CDAM
THE RIGHT TO COUNSEL
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A CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN PUBLICATION

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The Right to Counsel is the Criminal Defense Attorneys of Michigan's quarterly newsletter. It is dedicated to any and all information relevant to CDAM, its members, and the practice of criminal law.

Your contributions are encouraged. If you have news to share with CDAM members, please don't hesitate to call, email or write to:

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PRESIDENT'S COLUMN

STAND UP, STEP UP, SPEAK UP

Guest Columnist: by Margaret Sind Raben

I have been CDAM's Vice President since Marty Tieber was President. I've run out of excuses and, barring an uprising from the membership (which would not be unwarranted), I expect to become CDAM's President in May, 2007. I approach this position with some hesitation. Over the last few years, CDAM has changed some of its focus and moved forcefully into areas which have not been traditional for us. CDAM is standing up, stepping up, and speaking up. I think this is a good thing and long overdue. My concern is whether I keep CDAM's momentum going and engage you in our newer public role.

As one example, I have, as VP of CDAM and at the request of President Jill Price, joined the Michigan Public Defense Task Force. The Task Force has spent the last several years focusing on Michigan's systems for delivery of legal services to indigent persons. The Task Force has produced a Model Plan for public defense services in Michigan and established Eleven Principles of a public defense delivery system. The Eleven Principles was passed as a joint resolution of the Michigan Legislature and the Legislature has approved a study by the State Bar and the National Legal Aid and Defender Association of the state,s assigned counsel systems, workloads, costs and resources. The study will be done by national expert David Carroll of the NLADA and will begin as soon as the 10-12 targeted counties have been selected. Toward this matter, I have been invited by Senator Alan Cropsey to be on the Advisory Committee which will determine which Michigan counties will have their indigent defense systems studied. Once this data is collected and analyzed, there may be legislative action. The Task Force also drafted a bill for a new indigent defense system as a talking point for Michigan legislators. The bill is based on the Eleven Principles and requires the State of Michigan to fund constitutionally adequate defense services to indigent criminal defendants and not leave the funding of those services to the vagaries of the individual counties. The Task Force is also working with a litigation team (the Team) of law firms and outside experts who will challenge Michigan's current indigent defense systems in the courts. CDAM is not part of the litigation team, although several CDAM/Task Force members (Frank Eaman, Dawn Van Hoek, and myself) have met with the Team.

I suspect any discussion of changing any of Michigan's existing indigent defense systems raises anxiety among some of our members. At this time, CDAM is participating in the gathering of data to pursue an intelligent discussion with Michigan's legislators about the current systems, known effective model systems, costs, parity in resources, and funding. These are the first steps to determining if Michigan's public defense system is, as many of us suspect, failing to deliver what is required and must be reformed or recreated. If, and when, the Legislature concludes that Michigan's system must be fixed, the nitty-gritty of the details of the fix will be debated. Right now, CDAM has an opportunity to inform and educate the Michigan public and its legislators as to what we do as defense attorney, how we do it, and the barriers created by lack of funding and lack of parity of resources. CDAM should be part of this process. On behalf of CDAM, I am pleased to represent you.

Welcome!

By: Margaret Sind Raben & Richard D. Stroba

CDAM welcomes the following new members, who joined us since the Publication of the Summer Issue.

Membership News:
CDAM would like to welcome the following New Members:

- Yvonne M. Anderson
- Terry B. Angle
- Vicki L. Armstrong
- Michael R. Bartish
- Stacia J. Buchanan
- Connie M. Bukoski
- Britt M. Cobb
- Christopher Croker
- Michael J. Cronkright
- Lisa L. Dwyer
- Elisha Fink
- Kimberly A. Fink
- Maureen L. Fitzgerald
- John D. Gifford
- Lisa Gladstone
- Bradley R. Hall
- Timothy H. Havis
- Mark Hugger
- Donna J. Innes
- Andrew J. Kandrevas
- Adam Kelly
- Michelle Kelly
- Elizabeth A. LaCosse
- David R. Lady
- Neijla Lane
- Doraid Marcus
- Sarah Mason
- Marla L. Mitchell-Cichon
- Michael Naughton
- Moneka L. Sanford
- Donald Shaw
- Steven Shelton
- Shawn M. Sutton
- Pamella R. Szydlak
- John H. Waldeck

Upgraded Memberships:
CDAM would also like to thank those renewing members who upgraded their memberships to a "Constitutional Warrior" ($500.00) or "Sustaining Membership" ($200.00):

Constitutional Warriors:
- Mitchell Foster
- Greg Jones
- Richard Steinberg

CONSTITUTIONAL WARRIOR PROFILE: GEORGE SPANOS

George Spanos

George Spanos is a longstanding CDAM Member (over 15 years) and was a member of the Board of Directors for approximately 8 years in the 1990's. Besides being a member of CDAM, Mr. Spanos has been a member of the American Bar Association (ABA) for 41 years, the State Bar of Michigan for 44years, the Charleviox-Emmet County Bar Association for 15 years and the National Association of Criminal Defense Lawyers for approximately 10 years.

