

## Defence counsel's file

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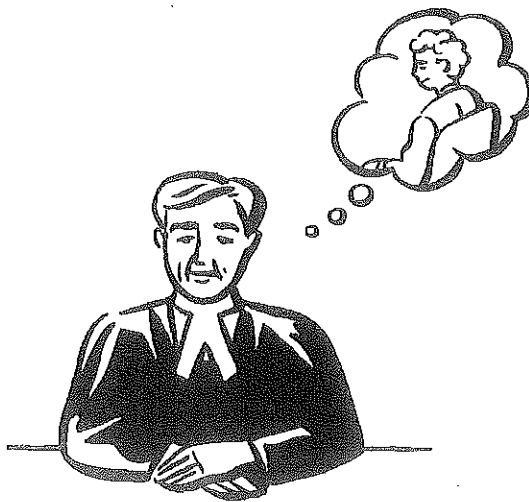
To complete this file you need to add:

**Basic information about the trial (from Chapter One):**

- General trial script
- Rules of examination and evidence
- Trial script summary

**Specific case materials:**

- Relevant law
- Indictment
- Exhibits
- All witness role sheets (both Crown and defence)
- Additional material for Meeting with Witnesses
- Additional material for Questioning Witnesses
- Strengths and weaknesses of the defence's case



# Defence counsel's role

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## Introduction

You are going to be counsel for the defence in this mock trial. This means that you will conduct the defence on behalf of the accused.

### HOW DID YOU GET TO BE DEFENCE COUNSEL?

Well, if this case is a typical one, the accused person phoned your office and told you that he or she had been charged with an offence. He or she asked if you would act as counsel. You agreed to take the case. Before any further questioning, you phoned the Crown counsel office and asked to see the file containing the police report on the case. The police report contained the information to which the police officer who arrested the accused will testify. After you read the report, you made an appointment with the accused and heard his or her side of the story.

### WHAT IS YOUR JOB?

First of all, remember that you are not the judge. It is not your job to judge whether your client is telling the truth or lying. Even if you suspect that he or she is lying, it is still your duty to put forward the best defence. It is then up to the judge and jury to decide on innocence or guilt. However, as a lawyer you may never call evidence that you know is not true and must never ask a question of a witness when you know the answer will be a lie.

An accused person is presumed innocent until proven guilty beyond a reasonable doubt. That is very important for you as defence counsel. It means that you do not have to prove that your client is innocent. Rather, the Crown counsel must prove the accused is guilty. In order to secure a conviction the Crown must prove all of the elements of a particular charge beyond a reasonable doubt. If you can show that there is a reasonable doubt in the Crown's case, then your client will be found not guilty.

### HOW SHOULD YOU CONDUCT THE DEFENCE?

In conducting the defence, you must make some important decisions. Perhaps the most important decision you must make is which witnesses to call for the defence. The hardest decision is usually whether to call the accused to the stand or not. The Crown counsel has no right to call the accused—only the defence may do that. Consider the following in making that decision: if the accused does not testify, then his or her record, if there is one, will not be put in as evidence. Also, your client will not be subject to cross-examination by the Crown counsel. Cross-examination may expose any lies your client is telling or show confusion in his or her story. Either way, your client could look bad in the eyes of the jury. On the other hand, if your client does not testify, then the jury will not hear his or her side of the story and the jury might think that your client has nothing to say in his or her defence.

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If much of the defence rests on the accused's word there is no doubt that you will have to call the accused to the stand.

During the trial, you are expected to cross-examine witnesses called by the Crown. You don't have to be kind to Crown witnesses. Your cross-examination of them should be designed to show any weaknesses or inconsistencies in their testimony.

After the Crown has finished calling its witnesses, you may then call your defence witnesses to testify. Before you do this, you should address the jury and briefly state what your defence is going to be.

After all the Crown and defence witnesses have testified, you should then sum up your case and present a concluding argument to the jury. After you've finished, the Crown counsel will also present an argument to the jury.

### Preparation

The first thing you should do is read everything in this file.

Read the indictment, the relevant law, and all the role sheets that relate to the case.

Read through the "General Trial Script" so that you know how the trial will be conducted and when you should speak.

