



Client:

Trial:

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Introduction

Welcome to this first test version of the Lawyer Workbook. It is a resource provided by The Trial Workbook Company Limited, and supplemented by the website www.trialworkbook.co.nz. We look forward to hearing your feedback on its use as an aid to the lawyer/client relationship.

This is a workbook to help you and your client to brainstorm, plan, and agree upon a trial strategy. There is a corresponding workbook for you to give your client, about their role in the process. There is also advice for clients on the website (click For Defendants).

Why?

A common complaint by defendants is that decisions were made in or about their trial by their lawyer, but without their input being sought, or listened to. The objective is that your use of this workbook, and the client's ability to refer to their workbook, will improve client awareness of trial process, and the roles of lawyer and client within it. There are places in the client workbook for the client to record tasks that are their responsibility. The goal is that clients believe they had fair trials, where they understood their role, and made their own decisions after receiving full and informed advice.

How?

First, there is information about your professional responsibilities, both as a reminder, and so it is easily accessible if an ethical issue arises during a meeting with a client or a trial. Comments are to assist with considering issues which may arise.

Next, you can use the Trial Preparation pages to record, and have the client acknowledge, decisions made and instructions given at each stage of the trial process. Or you can use it as a prompt for meetings with the client, and keep the records of what was discussed on your trial file. If the client changes lawyer, then this workbook should be part of the file handed over. Part of the idea is that the client seeing that you have a companion resource to theirs will assist with getting the two of you on the same page (literally and metaphorically).

Finally, the At Trial section contains commonly used sections of the Evidence Act 2006, and a checklist for warnings you may want the Judge to give a jury.

Feedback

We will be emailing you occasionally over the course of about 20 weeks with inquiries and suggestions about your use of the workbook and website. At the end of that time we will ask you to complete an online survey, with plenty of opportunities for you to suggest improvements. Feedback can be given at any time via email (feedback@trialworkbook.co.nz) or the website.

Sources

Information under the headings “Professional Obligations” is taken from Practice Standards for Legal Aid Providers (Ministry of Justice February 2017); *Mason v Glover* [2013] NZHC 1321 (Whaata J); and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. See the Professional Obligations article on www.trialworkbook.co.nz for links to the full versions.

Comments about Professional Obligations and the remainder of the text is advice, written by Nicolette Levy with the experience of many years conducting appeals for clients who thought their conviction was the result of an unfair trial and their lawyer was to blame. Nicolette has discussed some issues with experienced colleagues before sharing the advice. Discussion about any issues is welcome – please send feedback via the website.

Part One – PROFESSIONAL OBLIGATIONS

Professional Obligations – General

As a lawyer acting for a client you must:

- Protect and promote the client's interests and act free from compromising influences or loyalties
- If appropriate, seek the use of a qualified interpreter. If legal aid funding is required for this, apply for and obtain that funding in a timely manner in advance.
- Obtain relevant disclosure from the prosecution, and discuss it with the client.
- Advise the client of the steps that he or she can or ought to take in order to assist the efficient and effective conduct of the matter.
- Make inquiries yourself concerning evidence that might assist in the defence of a criminal charge.
- Be satisfied that all relevant information for the purpose of conducting the defence has been obtained.
- Discuss the information in his or her possession with the defendant prior to taking instructions on the conduct of the defence.
- Give timely, appropriate and sufficiently detailed advice and explanations to the client to enable him or her to make an informed decision about the matter.
 - Comment – a common complaint is that the lawyer's advice that there is no defence is given for the first time on the eve of trial, when the opportunity to benefit from the full guilty plea discount has passed. If the situation looks grim, advise your client about this early. The Client Workbook notes that your job is to deliver bad news if that's what is required.
- At appropriate times, reassess and again advise the client of the relevant aspects of the matter.
- Where appropriate and practical, advice should be provided to the client in writing and a copy retained.
 - Comment – putting it in writing also sharpens your own focus on the evidence and the issues.
- Consider issues such as any intellectual disability or mental health issues – when and how are they to be addressed?