Mr. Spanos was born and raised in East Lansing, Michigan and graduated from East Lansing High School in 1954. He obtained his BA in 1958 from Albion College and his Juris Doctor from Northwestern School of Law.

He moved to Petoskey, Michigan and started practicing criminal defense in 1980. Along with being a member and holding a Board of Director's seat in the past, Mr. Spanos has made every effort to attend almost every CDAM conference for the past 20 years as he finds them extremely helpful in his practice and notes that, "they (the conferences) are the best continuing education programs, bar none." He went on to add that, "one of my pet peeves is that I can not understand why any attorney doing criminal defense does not belong and support CDAM. It is the most cost effective legal provider, period."

Mr. Spanos has been married to his wife Lea for 35 years, who recently retired from working as his secretary for some 30 years. He also has three stepsons and two grandsons and enjoys spending as much time as possible with his family.

Mr. Spanos noted that he has always believed in what he is doing and fights vigorously for the rights of his client. When asked to relate some of his more memorable cases, he noted that:

"My most memorable cases are usually my last especially if they were successfully concluded. Just recently I had a two such cases. The first case was a client charged with AWIGBH, A-CSC-penetration, Telephone tampering. Jury verdict of Not Guilty on all counts. The second case was MIP and three Furnishings. Jury verdict of Not Guilty on the three Furnishings, guilty on MIP."

He noted that he savors such wins as the life of a criminal defense attorney is filled with so many losses that wins, no matter how small, makes agonizing defeats a bit more palatable.

Keep fighting the good fight Mr. Spanos – CDAM and the criminal defense community needs **"Constitutional Warriors"** such as you.

Make Nominations Now!
Awards Committee Needs your Input

By Jill L. Price

Make your voice heard! CDAM's Awards Committee invites the participation of all CDAM members in the new awards process.

Is there a CDAM member you especially admire? Someone you feel should be recognized publicly for his or her excellence in representing clients? Or for a more general commitment to the protection of constitutional rights?

Please take a minute to provide the information below and nominate a fellow member for either or both of the following awards.

Right to Counsel Award: This award recognizes an attorney whose achievements exemplify a commitment to providing the highest quality assistance of counsel.

To nominate an individual, please send the information requested below. You may either complete the form or write out the information. Please mail to:

CDAM Awards Committee
C/o Jill Leslie Price, Chair
645 Griswold, Suite 2255,
Detroit, MI 48226.

Equal Justice for All Award: This award recognizes an individual whose contributions have a made a positive impact on the practice of law, the effective representation of defendants, and/or the protection of constitutional rights in general.

Nomination Form

Mail to: CDAM Awards Committee
C/o Jill Leslie Price, Chair
645 Griswold, Suite 2255,
Detroit, MI 48226

Nomination for Award (circle one): ***Right to Counsel*** ***Equal Justice for All***

Nominee Name: _____

Address: _____

_____

Phone & Email: _____

Please feel free to include comments in support of the nomination on a separate sheet of paper.

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Michigan Innocence Project, Investigations Division (Member)
Michigan Association Of Polygraph Examiners *(Member, Past President, and Chairman-Board Of Directors)*

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DOES ANSTEY SUGGEST AN EXPANDED ROLE FOR MICHIGAN'S DUI JURIES?

by Patrick T. Barone, Esq.

Patrick T. Barone, Esq.

"Freedom of religion; freedom of press; freedom of person under habeas corpus; and trial by juries impartially selected - these principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation."