Also read through the "Rules of Examination and Evidence" which are provided in this file. When you ask questions, stay within the rules of evidence. If the Crown asks questions or receives answers which you feel fall outside the rules of evidence, then object, stating your reasons, and let the judge rule on those questions.

Prepare a list of questions to ask each witness. These are direct examination questions for the defence, cross-examination questions for the Crown.

Make sure you completely understand the type of defence that you will present. If you don't understand it, then the jury won't.

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## The approach

Presenting your case is somewhat like painting a picture. Before the trial, imagine yourself as a painter who has to slowly fill in all the pieces of a picture. Start by sketching an outline for the jury and gradually and carefully colour in the various parts of it. Remember: you are starting with a blank canvas. The jury knows nothing about this case. Ask yourself—are all the elements of the picture contained in my question? Are there any blank spots? Do I know which witnesses are going to produce the colour for a certain part of the picture? Am I presenting them in the proper order?

When you have finished this, pretend that you are a juror who knows nothing about this case. Examine your presentation from that perspective and see if it paints an orderly and clear picture.

## Preparing your case

One of the best strengths you can have in preparing a case is a thorough understanding of not only your own case but the other side's case as well. Put yourself in the place of the opposing side—what is their theory of the case? Who are they calling as witnesses and why? When you have considered these questions it will be much easier for you to prepare your own case. Methods of case preparation vary from lawyer to lawyer. As this is probably your first case, you might find it helpful to use the following eight steps as an outline for preparing your case.

1. **Examine the indictment.** You need to be clear about the charges against the accused. How many are there? How do they differ from each other? In which ways are they related?
2. **Prepare an outline of the Crown's case.** You need to do this even if you are the defence counsel because you need to have a very clear idea of what the Crown is going to say.

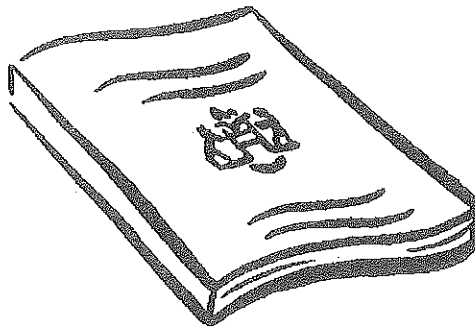
After you have finished reading your file, prepare a detailed outline of the Crown's case against the accused. In it, describe the Crown's theory of this case and then summarize the important evidence that will be presented by each Crown witness.

When you list the evidence of a witness, try to figure out how the Crown will try to use this evidence to prove the charges against your client. In a separate column, list what you see to be the weaknesses of the evidence that each witness will present. This is important. This information will form the basis for defence counsel's cross-examination of each Crown witness. To be prepared for trial, both Crown and defence lawyers should know both strengths and weaknesses of their cases.

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3. **Prepare your outline of the defence's case.** List your theory and all the defence witnesses, with a brief summary of their evidence. In a separate column, list what you see to be the weaknesses of each defence witness.
4. **Fill in the pieces.** You and the other lawyers for your side should meet with your witnesses to fill in the pieces of the stories and to begin developing your questions.
5. **Meet with the other side.** Crown and defence counsel should meet to exchange the additional information that was developed during meetings with the witnesses.
6. **Organize your notes for trial.** Be as methodical as possible.
7. **Test your witnesses.** Meet with your witnesses and question them thoroughly on their stories. Afterwards, play devil's advocate and cross-examine them on the weak sides of their stories.
8. **Prepare speeches.** The final step is to prepare your opening statement, your closing arguments and your speaking to sentence speech.



# Defence counsel's role

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## Sample outline format

NAME OF CASE:

Charges:

1

2

3

**THEORY**

**WITNESS**

**EVIDENCE**

**WEAKNESSES**

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Witness #1

Witness #2

Witness #3

You will find it necessary to use a larger sheet. When you are finished, prepare a similar outline for Crown witnesses.

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## Meeting with your witnesses

The success of your presentation depends, in part, on how well you have coordinated your witnesses. It is important that you meet with your witnesses to ensure that they understand their roles.

