Indian legal system, Article 22(1) of the Constitution of India provides that the arrested person should be informed as soon as possible about the grounds of his arrest and he shall not be denied the right to consult with and to be defended by a legal practitioner of his choice. Article 20(3) of the Constitution of India, which is based on the 5th Amendment of the U.S. Constitution made in 1791 provides that “**no person accused of any offense shall be compelled to be a witness against himself.**”

Search and Seizure

Every citizen has the right to be free from unreasonable government intrusion into his or her person, home, business, and property. Lawmakers

and the courts have put in place legal safeguards to ensure that law enforcement officers conduct searches and seizures only under certain circumstances, and through specific methods.

Conviction of the accused based on the admissibility of the evidence obtained during a search conducted in contravention of the provision prescribed in the Criminal Procedure Code 1973 may be excluded if the irregularity represented caused a failure of justice to the accused. The legal aid lawyer has to demonstrate that the police or investigating authority ignored the law which caused the failure of justice. If the appellate court finds the search was invalid, the appellate court will not overturn the conviction if the prosecutor successfully argues that the erroneous admission of the evidence was harmless, and would not have changed the outcome of the trial.

Arrests

An arrest must always be based on probable cause. Probable cause to arrest exists when, at the time of the arrest, the officer is relying on reasonably trustworthy facts and circumstances sufficient to lead a reasonably prudent person to believe that the accused has committed or is committing a crime.

An officer need not obtain an arrest warrant for an accused except in non-cognizable offences, however, he must receive an arrest warrant provided that the accused provides his name and address. In non-cognizable cases in order to enter an accused's home to arrest the accused, police must generally have a warrant. Upon entry, the officer may search for the person to be arrested, but no provision is made for a general search of the premises for evidence.⁷

Search of place entered by person sought to be arrested

When the police wish to search a person's property, they are generally required to present their basis for probable cause to a judge, who will issue a search warrant if the judge agrees that probable cause is present and that the evidence is likely not going to be produced with a judicial summons. Probable cause exists if the evidence presented would lead a reasonable

⁷Section 47 of the Criminal Procedure Code

person to believe that a crime has been committed and the suspect is connected to the crime. The judge shall record his reasons for issuing the warrant either on the warrant or elsewhere, unless there is documentation which demonstrates independently, why the search warrant should be granted. Upon a lawful arrest, without a warrant where the accused cannot legally be admitted to bail or is unable to furnish bail, the police are entitled to search the person but should do so in the presence of a witness⁸. The police are required to furnish a receipt for all seized items. The limitations on searches apply only when the suspect has a reasonable expectation of privacy. For example, a police search of a public place would not implicate a suspect's right to be free of an unreasonable search because the suspect does not have any expectation that that place is private.

Confessions

No confession made to a police officer is valid as evidence. All confessions must be made to a Magistrate not below the rank of Judicial Magistrate. The Magistrate taking the confession must give the accused due time out of the custody of the police, and make an effort to ensure that the accused was not coerced or intimidated in any way, before receiving the confession. At the bottom of the confession the Magistrate must write out that he has informed the accused that this confession may be used against him and he is not obligated, in any way, to incriminate himself⁹.

RIGHT TO COUNSEL

Article 22 of the Constitution of India guarantees an accused the right to a lawyer. Decisions of the court made without the accused having been provided a lawyer are not valid.¹⁰ Hon'ble Supreme Court in *Hussainara Khatton (IV)*¹¹ has held that "...the right to free legal service is clearly an essential ingredient to a reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the status under constitutional mandate to provide a lawyer

⁸ Section 51 of the Criminal Procedure Code

⁹ Section 164 of the Criminal Procedure Code

¹⁰ *Khatri (II) v. State of Bihar (1981) 1 SCC 627*

¹¹ *Hussainara Khatton & Ors. V. Home Secretary, Bihar, Patna, (1980) 1 SCC 98*

to an accused person if the circumstances of the case and the needs of justice so required...”

The right to counsel applies at all custodial interrogations (i.e. the accused has been brought into police custody for questioning) and at all critical stages of a prosecution after formal proceedings have begun. These stages include post-indictment interrogations, arraignment, guilty plea, and trial.¹²

RIGHTS AT TRIAL

The accused is guaranteed a number of rights during a criminal trial.

Right to a Fair Trial

The Constitution under Article 14 guarantees the right to equality before the law.¹³ The Code of Criminal Procedure also provides that for a trial to be fair, it must be an open court trial.¹⁴ This provision is designed to ensure that convictions are not obtained in secret. In some exceptional cases the trial may be held in camera.¹⁵

Every accused is entitled to be informed by the court before taking the evidence that he is entitled to have his case tried by another court and if the accused subsequently moves such application for transfer of his case to another court the same must be transferred. However, the accused has no right to select or determine by which other court the case is to be tried.¹⁶

RIGHT TO CONFRONT WITNESSES

The accused has a right to confront only witnesses.¹⁷ This right ensures that the accused has the opportunity for cross-examination of the adverse witness.

¹² *State of M.P. v. Shobharam*, AIR 1966 SC 1910 : (1966) Cri LJ 1521

¹³ *Article 14 of the Constitution of India*,

¹⁴ *Criminal procedure code* Sec 327

¹⁵ *U/s 376 – 376D of Indian Penal Code*

¹⁶ *Section 191 of the Criminal Procedure Code 1973*

¹⁷ *Section 138 of the Indian Evidence Act*

If a witness is unavailable at trial, a testimonial statement of the witness maybe dispensed by issuing commission. The testimony at a formal trial is one example of prior testimonial statements which can be used as documentary evidence in a subsequent trial.¹⁸

Right to a Speedy Trial

The Constitution provides an accused the right to a speedy trial. Although this right is not explicitly stated in the constitution, it has been interpreted by the Hon'ble Supreme Court of India in the judgment of Hussainara Khatoon.¹⁹ This judgment mandates that an investigation in trial should be held “as expeditiously as possible”.²⁰ In all summons trials (cases where the maximum punishment is two years imprisonment) once the accused has been arrested, the investigation for the trial must be completed within six months or stopped on an order of the Magistrate, unless the Magistrate receives and accepts, with his reasons in writing, that there is cause to extend the investigation.²¹ The accused is not to be detained in police custody for more than 24 hours without being produced before a Magistrate.²² An officer not below the rank of sub-inspector is to transfer the accused to a Judicial Magistrate who may allow the accused to be held for up to fifteen days in police custody. If a Judicial Magistrate is not available, an Executive Magistrate so empowered by the High Court may allow for a detention of up to seven days, which a Judicial Magistrate may extend up to not more than fifteen days in total. At the expiration of these fifteen days, if a Magistrate believes adequate grounds exist, he may allow for the suspect to remain in the judicial custody for a period up to ninety days total (including the original fifteen) for a case involving potential punishment of more than ten years imprisonment or up to sixty days for all other cases. The accused has the right to get bail in case the prosecution fails to submit the charge sheet within a period of ninety days of such custody.

¹⁸ Section 33 of the Indian Evidence Act, 1872

¹⁹ *Hussainara Khatoon & Ors. V. Home Secretary, Bihar, Patna, (1980) 1 SCC 98*

²⁰ Section 309 of the Criminal Procedure Code

²¹ Section 167 of the Criminal Procedure code

²² Article 22(2) of the Constitution of India

In cases involving punishment of more than ten years; the charge sheet has to be submitted within a period of sixty days by the prosecuting agency.²³ The following factors should be considered in determining whether an accused's right to a fair trial has been compromised: period of the delay, reason for the delay, whether the accused asserted his right, and prejudice to the accused. Loss of evidence, such as the death of a key witness, or the inability of witnesses to testify accurately after a long delay, can be powerful tools for the defense.

RIGHTS WHILE DETAINED

In India, persons accused of committing a crime have a series of rights, some of which are guaranteed by the Indian Constitution and others the result of case law or statutes.

When the accused is arrested in warrant cases the Magistrate may notify the accused of his right to bail and prescribe the amount of bail bond on the warrant, at which point the arresting officer will release the accused on execution of bail bond. Likewise, in the cases of bailable offences,²⁴ any officer arresting a suspect without a warrant is obligated to tell them of their right to bail upon arrest. The accused should be advised that he has a right to a legal aid lawyer and that one will be appointed if he cannot afford to pay for the legal services. The arresting officer must, without delay, bring the detained person to the officer-in-charge for all arrests without warrant and the officer-in-charge must report all arrests to the concerned Magistrate.²⁵

The accused has the right to have a person of his choosing be informed of his arrest and for that person to be told where the accused is being detained. The opportunity to advise this person of the arrest should be afforded to the accused upon arriving at the police station and shall be communicated by the arresting officer to the person nominated by the accused.²⁶

²³ Section 167 of the Criminal Procedure Code 1973

²⁴ Section 50 of the Criminal Procedure Code

²⁵ Section 58 of the Criminal Procedure Code

²⁶ Section 50A of the Criminal Procedure Code

The Hon'ble Supreme Court in "*D.K. Basu v. State of West Bengal*,"²⁷ laid down the following guideline:

- 1 The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
- 2 That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.
- 3 A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
- 4 The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
- 5 The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
- 6 An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

²⁷ *D.K Basu vs. State of West Bengal* (1997) 1SCC, 416.

- 7 The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The “Inspection Memo” must be signed both by the arrestee and the police officer affecting the arrest and a copy provided to the arrestee.
- 8 The arrestee should be subjected to medical examination every 48 hours during his detention in custody by a trained doctor on the panel of approved doctors appointed by the Director of Health Services of the concerned State or Union Territory. The Director of Health Services should prepare such a panel for all Tehsils and Districts, as well.
- 9 Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.
- 10 The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
- 11 A police control room should be provided at all District and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

The accused has the right to be treated decently while he is in custody. He must be provided with food and drink, clothing as necessary as well as sleeping and washing facilities. The accused cannot be “punished” or treated as guilty while he awaits trial. While detained, the accused retains the right to court access and to a legal aid lawyer. That access may be subject to security restrictions typically used in a detention facility.

RIGHTS TO APPEAL AGAINST CONVICTIONS

Section 374 of the Criminal Procedure Code, 1973 states that any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court. Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years has been passed against him, may

appeal to the High Court. Any person convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class, may appeal to the Court of Session.

Any miscarriage of justice that demonstrates prejudice to the accused is a potential ground of reversal of the trial on appeal.²⁸ However, any mistake which does not jeopardize the fundamental fairness of the trial is not grounds for reversal on appeal. By way of example, if a case which should have been tried as a warrant case is tried as a summons case (where the standards for recording of evidence are lower) there would be grounds for reversal, but the same would not be true in reverse. It the best practice to bring up irregularities as soon as possible during the case, rather than to present them on appeal. However, an appeal cannot be thrown out only because irregularities were not brought up during the original trial. Finally, a strong case for reversal on appeal would be if police discounted evidence which could have helped exonerate the accused.³¹ A full list of irregularities which do or do not overturn a trial on appeal are listed in the Cr.P.C.²⁹

If it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing an arrest, the Magistrate may award such compensation, not exceeding one thousand rupees, to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.³⁰ Criminal charges may also be filed on the police for wrongful confinement.

²⁸ *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, at page 206

²⁹ Section 460-466 Chapter XXXV of the Criminal Procedure Code

³⁰ Section 358 of the Criminal Procedure Code, 1973

³¹ *Pursottam Jathanand v. State of Kutch*, AIR 1954 SC 700

CLIENT INTERVIEW

THE FIRST CLIENT INTERVIEW

The legal aid lawyer should meet with the client as soon as possible in order to gather preliminary information for building an effective defense. In the first interview, the lawyer should inform the client of the legal procedures of his case and explain his role as the legal aid lawyer. If possible, counsel should meet with their client within 48 hours after he or she has been placed in custody, or within 48 hours of appointment to the case, whichever is sooner.

Establishing the Lawyer-Client Relationship

The initial interview is the most important meeting that the legal aid lawyer will have with the client. The first impression is lasting and is key in shaping the client's judgment of the lawyer. Therefore, the lawyer's primary objective in the initial interview is to establish an attorney-client relationship grounded on mutual confidence, trust and respect.

Listen to the client's story

To be an effective interviewer and communicator, you must learn to use basic listening skills. Try to understand your client's goals and concerns. Let your client know that you are not there to judge him but are, in fact, trying to get him out of trouble. Let the client know that he has control of the interview, for example:

1. "Let's do this: why don't you tell me first why you think the police arrested you. I'll take a few notes and then ask you some questions. Then, we'll try to figure out what we can do to help you. Does that work for you?"
 - a. Encourage the client to give a full narrative of what happened.
 - b. If possible, have your client write down his version of what happened.
2. Listen and observe. By listening to others, you show your respect for them. Use body language that demonstrates you are listening and seeking to understand what he is saying.

- a. Do not fold your arms or lean back casually. Lean towards your client as he talks to show him you're listening, Encourage your client to share more by nodding your head and saying things like, "Uh huh," "I see," or "I understand." Echo back what the client says. Look directly at the client and make steady eye contact, indicating your interest and concern.
- b. Take brief notes to guide you in asking follow-up questions. Note taking also expresses your interest. Before taking notes, remember to ask if they mind and explain that you are only taking notes in order to remember the details.

Cede some control to the client during the beginning portion of the interview.

As mentioned, it is helpful to give control of the interview to the client at the beginning of the narrative segment of the interview. This allows the client to get his troubles "off his chest" by sharing it with you, the problem-solver, and most clients appreciate the opportunity to vent their frustrations, fears, anger, and anxieties. The only negative aspect of giving the client control is that he may tell you more than you need to know at this early stage.

After listening to the client's narrative, repeat it back to him. In this way, the client will know that you have been carefully listening and that you understand his narrative.

IN THE CLIENT INTERVIEW, WHAT RESPONSIBILITIES DOES THE LEGAL AID LAWYER HAVE?

When interviewing the client, the legal aid lawyer must inform the client about what he can and cannot legally do to assist the client and must advise the client of his client's rights.

Tell the client that any information he shares about the alleged crime is confidential; however, inform him that you cannot do anything illegal on his behalf.

1. Advise the client of his rights:
 - a. The presumption of innocence—that the he is presumed innocent until judged guilty by the court according to the law and the burden of proof.
 - b. The right to have a lawyer protect his legal rights and interests.

The lawyer will work his utmost to defend his client's innocence or mitigate the client's sentence.

- c. Hearings are conducted in the spoken language commonly used in the locality-judgments, notices, evidence and other documents shall be issued in the written language of the court. If any evidence is given in a language not understood by the accused and he is present in the court, it shall be interpreted to him in open court in a language understood by him. If client is represented by counsel and the evidence given is in a language other than the language of the court, and not understood by counsel, it shall be interpreted to counsel in that language. When documents are offered for the purpose of evidence it shall be in the discretion of the court to interpret as much of the document as appears necessary.³²
- d. The evidence that the prosecution can present to the Court is limited to witness testimony, sworn affidavits (recorded by another Magistrate), statements made to the police only when the defense uses those statements to refute the witness's testimony (and only the aspects of the statement referred to by the defense in cross examination), expert testimony, genuine documents and properly seized evidence, and a verified First Information Report.
- e. Legal aid lawyers may collect information pertaining to the case and they may apply before the trial court to summon witnesses to appear in court and give testimony.
- f. If a Magistrate declines the request of the accused for summoning of defense witnesses that order may be set aside by the Superior Court on appeal.³³
- g. The client has the right to refuse an unlawful search. If the client is not shown a search warrant before the search is to be conducted, then the search is probably unlawful. Any articles and documents discovered during an inquest or search that may be used to prove a criminal suspect's guilt or innocence may be seized, but articles and documents that are irrelevant to the case may not be seized. All seized articles and documents shall be carefully checked by the investigators jointly with the

³² Section 279 of the Criminal Procedure Code, 1973

³³ Section 233, 243, 254(2) of the Criminal Procedure Code

eyewitnesses and the holder of the articles; a detailed list shall be made and duplicated on the spot and shall be signed or sealed by the investigators, at least two eyewitnesses of respectable repute in the community and the holder. One copy of the list shall be given to the holder, and the other copy shall be kept on file for reference.³⁴ The Code of Criminal Procedure makes no provisions for warrantless searches unless they are made in the presence of a Magistrate entitled to issue a search warrant, or if they are searches for a person who may be arrested without warrant in a closed property. However this does not inherently give the police the right to make a search of that place for evidence.