President Thomas Jefferson
First Inaugural Address
March 4, 1801

Introduction:

Prior to July 31, 2006 Michigan's implied consent law helped protect drivers from being wrongfully convicted for drunk driving because after they submitted to the police officer's request to take a chemical test they could demand a separate "independent test" of their own. If the police denied or even significantly interfered with this right, then the appropriate remedy for such police misconduct was dismissal. *See People v. Koval,* 371 Mich. 453, 124 NW2d 274 (1963). There were several reasons that this prior panel of Supreme Court judges provided this remedy for such violation and these centered on the statutory use of the term "shall" when referring to the right. In other words, the statute specifically provides that a person having taken the police obtained chemical test "shall be given a reasonable opportunity to have a person of his or her own choosing administer" an independent chemical test. It was also thought that there was a constitutional dimension to this right because it was directly related to the due process right that a criminally accused has to produce a defense. Consequently, dismissal was necessary in order to deter police officers from violating this right.

Michigan's current Supreme Court sees things in a whole new light. They (or at least five of seven of them) are of the opinion that because the Legislature failed to state a remedy with specificity it would not be appropriate for the court to impose one. Though not specifically stated in these terms, they ruled the way they did based a separation of powers theory. However, the court did believe that doing nothing would permit the police to ignore "a defendant's mandatory statutory right to a reasonable opportunity for an independent test." Nevertheless, the Court was determined to not legislate from the bench. Thus, any remedy imposed would need to be well within the powers reserved by the judiciary, and those certainly include the conduct of trial. Thus, the conclusion of the Court was that if the implied consent law was violated then the jury should be apprised of this rights violation, and it would then be for the jury, not the judge, to decide the significance of this violation. So, as the Michigan Supreme Court sees it, the trial court judge's role and more generally the role of the judiciary, is "to assist the jury in ascertaining the truth." Thus, the Court decided that if a defendant could prove, after an evidentiary hearing, that in fact his or her implied consent rights were violated then it would be appropriate for the court to give the following special jury instruction:

> Our law provides that a person who takes a chemical test administered at a police officer's request must be given a reasonable opportunity to have a person of his or her choosing administer an independent chemical test. The defendant was denied such a reasonable opportunity for an independent

> chemical test. You may determine what significance to attach to this fact in deciding the case. For example, you might consider the denial of the defendant's right to a reasonable opportunity for an independent chemical test in deciding whether, in light of the non-chemical test evidence, such an independent chemical test might have produced results different from the police-administered chemical test.

The Court indicated that the authority to give such an instruction "derives from the inherent powers of the judiciary." According to the opinion, this instruction will "communicate an accurate account of what transpired and allow the jurors to apply the law to the facts as they decide." In footnote 22, the Court indicates that "police agencies will be deterred from breaching this obligation if they understand that jurors may consider the statutory violation at trial." Further that "unlike the harsh remedies of suppression or dismissal, a jury instruction will not seek to 'punish' police agencies, but will rather give the jury relevant information that they may consider when rendering their verdict."

It would seem that in this way the *Anstey* opinion follows the trend of placing what were previously legal issues for the court to decide squarely in the laps of the jurors. For example, it had been true that a 15 minute rule violation would nearly always result in the suppression of a breath test. Now this is an issue for the jury to deliberate and to give meaning or weight. Thus, much of what was the work of the judiciary has recently been passed on to the jury. One conclusion that can be drawn from this is that this opinions and those that have come before is that they have actually increased the power of the jury, or one might think at least ought to increase their power, and although much can be said about what is "wrong" about the *Anstey* opinion, further empowering the jury is in many ways quite the right thing to do. This is because jurors are quite literally a final check and balance on the use, misuse or outright abuse of governmental power.

Although not specifically stated in this opinion, it would seem that the Michigan Supreme Court has given its imprimatur to a defense argument to the jury that if in fact they find that the defendant's rights were violated, then they may, on that basis alone, acquit the accused. It would seem then that the next step from the defense bar ought to be to begin making these arguments to the jury, basically asking them not just to acquit, but also to suppress the evidence where an administrative rule has been violated, or to dismiss the case where a motorist's implied consent rights have been ignored.

It would seem also that addressing the jury in this way would always be a three-step process. The first step would be to persuade the trial court that a specific right has been violated. The second step would be to fashion the appropriate jury instruction, and unlike the jury instruction suggested in the Anstey opinion, such instructions should empower the jury to take the action previously "reserved" for the court, including suppression or dismissal. The third step would be to ask the jury to "grant" this remedy.