The witness role sheets are only basic outlines. The information contained in them is not sufficient to allow you to question a witness properly. Therefore, you will have to "fill in all the pieces" you need to develop the personal background of each witness.

As defence counsel, you must meet with the defence witnesses to develop their background. There are many details that need to be worked out. You must ensure that the evidence of the defence witnesses does not clash in any way.

It is important that these counsel/witnesses meetings be used to formulate an outline of the types of questions to be asked, and to develop the additional information your witnesses will need to answer the questions. Spend some time anticipating what questions will be asked in cross-examination of each witness by the other side. All witnesses need to be ready to answer questions asked in cross-examination without contradicting themselves or their evidence. You should practise some direct and cross-examination questioning techniques with the witnesses for your side before the trial.

The success of the trial depends on how well both Crown and defence counsels have developed their case. Use the basic outline and your sessions with witnesses to develop as solid a case from your point of view as you can. Avoid using tricks. Do not insert surprises designed to confuse the other lawyers.

## Meeting with Crown counsel

After you have finished preparing for your case, you should meet with the Crown counsel to share with them the additional information that you have developed. You should not tell them about your approach to questioning or any of your major arguments. Rather, in these meetings you should make sure that both sides understand the basic evidence of this case and agree upon it. After your discussion you should not introduce any major changes in your evidence. If you do, you must obtain the agreement of the other side.

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## Keeping notes

It is important that you keep notes during the trial.

Take your notebook with you when you stand to ask questions and tick off the questions you've asked, one at a time, so you don't forget any.

You can also take the witness role sheets with you and cross off the information from them as it is heard by the jury. In this way you make sure that nothing is missed. Make sure the answers are clear and understandable before moving on. It's a good idea to have both a blue and red ink pen with you. Record all questions and answers in blue ink and note any questions you have about those answers in red ink so that you will remember to ask them in cross-examination.

Take your time when questioning witnesses. Remember that the judge is also taking notes, so go slowly enough to allow for this. The thoroughness of your presentation is more important than the speed.

## How to organize your notes

Each lawyer has his or her own system of keeping notes during a trial. You should work out whatever system is easiest for you.

The main thing about keeping notes is that you must be able to check back on them very easily and quickly. Therefore, make your writing quite large and legible and don't be afraid to use different colours of ink, etc.

Make sure you have a good supply of paper with you when the trial starts.

The illustration below shows one of the most common systems used by lawyers to keep notes during trials. The page is divided into two columns for questions and answers. Make sure that you identify the witness who is speaking and whether the Crown or the defence is asking the questions. Because you must take notes quickly, just write down the most important words in a question and answer, rather than trying to write the whole thing word for word.

In your summation to the jury you will probably want to refer to your notes and to the testimony given by various witnesses. If you are going to restate the testimony of a witness in closing arguments, make sure that you state the evidence correctly. Also, when the other side is restating evidence, consult your notes to make sure that the evidence is being stated correctly.



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### WITNESS: Officer Mary Smith (Direct Ex)

Questions	Answers
1. how long police officer	1. 8 yrs
2. how long drug squad	2. 5 yrs
3. where were you on July 21st 10:00 p.m.	3. Main St. Mall

## The opening statement and closing argument

After the Crown has finished calling witnesses, it will be your turn as defence counsel to call witnesses for the defence. Before you begin calling witnesses, you make an opening statement to the jury. The opening statement should be quite brief.

In it, you introduce your theory of the case to the jury. For example, in a drug case, you may tell the jury that the defence believes that the accused is not a drug dealer, and that any drugs which have been found belonged to someone else. After outlining your theory, tell the jury who you will be calling as witnesses (e.g. the accused person and character witnesses) and tell them very briefly what you expect the witnesses will say (e.g. "I will call a witness who will tell you that the accused does not use cocaine.") In this way, the jury will know who each witness is and be able to put the evidence in context. After you have finished your opening statement, call your first witness.

After all the witnesses for both sides have completed their testimony, both lawyers give their closing arguments to the jury. In the mock trial, the defence counsel goes first. The Crown counsel follows.