- h. The client has the right to refuse to answer any questions that would incriminate him, and cannot be prosecuted for lying in response to questions.³⁵ No statement made by anyone during the course of investigation by the police is to be signed by any witness or the accused (other than the FIR which must be signed by the complainant or witness and the officer who received the statement after it has been verified by the complainant). Any statements made to the police may be recorded by the officer, but can only be used in court to refute, or later corroborate the testimony of a witness.³⁶ If the defense is not furnished with a copy of the statement as required under sections 207 and 208 of the Cr.P.C, this should not vitiate the proceedings.³⁷
- i. It shall be strictly forbidden to collect evidence by threat, inducement, deceit or coercion except to tender pardon to an accomplice for testifying about a crime. This applies at all periods during the investigation and trial.³⁸

Information to be obtained in initial client interview:

- 1. Facts of the case relating to your client;
- 2. Any witnesses or jointly accused persons who should be found;

³⁴ Section 100 of the Criminal Procedure Code

³⁵ Article 20(3) of the Constitution Of India.

³⁶ Section 162 of the Criminal Procedure Code

³⁷ Noor Kahn v. State of Rajasthan, AIR 1964 SC 286: (1964) 4 SCR 521

³⁸ Section 24 of The Indian Evidence Act and Section 316 of the Criminal Procedure Code

3. Any evidence of misconduct by the police or prosecutor that has infringed on the client's rights;
4. Any evidence that can be preserved; and
5. Whether your client is capable of attending the trial and his mental state at the time of the alleged crime.
6. The legal aid lawyer must try to answer the client's most pressing questions!
7. Try your best to meet your client's most urgent needs, for example, providing contact with his family members or employer, or providing him with medical or mental treatment!

CLIENT INTERVIEW CHECKLIST

Circumstances of the Arrest

1. First Interview
 - a. When were you arrested?
 - b. Where were you arrested?
 - c. Who arrested you?
 - d. Were you informed of the reason for your arrest?
 - e. Did you understand the reason for your arrest?
 - f. At the time of your arrest, were you shown an arrest warrant or summons?
 - g. Were you able to read and understand the arrest warrant?
 - h. Were you provided a copy of the warrant or summons?
 - i. Were you informed of your legal rights?
 - j. Was your family or work unit notified of the reasons for your detainment and of the place of custody?
 - k. Where you presented before a Judicial Magistrate within 24 hours of your arrival at the police station?
 - l. Did the Magistrate sanction you to remain in custody? If so, for how long?
 - m. Were you presented a FIR or told on what grounds you were being detained?

- n. Was anyone else arrested at the same time you were? If so, do you know their names, addresses and telephone numbers and how to contact their family members? Do you know what offenses they were charged with?
2. Search and Seizure
- a. Were you strip-searched?
 - b. What has been taken from your person?
 - c. Were any of your clothes seized? Were any articles taken from your clothes?
 - d. Were any of your bodily fluids or hairs taken for testing?
 - e. Was a search conducted at the place of your arrest?
 - f. Was a search conducted at your residence?
 - g. Was a search conducted at your workplace?
 - h. Do you know of any other people or places that were searched? If so, what are the people's names, addresses and telephone numbers? What are the addresses of the places searched, and what types of places are they (e.g., residences, workplaces)?
 - i. Did you see the police or investigators seize any evidence?
 - j. What objects were seized?
 - k. Was there a search warrant, and did you see it? Did you understand it?
 - l. Were there any witnesses present at the time of the search? If so, what are their names, addresses and telephone numbers?
 - m. Was the search recorded? Did the investigators sign it? Did you sign it? Did anyone else sign it?
 - n. Did the investigators make a detailed list and duplicate copy of the articles and documents seized at the scene? Did they give a copy of the list to the owner of the seized items?
3. Interrogation
- a. What was said to you at the time of your arrest?
 - b. What was said to you after your arrest?
 - c. Who interrogated you; did they wear nametags or other means of personal identification? How many people interrogated you?

- d. Who initiated the conversation with you?
 - e. How did you respond to them?
 - f. What was your state of mind at the time?
 - g. Were your statements recorded?
 - h. Did you write a statement yourself and did the police attempt to get you to sign anything?
 - i. Were you allowed to adequately review and modify your statements?
 - j. Were you allowed to write down your opinions?
 - k. Have your jointly accused persons been interrogated? If so, do you know what they said about you?
4. Requests for legal aid
- a. Did you ask for a legal aid lawyer?
 - b. Did anyone inform you that you could have a legal aid lawyer? When?
 - c. Have you seen your family members, friends, or co-workers since the arrest?
5. Detention
- a. Describe the place where you were detained after your arrest.
 - b. How many public security officers were present during your arrest?
 - c. Were any compulsory measures taken against you before your interrogation?
 - d. Were you threatened with physical abuse during and after the arrest?
 - e. Were you treated with violence during or after the arrest?
 - f. Were you verbally abused or threatened during and after the arrest?
6. Information about the alleged victim
- a. Do you know the alleged victim? If so, describe your relationship with the alleged victim.
 - b. Do you know the alleged victim's name, age, address, telephone number, and vocation? Does he have a criminal record?
 - c. Has the alleged victim been physically or mentally injured? If so,

what type of injuries and how serious are the injuries? Has the alleged victim recovered? Has the alleged victim suffered any property damage? If so, tell me about the nature and the extent of damage.

- d. Has the alleged victim received any compensation? If so, when, how much and who paid the compensation?
 - e. What are your feelings about the alleged victim?
7. Information about the jointly accused persons
- a. Do you know the jointly accused persons? If so, describe your relationship with them.
 - b. What are the names, ages, addresses, telephone numbers, vocations and criminal histories of the jointly accused persons?
 - c. Do you know whether the alleged jointly accused persons have been arrested? If so, do you know what items, if any, were seized from them?
 - d. Do you know what statements, if any, the jointly accused persons made about you?

The Criminal Charges

- 1. Do you understand the nature of the criminal charges against you?
- 2. Do you understand the legal meanings of the charges?
- 3. Do you understand the defenses you might have to the charges?
- 4. Are you aware of anyone who can attest that they were with you at the time of the crime, but away from the scene of the crime? If so, what is their name, address and telephone number?
- 5. Is there anyone else who was charged or who should be charged? If so, what are their names, addresses and telephone numbers? How would you describe their involvement in the case?

Quick Investigation

- 1. Who should I contact? What are their names, addresses and phone numbers?
- 2. Are there any witnesses I should talk with? If so, can you give me their names, addresses and telephone numbers? What information do you think they might be able to provide? Do you think they are credible?

3. Is there any evidence that must be secured? If so, can you tell me what it is and where I can find it? Do you know whether it has already been seized?

In order to prevent unnecessary trouble or risks, we advise the lawyer to avoid the following actions and behavior during the interview:

1. To leak information about the case to the client, including information relating to written accusations and exposure;
2. To instigate the client to lie about his part in the case;
3. To lend your own cell phone to the client;
4. To give material articles to the client in private;
5. To bring a non-lawyer or the client's family members when meeting the client.

CLIENT BACKGROUND QUESTIONNAIRE

Date of Interview:

Name:

Birth date:

Identification Number:

Address:

Telephone:

Education (Degree) (School Name):

Vocational Training (Skills) (School Name):

If applicable:

Driver's License Number:

Automobile Model:

Automobile License Plate Number:

Who would you like to contact/inform about your arrest? Please provide their name, address and telephone number.

Have you contacted another lawyer about this case? Please provide details.

Have you received an arrest warrant (applies to all non-cognizable cases)? Please provide details.

List any prior arrests and the corresponding sentences.

Offense	Date	Result

Family

Name	Address	Telephone	Birth date	Place of Employment
Father				
Mother				
Brothers/Sisters				
Spouse				
Children				

Who should be contacted in case of emergency? If it is not a family member, please provide their name, address and telephone number. How long have you known them?

Employment History (List in sequential order, beginning with the most recent position)

From/To	Name of Employer	Address	Telephone	Job Type	Position and Salary

List personal reference with complete addresses (people who know you, other than your relatives, such as friends or co-workers).

Name	Address	Telephone

Physical, Mental, Emotional, and Marital Problems and Drug and Alcohol Abuse

Do you have a problem listed above that may be related to your case?

Y__ N__

If yes, please explain:

How long have you had this problem? Who first diagnosed it and when?

Are you currently undergoing treatment or seeing a counselor? Y__N__

Name: Telephone:

Are you currently taking medication for this problem? If so, what kind of medication, how much are you taking, and what is the daily dosage? When was this medication first prescribed? Who prescribed it?

Witnesses: Please list all the names, addresses, and telephone numbers of people who can provide evidence or information about the case.

Name	Address	Telephone

Jointly accused persons: Please list all the names, addresses, and telephone numbers of people who were involved in the alleged crime. What was the extent of their involvement? Have they have made statements to the police? What did they say? Are they currently in custody? Do they have previous criminal records? What is the relationship between the jointly accused persons and the client?

Name	Address	Telephone

BAIL

What finances do you have for bail?

Are there family members or co-workers who can stand surety for your release

Client's physical features

Height	Weight	Appearance	Other information pertaining to eyewitness identification

ASKING QUESTIONS

1. *Open and Closed Questions:*

Open-ended questions usually require a more detailed answer than “yes,” “no,” date or place.

Closed-ended questions can be answered simply with a “yes,” “no” or a simple fact.

In general, you want to ask open-ended questions rather than closed-ended questions in your interviews, because the answers to these questions provide much more of the information that you want to know. Also, these questions invite the witness to converse with you instead of simply answering questions. By asking a general question that requires a narrative answer, you will also learn unexpected information. Examples:

OPEN	CLOSED
Tell me about your family background?	Where were you born?
Could you describe one of the arguments you had with your husband?	Did your husband hit you?
Can you tell me about the first time you drank alcohol?	How old were you when you started drinking alcohol?

When to Use Closed Questions

When you need to obtain specific information such as birth dates or identification numbers, a witnesses' short response is fitting. You will also probably use more closed questions toward the end of the interview. Additionally, some witnesses may be confused by open-ended questions. In these situations, you will need to adapt your questioning to fit the witness's ability to answer questions.

2. Leading Questions

Leading questions will often elicit unreliable answers.

LEADING	REPHRASED
I'm sure you loved all of your children equally, didn't you?	When your children were small, how were they different from each other?
You never knew what Vijay and his friends were up to, did you?	Tell me about your relationship with Vijay before he was arrested.
Vijay does not know how to read, does he?	What kind of student was Vijay?

3. Follow-up and Probing Questions

The following are ways of eliciting more information from the witness when answering one of your open-ended, non-conclusive questions:

Nudging or encouragement: Verbal encouragement in the form of "uh huh" and "go on" will let the witness know that you are following and are interested in what he is saying, and that you do not wish to interrupt him.

Silence: You may choose to remain silent for a moment, signaling to the witness that you are waiting for him to elaborate, perhaps nodding and wearing an expectant look on your face.

Clarification: You can seek clarification from the witness in a number of ways that lets the witness know that you are interested in what he has said and that you want to make sure you correctly understand what he has said. For example:

- Ask the witness to define his terms: “What do you mean by ‘not very long’?”
- Ask the witness to provide a more thorough answer: “Tell me more about that,” “What else happened that day?”
- Ask for missing details: “I don’t understand. How did Vijay Singh get home from the hospital?”
- Ask for additional details: “What did you see Mr. Singh do when the fight started?”

4. “Why” Questions

It is usually a bad idea to ask people “why” questions about life events. “Why” questions often place blame and put a witness on the defensive. Many witnesses simply do not know the answer to why something happened and will invent a seemingly rational reason for their behavior when, in fact, they have no idea what really motivated them. Such answers then become facts that are not particularly helpful to the client. Examples:

“WHY” QUESTIONS	REPHRASED
Why didn’t you leave your husband?	Was there a time when you thought about leaving your husband?
Why did your husband hit you?	Can you tell me what happened between you and your husband that day?
Why do you think you married an alcoholic?	Tell me about your relationship with your husband.

5. Tips and Tricks

CONFRONTATION

Pursuing a direct line of questioning is usually not the most effective way of eliciting the witnesses’ true account. Confronting the witness by pointing out all the contradictions in his account or inconsistencies with other witnesses’ accounts can be a very serious mistake. For example, by asking direct questions about abuse, you may push the witness into a state of denial, which would make it difficult for him to disclose the actual situation afterwards. Examples:

- Your nephew told me that you molested him when he was seven years old, is that true?

- You said that you quit drinking two years ago, but your wife told me that you were drunk this past weekend. Why did you lie?
- You're just pretending to read that. You cannot really read, can you?

DO NOT TALK TOO MUCH!

Inexperienced interviewers tend to talk too much. During the interview, you should aim to spend 80% of the time listening to the witness and 20% of the interview talking with the witness.

LISTEN ATTENTIVELY

Listening intently requires discipline and practice. Listening, unlike hearing, is not automatic. Listening to a witness answer questions during an interview is entirely different from listening to friends chat. In social settings, you are able to multitask while listening to a friend; for example, while formulating a response, you might also be observing your surroundings or having an internal dialogue that has nothing to do with the other person. During an interview, however, you need to focus on listening to your witness with total concentration and must really pay attention to what they are saying, instead of formulating the next question, looking around the room, or figuring out how the witness' account fits into your theory of the case.

LISTEN WITH AN OPEN MIND

Sometimes we only hear what we expect to hear, rather than what was actually said. If you have already reached certain conclusions about who your witness is and what he will say even before the interview, you will unconsciously filter out information that is not consistent with your preconceived ideas. If the witness belongs to a certain group, you might make assumptions about him based upon your own impressions of that group. You might assume that the witness is racist, ignorant, provincial or superstitious. Once you think you can predict what the witness will say, you will not carefully listen to him. You may also mistakenly form a negative opinion of the person's value as a witness. If the witness' information does not conform to your understanding of the situation, you might dismiss it as an aberration, thus forfeiting an opportunity to develop an important relationship with the witness, one that could result in testimony helpful to your client's case.

BECOME COMFORTABLE WITH CONTRADICTIONS

You should be aware of and keep track of any contradictions, but do not directly question the witness about these contradictions. Different people will often describe the same event very differently, and one person may even describe the same event differently with each telling. Contradictions may actually result from miscommunication. For example, a witness might tell you that she had never consumed alcoholic beverages, but later tell you how she once went out to drink beer. Although this might be inconsistent, you may discover that the witness thought that drinking alcohol only meant drinking hard liquor, not beer.

DOUBLE-CHECKING

Communication between any two people is a complicated process that can lead to both trivial and serious misunderstandings. During an interview, everyone communicates, receives and decodes information, and misunderstandings are liable to occur at every stage of the process. Since every piece of information is based on any previous information, any miscommunication that is not addressed will have long-term consequences.

It is essential that you, the interviewer, confirm that the witness understands your questions and that you understand his answers. In the following example, the interviewer is checking to see if he and the witness are discussing the same thing, because they each give different meanings to a word:

WITNESS	INTERVIEWER
My father used to beat me but treated Vijay better.	Do you mean he didn't beat Vijay?
Right, only me, with his fists. He didn't do that to Vijay.	Do you mean he never hit Vijay at all?
Oh, he would whip him, you know, with his belt.	You mean he would punish Vijay by whipping him but not by punching him with his fists?
Yes.	Can you describe one time when you saw him whip Vijay?

In this example, the witness has a specific meaning for the word “beat” (hitting using one’s fists) that the interviewer needed to clarify.

REFLECTING

Reflective dialogue, or mirroring, is the immediate repetition of part of the conversation, which allows what has just been said to be adjusted or confirmed.

WITNESS	INTERVIEWER
I never knew my father. Well, I kind of did, but that was later. I met him once with my cousin, and she said, that’s your father.	You didn’t grow up with your father?
Right, he never even saw me.	Who told you that your father never saw you as a baby?
My mom	But your family knew who he was.
Oh yes, they knew. Of course they knew. Only I didn’t know.	You said you met him with your cousin?
Yes, once in Murshidabad.	Tell me about that.

6. CONCLUSION

Interviewing requires mutual communication. Although your goal is to gather information, you, the interviewer, are also unconsciously and consciously communicating a great deal of information to the witnesses through your words, your clothing, your body language and facial expressions, and the types of questions you ask. It is essential that you refrain from using judgmental or critical language, whether verbal or non-verbal.

OTHER PRETRIAL MATTERS

CONFLICT OF INTEREST

Counsel shall be honest and responsible, making every effort to safeguard the client's legal rights. To fully perform his duties, counsel shall be loyal to his client and to the client's interests.

Legal aid lawyers shall, as stipulated within legal parameters, remain loyal to their clients without condition. Once conditions arise that may threaten this professional loyalty, the lawyer shall avoid representing another accused in the same case and any other person or organization whose interests conflict with that of the client.

BAIL

Introduction

Bail pending trial is a compulsory measure adopted by the Criminal Procedure Code, 1973. It allows the criminal suspect to provide a guarantee or surety to guarantee that the suspect will not escape from the case investigation during the bail period, and that he will appear as soon as summoned and will appear on all dates of hearing before the court when called to appear. Although personal freedoms are restricted when the suspect is out on bail, such restrictions are far less severe than the restrictions placed on those in custody. The legal aid lawyer should apply for his client's bail as soon as possible.