How *Anstey* Might Actually Help the Defense:

Michigan's system of elected Judges has resulted in a commonly held sentiment among defense attorneys that a criminally accused can only hope to find justice before a jury. This is because the defense community understands that once convicted there will almost certainly no possibility of appellate relief, and that relief at the trial level in the form of "defense friendly" rulings is also unlikely. Thus, so the thinking goes, the accused really only has one shot at justice, and that shot sits squarely with the jury trial process. Because of this sentiment, any written opinion that expands the role of the jury ought to be viewed with optimism, and such expansion seems to be exactly what *Anstey* has accomplished. This is because the jury is now called upon to decide the actual significance of police misconduct.

While it may appear that this potential is not fully realized because the proposed jury instruction does not explicitly allow the jury to impose an actual remedy for the police misconduct of interfering with the right to collect potentially exculpatory evidence, one may argue that such increased jury power simply must be read as implicit in the *Anstey* opinion. Because the opinion stresses the importance of a fully advised jury, where a defendant's implied consent rights have been violated, defense counsel are well advised to file their motions requesting an appropriate jury instruction, and then proposing that the court adopt one that specifically empowers the jury to fashion an appropriate remedy. One also

that then spells out that such remedy may be either dismissal or suppression. The *Anstey* opinion also now makes it incumbent for the defense bar in all criminal cases to request pretrial motions and special jury instructions for all legal issues that have now been passed on to the jury but that might previously been reserved to the courts. These motions might include requesting special jury instructions for things like improperly issued warrants or as it related to chemical tests, administrative rights violations. What is particularly interesting about the Anstey opinion is the lengths to which it goes to describe the importance of a properly advised jury, even to the point of suggesting that a jury may be advised regarding the facts of the case. This might be important when, in a drunk driving case for example, an instruction is requested relative to the many causes of horizontal gaze nystagmus. Undoubtedly Anstey gives the defense a great deal more flexibility and credibility when requesting any kind of special jury instruction, and since justice is best served before a jury, special jury instructions should nearly always be requested.

Why Anstey May Reinvigorate the Availability of Jury Nullification:

It seems evident that the *Anstey* opinion sends a message of strict construction to the Legislature and to the lower courts. In such a strict construction scheme juries are viewed as the final check and balance on the use of governmental authority, most notably in this context a check on the improper use of the executive power. The ultimate ability of the jury to perform this function is sometimes called "jury nullification" though it's not clear that Michigan's current and very conservative Supreme Court majority is in favor of allowing the defense to argue for nullification. Nevertheless, the essential problem with the opinion is not that it took the imposition of the remedy away from the trial courts but that it does not explicitly give this power to the jury. It does seem however to empower juries by giving them an additional power, and in this way it would appear that *Anstey* definitely broadens the role of the jury. Accordingly it would appear not to far a stretch for defense counsel to suggests to the jury during summation that because they have been informed that a violation has occurred they may therefore either acquit the defendant on this basis alone or alternatively may disregard the chemical evidence altogether. In other words, and in following with the reasoning of *Anstey*, if the legislature did not provide for a remedy then what's to stop the jury from fashioning one? After all, simply telling the jury only that they may decide the "significance" to be placed on this fact without advising them of the remedy to be imposed is akin to instructing a jury that they may decide the significance of an improper stop or improper search and seizure, but telling them that they must do so only in the broader light of all of the evidence collected. The bell has been rung so to speak, and this approach does almost nothing to protect the rights of the accused and even less to uphold the Constitution rights of the accused.

Conclusions:

Criminal defense attorneys are often frustrated with what they believe to be the law enforcement or prosecutorial bent of the judiciary. There is a common belief among the defense bar that the only way to attempt to obtain justice is to put the matter before a jury, and for this reason bench trials are exceptionally rare in our state. It would seem that the *Anstey* opinion, when reviewed carefully, might actually help in the defense bar's efforts to obtain this "jury justice" because the opinion passes what was the power of the judiciary on to the jury, thereby increasing this power. This power is useless unless it is pursued but with the proper instruction, and the proper argument, this power can be capitalized upon. It would seem that if the Court is going to ostensibly pass their power, authority and responsibility on to the jury, then they ought to at least do so in a way that empowers the jury to exercise authority previously reserved for the Court, that is, to actually impose a remedy. Otherwise, the rights previously reserved to the people are effectively lost.