Make your closing arguments fairly brief, although not as brief as your opening statement. In your closing arguments you should review the evidence which has been presented by your defence witnesses and compare it with the evidence of the Crown witnesses. Point out problems with the Crown's theory of the case, and stress the strengths of the defence's case. Emphasize to the jury that the accused must be found not guilty if they have any reasonable doubt.

Talk to a local lawyer about what the Crown must prove to obtain a conviction on the relevant charge. Try to incorporate this information into your closing argument.

Try to be as persuasive as you can in the closing argument. It is one of the last things that the members of the jury hear before they make their decision.

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### Questioning the witnesses

One of the hardest things for you to adapt to in your role as counsel will be how to ask questions. From your "Rules of Examination and Evidence" you already know that you may not ask "leading" questions during direct examination, but that you may ask these kinds of questions during cross-examination. These are formal rules, but just as important to you is to develop a way to ask questions effectively.

The first thing to remember is that neither the judge nor the jury knows anything about the case until the evidence is presented.

Therefore, anything that you want them to know must be brought out through the witnesses by the questions you ask. Don't be afraid to be picky—make sure all the little details come out so that the jury has a complete picture.

When you conduct direct examination of one of your witnesses, take the appropriate witness role sheet to the podium with you and follow it along line by line, and make sure the jury gets every bit of information which is contained in the role sheet.

For example, suppose you are involved in a drug case and you are calling a character witness. This witness works with the accused, who is a doctor.

Your questioning may go like this:

Q. Ms. \_\_\_\_\_, what is your profession?

A. I am a medical practitioner, My Lord/My Lady.

Q. And for how long have you been a medical practitioner?

A. \_\_\_\_\_ years.

Q. What area of medicine do you practise in?

A. I'm an ear, nose and throat specialist, My Lord/My Lady.

Q. And how long have you been an ear, nose and throat specialist?

A. For \_\_\_\_\_ years, My Lord/My Lady.

Q. And do you know the accused in your capacity as a medical practitioner?

A. Yes, My Lord/My Lady.

Q. And what is your relationship with the accused?

A. We work in the same practice, My Lord/My Lady.

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Notice that nothing is taken for granted. You do not assume that the jury knows who this witness is, how she knows the accused, or anything else. She's a complete stranger to them. You have to fill in the details, one by one.

When you are preparing for cross-examination, go over the witness role sheets of the other side's witnesses and think of questions you would like to ask about their stories. Remember, the Crown counsel will try his or her best to discredit the defence witnesses as much as possible. As defence counsel, you should try to bring into question the Crown witnesses' stories and challenge their credibility.

The Crown may want to introduce exhibits during the trial. In order to do this, the Crown counsel must question the appropriate witness about the exhibits. Suppose the Crown counsel wants to ask a Crown witness, a police officer, what she found on the accused. Suppose she says she found a bag containing cocaine. The Crown counsel must ask the court clerk to produce the exhibit containing the drugs, and ask the officer to identify the bag.

The Crown's questions might go like this:

Q. Is this the bag of drugs you found on \_\_\_\_\_ (the accused)?

A. Yes it is, My Lord/My Lady.

Q. How do you know it's the same bag?

A. I placed my initials on it and handed it to the crime laboratory. I see the initials on it now.

Then suppose that the crime laboratory has a certificate of analysis that says that the substance in the bag is cocaine. The Crown counsel might want to introduce that certificate of analysis as another exhibit.

The Crown would introduce the exhibit like this:

Q. Did the crime laboratory give you a certificate of analysis?

A. Yes.

The Crown counsel asks the court clerk for the certificate.

Q. Is this it?

A. Yes it is.

Q. What does it say?

A. (Officer will read the appropriate parts.)

Each exhibit must be introduced in this way. Make a list of exhibits as they are introduced. After the Crown introduces each exhibit, ask to see it and raise any objections you may have to it.

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### Speaking to Sentence

If the accused is convicted, you will need to speak to sentence. Before the judge passes sentence he or she will ask you to present an argument as to what the best sentence for the accused should be. As defence counsel, you want the court to treat the accused as leniently as possible, because you are defending your client's interests.

There are three main things you should talk about when speaking to sentence.