The provisions of bail are broadly classified into two categories:

1. Bailable¹
2. Non-Bailable cases²

In the first category, grant of bail is a matter of course and it may be given either by police in charge of the police station having the accused in custody or by the court before whom the trial is put up for hearing. Persons under

¹ Under Section 436 of Criminal Procedure Code

² Under Section 437 of the Criminal Procedure Code

this provision may be released on executing of bond with or without sureties.

In the second category u/s 437(1) a person may be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm or if the court is satisfied that it is just and proper to do so in any other special reason. As soon as reasonable grounds for the guilt cease to appear the accused is entitled to be released on bail or on his own recognizance. The accused can be also released for similar reasons between the close of the case and delivery of judgment. When a person is released on bail the order of release is to be in writing by the court.

In general, the court considers the seriousness of the charge, the nature of the evidence recovered, if any, the severity of the punishment prescribed for the offence and, in some instances, the character, means and standing of the accused.³

A person can apply to High Court or Court of Session and the said courts can direct for grant of bail to such person apprehending arrest u/s 438.

Where a person has all reason to believe that he may be arrested on accusation of having committed a non-bailable offence, on moving for the appropriate application under this section with such firm reasons mentioned and assurance that he will cooperate with the police, when needed in the investigation, and will not try to interfere or tamper with evidence or witnesses during the investigation procedure, can be granted with an interim order u/s 438(1), that he will get a notice period of not more than seven days (7 days) prior to such arrest to move for a regular bail application before the appropriate court as per the concerned offences.

Care must be taken by the lawyer before moving for such an application because if the application gets rejected then it shall be open for the officer-in-charge of the police station to arrest without warrant on the basis of the accusations in the application.

In the application for anticipatory bail the petitioner must make out the special case with a firmness of belief of arrest in a false case. The petitioner must satisfy the court that the accusation against him does not stem from ordinary reasons

³ *Nagendra Nath Chakravarti, (1923) 51 Cal 402, 416; Robinson, (1954) 23 LJQB 286, 287*

of furthering the ends of law and justice in relation to the case but solely from other dishonest motives with the object of humiliating him.⁴

The trial Magistrate shall not authorize the detention of the accused person in custody for a total period exceeding:

1. ninety days, where the investigation relates to an offence punishable with that, imprisonment for life or imprisonment for not less than ten years.
2. Sixty days, where the investigation relates to any other offence

In such circumstances the accused shall be released on bail if he is prepared to and furnishes the requisite bail bonds. This is a right of the accused to get bail in the aforesaid circumstances and the trial court shall release him on bail.⁵

Under What Circumstances May a Client Apply for Bail Pending Trial?

The accused may be granted bail under any of the following circumstances:

1. All cases which are listed as bailable under the Indian Penal Code, The Criminal Procedure Code, or subsequent and complimentary major or minor acts.
2. All non-bailable cases where the judge determines that the client is suitable for bail (does not include death penalty cases, life imprisonment cases or cases where the accused has a number of serious prior convictions as dealt with in the Cr.P.C sec. 437). These cases include when the client has deep roots in the community.
3. All non-death penalty cases where the client has served one-half of the maximum sentence for the crime committed, whether it be listed as a bailable or non-bailable offence. In this case, a charge liable for life imprisonment shall be considered a 20-year term, i.e., once an accused has served ten years (10 years) without completion of the trial, he is eligible for bail.⁶

⁴ *Gurbaksh Singh Sibbia V. State of Punjab*, (1980) 2 SCC 565

⁵ *Section 167 of The Code of Criminal Procedure*, 1973

⁶ *Section 436A) of Criminal Procedure Code: has been inserted by the Cr P.C (Amendment Act), 2005*

4. When accused is suffering from serious illness he can be released on bail.⁷
5. If a case involving a criminal suspect or accused in custody cannot be closed within the time limit stipulated by law for keeping the criminal suspect or accused under custody for the purposes of investigation, conducting examination before prosecution, or further investigation, verification and handling are needed, the criminal suspect or accused should be allowed to apply for bail, with or without sureties.⁸
6. Cases in which the police lack sufficient evidence to arrest a criminal suspect who has been detained and require further investigation.

What methods exist for applying for bail pending trial?

The Criminal Procedure Code provides for two ways to obtain bail pending trial: (1) on bond with or without sureties; and (2) through a deposit in security of property, money, etc. (bail) with or without sureties

1. **Sureties:** Bail guaranteed by a person, who submits a letter to the proper authorities promising that the guaranteed person will not escape or obstruct the investigation, prosecution and trial and will appear whenever summoned. Granting of bail is based upon the character, reputation and credit of the guarantor, who must be willing to act as guarantor and must be approved by the applicable authority.
2. **Bail guaranteed by property or money (security deposit):** Under the bail system, the proper authorities have the accused deposit a security along with a written pledge promising not to evade investigation, prosecution and trial and promising to appear as soon as summoned during the course of bail. The amount of the security shall be determined by the decision-making body, which will take into account how much of a threat the suspect or accused poses to society, the nature and circumstances of the case, the financial situation of the suspect or accused, and the state of local economic development. The security deposit shall not be excessive.
3. **Bond:** Release on condition solely of attendance or sureties.

⁷ *Niranja v. Prabhakar, A. 1980 S.C. and Cr.P.C sec. 437(1)*

⁸ *Section 167 of the Criminal Procedure Code*

CONCLUSION

If a client meets the applicable conditions for bail, the legal aid lawyer should make every effort to secure the client's bail as early as possible. In all cases of bail-eligible offences, **reasonable** bail is a **right** that all clients are entitled to. In other cases, it is helpful to demonstrate that the client has deep roots in the community and is not likely to leave.

REVIEWING THE DISCOVERY

It is the duty of the magistrate to furnish to the accused and his pleader, free of cost, the copy of relevant documents or extracts of documents. These judicial documents include the FIR, the police report, any statements made by potential witnesses, and all other documents submitted to the Magistrate in a police report. Such rights have been guaranteed and provided by the lawmakers.⁹ The legal aid lawyer must review the judicial documents and materials pertaining to the case without delay.

INVESTIGATION TO COLLECT EVIDENCE

Legal Stipulations

Indian law allows the legal aid lawyer to:

1. Review the judicial files and the technical verification material.
2. Request a Magistrate to conduct an investigation to verify the evidence gathered by police.
3. Evaluate the testimony of the expert witness.

The following suggestions may help you in the investigation of the relevant evidence:

- Take Prompt Action
 - o Begin the investigation as soon as possible.
 - o If you delay investigating, you risk losing material evidence and witnesses can more easily recall recent events.

⁹ Section 207, 208 and 210 of *The Criminal Procedure Code*

- Guard against Risks
 - o Conduct your investigation with a companion.
 - o Get the signature of any person who provides evidence.
 - o Tape-record the whole course of collecting evidence.
- Valuable Sources of Information
 - o Charge sheet/Police report on completion of investigation
 - o First information report
 - o Case diaries if accessible
 - o Statement of witnesses made before the investigating officer¹⁰
 - o Statements of the co-accused(s)
 - o Client interview
 - o Statement of eyewitnesses
 - o MLC (Medic Legal Case Report)
 - o Experts' conclusions
- Visit the Scene of the Alleged Crime
 - o If permitted and possible, visit the scene of the alleged crime as soon as possible.
 - o Use sketches, charts, photos, videotapes, measurements, etc., to record evidence found at the scene.
 - o Search for undiscovered evidence.
 - o Confirm who could be defense witnesses and write down how to contact them in the future; and
 - o Search for witnesses who have not been questioned by the police.
- Witness Interview
 - o Consider recording the witness interview with videotapes or cassette tapes.
 - o Is the witness capable of providing testimony? A minor who lacks the ability to distinguish right from wrong, or a person who cannot clearly and correctly express himself, or understand

¹⁰ Section 161 of *The Code of Criminal Procedure, 1973*

and respond to questions cannot act as a witness. Someone considered insane or mentally handicapped, however, who is capable of understanding and responding to questions, is capable of being used as a witness.

- o If possible, interview the prosecution's witnesses.
- o Meet the eyewitnesses.
- o The interview should be conducted in a safe and comfortable environment.
- o Make a record of the witness's background and details of current employment.
- Statements of the Witness and the Victim
 - o Are there any videotape or cassette tape records of the statements made by the witness and the victim?
 - o Did the witness and the victim themselves personally write their statements?
 - o What motives do the witness and the victim have to provide testimony? Does the witness have any personal interests relating to the case?
 - o Has the victim been injured? If so, has the victim provided detailed information relating to the degree of his injury?
 - o What is the relationship between the victim and the accused? The witness and the accused? The witness and the victim?
 - o Has the victim been compensated in any form? If so, when, how much and who paid the money?
 - o What is the mental condition of the witness and the victim?
 - o Is the witness' statement based upon the witness' and the victim's own firsthand observation or based upon hearsay?
 - o Has the witness' and the victim's testimony been obtained in legal ways? Has the testimony been obtained through torture, coercion, inducement, deception or other illegal ways?
 - o Is the witness' testimony consistent with the victim's testimony? If not, what are the contradictions? Are the inconsistencies helpful or harmful to the defense of the client?

- o Are the witness' and victim's testimonies consistent with the accused's statement? Are they consistent with the co-accused's statement? If not, what are the inconsistencies? Are the inconsistencies helpful or harmful to the defense of the client?
- Material Evidence
 - o How did the police obtain the material evidence?
 - o Was the search warrant that the police used valid, was the warrant executed by the person listed on the warrant as entitled to carry out the search or arrest?
 - o Is there a detailed list of all the seized articles? Do the listed articles match the material evidence gathered by the prosecution?
 - o Is there any relevant material evidence?
 - o Can more than one interpretation be applied to the evidence?
 - o Is the collected evidence first-hand or second-hand evidence?
 - o Is the evidence of a fragile or stable nature? If fragile, have proper steps been taken to preserve it?
 - o Has the evidence undergone any changes due to the passage of time, changes in the environment or any other factors?
 - o If evidence was obtained through photography or filming, were there at least two participants at work? Has the photographer or the videotape recorder made a complete record of the evidence?
 - o Has the evidence been verified? Will the evidence used for the defense hold its ground at trial?
- Documentary Evidence
 - o Was the search warrant that the police used valid?
 - o Is there a detailed list of all the seized documents? Are the listed documents consistent with the evidence gathered by the prosecution?
 - o Is there relevant documentary evidence?
 - o Are there different interpretations of these documents?
 - o Are these documents genuine or fabricated? It is the responsibility of the defense to repudiate seemingly authentic documents and

other evidence. If this is not possible, try to plant doubt about the authenticity of some evidence, where it seems appropriate.

- o Are the signatures and seals on the documents genuine and complete?
- o If the documentary evidence is a duplicate or photocopy, why has the original not been submitted as evidence? Have the duplicates or photocopies been made with at least two persons present? Does the person who duplicated or photocopied the documents have any interests related to the case? Are the duplicates or photocopies entirely identical to the original?
- o Have the duplicates or photocopies been verified as genuine?
- o If the police seized mail or telegraphs, were their procedures consistent with the requirement that a Chief judicial Magistrate or District Magistrate or higher make out the search warrant for such material? Has the post office examined and delivered the items? Is there a possibility that the seized mail or telegraph has been fabricated, altered, or replaced?
- Expert Evaluation
 - o Has the expert obtained judicial permission to conduct the evaluation?
 - o What evidence has the expert examined?
 - o What are the expert's fields of expertise?
 - o How long has he been considered an expert in his field?
 - o What are the expert's qualifications? Has he been authorized and does he have the credentials to be an expert evaluator?
 - o Is the expert equal to the work of his own field? Are the expert's methods and techniques in accordance with the relevant national or professional standards? Has the expert used up-to-date technology to conduct his evaluation? Does the evaluation require the expert to cover subjects beyond his area of expertise or beyond the technical and evaluation capacity of the judicial expert examination apparatus?
 - o Are the materials that are the foundation for the expert's conclusions sufficient and authentic? Are the materials suitable

for evaluation or assessment, or do the materials conflict with the evaluation requirements?

- o Consider whether there is a need to advise the defense expert to independently verify the evidence.
- o Does the client have any physical or mental injuries that need an expert evaluation and technical explanation? If so, apply for the court to provide expert evaluation on the client's physical health or mental state. Provide the expert with the client's relevant medical records and biographical data.
- Witness' Character Traits and the Scene of the Alleged Crime
 - o When reviewing an eyewitness testimony, focus on the following aspects listed below. An understanding of the witness' character traits will help the lawyer narrow the range of investigation and identify the strengths and weaknesses of the witness' testimony. The items listed below affect how the witness might have observed facts of the case.

Witness' Character Traits	Surroundings of the Scene
<input type="checkbox"/> Gender <input type="checkbox"/> intelligence <input type="checkbox"/> memory capacity <input type="checkbox"/> educational background <input type="checkbox"/> employment history <input type="checkbox"/> language <input type="checkbox"/> speech impediment <input type="checkbox"/> age <input type="checkbox"/> temperament <input type="checkbox"/> mental state <input type="checkbox"/> state of health <input type="checkbox"/> alcoholic consumption <input type="checkbox"/> trauma caused by medicine or illegal substance abuse <input type="checkbox"/> eyesight <input type="checkbox"/> hearing <input type="checkbox"/> relationship with the victim <input type="checkbox"/> relationship with the accused <input type="checkbox"/> relationship with the co-accused <input type="checkbox"/> motive <input type="checkbox"/> partiality towards the client, victim or co accused <input type="checkbox"/> bias towards the victim or <u>witness</u> <input type="checkbox"/> was threatened before, during or after the alleged crime <input type="checkbox"/> lighting conditions	<input type="checkbox"/> daytime or nighttime <input type="checkbox"/> exact time during the day or night <input type="checkbox"/> moonlight <input type="checkbox"/> rain <input type="checkbox"/> fogq coldness <input type="checkbox"/> heat <input type="checkbox"/> number of people present <input type="checkbox"/> duration of observation of the occurrence <input type="checkbox"/> realistic ability to see all the people present and their activities at the sceneq criminal weapon <input type="checkbox"/> natural plant life <input type="checkbox"/> buildings <input type="checkbox"/> automobiles <input type="checkbox"/> traffic conditions <input type="checkbox"/> observation angle or position <input type="checkbox"/> bird's eye view <input type="checkbox"/> upward view

THEORY OF THE CASE

INTRODUCTION

Whether a lawyer chooses to develop a specific defense or simply to rely on the prosecutor's failure to carry the burden of proof, he must begin early on to develop a theory of the defense. Some defenses are directed at a failure of proof (e.g. alibi or consent) whereas others are more general and are applicable even if all the elements of the crime are proved (e.g. self-defense, insanity, entrapment). The approach you take will determine many subsequent actions. In addition, in some states the defense must give notice to the prosecutor that a specific defense is being asserted. This is often true, for example, of the alibi defense.

Creating a theory of the case

The first step in creating a theory of the case is to review the indictment or criminal information to determine with what crime the accused is being charged. Check the law of the applicable jurisdiction to determine the essential elements of the crime.

The second step is to thoroughly investigate the facts of the case:

-
- If possible, interview eyewitnesses to the alleged crime to obtain their version of the facts.
 - If possible, interview other potential witnesses who may have relevant information regarding the alleged crime, or the character of the accused.
 - Inspect and examine carefully all documents and other materials made available by the prosecution.
 - If applicable, examine the scene of the alleged crime.
 - Check to determine if the accused's constitutional rights were violated.
 - o When arrested, was the accused warned that he could remain silent and that anything said can and will be used against the accused?
 - o When arrested, was the accused advised that he had the right to

an attorney (even if accused could not afford an attorney) and that the attorney could be present during any interrogation by the government?

- o Was there an unreasonable search and seizure of accused's person and/or property? Was there probable cause for any arrest or any search warrant?

The third step is to determine how you will go about developing your defense in the courtroom:

- Identify the facts you will need to establish (e.g. eyewitness has poor eyesight or the accused has an alibi).
- Identify the witnesses you will need to establish those facts.
- Determine whether the prosecution's witnesses have significant credibility issues.
- Visit the scene of the crime to verify, for example, that an eyewitness could not possibly have seen the crime from where he was located.
- Identify any facts that undercut your theory (e.g. the accused's alibi is a close personal friend with a motive to lie)
- No matter what strategy seems best, the lawyer should always emphasize the heavy burden that the prosecution bears.

An accused is entitled to raise "inconsistent defenses" so long as the proof of one does not necessarily disprove the other. For example, the defenses of insanity and self-defense, intoxication and non-involvement, insanity and alibi, which defenses are inconsistent, may be raised since proof of one does not disprove the other.