Biography of Patrick T. Barone

Patrick T. Barone's is the principle and founding member of the Barone Defense Firm, headquartered in Birmingham, Michigan. The Firm exclusively represents those accused of crimes involving impaired driving as a result of allegedly ingesting too much alcohol or drugs. After a national search in 2005 Mr. Barone was selected to assume authorship of *Defending Drinking Drivers*" (James Publishing) a well-known and highly respected multi volume national legal treatise on DUI-DWI law and practice. He is also the author of the Michigan edition of "*The DUI Book, A Citizen's Guide to Understanding DUI-DWI Litigation in America."* Mr. Barone has published dozens articles on trial practice and drunk driving defense tactics, and these articles have been published both locally and nationally. He is a frequent lecturer, and he has appeared on television and radio as a drunk driving defense expert. He can be contacted at (248) 594-4554 or on the web at: www.mi-dui-central.com.

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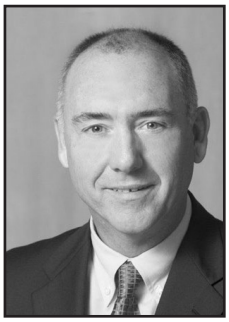
Rosemary Gordon


Ron Bretz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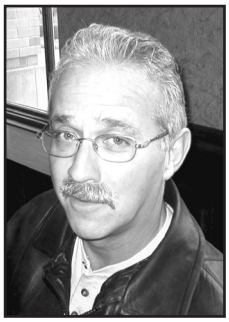

Steve Fishman


David Moran

Tucson, Arizona Seminar for Michigan Criminal Defense Practitioners adds WSU Law School Associate Dean David Moran as a "Regular"

NEW LOCATION ANNOUNCED

The fifth in an annual series of "sun spot" criminal defense seminars geared specifically to Michigan Criminal Defense attorneys, put on by Rosemary Gordon, Marty Tieber, Cooley law professor Ron Bretz, Detroit criminal defense practitioner Steve Fishman, and Wayne State University Law School Associate Dean Dave Moran, will be held Thursday, April 12 through Saturday, April 14, 2007 at a brand new location – the Omni Tucson National Golf Resort and Spa.

Last year, CLIS IV had a breakout year with the return of 5 speakers whose work to date has been acclaimed by attendees, along with solid attendance numbers. Organizers are committed to keeping the total number of attendees low to promote the informal give and take that has been a hallmark of this training conference through its first three years, so be sure to reserve your room and sign up early. Enrollment materials should be arriving in the mail by January at the latest.

The weather for these seminars is always outstanding (constant sun with temperatures in the high 70's, low 80's during the day and cool at night), as is expected in April in Southeast Arizona. The seminar runs Thursday through Saturday, mornings only (two sessions each day), leaving the afternoons and evenings for enjoyment of the company and the incredible setting. The Omni is the premier golf location in the Tucson area, having christened a stunning new 18 hole desert-style golf course in December of 2005. The course was designed by Tom Lehman, 2006 Ryder Cup Captain. The rooms are very reasonably priced in April.

The principal organizers of the endeavor are all members of the Criminal Defense Attorneys of Michigan. Rosemary Gordon is a solo practitioner who specializes in preparing pre-trial motions and appeals for the defense in criminal cases. She entered private practice after 13 years with the Wayne County Prosecutor's Office and was a founding member and long time Secretary of the State Bar Appellate Practice Section and also chaired the Criminal Law Section Council in the early nineties. She currently lives in Tucson but still works primarily on Michigan cases. Ronald J. Bretz is a criminal law professor at Cooley Law School in Lansing. While at the State Appellate Defender Office for 20 years he established himself as an expert in the use of serology/DNA and other scientific evidence and argued and won a case before the United States Supreme Court. F. Martin Tieber is a past president of CDAM and is now engaged in a solo private practice in East Lansing. He retired from the State Appellate Defender in 2002 after 29 years of service.

In addition to the three founding members, two additional outstanding criminal defense practitioners are returning for their fourth and third years respectively. Steven Fishman is a high profile criminal defense attorney with offices in Detroit.

Fishman recently was touted by the Detroit Free Press as one of the top criminal defense practitioners in the state after his successful defense of NBA star Chris Webber. He is a regular and well received presenter at CDAM conferences in Traverse City and Novi. David A. Moran, a decorated law professor and newly installed Associate Dean at Wayne State University Law School, recently completed his **fifth** argument in the United States Supreme Court in just a few years. Dave has become a sought after speaker and the Criminal Law in the Sun seminar is very pleased to add him as a fifth regular presenter.