- Are there any addiction, alcohol or drug issues that require addressing?
- Be familiar with a client's previous convictions before a plea is entered.
- Where appropriate discuss the availability of a sentencing indication hearing with the client.
 - Comment – there is information about this in the Client Workbook, as well as information about the Disputed Facts Hearing process.
- Decline to accept or return for reassignment any matter where you have a conflict or potential conflict of interest.
- When acting for more than one co-accused, take particular care to ensure you have considered the duties owed to each client and any potential conflicts, and, if any doubt that there may be conflicting duties, you must decline to accept the matter or return it for reassignment.
- Advise the client at the first reasonable opportunity and throughout the case about the sentencing discounts for pleas of guilty in terms of *R v Hessel* [2011] 1 NZLR 607 (SC). Remind the client of the discounts prior to any status hearing or call-over, and before any trial or hearing.
 - Comment – there is information about this in the Client Workbook.
- Wherever practicable, obtain instructions in writing concerning the incident or events giving rise to the charge(s). Details as to the client's background, physical health and other relevant details should be obtained. When it is not possible to obtain instructions in writing, a lawyer should make clear file notes of instructions (or the lack of instructions).
 - Comment – *when* you do this may be a matter of professional judgment, particularly in a complicated or serious case where a client may be juggling other relationships such as family or co-accused, or where you believe that the client will be more forthcoming when a level of trust has been established. Sometimes it is useful to provide your advice on what the Crown evidence appears to show, or is capable of proving, before beginning to take detailed instructions.
- Record the client's factual instructions in a signed brief of evidence unless there is a good reason not to, for example where a client is not a witness or has already given a full account such as in a Police interview or where the evidence will be in an affidavit.
 - Comment – prior to trial is the best practice deadline for this – explain to your client that you need this as a blueprint for how to challenge the Crown evidence.
- When taking instructions from a client, including instructions on a plea and whether or not to give evidence, you must ensure that your client is fully informed on all relevant

implications of his or her decision and you must then act in accordance with the client's instructions.

- Advise the client of the right to give and/or call evidence on his or her behalf (whether by affidavit, brief of evidence, oral evidence or in some other form) that is relevant and legally admissible.
- [Where a not guilty plea is entered] you must protect your client so far as is possible from being convicted (except upon admissible evidence sufficient to support a conviction for the offence with which the client is charged) and in doing so must— (a) put the prosecution to proof in obtaining a conviction regardless of any personal belief or opinion you hold as to your client's guilt or innocence; and (b) put before the court any proper defence in accordance with your client's instructions— but must not mislead the court in any way.
- You must not attribute to another person the offence with which your client is charged unless it is necessary for the conduct of the defence to do so and the allegation is justified by facts or circumstances arising out of the evidence in the case or reasonable inferences drawn from them.
- You must not disclose a client's previous convictions without the client's authority.
- If at any time before or during a defended trial a client makes a clear confession of guilt to you, you may continue to act only if the plea is changed to guilty or you — (a) do not put forward a case inconsistent with the confession; and (b) continue to put the prosecution to proof and, if appropriate, assert that the prosecution evidence is inadequate to justify a verdict of guilty; and (c) does not raise any matter that suggests the client has an affirmative defence such as an alibi, but may proceed with a defence based on a special case such as insanity, if such a course appears in your professional opinion to be available.
- Where you are told by your client that he or she did not commit the offence, or where you believe that on the facts there should be an acquittal, but for particular reasons the client wishes to plead guilty, you may continue to represent the client, but only after warning the client of the consequences and advising the client that you can act after the entry of the plea only on the basis that the offence has been admitted, and put forward factors in mitigation.

Experts

- A lawyer must consider whether expert evidence could be substantially helpful.
- If expert evidence could be substantially helpful apply for legal aid funding in a timely manner and in advance of engaging an expert. When seeking that funding it is important to set out the reason why expert evidence is appropriate and a realistic estimate of the cost that would be involved.

- Where the cost of an expert increases seek approval for the increase before the corresponding work is undertaken.
- Ensure the expert is aware that they are subject to the estimate and that they need to advise the engaging lawyer if the estimate is going to be exceeded.
- Help ensure that when an expert is preparing and giving evidence, the expert is aware of the need to conduct herself or himself in accordance with the applicable rules relating to the conduct of experts.