Storytelling Methods

During the course of investigation and preparation for trial, the lawyer should gradually build and develop a theory of the case, as well as continually revising it. A theory of the case consists of three parts: the relevant law, facts of the crime and emotional factors. In the court, a lawyer uses a theory of the case to tell the client's story. The storytelling is composed of three parts: the general theory of the case, several supporting sub-theories, and the oral presentation to the court. Varied tones of voice, proper rhythm

and tempo in questioning, body language, communication with your eyes, and application of different rhetorical skills make for effective storytelling, creating an atmosphere that both keeps the audience in suspense and engaged and builds a positive environment for the argument of defense. It is in such an environment that the court will evaluate the evidence.

EXECUTION

1. A lawyer should build a general theory of the case centered on the client's best interests and based upon the actual situation, which will help him evaluate what choices to make throughout the defense process.
2. Counsel should allow the theory of the case to guide his focus during the investigation and trial preparation process. Counsel should dig into and expand upon the facts and evidence supporting his theory of the case. Nevertheless, the counsel should not become a "prisoner" to his theory of the case.

WORK FORM FOR DEVELOPING A THEORY OF THE CASE

The following questions may help a legal aid lawyer to build a complete and coherent theory of the case:

1. What is your theory of the case? (e.g. innocence, alibi witness, misidentification)
2. Why do you believe this is the best theory of the case?
3. What is the relevant law? What are the elements of the offense? How will your theory of the case prove the client's innocence?
4. What are the unalterable facts that you need to confront and explain in the theory of the case?
5. What are the facts in favor of the client?
6. What is the key emotional theme in the case?
7. What emotional themes is the prosecutor most likely to use in his argument? How will you use your theory of the case and emotional theme to refute these emotional themes?

8. Make a list of the prosecution witnesses with specific questions attached to their names. Briefly point out the questioning styles.
9. Make a list of the defense witnesses, and under each of their names, write out how you plan to question them. Finally, briefly indicate the style of questioning.
10. List your main desired objective when directly questioning the accused. How will the accused's testimony strengthen your theory of the case?
11. What further investigation do you need to do to complete your theory of the case?
12. Do you need to solve any problems with the evidence? Are these problems likely to strengthen or weaken your theory of the case? How will you explain the evidence that is inconsistent with your theory of the case?
13. Make a brief, effective statement for your theory of the case.

STORYTELLING: TEST YOUR THEORY OF THE CASE AND THEMES AT COURT

To defend your client effectively, the lawyer must understand how to tell a story to the court. The more convincing and touching the story is, the more persuasive the argument becomes to the judge who ultimately decides the facts of the case. Every well-knit story needs a plot, and for a defense argument, a plot provides the best tool for explaining the facts of your theory of the case.

Why must the legal aid lawyer use storytelling methods in the court?

Storytelling allows the legal aid lawyer to set the stage, introduce the characters, create an atmosphere, and organize ideas into a carefully crafted narrative format, thereby impacting the way each judge perceives a given case. Without such a framework, judges will understand the evidence and testimony in accordance with the prosecutor's argument. Once the legal aid lawyer successfully executes a framework, he can use the client's experiences to influence the judges' imagination, leading most judges to understand the evidence in the context of the client's past experiences.

More importantly, storytelling will cause judges to use both their hearts and minds in considering the defense's argument. "One who relies on reason" is more likely to change their judgment, because they often use the following thought pattern to reflect on and analyze a case: "My (the lawyer's) view is based on logic. Therefore, if you (the judge) reasonably point out any flaw in my thinking, I will consider changing my views." In contrast, "one who relies on his heart and emotions" will reflect on and analyze a case in a different way: "I am right, and you are wrong, so you must change your view."

CONCLUSION

To develop a theory of the case, the legal aid lawyer should objectively evaluate the prosecution's case, and then, in accordance with applicable laws, structure a moving story based on the facts of the crime and emotions that will serve as a rebuttal. The theory of the case will influence the investigation, which witnesses will testify at trial, and what demonstrations will be held in court. Through telling a reasonable and convincing story, the lawyer can persuade the judge to find the client innocent, mitigate his sentence, or exempt him from criminal responsibility.

VARIOUS DEFENSE STRATEGIES

INTRODUCTION

In the process of developing a theory of the case, a legal aid lawyer shall decide whether it is possible to exonerate the client from guilt. If so, the lawyer shall further consider how to prove the innocence of the client at trial. The following are possible defenses for exonerating an accused from criminal liability under the Indian legal framework and applicable circumstances to raise such defenses.

HAS THE PROSECUTION BORNE THE BURDEN OF PROOF?

Remember that your client is entitled to the right of being innocent until proven guilty. No person shall be found guilty without being judged as such by the Court according to law. It is the prosecution's duty to prove that the client is guilty of the charges against him. It means the prosecution must prove that the facts are clear and the evidence is sufficient.

Before forming other defenses, the counsel should critically scrutinize the bill of prosecution to confirm whether the alleged crime has really occurred or not. If it has occurred, further consider whether the prosecution has presented evidence sufficient enough to support the charge. Consider whether another charge (a lighter charge) fits better with the case evidence. The following are necessary questions for your consideration:

- **What are the elements of the accused offense? For example:**

Self-driven act: Did the client act from his own free will? What evidence has the prosecution presented to prove that the client acted of his own accord?

State of mind: Under what state of mind would the client's act constitute a crime (for example: intentionality, disregard of the outcome, negligence)? Is the crime a strict liability crime (the prosecutor has no burden to present evidence concerning the accused's intent)? What evidence has the prosecution presented to prove that the client in his actions had the requisite criminal intent, had specific knowledge or skill necessary for committing the act, or was criminally negligent?

Cause and effect: Did the client's act result in the ultimate injury?

Direct cause: Were the client's actions far enough from the charged crime that he should not be subject to any legal responsibility?

Legal obligation: In this situation, does the law stipulate that the client must act in specific ways to exercise his distinctive legal obligation?

- What laws define the elements of a crime? Are these laws contradictory with each other?
- How much evidence must be presented in order to sufficiently meet all the required elements of the accused crime? What are the elements of the crime that the client should have been charged with, but was not?
- Does the evidence presented meet the evidence requirements for all the elements of the alleged offense? What are the legal stipulations regarding evidence for elements of the accused crime? What evidence supports the prosecution's case? What evidence is not consistent with the prosecution's argument?
- If the prosecutor cannot present sufficient evidence to support the charged offense or even support a lighter offense, the legal aid lawyer shall point out the insufficiency of evidence to the court and request that the court either judge the client as innocent or dismiss the charges.

HAS THE STATUTORY TIME LIMIT FOR CRIMINAL PROSECUTION EXPIRED?

In view of the Section 468 of The Code of Criminal Procedure no court shall take cognizance of an offence for the following category after the expiration of a period of limitations as follows:

1. Six months—where the offence is punishable with fine only
2. One year—if the offence is punishable with imprisonment for a term not exceeding one year
3. Three years—if the offence is punishable with imprisonment with a term exceeding one year but not exceeding three year.

However, any court may take cognizance of the offence after the expiration

of the said period of limitations if it is satisfied on the facts and circumstances of the case that the delay has been properly explained or that it is necessary in the interests of justice.¹¹

IS IT POSSIBLE TO MAKE AN AFFIRMATIVE DEFENSE IF THE FACTS OF THE CRIME CANNOT BE DENIED?

In an affirmative defense, counsel does not deny the elements of the alleged offense but still attempts to prove the innocence of the accused. Such a defense requires counsel to present sufficient evidence, including witness testimony or material evidence. Even if the lawyer does not deny that the accused committed the alleged acts, the defense will try to prove that the acts were justified or provide another legal defense for negating the accused's criminal liability.

CAN THE LEGAL AID LAWYER PROVE THE INNOCENCE OF THE ACCUSED?

This is one type of affirmative defense and aims to prove that the accused did not commit the crime, i.e. that the accused could not possibly have committed the alleged offense.

The two most common methods of proving the accused innocent are: proving the accused's alibi and using the material evidence to prove that the alleged offense could not have happened. In employing the first strategy, the criminal legal aid lawyer can provide credible evidence, such as the testimony of a witness at the scene to prove an alibi; if adopting the second strategy, the legal aid lawyer can cite credible evidence demonstrating the weaknesses of the material evidence against the accused, and explain how these limitations or weaknesses exclude the possibility of the alleged offense. For example, suppose the accused was accused of stabbing the victim, and the evidence provided by the prosecutor indicates that the victim was stabbed by an assailant who used his right hand. In such circumstances, if the criminal legal aid lawyer can provide credible evidence to prove that the accused's right hand was previously injured and that he could not have used it at the time that the crime was committed; this demonstrates that the accused could not have committed the alleged offense.

¹¹ Section 473 of *The Code of Criminal Procedure*

CAN THE LEGAL AID LAWYER JUSTIFY THE CRIME COMMITTED BY THE ACCUSED?

Justifying the crime for the accused is another type of affirmative defense wherein the accused does not deny the alleged offense, but argues that he should not bear legal responsibility for it. Counsel is arguing that the accused committed the alleged offense for justified causes that are socially accepted or that conform to moral principles.

1. Statutory Excuses that Exclude Transgression: Justifiable Defense and Averting Danger in an Emergency¹²
2. Legally Prescribed Excuses for Mitigation:

The Penal code in Chapter IV describes the following acts exempted under the code from criminal liability :

- A Acts of person bound by law to do certain things.¹³
- B Act of Judge acting judicially (s.77).¹⁴
- C Act done pursuant to an order or a judgment of a Court.¹⁵
- D Act of a person justified, or believing himself justified, by law.¹⁶
- E Act caused by accident.¹⁷
- F Act likely to cause harm done without criminal intent to prevent other harm.¹⁸
- G Act of a child under 7 years.¹⁹
- F Act of a child above 7 years and under 12 years, but of immature understanding.²⁰
- G Act of a person of unsound mind.²¹

¹² Section

¹³ Section 76 of *The Indian Penal Code*

¹⁴ Section 77 of *The Indian Penal Code*

¹⁵ Section 78 of *The Indian Penal Code*

¹⁶ Section 79 of *The Indian Penal Code*

¹⁷ Section 80 of *The Indian Penal Code*

¹⁸ Section 81 of *The Indian Penal Code*

¹⁹ Section 82 of *The Indian Penal Code*

²⁰ Section 83 of *The Indian Penal Code*

²¹ Section 84 of *The Indian Penal Code*

- H Act of an intoxicated person and partially exempted.²²
- I Act not known to be likely to cause death or grievous hurt done by consent of the sufferer.²³
- J Act not intended to cause death done by consent of sufferer .²⁴
- K Act done in good faith for the benefit of a child or an insane person by or by the consent of guardian.²⁵
- L Act done in good faith for the benefit of a person without consent.²⁶
- M Communication made in good faith to a person for his benefit.²⁷
- N Act done under threat of death.²⁸
- O Act causing slight harm.²⁹
- P Act done in private defense.³⁰

Minor Offender

In representing juvenile offenders, the legal aid lawyer emphasizes that the accused should not bear criminal responsibility because of his or her age. Section 2(k) specifies eighteen as the higher limit for bearing criminal responsibility.

3. Other Excuses of Defense:

Maltreated Women Syndrome:

Although some courts do not recognize “Maltreated Women Syndrome” as a criminal defense, it can be considered secondary evidence for other defenses such as self-defense, defense from being coerced, etc. Because “Maltreated Women Syndrome” affects a person’s

²² Section 85 and 86 of *The Indian Penal Code*

²³ Section 87 of *The Indian Penal Code*

²⁴ Section 88 of *The Indian Penal Code*

²⁵ Section 89 of *The Indian Penal Code*

²⁶ Section 92 of *The Indian Penal Code*

²⁷ Section 93 of *The Indian Penal Code*

²⁸ Section 94 of *The Indian Penal Code*

²⁹ Section 95 of *The Indian Penal Code*

³⁰ Section 96-106 of *The Indian Penal Code*

behavior, an expert needs to be retained to testify and explain her acts in this context. Some courts allow using expert testimony about “Maltreated Women Syndrome” to prove the accused did not have the requisite intent for committing the alleged crime.

Being under Coercion or Duress

If the accused was forced or coerced to participate in a crime, the legal aid lawyer can argue the defense of being forced or coerced. When many accuseds are involved in a case and any one of them may have been coerced by the other accuseds, the legal aid lawyer often employs this kind of defense.

Criminal Act of Necessity

When the accused committed some crimes to avoid more serious damage, the defense of necessity can be adopted. Similar to the stipulations concerning justifiable defense, if the accused’s act exceeds the limits of necessity and causes undue damage, he shall bear criminal responsibility; however, he shall be given a mitigated punishment or be exempted from punishment.

Misunderstanding of Law/Facts:

In this type of defense, the criminal legal aid lawyer argues that the accused had no knowledge that his act constituted a crime at all. In the defense of misunderstanding the law, the criminal legal aid lawyer must prove that first, the accused can be found guilty of the alleged crime only if he deliberately broke the law, and second, that the accused did not know the law at the time of the offense. In the defense of misunderstanding facts, the criminal legal aid lawyer must prove that first, the accused misunderstood the true circumstances at the time of the offense; second, if he understood them, he would not have committed the crime; third, there were understandable reasons for this misunderstanding.

Being Instigated or Misled by Government

When the government has instigated or misled the accused to commit a crime, the criminal legal aid lawyer can consider using two types of defense. In the “instigated by the government” defense,

the legal aid lawyer must prove that government officials instigated the accused to commit the crime, and that the accused would not have otherwise committed the crime. In the “misled by the government” defense, the criminal legal aid lawyer must prove that first, government officials told the accused that the alleged crime was legal; second, the accused committed the crime only because he believed this; and third, there were understandable reasons for the accused’s credulousness. The legal aid lawyer then argues that the accused should therefore not be held criminally responsible. In this type of defense, the legal aid lawyer focuses on the government officials’ acts rather than on the accused’s thoughts and on whether the accused had the motive to commit the crime. Even if the case concerns a crime usually considered under the “strict responsibility principle” (i.e. even if the crime is one of “strict responsibility” under the law), this type of defense can still be employed.

Criminal Act with Sincere Intent

“Sincerity” refers to very sincere ideas or beliefs, or is used to describe somebody lacking in evil or malicious intent. The defense of “crimes with sincere intent” usually applies to crimes of tax or financial fraud for which the accused’s intent needs to be verified. Deliberate fraud or forgery cannot be considered “sincere.” If, however, the criminal legal aid lawyer can prove the accused possessed all sincerity in his act, it can be inferred that the accused did not have fraudulent intent as alleged by the prosecutor.

DID THE ACCUSED COMPLETE THE CRIME?

Although being only at a certain stage of the crime (e.g. an intermediate stage) cannot count as evidence that proves the accused’s innocence, it can lessen the accused’s punishment in the court’s final sentencing and even result in the accused being exempted from punishment. Thus, the legal aid lawyer must carefully research the accused’s acts to determine whether the following circumstances exist so as to request a mitigated punishment or exemption from punishment : crime preparation V, an attempt to commit a crime, as the discontinuation of a crime (or lack thereof).

IS THERE ANYONE WHO SHOULD TAKE MORE RESPONSIBILITY THAN THE CLIENT FOR THE ALLEGED OFFENSE?

Does the accused have any other jointly accused persons? If so, the legal aid lawyer must investigate the concrete role of every co-accused to determine the actual role of the client. The lawyer needs to pay particular attention to joint crimes .

Was your client the ringleader in the course of the crime? Did your client organize, plot, or direct/lead the criminal group or other jointly accused persons? Was your client playing an important role in the course of joint crimes? Did your client instigate others to commit a crime?

Did your client play a secondary role in the course of the preparation and commission of the crime?

IS YOUR CLIENT ELIGIBLE FOR A LIGHTER OR MITIGATED PUNISHMENT?

The court can be allowed to give the accused a mitigated punishment or exempt him from punishment under some circumstances according to law.

Can the lawyer still seek a mitigated punishment for the client if there are no statutory specifications about mitigation?

Yes, The following are some points of evidence that may help in obtaining a mitigated punishment:

1. The accused does not have long-term criminal record.
2. The accused has expressed sincere remorse and self-examination for having participated in the crime.
3. The accused has compensated the victim for all his or her losses.
4. The accused is still a minor and also wants to continue schooling; his school also allows him to continue enrollment.
5. The accused needs to take care of elderly and young household members.

6. The accused is mentally retarded and cannot sensibly make judgments, and is thus easily taken advantage of by others.
7. The accused had a difficult childhood (for example, he was ill-treated at home) that has affected his long-term personal development.
8. The accused has had to overcome great hardships that have tested his limits and abilities as a person (for instance, domestic violence, drug-addiction).
9. The accused has good work experience or educational background, or has made significant contributions to society.
10. Any other mitigating circumstances about the accused. The legal aid lawyer should think of any means to describe the accused as pitiable and condonable.