1. The background of the accused. You should provide a brief summary of your client's background. Mention family background, schooling, employment and future plans. Stress the client's current responsibilities—does he or she have any dependants, for example?
2. Previous criminal record. If your client has no previous convictions, be sure to emphasize that fact.
3. Circumstances of the offence. Be sure to mention any special circumstances relating to the offence which the judge should consider. In a drug case, for example, it may be relevant to mention that the amount of drugs found on the accused was not large.

In deciding what sentence to impose, the judge must consider several things:

1. The judge must ensure that the punishment fits the person. The judge will ask you to tell him/her about the background of the accused. The judge must consider the age, past criminal record, family life and job status of the accused.
2. The judge's sentence must be fair. Similar offences should get similar kinds of sentences. You should check with a local judge or lawyer to find out what the range of sentences could be for someone convicted of the offence in question. Judges are expected to apply the law evenly.
3. The judge will consider whether this case should be made an example to others. If the offence is a common one in the community, the judge may feel that the most important consideration should be that the sentence be harsh enough to deter others from committing similar offences.
4. The judge will take into account the desire of society to help a convicted person rehabilitate himself or herself. What type of sentence will best help the accused reform?
5. The judge will consider the seriousness of the offence when deciding the sentence. For example, a robbery conviction is more serious than a theft conviction, and the sentence should reflect this.

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Some of the points listed above reflect society's desire to protect itself, punish offenders and deter future offenders. Others reflect a desire of society to help reform the accused. The judge will weigh these considerations and decide which ones should be most important in determining the sentence.

Design your presentation to reflect both these considerations and your responsibility to defend your client's interests.

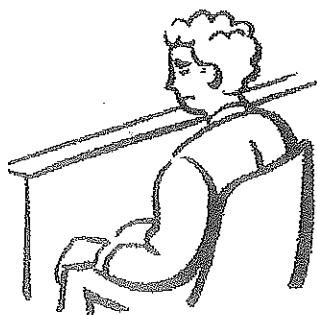
Remember, your presentation will play a large part in determining your client's immediate future.

### Dividing the work

You and your partner will divide the work. You could use the following division:

1. Opening statement to the jury. This is a short statement to the jury. It gives them an outline of your case, and tells them which witnesses you are going to call. (Lawyer #1)
2. Cross-examining Crown witness #1. (Lawyer #2)
3. Cross-examining Crown witness #2. (Lawyer #1)
4. Cross-examining Crown witness #3. (Lawyer #2)
5. Questioning Defence witness #1. (Lawyer #1)
6. Questioning Defence witness #2. (Lawyer #2)
7. Questioning Defence witness #3. (Lawyer #1)
8. Closing statement to the jury. This is a short statement telling the jury what the most important evidence is. (Lawyer #2)
9. Speaking to Sentence, if necessary. (Lawyer #1)

The "Trial Script Summary" tells you when each task should be done.



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## Getting Started

This section gives you some tips on how to begin developing your lines of questioning.

### PREPARING QUESTIONS FOR YOUR WITNESSES

1. Review all the witness role sheets and think about what the major arguments will be on each side.
2. Look at the defence witness sheets and make up a list of questions.
  - a) Prepare some questions to show the jury who your witness is.
  - b) Prepare some questions to show the jury what your witness did or saw or heard. Make sure it is clear where your witness was, how it happened or why it happened.
  - c) When you have finished making your list, check the questions to see that they are in the right order and that you haven't missed anything. The questions should make it easy for the jury to understand what you want to prove.

### PREPARING QUESTIONS FOR THE CROWN WITNESSES

Your job is to point out to the jury the weaknesses in the stories of the Crown witnesses.

1. Read the stories of the Crown witnesses again.
2. Think of some questions you can ask each person. Try to think of about four or five questions. Practise these questions on your partner to see if they work.

## During the trial

1. Introduce yourself to the judge as follows:

"May it please My Lord/My Lady, \_\_\_\_\_ (your name) appearing for the defence."

2. When you call your witnesses, you say:

"My Lord/My Lady, the defence wishes to call \_\_\_\_\_ (name of defence witness) to the stand."

3. End your questions by saying:

"No further questions, My Lord/My Lady."