Professional Obligations – Witnesses

- A lawyer engaged in any proceeding does not have the sole right to call or discuss the case with a witness.
- You must not suggest to a witness or potential witness, whether expressly or impliedly, that false or misleading evidence ought to be given or that evidence should be suppressed.
- You may assist a witness in preparing to give evidence by assisting in the preparation of a brief of evidence, and by pointing out gaps, inconsistencies in the evidence (with that witness's evidence or the evidence of other witnesses), the inadmissible nature of proposed evidence, or irrelevancies in evidence that the witness is proposing to give.
- A lawyer acting for one party may interview a witness or prospective witness at any stage prior to the hearing, whether or not the witness has been interviewed by the lawyer acting for the other party. Where you propose to interview a witness for the other side, it is prudent to inform the lawyer representing the other side of this fact, especially in respect of sensitive criminal matters where it is important to take steps to avoid any suggestion of interfering with the course of justice.
 - Note that the Criminal Committee of the ADLS caution against defence counsel speaking with a complainant at all – see **Defence counsel beware when speaking to the complainant** available on www.trialworkbook.co.nz or at www.adls.org.nz. If a Crown witness invites an approach, in my view you are obliged to consider what is in your client's interests, give advice, and take instructions. Seek advice from a senior colleague if in doubt.
- You must not treat a witness or potential witness in an overbearing or misleading way and if asked you must inform a witness or potential witness of his or her right to decline to be interviewed.
- You must not discourage a witness or potential witness from discussing the case with the lawyer acting for the other party or otherwise obstruct access to that witness or potential witness by the lawyer acting for the other party. You are, however, entitled to

inform a witness or potential witness of the right to decline to be interviewed by the other party and of any relevant legal obligations. You are also entitled to remind a potential witness of any legal obligations of confidence or privilege that may be attached to information he or she holds.

Professional Obligations – Evidence

- You must not adduce evidence knowing it to be false.
- When cross-examining you must not put any proposition to a witness that is either not supported by reasonable instructions or that lacks foundation by reference to credible information in your possession.
- You must not put questions regarding allegations against third parties to a witness when you know that the witness does not have the necessary information or knowledge to answer questions in respect of those allegations, or where there is no justifiable foundation for the allegations.
- You must not communicate with a witness during the course of cross-examination or re-examination of that witness or between the cross-examination and the re-examination, except where good reason exists and with the consent of either the judge or the lawyers for all other parties (or, where a party is unrepresented, the consent of that party). This applies during adjournments of the hearing.
- If a witness (not being your client) gives material evidence in support of the client's case that you know to be false, you must, in the absence of a retraction, refuse to examine the witness further on that matter.
- If your client gives material evidence in support of the client's case that you know to be false, you must, in the absence of a retraction, cease to act for that client.
 - Comment – make sure that there is the opportunity for a retraction. Ask for an adjournment, speak to your client, and explain the consequences.

Part Two – TRIAL PREPARATION

What is the Defence?

One of your tasks is to give advice about available defences. The decision about which, if any, defence is to be run is for the client to make, after receiving advice. Sometimes a decision will be made after the outcome of inquiries with witnesses, or expert opinion, is known.

The defence chosen will usually affect the way you run the trial. For example, if the defence is that a critical witness is mistaken or unreliable then you may not wish or need to challenge the witness as lying. It can be useful to explain this to a defendant who considers all Crown witnesses to be liars or biased against them.

Example of Possible Defences:

Count	Possible Defences
<i>sexual violation by unlawful sexual connection – that the Defendant on [date], at [location], did sexually violate Complainant [the daughter of his de facto partner] by unlawful sexual connection effected by the introduction into her genitalia of his fingers</i>	Nothing happened – C has made it up. It may be useful to brainstorm whether D knows or suspect why C has made it up. Would someone else know?
	D wasn't there – Is any alibi type evidence available if a specific date is alleged?
	Something happened – but it didn't go as far as the introduction into her genitalia of his fingers. Was the something consensual? Does the age of C make consent a realistically available defence to a lesser charge? Could C be mistaken or confused about what happened? Is C lying about the introduction into her genitalia of his fingers?
	It happened but she consented – how can we show that? What were the indicators? Is C now lying or is she confused? Can we know or suspect why she's lying or confused?
	It happened but D believed on reasonable grounds C was consenting – how can we show that? What were the indicators?
	It happened but another person was the offender – how do we know that? How can we raise it? Is C lying or is she confused about who it was? Can we know or suspect why she's lying or confused?

You can make notes of defences and decisions about them on the following page.

Jury trial or Judge alone trial (JAT)?

The list of offences where there must be a jury trial is much shorter than it used to be. See Schedule 1 to the Criminal Procedure Act 2011. For example, all sexual offending can now be determined at a JAT. A jury trial can only be elected for offences punishable by 2 or more years imprisonment, but related lesser charges will also be heard by a jury if an election is made for a more serious related charge (s 139 Criminal Procedure Act 2011).