In order to discover these points of evidence for a mitigated punishment, the legal aid lawyer must win the trust of the client, his family members, and other important persons in his life (such as his teacher or boss). The evidence for a mitigated punishment must form an important part of the theory of the case. When presenting the evidence for mitigated punishment in court, the legal aid lawyer does not need to conceal his own feelings. The legal aid lawyer's objective is for the court to see his client's more humane side and thereby to give him the opportunity for reform.

CONCLUSION

In the course of developing the theory of the case, the lawyer needs to carefully consider the prosecutor's burden of proof. Furthermore, after the conclusion of the investigation, the legal aid lawyer can judge whether the client's act constitutes a crime, whether there is any possibility that the client has a reasonable and legitimate defense, whether the client has actually completed the crime, whether the client is only an accessory, and whether there is evidence supporting mitigated punishment. Only after the analysis of the above questions can the legal aid lawyer present a complete, persuasive theory of the case in court.

QUESTIONING THE WITNESSES

Prosecution Witness

The following form will assist you to evaluate and prepare your defense against the statements of the prosecutor's witnesses:

PROSECUTION WITNESS EVALUATION FORM

Name of Witness:

Analysis

List the reasons why this witness helps the prosecutor prove the crime charged.

List the reasons this witness's testimony will hurt the defense of your client.

List the reasons (if any) this witness will help the defense of your client.

List the ways (if any) in which this witness's testimony is inconsistent with their previous statement, statements of other witnesses, the victim, accused and jointly accused persons, and the evidence presented.

List the ways (if any) that this witness's testimony may be utilized to advance the defense attorney's theory of the case.

Pages in the case file where this witness appears:

Supporting Evidence

List the evidence to be used when asking this witness questions.

In case the prosecution witness changes their previous statements, the legal aid lawyer can use the following prompts:

You can ask the witness: "You previously said...", and the witness will in all likelihood say "yes," or argue with his or her previous statement. If the witness says "no," or contradicts his or her previous statement, you can:

Refer to trial documents or other evidence:

Call an already prepared defense witness to the stand to refute the prosecution witness' claim:

Sample Questions

Is this witness helping your case? If so, remember to:

1. Repeat the aspects of the witness' testimony that are helpful to your case during your questioning.

Example: "I want to make sure I heard your testimony correctly. Did you say that [helpful statement]?"

2. First ask the witness easy, supportive questions in order to make them comfortable, then you can ask more difficult or aggressive questions. Examples (of easier, introductory questions):

- How many years have you been doing this? (if the witness is an expert witness, teacher, policeman, etc.)
- How well do you know the person?
- Are you the type of person who notices details?
- How good is your eyesight?
- How good was the lighting?

Is this witness against, or hurting, your case? If so, try to demonstrate inconsistencies and problems in their testimony. Examples:

- Is it true that you are friends with the victim?
- You didn't write down any of your observations at the time of the event?
- You did not speak with the police until many weeks after the alleged crime?

Your concluding question should be your strongest one and one that:

1. You safely know the answer to, and
2. Whose answer supports your case?

Example: Isn't it true that my client called the police, and waited for them at the scene?

Defense Witness Evaluation

1. Cross-examine the prosecution's witnesses

2. Use evidence to impeach the prosecution's witnesses
3. Ask a Magistrate or police officer to collect evidence on behalf of the accused. If the police or a Magistrate, discount evidence which could favor the defense, this is grounds for an appeal, and strong grounds for later nullification of the verdict.

The following form serves as a guide to help you evaluate and prepare for the testimony of witnesses that may help your case.

DEFENSE WITNESS EVALUATION FORM

Defense Witness #_____

Name of Witness:

Address:

Phone number:

Family member(s):

Place of work:

Relationship to accused (if any):

Reputation for honesty or dishonesty:

Capacity/mental health issues (if any):

Prior arrests/criminal convictions (including juvenile record):

Pages in the case file where this witness appears:

Prosecutor's evidence we need to discuss or explain:

1. description of crime scene
2. knowledge of complainant/victim
3. knowledge of prosecution witness
4. expert testimony on:
 - a. blood
 - b. tests by prosecution
 - c. reconstruction of the crime scene
 - d. victim's injuries/mental health status

Defense evidence to identify or admit:

1. knowledge of accused's:
 - a. character
 - b. habits
 - c. mental health status/limitations
 - d. physical health status/limitations
 - e. business practice
 - f. family
2. knowledge of the crime scene
3. alibi evidence
4. new evidence, such as:
 - a. scientific testing
 - b. diagrams
 - c. reconstruction of the crime scene
 - d. results of mental health evaluation of accused
5. When preparing questions, remember to consider how each witness's testimony can be developed to advance the defense attorney's theory of the case.

PREPARING FOR THE PROSECUTION TO QUESTION YOUR CLIENT

1. The theory of most prosecution questions promotes the following false logic:
 - a. Story has changed from the original account or is different from the police's account,
 - b. The accused is lying, and so therefore,
 - c. He must have committed the crime.
2. Prepare your client for the prosecutor's tone.
3. Your client should answer the prosecutor as he or she answered you,

with the same voice inflection, the same eye contact, and a body language that indicates they are telling the truth.

4. Approach expert questions that produce damaging evidence carefully. These questions must be answered directly by the accused, with no attempt to either evade or explain. The accused's body language must not convey any effort to evade touchy questions.

Evasion makes the client look untruthful.

Explanations can become opportunities for a prosecutor to start tearing holes in the accused's account.

Therefore, let the client know that you can return to these issues during re-questioning and clean up some damage. During re-questioning, be sure to ask questions that will advance your theory of the case.

5. If the accused does not know the answer, he or she should not be afraid to say "I don't know." *This may be especially important if a prosecutor tries to make your client admit to a certain number, or quantity:*

A prosecutor will try to show that your client is incorrect about something, anything at all: A frequent trick is to ask how *long* the red light lasted, how *many* meters it was across the room, or how *many* beers were consumed, etc.

Even if the accused first says that he or she does not know, the prosecutor may badger them to assent to an *estimate*, or a *range*.

QUESTIONING WITNESSES DURING TRIAL

1. Start with simple background questions to put them at ease. Examples:
What is your....

Name

Place of Birth

Work history

2. Ask a few “foundation” questions about the witness; they can be general but should be *consistent with the main testimony*. Examples:
 - If the main testimony is about a character trait or habit of someone connected to the case, ask how long they’ve known the person.
 - If the testimony is mainly about neighborhood layout or traffic, ask how long they’ve lived there, or how good the lighting is.
 - If the testimony is an expert opinion, ask how many and what types of materials the expert reviewed before coming to a conclusion. How much time did he spend on the review? Who did he interview?
3. Ask the “main” questions clearly and understandably.

GO SLOW. BE CLEAR. Witnesses get nervous up on the witness stand. There is a significant chance that your question will be confusing, even if you have discussed it ahead of time. There is a very real risk of getting an answer you do not want.

4. Phrase the main questions you ask each witness in a way that will advance the defense theory of the case.
5. If there is evidence that hurts your accused, bring it out before the prosecutor’s questioning. Examples:
 - Tell us why you did not talk with the police before coming here.
 - Tell us why you’re saying this today, but said something different earlier.
 - Tell the judge, please, why you didn’t go to the police and explain this alibi the day your husband was arrested.

EXAMINATION IN CHIEF AND CROSS-EXAMINATION

Questions to Consider

Regardless of whether the legal aid lawyer is preparing for examination in chief or cross-examination, he should prepare his inquiry by answering the following questions:

1. What is the overall theory of the case?

2. How does this witness fit into the overall theory of the case?
3. How can you fit this witness's story into the story that has already been told and the story that will be told after this witness testifies?
4. How will the witness's testimony help you to develop your client's story? To counter the prosecutor's story?
5. What evidence do you need to introduce or rely on during examination in chief? During cross-examination?
6. What evidence will the prosecutor rely on during examination in chief? During cross-examination? What questions can you ask or what evidence can you use to counter the prosecutor's evidence?

Purpose of Examination in Chief and Cross-Examination

Section 137 of The Indian Evidence Act, 1872 defines that the examination – in – chief is the Examination of the witness by the party who calls him to give his testimony before the Court. The Cross Examination of the witness is the examination of the witness by the adverse party. In case it is desired by the party calling his witness subsequent to cross examination, that witness may be called for Re- Examination. Although the legal aid lawyer should ask the six questions listed above when preparing for either examination in chief or cross-examination, he should be aware that examinations in chief and cross-examination have very different purposes and techniques.

EXAMINATION IN CHIEF

The examination of witness by the party who calls him shall be called his **Examination – in – chief**³¹. which requires the witness to tell a story. The goal of examination in chief is for the legal aid lawyer to elicit the witness's story in the witness's own words in a manner that will advance the overall theory of the case.

CROSS-EXAMINATION

The examination of a witness by the adverse party shall be called his cross

³¹ Section 137 of The Indian Evidence Act, 1872

- examination³² which is a selective, targeted attack on the prosecutor's theory of the case. It is not simply rehashing the testimony that was developed during the direct examination of the witness. The legal aid lawyer seeks to develop points that will show that the witness's testimony is inconsistent with other testimony or evidence; that the witness is biased against the accused; that the witness has a motive to testify against the accused; that the witness (if he is a co-accused) had the opportunity to commit the crime; that the witness lacks knowledge of the facts and the evidence in the case; and that the witness was unable to see, hear, perceive, and observe the major events in the case.

Types of Questions to Ask

Open-ended questions: Since the purpose of examination in chief is to have the witness tell a story in narrative form, the legal aid lawyer should ask questions beginning with words that are intended to elicit information from the witness, such as *who, what, where, when, why, how, describe, explain*. Asking these types of questions requires a witness to do more than simply answer yes or no. Examples:

- When you arrived at the bar, what did you see?
- Can you tell us how the fight began?
- Who did you see at the bar? What were they doing? What happened next?

Closed-ended questions: Closed-ended questions require the witness to answer yes, no or as briefly as possible; therefore, the legal aid lawyer should avoid asking these types of questions during examination in chief and should ask closed-ended questions during cross-examination. Examples:

- Was the bar crowded the night that the fight occurred?
- Who threw the first punch—the victim or the accused?
- Were you still there when the fight ended?

WORDS NEVER TO USE DURING CROSS-EXAMINATION

Legal aid lawyers should NEVER ask *who, what, where, when, why, how,*

³² Section 137 of *The Indian Evidence Act, 1872*

describe and explain during cross-examination. These are words requiring explanation that you do not want to elicit during cross-examination. The goal of cross-examination is to target the prosecutor's case and to advance the accused's theory of the case without giving the witness an opportunity to explain their answers. You want the witness to agree with your version of events, not to develop their own.

HOW TO PREPARE YOUR CLIENT AND OTHER WITNESSES

1. Communicate your theory of the case to the client or other witness. Explain how their testimony advances the theory of the case and refutes the prosecutor's version of events.
2. Prepare your client and other witnesses for both examination in chief and cross-examination.
3. Prepare your questions for both examination in chief and cross-examination. Remember to begin with broader, more general questions at first and more specific, detailed questions as the examination proceeds. Be sure to save your strongest/best points for the end of your examination. Do not ask a question for which you do not know the answer.
4. Role-play with your client or other witness. Prepare them for the prosecutor's tone, questions the prosecutor will ask, and evidence the prosecutor will use.
5. Advise your client or other witness to listen carefully to the question that is being asked, regardless of whether you or the prosecutor is doing the questioning. Make sure the client or other witness understands that they need to concentrate on answering the question that is actually asked and that they should not provide information that they have not been asked to give.
6. If the client or other witness truthfully does not know the answer to a question, he should say, "I don't know" instead of guessing or speculating.
7. Reassure the client or other witness that they will have the opportunity to clarify any matters that need clarification during re-examination in chief.

CONCLUSION

Developing effective examination in chief and cross-examination skills takes persistence, patience and most of all, practice, practice, practice! By developing a comprehensive theory of the case and structuring your examination in chief and cross-examination questions in a manner that advances your theory, you will be able to persuasively argue your client's case to the court.

PLEA BARGAINING/GUILTY PLEAS

Introduction – The concept of Plea Bargaining has been recently introduced in India. By insertion of a new chapter XXIA consisting of 12 sections in The Code of Criminal Procedure, 1973 by act 2 of 2006. The Central Government has modified the offences affecting the socio-economic condition of the country, which have been kept out of the preview of Plea Bargaining. Not only the Plea Bargaining will expedite the disposal of the cases, it may also result in adequate compensation for the victim of the crime, since he along with the prosecutors will be in a position to bargain with the accused.

In order to bring about a substantial reduction of cases, other than cases involving capital punishment, life imprisonment or imprisonment for a term exceeding seven years, suitable instructions have been issued for proper implementation of the Plea Bargaining Scheme.

TYPES OF GUILTY PLEAS

In the American legal system, there are essentially two types of guilty pleas: guilty and nolo contendere (or “no contest”). A plea of guilty is an admission that one has committed the crime in question, and an acceptance of the related punishment. A plea of nolo contendere allows the accused to accept the punishment related to the crime without admitting to the crime. It is instead a statement that the accused will not contest the charges levied against him. Courts in the United States very rarely accept nolo contendere pleas. The implications of a guilty plea go beyond claiming responsibility for an act and replace the role of a jury at a trial.

In India the Plea Bargaining can be divided into three types:

1. Charge bargaining
2. Sentence bargaining
3. Fact bargaining

Guilty pleas are often entered as the result of a plea bargain or an agreement in which a prosecutor and a accused arrange to settle the case against the accused. The accused agrees to plead guilty to a specified charge in exchange for a mutually agreed-upon sentence, a sentence recommendation to the

judge, or the dismissal or reduction of other criminal charges. Quite often, an agreement to testify against a co-accused is a condition of a plea bargain.

A guilty plea is formal admission of guilt and is the equivalent of a conviction. Most often, it occurs as part of a plea bargaining process which may result in reduced charges or an agreed-upon favorable sentence. The vast majority of criminal cases in the U.S. (probably more than 95%) are resolved through this procedure. Plea bargaining has only been introduced to Indian law since 2005 and is probably the most effective means for expediting cases.

Plea Bargaining are often entered as the result of a plea bargain or an agreement in which a prosecutor and an accused arrange to settle the case against the accused. The accused agrees to plead guilty to a specified charge in exchange for a mutually agreed-upon sentence or the dismissal or reduction of other criminal charges. Quite often, an agreement to testify against a co-accused is a condition of a plea bargain. Each type of Plea Bargaining mention herein above involves implied reduction sentence, but differ in the ways of achieving reductions.

The supervising judge must approve of any guilty plea or plea bargain. Generally a judge will authorize the plea if the accused makes a knowing and voluntary waiver of his right to trial, the accused understands the charges, and the accused makes a voluntary confession, in court, to the alleged crime. Even if an accused agrees to plead guilty, a judge may decline to accept the guilty plea and plea bargain if the charge or charges have no factual basis or support.

The court must also explain the nature of the crimes to which the accused is pleading guilty. For example, while a person not involved in the legal system by trade or experience may have a general notion of what a crime such as murder means, he may not understand the difference between murder and manslaughter. It is important for the accused to understand to what he is pleading guilty, so that he may better understand the potential ramifications beyond the courthouse and any legal penalties.

The following offences are excluded from the preview of the Plea Bargaining:-

- a. Dowry Prohibition Act

- b. The Commission of Sati Prevention Act, 1987.
- c. The Indecent Representation of Women (Prohibition) Act, 1986.
- d. The Immoral Traffic (Prevention) Act, 1956.
- e. Protection of Women from Domestic Violence Act, 2005.
- f. The Infant Milk Substitutes, Feeding Bottles and Infant Foods (regulation of Production, Supply and Distribution) Act, 1992.
- g. Provisions of Fruit Products Order, 1955 (issued under the Essential Commodities Act, 1955).
- h. Provisions of Meat Food Products Order, 1973 (issued under the Essential Commodities Act, 1955).
- i. Offences with respect to animals that find place in Schedule I and Part II of the Schedule II as well as offences related to altering of boundaries of protected areas under Wildlife (Protection) Act, 1972.
- j. The SC and ST (Prevention of Atrocities) Act, 1989.
- k. Offences mentioned in the Protection of Civil Rights Act, 1955.
- l. Offences listed in Sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000.
- m. The Army Act, 1950.
- n. The Air Force Act, 1950.
- o. The Navy Act, 1957.
- p. Offences specified in Sections 59 to 81 and 83 of the Delhi Metro Railway (Operation and Maintenance) Act, 2002.
- q. The Explosives Act, 1884.
- r. Offences specified in Sections 11 to 18 of the Cable Television Networks (Regulation) Act, 1955.
- s. Cinematograph Act, 1952.