This year Marty Tieber will provide an update on new case law, court rules and legislation. Steve Fishman will speak on search warrants, and how to attack them, covering *Goldston* (good faith), *Franks* and *Poindexter*, among other issues. Dave Moran will provide an update on confrontation issues in the wake of *Crawford v Washington*, having recently, in addition to the five arguments he has conducted, second chaired the defense position in the Supreme Court in the *Davis* and *Hammon* cases, recently decided and providing guidance on the meaning of "testimonial" under *Crawford*. Also to be invited is former SADO assistant defender Kenneth Lerner, now in private practice in Portland, Oregon, and the lead counsel on the recent U.S. Supreme Court decision in *Kyllo v. United States*, 533 U.S. 27 (2001) (use of thermal imaging device constitutes a search within the meaning of the Fourth Amendment). Other topics will be announced in the coming months.

Look for information regarding the Criminal Law in the Sun seminar early next year and mark the dates on your calendar now. Again, the dates for next year's seminar are **Thursday through Saturday, April 12-14, 2007.**

NEW DRUNK DRIVING BOOK CALLED FIRST OF ITS KIND

Birmingham, Michigan attorney Patrick T. Barone has collaborated with Atlanta Georgia attorney William C. Head to write a first of its kind reference resource for those who are or may become accused of drunk or drugged driving. This new hardbound book is called "The DUI Book, A Citizen's Guide on Fighting a Drunk Driving Case" and consists of over 600 pages of useful information all written in plain English.

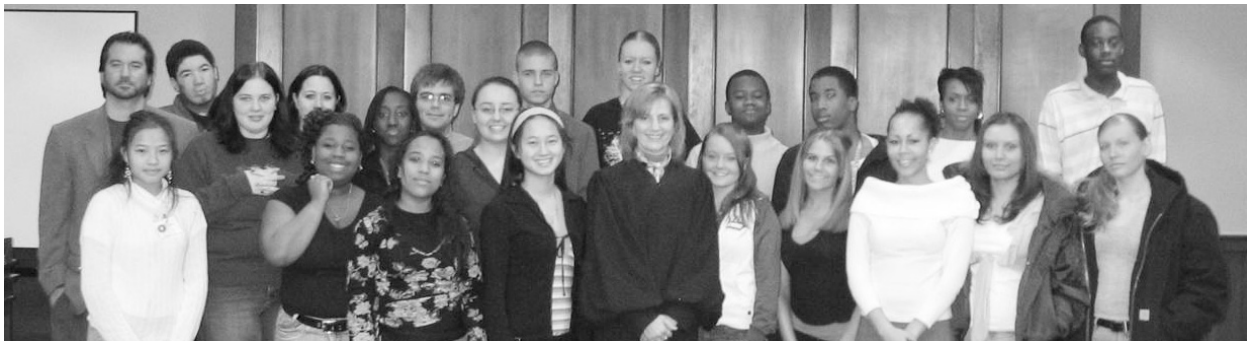
The authors wrote The DUI Book because more than 1.6 million persons are accused of drunk driving in the U.S. every year, and each of them wants to know what will happen to their driver's license if they are convicted, whether they will go to jail, and how an a conviction will impact their job, their ability to travel and their ability to maintain or pay for automobile insurance. The DUI Book answers these questions in an authoritative though surprisingly simple manner, and lawyers from many states have praised the book for its straightforward approach to this increasingly complex area of the law.

Mr. Barone said he decided to devote the time and effort necessary to write The DUI Book "because I believe that most lawyers who handle DUI cases plead their clients guilty due to the fact that they lack the specialized knowledge to actually defend them. The result of this is that most lawyers miss possible defenses and generally provide an exceptionally low level of court room advocacy for their clients." Mr. Barone is also the author of "Defending Drinking Drivers" a multi-volume legal treatise relied on by dedicated DUI defense lawyers throughout the country.

The DUI Book provides plainly written descriptions of the various stages of a typical DUI case including multiple sections describing the pre-arrest, arrest, post-arrest, bonding out, attorney selection, pre-trial, mid-trial, and post-trial processes. Several chapters of The DUI Book also describe the sometimes faulty science behind field sobriety exercises and breath and blood testing. The book suggests that much of what the government wishes to pass off as "science" is not really science at all. The conclusion drawn is that Michigan's prosecutors use the existing laws to help them present this bad science to the jury. In this way the law actually helps prosecutors bring about wrongful convictions.

The DUI Book is organized in an easy-to-follow format, and is written for a non-lawyer's reading level. Nevertheless, the book contains so many legal references that it is an excellent primer for the new or non-specialist lawyer. These references include thousands of cases to help illustrate how each idea or legal defense presented in The DUI Book might be employed to effectively present an accused citizen's case. Mr. Barone said "I hope that by purchasing and reading the book, citizens and their lawyers will be able to more intelligently and effectively defend these charges." The DUI Book can be purchased directly from Mr. Barone by calling 1-800-DIAL-DUI.