If the charges are not in Schedule 1, advise your client that they have a choice, and discuss the pros and cons of each option.

Advice:

Decision made about jury or JAT:

Will the Defence Call Evidence?

The decision about this is for the Defendant.

The lawyer's role is to give advice, including about the possibilities that may change that advice (such as a Crown witness making concessions or accepting the defence perspective on some issues).

The Defendant's decision can be made as late as at the end of the Crown case.

Suggested approach:

- Brainstorm potential witnesses.
- Could any experts assist?
- Is character evidence appropriate and available?
- Note whether you or the client will initiate contact with each potential witness.
- Is a Private Investigator required?
- Interview or brief witnesses as instructed, or as is necessary. Best practice is to obtain a signed brief from all potential witnesses.
- For each witness, note their available evidence, pros and cons of calling the witness, and decision made (dated). Copy the worksheet on the following page.

Witness worksheet

Name:	
Contact details:	
Evidence:	
Decision:	<p>Call witness</p> <p>Call witness in following circumstances:</p> <p>Delay decision until:</p> <p>Final decision:</p>
Summons required:	Yes/No – arrangements to make

Will the Defendant Give Evidence?

Obligations and rules

- You must advise the client of the right to give and/or call evidence on his or her behalf that is relevant and legally admissible.
- You must record the client's factual instructions in a signed brief of evidence unless there is a good reason not to, for example where a client is not a witness or has already given a full account such as in a Police interview or where the evidence will be in an affidavit.¹
- The decision about whether or not to give evidence is for the defendant.
- The lawyer's role is to give advice, including about the possibilities that may change that advice.
- The Defendant's decision can be made as late as at the end of the Crown case. But the *probable* decision will affect the way you run the case, so make sure your client knows this.
- Best practice is to record your advice and the client's instructions on this issue in writing.

Consider the following issues to promote discussion:

- What evidence is there already from the Defendant? Police interview? Statements by other witnesses?
- Is all the existing evidence admissible? Can any of it be challenged as unreliable or improperly obtained or obtained by oppression?
- Is all the existing evidence from the Defendant correct?
- Have lies have been told to Police or other witnesses? Are explanations required or available?
- Will the Defendant be offering evidence about his or her veracity or challenging the veracity of a Crown witness by reference to matters other than the facts in issue? What are the consequences of this?
- Could the decision depend on the result of a pre-trial application?
- Could the decision depend on what happens at trial (for example a witness says or does not say a particular thing)?

¹ Experience and judgement will help you recognise the (few) situations where it is useful to defer this step until close to the trial.

- Could another witness give the evidence the Defendant needs to give, or produce necessary information?

Some other matters to consider:

- If the Defendant gives evidence, then the jury hears them in person.
- If the Defendant gives evidence, then additional information is provided.
- If the Defendant gives evidence, then their credibility may be enhanced.
- How will the Defendant appear to jury?
- Could cross examination damage the defence?
- How strong is the Crown case?
- Will the Defendant regret a decision not to give evidence if they are convicted?

Advice given:

Decision made by client (sign and date):

Some Topics and Goals for the Defendant's Brief of Evidence

- Address
- Family
- Relevant relationships (Crown witnesses, Defence witnesses, other)
- Occupation
- Personal background
- Corrections to Police interview
- An account of events that is a defence or a partial defence
- A presentation that enhances the defendant's credibility
- An opportunity for the jury (some or all) to warm to the defendant

Notes for Closing

Possible general topics

- Onus of proof
- Roles of lawyers and Judge
- Prejudice and sympathy
- Elements of charges
- Defence case
- Reliability
- Credibility
- What is evidence (cf submissions, opinions, loyalties, arguments etc)
- Burden of proof
- Reasonable doubt
- Role of Jury
- Importance of decision – can't change it later
- Separate trials (if multiple counts)
- Mistaken witnesses
- Lies

Defence theory of the case: the right outcome in this case is that the Defendant should be found not guilty because ...

Part Three – AT TRIAL

Some prohibited uses of evidence

This is a checklist for some common Evidence Act 2006 prohibitions.

Section 33 – No person other than the defendant or the defendant's counsel or the Judge may comment on the fact that the defendant did not give evidence at his or her trial.

Just what it says!