When a court in India accepts a plea bargain, the guilty plea operates as a conviction, and the accused cannot be retried on the same offense by the same governmental entity. If the government breaches a plea bargain (for

example, by arguing for a specific sentence when the agreement is that it will not do so), the accused may seek to withdraw the guilty plea, ask the court to enforce the plea bargain, or ask the court for a favorable modification in the sentence. If the accused breaches a plea agreement (for example, by refusing to cooperate in the prosecution of jointly accused persons), the prosecution may re-prosecute the accused.

GUILTY PLEA AND ACCOMPANYING WAIVERS MUST BE VOLUNTARY!

In the Indian criminal justice system, a guilty plea that is the result of coercion or force is not acceptable to the court. The requirements discussed above are designed to provide the accused with a depth of knowledge required to make an informed decision. If, after being informed of the implications of entering a guilty plea, the accused chooses to enter that plea, it is considered to be a voluntary waiver of rights as specified above.

Factual Basis Determination

The court must also determine that there is a factual basis for the plea. Generally speaking, this is done through a “colloquy” or conversation between the accused and the judge in which the judge states the facts that the government believes it can prove and the accused states that he accepts those facts as true. The facts must support the crime to which the accused is pleading guilty.

Benefits of Pleading Guilty to the Accused

The result of a guilty plea is often a reduction in charges (e.g., murder to manslaughter). Also, at the Magistrates discretion, if the agreed upon sentence from plea bargaining is the minimum sentence allowed, the judge can choose to impose as little as half that sentence, at his own discretion.

A trial never has a guaranteed outcome. No matter how strong either side's case may be, there is always the possibility of loss for either side. Pleading guilty removes the process and the uncertainty of the trial, and provides a guaranteed penalty. The stress of criminal prosecution can be great on the accused and his family, and even though a guilty plea is being entered, many accused persons may prefer to put an end to the ordeal and have

some sense of finality. From a practical standpoint, if the accused is paying for private counsel, entering a guilty plea removes the costs associated with a trial. Keep in mind, however, that all accused persons have a right to a fair trial, not simply those who can afford it. The idea that entering a guilty plea costs less is simply a side effect of pleading and should not really be considered as a factor.

Negotiation Tips

The legal aid lawyer should discuss strategies and potential tactics for the negotiation, including whether to argue for a reduction of the charge (for instance, from first-degree murder to manslaughter), a specific recommendation for sentence (for example, 6 months in prison), and/or an agreement by the prosecutor not to oppose the accused's request for probation (supervision by the government for a specific period of time). It is always the accused's decision whether to enter into a plea agreement. The legal aid lawyer can only explain the benefits and drawbacks and make a recommendation.

The legal aid lawyer should consider the severity of the crime, the strength of the evidence in the case, and the prospects of a guilty verdict at trial when preparing to negotiate with the prosecutor. He should also consider collateral consequences of a guilty verdict.

The prosecutor typically may not offer a plea bargain if the alleged crime is particularly heinous or the case is highly publicized or politically charged.

The accused may wish to reject a plea bargain if the accused believes that the possibility of acquittal (being found not guilty at trial) outweighs the possibility of conviction.

Benefits and Harms

Plea bargaining is a controversial feature of the criminal justice system. Supporters argue that it resolves matters quickly, speeds court proceedings, reduces the number of cases in overburdened courts, guarantees convictions, reduces the number of people in overcrowded jails, helps prosecutors manage their caseloads and saves the government the time and cost of a trial.

Opponents claim that plea bargaining can put pressure on accused persons

to plead to crimes that they know they did not commit, and that the outcome of a plea bargain may depend strongly on the negotiating skills of the legal aid lawyer, which puts persons who can afford good lawyers at an advantage. The legal aid lawyer must be sure that the accused fully understands the rights he is waiving and the consequences he is facing as a result of a plea bargain.

It is not denied that the introduction of plea bargaining mechanism is to reduce the gigantic load of criminal cases in India but one cannot overlook its controversial features also. It can allow the prosecution to obtain conviction from the accused that would have resulted in an acquittal at trial just because of hostile witness or lack of evidence. Some of the other lacuna in the concept of plea bargaining are as under:

- Involving the police in plea bargaining would invite coercion.
- By involving the court in plea bargaining process the court in partiality is impinging involving the victims in plea bargaining process would invite corruption.
- If the plead guilty application of the accused is rejected then the accused would face a great hardship in future to prove himself innocent.
- Thus the legal aid lawyers should in compass the following minimum requirement:
 - § The hearing must take place in court the court must satisfy itself that the accused is pleading guilty knowingly and voluntarily.
 - § Any court order rejecting a plea bargaining application must be kept confidential to prevent prejudice to the accused.
 - § It would be like to say that the nature of this concept is in unconstitutional manner to reduce the work load but we have no other choice to reduce the over burden shoulders of our judicial work.

EVIDENCE

BACKGROUND

The laws of evidence impose standards that govern the admission of proof at trial. This proof can come in the form of testimony, documents, or physical objects. There are four main types of evidence that may be offered in a criminal case:

- Demonstrative
- Documentary
- Real
- Testimonial

Demonstrative evidence illustrates the testimony of a witness and includes items such as maps, diagrams, and charts. Documentary evidence is contained in the form of writing, such as a contract. Real evidence is generally an object that was directly involved in the case, such as the murder weapon or a piece of the victim's clothing. Testimonial evidence is oral evidence provided by a witness under oath. Both the content and form of proffered evidence is considered when determining its admissibility at trial. Many volumes have been written on the rules of evidence. What follows are some general principles that frequently arise in criminal trials.

The Process of Admitting Evidence

Before evidence can be used at trial, it must be admitted. The judge determines the admissibility of evidence. To be admissible, evidence must be material, relevant, trustworthy, and must not violate an exclusionary rule. Real and documentary evidence must also 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. Once admitted, the finder of fact will determine the appropriate weight to give to a particular piece of evidence. Evidence is material if it relates to a substantive legal issue in the case. Evidence is relevant if it tends to prove or disprove a material issue. Exclusionary rules,

discussed above, prevent the admissibility of relevant and material evidence due to concerns about the manner in which the evidence was obtained. Additionally, a trial judge has significant discretion to exclude evidence, despite its relevance, if its probative value is outweighed by its prejudicial value, if it could be confusing or misleading, or if its admission would cause undue delay.

Tips for Evaluating Materiality and Relevancy

Inquiries into materiality and relevancy are intertwined as they both seek to determine whether the proffered evidence tends to prove or disprove a substantive issue in the case. 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 a material fact? Will the evidence tend to make the fact more or less likely to be true?

As a general guideline, relevant evidence relates to a time, event or person involved in the controversy that is the subject of the trial. Evidence that does not relate to a time, event or person involved in the current controversy, but rather to a similar time, event, or person, should be carefully evaluated. For the most part, evidence of a similar occurrence is not relevant, and even if it is relevant, the risk of unfair prejudice may make it inadmissible. For example, in a murder case, evidence that the criminal accused threatened the victim on the morning of the killing is probably relevant, 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. Legal aid 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.

Character Evidence: The Basics

Quite often, character evidence is the only evidence offered by an accused in his case. This evidence is intended to show that upstanding persons in the community know the accused and that he has a reputation as a law-abiding citizen.

- Evidence of the Criminal Accused’s Character

Character evidence concerns a specific quality attributed to a person, such as truthfulness or violence. The three main methods for proving an individual's character for a particular quality or trait are: (1) introducing evidence of the individual's specific acts; (2) offering a witness's opinion of the individual's character; and (3) offering a witness's testimony regarding the individual's overall reputation in the community. Evidence concerning the character of a criminal accused raises special relevancy concerns. Generally, the prosecution cannot offer evidence of the bad character of the criminal accused in order to show that the accused is more likely to have committed the crime of which he is accused.

However, because the liberty of the criminal accused is at stake, the criminal accused may introduce evidence of his good character to demonstrate his innocence of the crime of which he is accused. An accused may do so by calling a qualified witness to testify to the accused's good reputation for the trait involved in the case, as well as to testify to the witness's personal opinion regarding that trait of the accused. Should the accused call a character witness, the prosecution may rebut such testimony by cross examining the character witness, as well as by calling a witness to testify to the accused's bad reputation or the witness's opinion of the accused's character for the particular trait involved. Character evidence may be useful in a case in which the accused is a respected member of the community. The legal aid lawyer should explore carefully with his client whether there are incidents of improper conduct that could be used to cross-examine such witnesses.

- Evidence of the Victim's Character

The criminal accused may introduce reputation or opinion evidence of the bad character of the victim only when it is relevant to prove the accused's innocence. For example, in a murder case where the accused claims self defense, the accused may introduce evidence showing that the victim threatened him. Should the accused introduce such evidence, the prosecution may offer reputation or opinion evidence regarding the victim's good character or the accused's bad character for the same trait. As a public policy matter, the criminal accused is generally not allowed to present evidence regarding the bad character of a rape victim.

- Evidence of Habit

Unlike character evidence, evidence that demonstrates a criminal accused's habit, that is his usual response to a specific circumstance, may be introduced in certain circumstances to prove that the criminal accused acted in conformity with his habit on a particular occasion. The reason for allowing habit evidence as opposed to character evidence is that habits are specific, regular, and consistently repeated.

- Evidence of Specific Acts of Misconduct

Generally, evidence of an accused's past crimes or specific acts of misconduct is inadmissible to establish the accused's criminal disposition. The purpose of this rule is to prevent conviction based on evidence of prior crimes, rather than evidence that the accused committed the present crime. Although evidence of specific acts of misconduct cannot be used to demonstrate conformity with them, such evidence may be admissible for other purposes, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake. For example, evidence that the accused committed "signature" prior acts may be introduced to prove that the criminal accused committed the act in question.

EXCLUDING EVIDENCE: THE BASICS

- The Exclusionary Rule

The exclusionary rule is a rule by which Magistrates prevent the introduction of evidence in a criminal trial that would violate certain rights of the criminal accused. These rights, which are discussed in greater detail above, include: (1) the right to be free from unreasonable search and seizure; (2) the right to be free from compulsory self-incrimination; and (3) the right to the assistance of a legal aid lawyer. The exclusionary rule prohibits the government from using evidence obtained in violation of these rights, as long as it constitutes a "failure of justice". There are several purposes of the exclusionary rule, including: to avoid the risk of unreliable evidence, to discourage law enforcement officers from violating the rights of the accused, and to prevent unfairness to the accused caused by introducing evidence that is more prejudicial than probative.

HEARSAY: THE BASICS

Hearsay is an out of court statement, made by someone other than the witness testifying at trial, offered at trial for the truth of the matter asserted. If a statement is hearsay, and one of the many exceptions to the rule against hearsay does not apply, the statement is inadmissible. Unlike materiality and relevancy which evaluate the content of the evidence, hearsay rules evaluate the manner in which the evidence is offered. The purpose of the rule against hearsay is to insure that the adverse party is afforded an opportunity to cross-examine the declarant to test whether his testimony is accurate.

There are some statements, that although hearsay, are deemed to be trustworthy and therefore admissible as exceptions to the hearsay rule. Some of these exceptions require a declarant to be unavailable. A declarant is unavailable if he is exempted from testifying by a court ruling, refuses to testify despite a court ruling, lacks memory to testify, cannot testify due to death or illness, or he cannot attend the trial.

The following are some examples of exceptions to the hearsay rule requiring a declarant to be unavailable:

- Statements previously given under oath
- Statements against the declarant's pecuniary, proprietary, or penal interest
- Statements made under a belief of impending death
- Statements about personal or family history

The following are some examples of exceptions to the hearsay rule that are not affected by a declarant's availability:

- Statements concerning the declarant's then-existing state of mind
- Excited utterances
- Present sense impressions
- Statements concerning present bodily condition
- Business records

- Statements previously recorded and used at trial to refresh a witness's recollection
- Public records and other official documents

Additionally, there is a catch-all exception to the hearsay rule which allows the admission of hearsay, not covered by a specific exception to the rule, if: (1) the statement has particular guarantees of trustworthiness, (2) the interests of justice would be served by its admission, and (3) the proponent gives adequate notice to his adversary.

NON-HEARSAY

Some out-of-court statements are deemed not to be hearsay. According to its very definition, hearsay is a statement that is being offered to prove the truth of the matter asserted. If the statement is offered for any other purpose, then the statement is not hearsay. For example, a witness may testify that yesterday he spoke to a friend who lives in Jaipur. While on the phone that friend said, "It's raining here!" If the witness' lawyer is seeking to use this statement to prove that it was in fact raining in Jaipur, then the statement is hearsay and is not admissible. If the Legal aid lawyer, however, is seeking to use the statement to prove that the phone lines were operating that day, or that the declarant had not lost the power of speech, or that the two parties were in contact on that particular day, or for any other purpose, then the statement is not being offered to prove the truth of the matter asserted, and is not hearsay.

Another situation in which an out-of-court statement is deemed not to be hearsay is a statement by a co-conspirator in the course of a conspiracy. The statement must have been uttered (1) by a co-conspirator of a party (2) in furtherance of the conspiracy (the statement need not have actually furthered the conspiracy to be admissible; it need only have been uttered for the purpose of furthering the conspiracy); and (3) during the existence of the conspiracy (statements made after the object of the conspiracy is attained or after the conspiracy is terminated are still hearsay and inadmissible). The existence of the conspiracy and the accused's participation in it are matters to be determined by the court. The co-conspirator statement offered by the prosecution can be considered by the court in this determination but it cannot be sufficient.

ARGUMENTS

ARGUMENT ON THE CHARGES

Background

The argument on the charges is an opportunity for the defense to marshal the significant facts in a logical fashion that makes sense and leads to one conclusion, a defense verdict. The argument on the charges may be the most effective piece of advocacy during a trial and, as such, should be delivered in a calm, logical manner that brings the Magistrate to your side.

Basics

This may be the Magistrate's first contact with the legal aid lawyer. Given the fact that first impressions are hard to change, counsel should be very conscious of dress, grooming and body language. The lawyer must attempt to come across as honest, sincere, considerate and credible.

CLOSING ARGUMENT

Sample Themes:

One important theme in any closing argument is the prosecution's heavy burden of proof. Some ways of emphasizing that burden are as follows:

- The test is not which side you believe - The prosecution may suggest to you that the test in this case is simply which side you believe. They invariably do this - and it is wrong. That's not the test. The test is this: "Do you have a reasonable doubt whether the accused is guilty of the crime alleged?" Is there at least one reasonable doubt that (name the accused) might be wrongly accused?
- Reasonable doubt as an abiding conviction of the truth of the allegation - I suggest to you that reasonable doubt about a person's guilt is when, after considering and comparing and weighing all the evidence, you are not left with an abiding conviction of the truth of the charge that has been leveled at the accused.
- Reasonable doubt as meaning at least "firmly convinced" of guilt -

Whatever you may think about what reasonable doubt means, I submit to you that it means, at least, that you, as a responsible Magistrate, cannot convict a person of a crime until you are firmly convinced, personally, of the accused's guilt.

- Evidence must leave no room for reasonable doubt - By your oath, you cannot convict the accused when after careful consideration of the evidence there still remains one reasonable doubt as to whether the accused is guilty of this charge. It is only when the evidence leaves no room whatsoever for reasonable doubt that you are allowed to find that the accused is blameworthy.

Many criminal cases are built on the testimony of either cooperating jointly accused persons or persons who themselves have prior criminal records. This is also an important theme to emphasize. Some samples of arguments discrediting informants and cooperating co-conspirators are as follows:

- Be skeptical from the beginning of the case - I told you in my statement, at the very beginning of this case, that you are going to hear from some biased people, and, without exception, the record reflects either that every one of them had made some kind of deal or that every one of them had a reason to say what he said. I asked you to please be skeptical and to listen not only to what they said, but to the way they said it and how they said it and why they said it. I asked you to keep your mind open to that because you don't have to accept at face value what they said.
- Credibility of prosecution witnesses - The test of believability doesn't rest on anyone but the prosecution. They must prove that what (name the informant or cooperating co-conspirator) told you was true beyond any reasonable doubt. They can't shift the burden of proving the honesty of their witness by saying, "Well, what kind of witness would you expect us to have?"
- Prosecution vouching for credibility and truthfulness of accomplice or co-conspirator witness - How can you believe someone like (name the accomplice/co-conspirator)? This is such a topsy-turvy sort of case. I really marvel at it because here we have the government, through its prosecutor, vouching for the credibility and truthfulness of an admitted criminal.