LANSING TEEN COURT CELEBRATES FIFTH ANNIVERSARY OF EARLY INTERVENTION PROGRAM FOR YOUTH OFFENDERS



On October 31, 2006, Lansing Teen Court, a novel intervention program for first-time juvenile offenders, celebrated its fifth anniversary of a collaborative effort that offers youths an opportunity to expunge their criminal records in exchange for personal accountability and peer justice. An Awards Luncheon was held at the Cooley Center, honoring the many people that work tirelessly to make this program a success. Those awardees included Michael Botke, Executive Director, and Latisha Heath, Family Youth Advocate at Lansing Teen Court who have been with the program since its inception and who put in untold hours in making this program the success it is. Both Mr. Botke and Ms. Health are Associate Members of CDAM. Board of Director Marjorie P. Russell was also honored for her work in overseeing hearings. She is a longstanding CDAM member and one of our newest Constitutional Warriors, and is the driving force behind the Annual Trial Practice College. Also recognized for her years of service as presiding judge, the Honorable Janelle A. Lawless, 30th Judicial Circuit Court – Family Division whose valuable guidance and judgment helps to make Lansing Teen Court what it is.

Founded in 2001 by a group of community stakeholders, Teen Court is designed to hold youth ages 11-16 responsible for their actions through peer justice, and parental and community collaboration while teaching ownership and accountability for inappropriate actions. Since its inception, more than 600 Ingham County teens have participated in the program.

To qualify, youth meeting selected criteria must be referred by the Ingham County Prosecuting Attorney and the 30th Judicial Circuit Court Circuit Court, accept responsibility for their choices, and, with the support of their parents/guardian(s), participate in a variety of activities ranging from substance abuse counseling to tours of the county jail – all designed to address risk factors contributing to their negative behaviors.

In return, offending youth receive a clean record — but not before they experience what many believe is the harshest sentence, judgment by their peers. In

courtrooms housed within the Thomas M. Cooley Law School, youth charged with everything from shoplifting to marijuana possession share their misgivings with Lansing, Mason and Dansville high school students who serve as jurors, bailiffs and clerks. Local educators find the service learning experience to enhance classroom lessons; since the program's inception, more than 2,500 local high school students have been trained and served in the hearing step of the Teen Court process.

"This program shifts the paradigm of addressing teen delinquency issues in our community," said

Lansing Teen Court Director Mike Botke. "Our peer jury model empowers teens to become part of the solution, not the problem."

In a recent review conducted by the Ingham County Prosecutor's office, fewer than 11 percent of the program's teen participants committed a second offense, indicating a 90% success rate.
The program's unique process addresses many of the underlying school, peer and family issues that can foster negative juvenile behaviors.

A wide network of community resources support Lansing Teen Court. In addition to Cooley Law School's donation of courtroom space and offices, several professors help to oversee hearings working with sitting judges and referees from local courts. Additionally, law students from Cooley and Michigan State University, as well as other community volunteers, serve as "Respondent Advocates," guiding juvenile offenders through the legal process.

"Teen Court offers a unique way of efficiently addressing the underlying issues that drive youth to commit offenses and preparing them for a brighter future," said the Honorable Janelle A. Lawless, presiding judge of Ingham County's 30th Judicial Circuit Court – Family Division.

The collaborative, community program receives nearly $100,000 in funding from the City of Lansing's Human Relations and Community Services department, the Mid-South Substance Abuse Commission, Ingham County Juvenile Justice Milliage, the Capital Area United Way, Mayor Virg Bereno's Drug Free Youth Task Force and the Capital Region Community Foundation.

CDAM salutes Lansing Teen Court and all of its tireless advocates and wishes it many, many more years of successful advocacy.

Founded in 1972, Cooley Law School is the largest law school in the country. Cooley has three campuses across Michigan; its campus in downtown Lansing, its downtown Grand Rapids campus and its Rochester/Oakland University campus. In addition to the Juris Doctor program, students at Cooley can also pursue a Master of Laws degree in taxation or intellectual property.

THE THOMAS M. COOLEY LAW SCHOOL
In corde hominum est anima legis. 1972

BULLET BOUNCE AND RICOCHET

What are they? What can they tell us? And how do they effect our cases?