Section 32 – Fact-finder not to be invited to infer guilt from defendant's silence before trial

- (1) **This section applies to a criminal proceeding in which it appears that the defendant failed—**
 - (a) **to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or**
 - (b) **to disclose a defence before trial.**
- (2) **If subsection (1) applies,—**
 - (a) **no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and**
 - (b) **if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.**
- (3) **This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.**

This happens more frequently than it is recognised. The Crown and/or the trial judge cannot invite the jury to reason that because the defence was not raised at the time the defendant was spoken to by police, it must not be a credible defence. The trial judge must direct the jury that this inference is not to be drawn.

Section 31 – Prosecution may not rely on certain evidence offered by other parties

Evidence that is liable to be excluded if offered by the prosecution in a criminal proceeding because of section 28 or 29 or 30 may not be relied on by the prosecution if that evidence is offered by any other party.

This section is relevant to joint trials where co-defendant introduces evidence about the defendant that is liable to be inadmissible because of unreliability (s28), oppression (s29), or it was improperly obtained (s30).

Evidence Act 2006 extracts

7 Fundamental principle that relevant evidence admissible

- (1) All relevant evidence is admissible in a proceeding except evidence that is—
 - (a) inadmissible under this Act or any other Act; or
 - (b) excluded under this Act or any other Act.
- (2) Evidence that is not relevant is not admissible in a proceeding.
- (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

8 General exclusion

- (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
 - (a) have an unfairly prejudicial effect on the proceeding; or
 - (b) needlessly prolong the proceeding.
- (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

25 Admissibility of expert opinion evidence

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
- (2) An opinion by an expert is not inadmissible simply because it is about—
 - (a) an ultimate issue to be determined in a proceeding; or
 - (b) a matter of common knowledge.
- (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.

- (4) If expert evidence about the sanity of a person is based in whole or in part on a statement that the person made to the expert about the person's state of mind, then—
- (a) the statement of the person is admissible to establish the facts on which the expert's opinion is based; and
 - (b) neither the hearsay rule nor the previous consistent statements rule applies to evidence of the statement made by the person.
- (5) Subsection (3) is subject to subsection (4).

31 Prosecution may not rely on certain evidence offered by other parties

Evidence that is liable to be excluded if offered by the prosecution in a criminal proceeding because of section 28 or 29 or 30 may not be relied on by the prosecution if that evidence is offered by any other party.

32 Fact-finder not to be invited to infer guilt from defendant's silence before trial

- (1) This section applies to a criminal proceeding in which it appears that the defendant failed—
- (a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or
 - (b) to disclose a defence before trial.
- (2) If subsection (1) applies,—
- (a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and
 - (b) if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.
- (3) This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.

33 Restrictions on comment on defendant's right of silence at trial

In a criminal proceeding, no person other than the defendant or the defendant's counsel or the Judge may comment on the fact that the defendant did not give evidence at his or her trial.

122 Judicial directions about evidence which may be unreliable

- (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
 - (a) whether to accept the evidence:
 - (b) the weight to be given to the evidence.
- (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
 - (a) hearsay evidence:
 - (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
 - (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
 - (d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a police station, or another place of detention:
 - (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.
- (3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—
 - (a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or
 - (b) if the Judge is of the opinion that there is any other good reason not to comply with the request.
- (4) It is not necessary for a Judge to use a particular form of words in giving the warning.
- (5) If there is no jury, the Judge must bear in mind the need for caution before convicting a defendant in reliance on evidence of a kind that may be unreliable.
- (6) This section does not affect any other power of the Judge to warn or inform the jury.

124 Judicial warnings about lies

- (1) This section applies if evidence offered in a criminal proceeding suggests that a defendant has lied either before or during the proceeding.

- (2) If evidence of a defendant's lie is offered in a criminal proceeding tried with a jury, the Judge is not obliged to give a specific direction as to what inference the jury may draw from that evidence.
- (3) Despite subsection (2), if, in a criminal proceeding tried with a jury, the Judge is of the opinion that the jury may place undue weight on evidence of a defendant's lie, or if the defendant so requests, the Judge must warn the jury that—
 - (a) the jury must be satisfied before using the evidence that the defendant did lie; and
 - (b) people lie for various reasons; and
 - (c) the jury should not necessarily conclude that, just because the defendant lied, the defendant is guilty of the offence for which the defendant is being tried.
- (4) In a criminal proceeding tried without a jury, the Judge must have regard to the matters set out in paragraphs (a) to (c) of subsection (3) before placing any weight on evidence of a defendant's lie.