SENTENCING

Background on Sentencing

Sentencing takes place after a accused is convicted of a crime. The conviction can be the result of a trial verdict or a guilty plea. For minor offenses, sentencing typically occurs immediately after the conviction. For more serious and/or complex cases, the sentencing judge will set a date for sentencing.

Sentencing: Process

Generally, the court will impose a sentence that is within a range set by statute for the crime committed. The schedule of sentences or the sentencing range is codified in the Criminal Procedure Code.

In a sentencing for a crime, the sentencing judge may consider information from a number of sources in determining an appropriate sentence. Those sources, among others, are the accused's criminal history, the nature of the crime, the accused's personal circumstances, and the accused's expression of remorse.

It is important to note that the rules of evidence typically do not apply at sentencing. Many of the facts that the judge considers at sentencing are not elements of the offense and, as such, they will not have been established by the finding of the accused's guilt.

Courts have also held that hearsay testimony, which otherwise would have been inadmissible at trial, may be considered at sentencing; however, the information must have sufficient indicia of reliability to support its probable accuracy.

The judge will also consider input from the prosecution and defense in determining the sentence. The court is also required to permit the legal aid lawyer the opportunity to speak on the accused's behalf and the court may address the accused personally to determine whether the individual desires to make a statement or present any evidence in mitigation.

To counter any "aggravating factors" raised by the prosecution, it is advisable for the legal aid lawyer to raise the following points during the argument before the court for passing a lenient sentence.

- A detailed personal history of the accused in an effort to “humanize” the accused which may include, among other things, positive personal successes, volunteer work, and/or community service
- Possible alternatives to incarceration such as community-based probation, house arrest and/or placement in a half-way house
- Specific community service that may be related to the offense such as speaking to students about the negative impact of drug abuse or criminal activity
- Drug and/or alcohol treatment including placement in a specific facility coupled with outpatient therapy
- Psychiatric and/or psychological counseling with placement in a specific hospital or work with a specific psychiatrist/psychologist
- Victim restitution with a statement of remorse for the offense committed
- Specific employment options/coupled with a detailed work history

While the above examples are not exhaustive of what a legal aid lawyer may or should address during the argument before the court, it should be emphasized that legal aid lawyers should strive to be as creative as possible in advocating for a lesser sentence. The goal of the defense lawyer should be to provide the court with any and all positive information about the accused that would assist the court in its sentencing determination.



IBJ CRIMINAL JUSTICE SYSTEM SCORECARD¹

ASSESSMENT OF: _____

ASSESSOR²: _____

PLACE: _____

DATE: _____

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
I. POLICING			
<i>LEGAL and REGULATORY FRAMEWORK</i>			
Legislation exists that defines core responsibilities of the police force.			
Legislation assigns and distinguishes between the roles of different agencies in delivering police services.			
Police are trained on and bound by applicable human rights laws and standards.			
Updated laws, rules or regulations govern the powers and conduct of law enforcement officers.			
The law defines the grounds and threshold for the application of coercive powers, i.e. the concepts of “reasonable grounds,” “reasonable belief” “probable cause,” etc. exist and are defined.			
The use of police powers is limited to minimum reasonable force under the circumstances.			
The law establishes mechanisms for the monitoring and oversight of police conduct and performance, including a specific reference to corruption.			
The law provides a statutory right to make complaints against the police and provides a mechanism for making such complaints.			
Independent oversight over the complaints system exists.			
Differences in the roles of police in urban and rural areas are recognized in legislation, including the recognition of customary practices in rural areas.			

¹ This scorecard is used to assess the performance and needs of criminal justice systems. The scorecard is directive in that if the assessor answers any performance measure in the negative, it provides information as to how the system can be improved. It also allows IBJ to identify areas in which training is required, especially if there is a trend throughout a region showing that a particular practice is not properly performed. Finally, the scorecard can identify internal performance measures relating to IBJ training programs by administering the assessment instrument before a training program and then at set intervals throughout IBJ programming.

² To be completed by an IBJ representative. This form is to be filled out with the aid of interviews (of defenders, clients, other judicial actors), review of case assessment forms, and observations.

* These aspects are particularly difficult to assess. However, the assessor should still attempt to make some general assessment based on behavioural attitudes, relationships between parties, and a defender’s practice as a whole (e.g. are there a lot of successful plea bargains?)

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<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
<i>NATIONAL POLICING FRAMEWORK</i>			
A written, updated national policing plan or strategy exists.			
The national plan identifies core policing functions and assigns responsibility for delivering each function.			
The national policing plan gives guidance about delivering police services in local communities.			
Government policing priorities exist.			
Community policing strategies and priorities exist.			
Targets or performance measures have been set in relation to community policing priorities.			
Local police commanders have adequate information about policing demands within their areas (e.g. databases, paper records or other information sources indicating the number of calls for assistance from the public, crime levels).			
Formally defined and regularly timed mechanisms are in place allowing for consultation with the public, or their representatives, on local policing issues.			
A complaint system exists which enables members of the public to file complaints about the delivery of police services or the behavior of officers. The system is:			
• Independent			
• Locally based			
• User friendly			
• Publicized			
<i>NATIONAL INFRASTRUCTURE</i>			
Police commanders are given responsibility for managing their own budgets.			
Budgets and expenditures are subject to a national or local audit process.			
If necessary, local police can call for support from central reserves (i.e. in the case of large protests, international crimes, or special forensic investigations).			
<i>STAFFING</i>			
The police service is fully and adequately staffed.			
Staff completes a probationary period before being confirmed as an officer.			
A sufficient police budget exists.			
The staff salary structure is appropriate to the national average wage.			
Police officers and other staff receive their pay regularly and on time.			
Salary increases are based on merit.			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
Salaries do not discriminate between different people performing the same job.			
If private groups or organizations are involved in delivering police services:			
• They are held accountable.			
• Their allegiance is to the police and state structure.			
<i>RECRUITMENT</i>			
Appropriate recruitment procedures exist.			
Employment applications are open to all sections of the community.			
Vacancies are widely and publicly advertised.			
Recruitment is based on objective assessment and interview.			
The selection procedure is fair, transparent and objective.			
The police are representative of the community.			
• Police speak the local language.			
• Police live in the local community.			
Physical requirements (height, weight, sight) are attainable by all minority and ethnic groups.			
<i>TRAINING</i>			
Basic incoming training is given to all police recruits.			
Training focuses on practical policing skills and ethical behavior that is consistent with human rights.			
Individual officers can describe aspects of training relating to integrity, accountability and ethics.			
Officers receive ongoing refresher training.			
Training is provided on:			
• Control and restraint techniques			
• Use of weapons			
• Obtaining statements and confessions without the use of coercion, force or torture			
• New laws, regulations and procedures			
<i>CAREER DEVELOPMENT</i>			
Promotion is rewarded based on independent and objective assessment criteria.			
The promotion system is free from bias and favoritism.			
The selection process for work in specialized units is free from bias and favoritism.			
<i>CORRUPTION</i>			
Police do not receive direct payments or benefits from members of the public in exchange for special attention or additional protection.			
Police officers' lifestyles are compatible with their level of remuneration (no excessively large cars, etc.).			
Police are periodically tested with a polygraph and asked questions about dishonesty and corruption.			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
Police are periodically tested for substance abuse.			
Officers do not receive free items from shopkeepers or free food and beverages from bar or restaurant owners.			
Officers do not have inappropriate sexual relationships with witnesses, suspects or informants.			
<i>LOCAL POLICING STRUCTURES</i>			
Police stations are easily accessible by members of the public.			
Police stations are secure and include secure storage areas for evidence.			
Police stations have appropriate equipment (electricity, furniture, telephones, computers, etc.).			
Police stations are open to the public at all times.			
Members of the public are able to report a crime, make a complaint or make enquiries about lost property at police stations.			
Police stations have facilities where confidential matters will not be overheard by others.			
Visitors are not required to wait an excessive amount of time before being seen.			
<i>INVESTIGATIONS</i>			
There are enough investigators to handle the workload.			
Evidence is handled appropriately using latex gloves and sealable bags.			
A system exists to provide for appropriate preservation of evidence and to prevent tampering and contamination of evidence.			
Forensic examination facilities are available.			
The identities of informants are registered and kept confidential.			
<i>CUSTODY FACILITIES</i>			
Secure, clean cellblocks exist.			
Detainees are advised of their legal rights upon arrival.			
A written log exists of all incidents relating to a detainee's/prisoner's detention			
Detainees'/prisoner's medical needs are appropriately handled in a timely manner.			
Detention/imprisonment facilities include:			
• Toilet and washing areas			
• Separate areas for men, women and juveniles			
• Adequate lighting during the day			
• Adequate ventilation and heating			
• Recreation areas			
Detainees/prisoners are adequately fed on a regular basis.			
Detainees/prisoners are regularly released from their cells in order to exercise/receive fresh air.			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
II. COURTS			
<i>BUDGET AND ADMINISTRATION</i>			
An adequate budget exists to support court activities.			
Court employees, including judges and support staff, maintain regular work hours and are present during full court hours.			
<i>JUDICIAL COMPETENCE AND INDEPENDENCE</i>			
Judges demonstrate knowledge and understanding of applicable law, including relevant international human rights treaties/norms.			
Judicial decisions are made in a timely manner consistent with applicable laws.			
Judges comply with any legal obligations to conduct regular inspections of detention facilities.			
Judges conduct any regular review of cases pertaining to detained individuals required by law.			
Speedy trial requirements required by law are met.			
Judges maintain effective control of court proceedings, lawyers, staff, witnesses and public.			
Judges display independence and do not respond to interference, inducement or intimidation.			
Judges correctly apply laws regarding arrest and detentions:			
• They enforce laws regarding first appearance of the accused in court.			
• They comply with rules regarding orders to dismiss defective warrants.			
• They carry out appropriate remedies upon a finding of illegal detention.			
Judges enforce requirements regarding legal assistance:			
• They promote access of defense advocates during all phases of case.			
• They refrain from questioning unrepresented defendants who have requested counsel.			
Sentences are issued according to legally relevant grounds and not based on impermissible factors such as the race, gender, or ethnicity of the accused.			
Judges give individual attention to cases and decide them without undue disparity among similar cases.			
<i>STAFFING</i>			
The court hires and fires its own staff.			
A policy prohibiting nepotism exists.			
The most qualified applicants are hired for positions and a policy of non-discrimination exists.			
Court staff receive appropriate initial training for their positions.			
Ongoing training is available for court employees relating to skills, policies, professionalism, changes in the law and changes in court procedures.			
Staff are required to follow a code of ethics.			
Policies prohibiting corruption exist, and staff members who are proven to have accepted financial or other benefits from members of the public in exchange for special attention are appropriately sanctioned.			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
<i>COURT SERVICES</i>			
There is an information counter or other central location where members of the public can receive information about court cases and processes.			
Staff who speak local languages are available to provide information to the public.			
A court user may obtain a copy of a court order or judgment and court procedures and processes.			
Courts provide translation services for the accused, victims and witnesses in proceedings.			
Court proceedings are open to the public and media.			
Court fees are not prohibitive and do not prevent access by the public.			
Court calendars and schedules are accessible to the public.			
Cases are heard at the time they are set on the court calendar.			
Courts are perceived to be fair and equal by members of the public.			
<i>COURT FILES</i>			
Court proceedings are recorded or summarized in writing.			
Court files exist for all cases.			
Files are kept up-to-date.			
There is a court registry.			
An efficient filing system for case records exists.			
Court records are protected from theft and damage by natural causes, including the environment and insects.			
<i>CASE FLOW MANAGEMENT</i>			
Cases are begun and completed within applicable statutory time limits.			
There are no excessive backlogs of pending cases.			
Judges are assigned appropriate levels of cases.			
Judges are aware of how many cases are assigned to them.			
A plan for assigning incoming cases exists.			
Cases can be tracked throughout the legal system.			
<i>FACILITIES</i>			
The court is located where it can easily be reached by public transportation.			
Directions to the court facility are readily available to the public.			
The courthouse is clearly identifiable.			
The court is accessible to the disabled.			
Weapons and other security hazards are not allowed in the courthouse.			
Security personnel screen visitors.			
The courthouse is generally clean and well maintained.			
Visitors are assisted in a timely manner.			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
Work areas for court personnel are adequate and equipped appropriately with telephones, computers, furniture, etc.			
Courtrooms are well maintained and designed to be used for court-related purposes.			
<ul style="list-style-type: none"> Defendants can sit near counsel, 			
<ul style="list-style-type: none"> Workspace exists for completing court reports 			
Sufficient public seating exists in the courtroom.			
Judges chambers are adequate, appropriately equipped and secure.			
Courtrooms are not excessively noisy.			
<i>PRISONER TRANSPORT and CUSTODY</i>			
Men and women are transported to court separately.			
Children and adults are transported to court separately.			
Adequate holding facilities for detainees exist in the courthouse.			
Restraints are used only when necessary.			
<i>III. PRISONS</i>			
Prisoners are classified to determine the prison security level to which they should be sentenced (maximum security, minimum security, etc.)			
The penitentiary system focuses on the treatment of prisoners, the essential aim of which is their reformation and social rehabilitation.			
<i>PRISON MANAGEMENT</i>			
There is a consistent and regularly used system for receiving prisoners; personal information is kept about each prisoner.			
Prisoners are presented with a clear list of existing rules, regulations and disciplinary procedures and punishments.			
Prisoners' next of kin are informed of prisoners' admission to prison.			
Clear records are kept about the prisoner's time in jail (regarding medical needs, prison leaves, program participation, etc.)			
All prisoners are held under a valid court order and are released when the order expires.			
<i>LIVING CONDITIONS</i>			
The prison infrastructure is clean and well maintained.			
Sentenced prisoners are kept separate from detainees awaiting trial.			
Cell space is appropriate to the number of people housed.			
Each prisoner is given a bed to sleep in with sheets and blankets.			
Each prison area has adequate light during the day.			
Each prison area has adequate ventilation.			
Prisoners have access to fresh water.			
Prisoners have access to toilet and shower facilities.			
Prisoners receive adequate food (both in amount and nutritional value).			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
Prisoners have access to adequate medical care.			
There is an adequate supply of medicines and medical equipment.			
Adequate recreational facilities exist to which prisoners are given regular periodic access.			
<i>CONTACT WITH THE OUTSIDE WORLD</i>			
Prisoners are housed close to their communities.			
Prisoners have access to legal aid.			
Prisoners can receive regular visits from friends and family.			
Prisoners can receive mail and telephone calls.			
Prisoners have access to newspapers, magazines and televisions.			
<i>PRISON REGIMES and PROGRAMS</i>			
An organized daily program for prisoners exists.			
Prisoners have access to educational facilities (curricula, libraries).			
Prisoners have access to training and vocational programs.			
Prisoners have access to work programs.			
Prisoners are appropriately dressed and protected if they are performing work.			
The prison provides therapy and behavior modification programs.			
The prison provides recreational activities.			
The prison provides adequate religious services and activities (including for minority religions).			
The prisoners are appropriately prepared for release at the conclusion of their sentences.			
The prison helps prisoners find accommodations and work in preparation for release.			
<i>SAFETY and SECURITY</i>			
Prison security is adequate, including physical barriers such as walls, bars and movement detectors.			
Prisoners are classified on the basis of the risks they pose to themselves and others.			
Regular searches of prisoners' quarters are carried out to ensure prisoners' security.			
Searches of all visitors are carried out.			
Few, if any, serious incidents such as hunger strikes, riots, or protests exist.			
Specific punishments exist for prisoners who misbehave.			
Prisoners know what the punishments and procedures will be if they misbehave.			
There are maximum amounts of time prisoners can be housed in punishment units (lockdown, etc.)			
<ul style="list-style-type: none"> • Punishment units have adequate light and ventilation. 			
<ul style="list-style-type: none"> • Prisoners in punishment units receive at least one hour of exercise per day. 			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
<i>COMPLAINT PROCEDURES</i>			
A working complaints system exists by which prisoners can submit written complaints to prison administration.			
Prisoners who complain are not punished or victimized by staff.			
Complaints are reviewed by an independent body.			
Complaints are confidential.			
<i>JUVENILES</i>			
There are separate courts for juvenile offenders.			
Juveniles are kept separate from adult prison populations.			
Juveniles receive special care in prison.			
Juveniles are given educational and vocational training.			
Juveniles may receive visits from their families.			
Juvenile records are kept confidential.			
<i>WOMEN</i>			
Women are kept separate from the male population.			
Women have equal access to the same activities and services available to men.			
Women's particular medical and hygienic needs are met.			
Pregnant and breast-feeding women's needs are met.			
<i>MENTALLY ILL</i>			
Mentally ill prisoners have access to psychiatric treatment.			
Prisoners are transferred to civilian treatment centers if necessary.			
<i>MANAGEMENT SYSTEM</i>			
The prison system is under civilian (not military) management.			
Corruption does not exist in the system.			
There is no prisoner hierarchy allowing prisoners extort money or other benefits or services from weaker prisoners.			
IV. LAWS AND LEGAL PROTECTIONS³			
Domestic laws protect all citizens equally without distinction of any kind, such as race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.			
Laws ensure equal rights of men and women to the enjoyment of all laws and legal protections.			
If the death penalty has not been abolished, the sentence of death is imposed only for the most serious crimes in accordance with laws in force at the time of the commission of the crime. Death penalty sentences are only carried out pursuant to final judgments rendered by competent courts.			

³ These rights are established in the International Covenant on Civil and Political Rights.

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
Death sentences are not imposed for crimes committed by persons below eighteen years of age.			
Domestic laws protect everyone from being subjected to torture or to cruel, inhuman or degrading treatment or punishment.			
Domestic law prohibits the use of statements and confessions obtained by means of coercion or torture.			
Domestic laws protect everyone from being subjected to arbitrary arrest or detention and from being deprived of their liberty except on such grounds and in accordance with such procedure as are established by law.			
Everyone who is arrested has the right to be informed, at the time of arrest, of the reasons for his arrest and the right to be promptly informed of any charges against him.			
Minimum and maximum prison sentences are prescribed for different crimes.			
Anyone arrested or detained on a criminal charge has the legal right to be brought promptly before a judge or other officer authorized by law.			
Everyone charged with a criminal offense is entitled to a trial within a reasonable time or to release.			
Persons awaiting trial are not as a general rule detained in custody. Instead, release is subject to guarantees to appear for trial or at any other stage of judicial proceedings or for execution of the court's judgment.			
Under domestic law, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against him.			
All judgments rendered in criminal cases or in suits at law are made public, unless the interest of juveniles or guardianship of children requires otherwise.			
Everyone charged with a criminal offence is presumed innocent until proved guilty according to law.			
In the determination of criminal charges, domestic law accords everyone the following minimum guarantees, in full equality:			
<ul style="list-style-type: none"> • To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; 			
<ul style="list-style-type: none"> • To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; 			
<ul style="list-style-type: none"> • To be tried without undue delay; 			
<ul style="list-style-type: none"> • 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; 			
<ul style="list-style-type: none"> • To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; 			
<ul style="list-style-type: none"> • To have the free assistance of an interpreter if he cannot understand or speak the language used in court; 			
<ul style="list-style-type: none"> • Not to be compelled to testify against himself or to confess guilt. 			
Everyone convicted of a crime has the right to have his conviction and sentence reviewed by a higher tribunal.			
No one is liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with applicable law and procedure.			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
Domestic law prohibits a finding of guilt of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time it was committed.			
Internal and/or cross-border conflicts do not threaten or thwart human rights protections and democratic government.			



IBJ DIRECTIVE DEFENDER'S SCORECARD¹

ASSESSMENT OF: _____

ASSESSOR²: _____

PLACE: _____

DATE: _____

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
GENERAL			
Counsel does everything possible to gain free and full access to client whenever necessary			
*Counsel is respectful with client and explains attorney-client privilege			
*Counsel should provide zealous and quality representation to clients at all times			
Counsel develops and continually reassesses the theory of the case			
*Counsel abides by ethical norms (no corruption or collusion with state officials) at all times throughout the trial process (or at least, little suspicion)			
Counsel maintains lines of communication open with the client and with the prosecution/court			
Counsel ensures that Accused is present in courtroom for all court proceedings (e.g.: arraignment, trial, sentencing)			
As soon as counsel is retained, counsel begins a detailed file including, but not limited to, interviews, detailed notes, statements, potential pieces of evidence, case law to begin building theory of defense and maintains this file until completion of case			
PRE TRIAL			
<i>DETENTION and ARREST</i>			
Counsel presents self at place of detention <i>at earliest stage possible</i> , upon notification that client is detained			
Upon meeting, counsel informs client of legal rights and ensures that the client understands what they entail			
Prior to agreeing to act as counsel, or accepting appointment by a court, counsel ensures that he has available time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If this is not possible,			

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² To be completed by an IBJ representative. This form is to be filled out with the aid of interviews (of the Defender, clients, other judicial actors), review of case assessment forms, and observation.

* These aspects are particularly difficult to assess. However, the assessor should still attempt to make some general assessment based on behavioural attitudes, relationships between parties, and a Defender's practice on a whole (e.g. are there a lot of successful plea bargains?)

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<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
then counsel should move to withdraw			
Counsel does not seek to withdraw from cases without compelling cause			
Counsel explains to Accused what they have been charged with, and the case the prosecution has to prove. Also sees if Accused was reasonably informed of the charges against him			
If Client offers admission or statement without presence of counsel, counsel receives copy and understands circumstances in which admission occurred			
Counsel explains to client the maximum sentence possible and other possible sentencing options available to the court should the client be found guilty			
*Counsel does not participate in any form of corruption/collusion with judicial officials or police to obtain confession or release of Accused			
Counsel presents to appropriate judicial officer a statement of factual circumstance and legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release			
Counsel takes all possible and necessary steps to apply for pre-trial release as soon as possible			
If client is incarcerated and unable to make pre-trial release, counsel alerts the court to any special medical or psychiatric and security needs of the client and request that court direct appropriate officials to meet such needs			
Counsel obtains instructions from client at every stage of trial process (bail, pre-trial release, pleading, etc.)			
With the permission of the client, counsel explores and possibly conducts plea negotiations with state officials. Should there be negotiations, counsel keeps client fully informed of any continued plea discussion.			
Existence of ongoing tentative plea negotiations with prosecution should not prevent counsel from taking steps necessary to preserve a defense			
<i>DISCOVERY AND INVESTIGATION</i>			
Counsel ensures that there is adequate time for trial preparation and applies for a continuation if not			
Counsel conducts independent investigation regardless of the Accused's admissions or statements to the lawyer of facts constituting guilt			
Counsel conducts an in-depth interview of the client as soon as possible and appropriate after retention to obtain information regarding			
o The incident			
o Improper police investigative practices			
o Prosecutorial conduct affecting client's rights			
Counsel seeks full disclosure of relevant materials from the prosecution with reasonable time for counsel to prepare for trial			
In making discovery requests, counsel takes into account that such requests that may trigger reciprocal discovery obligations			
Counsel generally seeks discovery of the following at the earliest time:			
o Charging documents			
o Potentially exculpatory information			
o Names and addresses of all prosecution witness and any statements made by them			
o All oral and written statements made by accused and circumstances			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
in which they were made			
o Prior criminal record of the accused			
o Any evidence of misconduct that government may intend to use against the Accused			
o Relevant physical evidence			
o Expert opinion evidence			
o Statements of any co-Accused			
o Any police reports and investigative notes			
o Note that the Prosecution generally does not have to disclose information relating to solicitor/client privilege, informant privilege, immunity			
Counsel conducts interviews with key prosecution witnesses and has knowledge of purpose of testimony			
Counsel examines and obtains attendance of witnesses for the Defence under the same conditions as witnesses against him			
Counsel considered using, at a minimum, the following sources of investigation:			
o Charging documents (make sure that proper charge approval standards were used and that the wording of the document is sufficiently specific with regards to time, place, date, person, and nature of the offense)			
o Interviews with client and recommended sources by client			
o Potential witnesses			
o Disclosure materials from prosecution			
o Physical (direct + circumstantial) evidence			
o Visiting the scene of the incident (use camera to preserve)			
o Expert opinions			
Consider benefits and disadvantages of judge alone trial or jury trial and explain to client his options			
If jury trial is selected, then consider critical aspects of jury selection			
Counsel seeks and follows instructions of the client in deciding to go to trial			
Counsel strives to enter a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so			
Counsel does not unduly influence client's decision to plead guilty			
Counsel attempts to anticipate weaknesses in the prosecution's proof and prepares corresponding motions			
Counsel explores with client the possibility and desirability of reaching a negotiated disposition of charges rather than proceeding to trial and in doing so fully explains the rights that would be waived by a decision to enter a plea			
If prosecution uses expert witnesses, counsel investigates expertise and credentials of expert witnesses presented by prosecution			
Based on prosecution materials, police reports, and interviews, Counsel should consider whether the client's arrest was lawful			
Counsel conducts adequate legal research with critical thought			
<i>TRIAL PREPARATION (pre-trial motions, etc.)</i>			
Counsel endeavours to establish a proper record for appellate review. As part of this effort, counsel should request whenever necessary, that trial proceedings be			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
recorded			
Counsel arranges for free assistance of an interpreter is necessary for the duration of trial			
Counsel thinks critically and creatively and challenges constitutional validity of laws if possible			
Counsel considers filing pre-trial motions (or requesting voir dire, advance rulings) when there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant:			
o Pre-trial custody			
o Constitutionality of provisions or statutes			
o Potential defects of charging process			
o Joinder and severance of Accused			
o Discovery obligations			
o Illegally obtained evidence (were warrants used?)			
o Objections to potential witnesses (challenging competence or compellability or expertise of expert)			
o Involuntary statements or confessions made by Accused			
o Publication ban			
o Unreliable evidence			
o Suppression of evidence			
o Right to a speedy trial			
o Right to a continuance, trial or courtroom procedure			
o Use of prior convictions			
Counsel provides any necessary notices to court for trial (e.g. use of expert witness)			
If prosecution uses expert witnesses, counsel ensures that there is advance notice to the court			
Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor			
In preparing for trial, counsel should consider (with accused) whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt			
Where lacking expertise, counsel conducts appropriate research and seeks advice of more experienced counsel			
Where appropriate, counsel has the following materials organized and available at the time of trial:			
o Copies of all relevant documents filed in case			
o Relevant documents prepared by investigators (police, etc.)			
o Voir dire questions			
o Outline or draft of opening statement			
o Cross-examination plans for all possible prosecution witnesses			
o Direct examination plans for all prospective defense witnesses			
o Copies of defense subpoenas			
o Prior statements of all prosecution witnesses (e.g. transcripts, police reports)			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
o Prior statements of all defense witnesses			
o Reports from defense experts			
o A list of all defense exhibits, and the witnesses through whom they will be introduced			
o Originals and copies of all documentary exhibits			
o Proposed jury instructions with supporting case citations			
o Copies of all relevant statutes and cases			
o Outline or draft of closing argument			
Counsel arranges with client an effective communication method throughout trial			
If there is a preliminary inquiry, Counsel should apply for discharge or committal on a lesser offense if an essential ingredient of the charge is missing			
TRIAL			
<i>OPENING STATEMENT</i>			
Counsel ensures that his opening statement meets the permissible requirements of an opening statement within that jurisdiction			
In preparing the opening statement, counsel considers the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring opening statement until the beginning of the defense case			
Counsel's objective in making an opening statement may include the following:			
o Provide overview of defense case			
o Identify weakness of prosecution case			
o Emphasize prosecution's burden of proof			
o Summarize testimony of witnesses, and role of each in relationship to entire case			
o Describe exhibits which will be introduced and the role of each in relationship to the entire case			
o To clarify the juror's responsibilities			
o To state the ultimate inferences which counsel wishes the jury to draw			
If the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting (though sometimes frowned upon), requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:			
o Significance of the prosecutor's error			
o Possibility that an objection might enhance the significance of the information in the jury's mind			
o Whether there are any rules made by the judge against objecting during the prosecution's opening argument			
<i>PROSECUTION'S CASE</i>			
Counsel has attempted to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
Counsel is vigilant during prosecution's examination in chief to ensure that no leading/irrelevant/immaterial questions are asked			
Counsel is vigilant during prosecution's case that no immaterial/irrelevant/hearsay evidence is admitted without objection			
Counsel ensures that all prosecution evidence is properly authenticated following the rules of that jurisdiction			
Counsel may choose to object to the admissibility of Prosecution evidence because:			
o No identifying witnesses			
o Opportunity for tampering or contamination occurred			
o There were gaps in the chain of custody (who possessed the item)			
o Item is not a true and accurate depiction			
Counsel listens carefully of examination in chief and takes notes			
Counsel needs to ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If such statements have not been received, counsel should request adequate time to review these documents before commencing cross-examination			
Considers if prosecution witnesses are competent witnesses (no spouses, co-accused, mentally disabled, minors), and if not, object to their testimony			
In preparing for cross examination, counsel:			
o Considers need to integrate cross-examination of each individual witness is likely to generate helpful information			
o Anticipates those witnesses the prosecutor might call in its case-in-chief or in rebuttal			
o Creates any necessary cross-examination plan for each anticipated witness			
o Is alert to inconsistencies or possible variations in witness testimony and highlights these inconsistencies to the court			
o Reviews all prior statements of witnesses and any prior relevant testimony of the prospective witnesses			
o Where appropriate, reviews relevant statutes and local police regulations for possible use in cross examining police witnesses			
o Is alert to issues relating to witness credibility, including bias and motive for testifying and highlights these issues through cross-examinations			
Where appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel moves (or considers moving) for a judgment of acquittal on each count charged. This request should include that the court immediately rule on the motion in order that the counsel may make an informed decision about whether to present a defense case			
Counsel is aware of opening client to character evidence by asking specific questions during cross examination of prosecution witnesses			
<i>DEFENSE</i>			
Counsel develops the overall defense strategy in consultation with the client			
Counsel considers benefits and disadvantages of having the client testify			
Counsel protects the client's right to non-self-incrimination			
Counsel protects the client's right to silence			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
Counsel ensures that the client's failure to testify is not noted upon and that no negative inferences are drawn			
Counsel protects privilege relationships such as marital privilege and lawyer-client privilege			
If Counsel stages an affirmative defense, Counsel has necessary evidence available for submission to the court in support of this defense			
In preparing for mounting the defense, counsel has, where appropriate:			
o A plan for examination in chief of each defense witness			
o Considered the effective ordering of witnesses for testimony			
o Utilized the potential of character witnesses (if necessary)			
o Utilized the potential of expert witnesses (if necessary)			
Counsel has prepared all witnesses for direct and possible cross-examination			
Counsel has advised witnesses of suitable courtroom attire and behaviour and has talked them through the process of being a witness			
Counsel conducts redirect examination as appropriate			
In performing examination in chief, counsel is capable of refreshing witness' memory			
<i>CLOSING ARGUMENT</i>			
In making an effective closing argument, Counsel uses the defense summation to, where possible:			
o Highlight the weaknesses in the prosecution's argument			
o Describe favourable inferences to be drawn from the evidence			
o Highlight favourable testimony			
If the prosecutor exceeds the scope of permissible argument, Counsel should consider requesting a mistrial or seeking cautionary instructions unless tactical considerations suggest otherwise			
Counsel's finishes the submission asking jury or judge to acquit the Accused			
POST TRIAL			
Upon a verdict of "not guilty," Counsel explains to Accused that he is free to go			
Upon a verdict of "guilty as charged," Counsel:			
o Explains to client what steps are to follow			
o Counsel considers with the client whether or not they should appeal, or if they can appeal as of right			
o If client is returning to custody, Counsel should accompany him if possible. If not, Counsel should meet with client as soon as possible after the verdict			
Where possible, Counsel should exhaust all avenues of appeal			
<i>SENTENCING</i>			
If the client decides to not proceed to trial, plea negotiations should have considerations of sentencing, correctional and financial implications			
In making sentencing submissions, Counsel should ensure that the court is aware of all mitigating and favourable information which is likely to benefit the client (e.g. pleading guilty as a sign of remorse)			

<i>ASPECT OF PERFORMANCE</i>	YES	NO	Training Required
In preparing for sentencing, Counsel should inform the client of possible sentencing consequences and sentencing alternatives (therapy, volunteer time)			
In preparing for sentencing, Counsel should interview the client for the purpose of obtaining a personal history including prior criminal record, employment history and skills, medical history and condition, financial status, and possibly ask client for any letters of reference that could be beneficial to present to the court			
In preparing for sentencing, Counsel should prepare a folder of relevant materials for submission to the court			
In sentencing submissions, the client may address the court if he so wishes (even though it is usually not recommended) and counsel should not prevent/forbid this			
Counsel must seek to achieve:			
o the least restrictive and burdensome sentencing alternative that is most acceptable to that of the client			
o a sentence reasonably obtained based on the facts and circumstances of the offense			
o A sentence that takes into consideration the Defendant's background			
o A sentence that uses appropriate sentencing provisions most favourable to the Defendant			
In making sentencing submissions, counsel should ensure that the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed			
Upon sentencing, counsel should attend with the client:			
o To complete any necessary paperwork			
o Explain the parole system/ who the parole officer is			
o Explain any possible conditions to release			
o Discuss avenues of appeal			
o Receive instructions on any help or tasks that client requires lawyer to attend to (e.g. phone calls, etc.)			
If client is sentenced to further custody/incarceration, then lawyer should attend client as soon as possible to discuss next step of process if any			