125 Judicial directions about children's evidence

- (1) In a criminal proceeding tried with a jury in which the complainant is a child at the time when the proceeding commences, the Judge must not give any warning to the jury about the absence of corroboration of the evidence of the complainant if the Judge would not have given that kind of a warning had the complainant been an adult.
- (2) In a proceeding tried with a jury in which a witness is a child, the Judge must not, unless expert evidence is given in that proceeding supporting the giving of the following direction or the making of the following comment:
 - (a) instruct the jury that there is a need to scrutinise the evidence of children generally with special care; or
 - (b) suggest to the jury that children generally have tendencies to invent or distort.
- (3) This section does not affect any other power of the Judge to warn or inform the jury about children's evidence exercised in accordance with the requirements of regulations made under section 201.

126 Judicial warnings about identification evidence

- (1) In a criminal proceeding tried with a jury in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the Judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.
- (2) The warning need not be in any particular words but must—
 - (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and
 - (b) alert the jury to the possibility that a mistaken witness may be convincing; and
 - (c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.
- (3) If evidence of identity is given against the defendant in any criminal proceeding and the defendant disputes that evidence, the court must bear in mind the need for caution before convicting the defendant in reliance on the correctness of any such identification and, in particular, must bear in mind the possibility that the witness may be mistaken.

127 Delayed complaints or failure to complain in sexual cases

- (1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.
- (2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

What warnings does the Defence want?

This is a checklist for Evidence Act 2006 warnings, and other common jury directions.

For some of them it may be appropriate to get instructions (for example whether you want a reliability warning when some of what the witness says it is important to your case, but some of it is disputed; or if the defendant wants you to say to the jury that if it had happened the complainant would have made her complaint a long time ago you will want to advise the defendant about the likely response of the Trial Judge to that).

Highlight or list the warnings you are expecting or need to request and check them off during the Judge's summing up.

Section 122 – Judicial directions about evidence which may be unreliable

Counsel can ask the Judge to give a direction about evidence which may be unreliable, and the trial Judge must consider whether to give such a direction in certain circumstances. Be prepared to point this out to the Judge.

Section 124 – Lies

If you ask the Judge for a lies direction the Judge is obliged to give one. Sometimes the direction highlights evidence that a jury may otherwise have not paid much attention to. Does the defendant want the jury to be given a lies direction? What is your advice?

Tripartite direction

Section 125 – Children's evidence

Unless there has been expert evidence in the case on this point, the Judge may not instruct the jury that there is a need to scrutinise the evidence of children generally with special care; or suggest to the jury that children generally have tendencies to invent or distort.

Section 126 – Identification evidence

If the case depends wholly or substantially on identification (voice or visual) then the Judge must give an identification warning.

Section 127 – Delayed complaint in sexual case

If evidence is given or a question is asked or a comment is made that tends to suggest that the complainant either delayed making or failed to make a complaint the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

Any other matters the Defence will want the Judge to direct on?

Further resources

See range of articles and research resources on www.trialworkbook.co.nz

Or contact a Law Library:

NZ Law Society Library, Auckland

High Court Building, Corner of Waterloo Quadrant and Parliament Street
PO Box 4416, Shortland St, Auckland 1140

The library is staffed from 8.30am – 8pm Monday – Thursday and 8.30am – 5pm Friday.
24 hour access is available.

Email: auckland@nzlslibrary.org.nz Phone: +64 9 304 1020

NZ Law Society Library, Wellington

High Court Building, Kate Sheppard Pl entrance PO Box 494, Wellington 6140

Due to disruption after the November 2016 earthquake, access to print is currently very restricted. Please contact the librarians to see if the title you want is available.

Email wellington@nzlslibrary.org.nz Phone: +64 4 473 6202

NZ Law Society Library, Canterbury

Justice & Emergency Services Precinct (B2 entrance), Emergency Services Building,
Ground floor, Tuam Street, Christchurch 8011. PO Box 565, Christchurch 8140,
DX WX10074

Email: canterbury@nzlslibrary.org.nz Phone: 0800 377 347 or +64 3 377 1852

NZ Law Society Library, Otago

Level 4, John Wickliffe House, 265 Princes Street, Private Bag 1901, Dunedin

Email: otago@nzlslibrary.org.nz Phone: +64 3 477 0596