Steve "The Gun Guru" Howard

By
Steve "The Gun Guru" Howard

We see it in the movies all the time; the hero bounces a bullet off a wall or other hard and flat surface, the bullet then hits the evil villain in the head, or the heart, and kills him/her.

QUESTION: How much of this is truth, and how much is fiction?

ANSWER: All of it, and none of it.
This is something that is widely taught to police, but they rarely understand anything other than what they are taught at the academy. When I was trained at the United States Border Patrol Academy, we were lectured on the subject for about an hour and then we watched a film for about 30 minutes to an hour. This is typical for most police. The training is centered around surviving gunfights and not toward investigating claims or accidental shootings, or claims of self-defense.

As it has been from the beginning of time, police, like people in general, tend to see what they want to see. If there is a dead body, it is far more likely to be seen first as a murder before it is seen as anything else. Why is this? The reason can be as simple as human nature. Sub-consciously they can be thinking: "Which looks better at promotion time? "I cleared a murder" or "I cleared an accidental death that really was just an accident."

But, back to the subject at hand. The science behind bullet ricochet is very simple to say and very difficult to work out the numbers.

RULE: For every action, there is an equal and opposite reaction-Newton.

But the trick is, not everything happens in a perfectly straight line. And, very little if anything happens as we envision it.

RULE: Bullets do not bounce like pool balls, but they can bounce, and they always ricochet.
Pool balls either strike the springy rubber sides of the pool table or another ball. If they strike the soft springy rubber sides of the pool table, it compresses and, stores the ball's energy. Then, it releases that energy back into the ball which causes it to bounce at what appears to the naked eye as a right angle. If one ball strikes another, the first ball transfers part, or most, of its energy to the second ball, because they are both springy. Again, this is a bounce. In both cases, the ball is hitting a springy object that causes the bounce.

Bullets on the other hand are very soft, because they are made of lead. Likewise, they generally strike either very soft objects, like flesh, wood, drywall, or thin steel, which fails to stop the bullet completely. If this is the case, barring the bullet striking at a perfect ninety degree angle Newton's Law kicks in and the bullet will be ever so slightly knocked off its original course. The amount of course change depends on the material struck. One single sheet of paper will change the course less than oak wood or thin steal. This kind of deflection is a ricochet. Deflection is the deviation of the original course after striking any object.

If the bullet strikes a very hard object that has very little spring in it like concrete, thick steel, rock, or other material which will not yield, much, if any at all, thing happen differently. The bullet will strike the object and transfer part of its energy to the surface, it will conform itself to the surface it strikes, thereby also using up part of its energy, it will changing direction and expend more energy, and it will then continue on its way with whatever energy it has left after the previous two events have been completed. In both cases, the bullet strikes at very high speed which differs from the low speed of pool balls. This calls on Newton's next law: ***"A body in motion***

tends to stay in motion." A slow moving pool ball can change or reverse direction far more easily than a bullet traveling one and a half times the speed of sound.

RULE: When a bullet strikes ANYTHING the bullet changes direction, even if only slightly.
When a bullet strikes even a blade of grass, it transfers some of its energy to the blade of grass to push it out of the way, or cut it in two. Newton's law kicks in and whatever energy that is transferred to the grass, the same is transferred to the bullet. If the bullet hits the grass at a perfectly square, perfectly right angle, then the bullet will slow down slightly, but that's all. The chances of a bullet hitting anything perfectly squarely are like hitting the Lotto. If it doesn't hit perfectly, if will deflect ever so slightly in the opposite direct of the hit. It will either fly slightly left or right depending on which side of the bullet strikes the grass. Also, the bullet's spin, will grab the grass and pull the bullet up or down slightly, depending on which way the bullet is spinning.

When a bullet strikes something very hard, like thick steel, at a 45 degree angle, several things happen at once. The bullet deforms-badly, even if it has a steel jacket, or even a steel core. It will assume the shape of whatever it strikes. If it strikes a flat, hard surface, it will have a big flat spot on it. I can't count the number of times that I have inspected bullets that shot someone and I can see the weave of the cloth that made up their shirt, or coat, impressed into the soft lead, the copper, or even the brass jackets that covers the lead core of the bullet. Many times I can see the grain of the wood that the bullet struck.

RULE: ALMOST WITHOUT EXCEPTION, BULLETS WILL FOLLOW THE SURFACE FOR WHICH THEY STRIKE.

TESTING THE RULE:
I placed a firm piece of hard steal against the solid concrete foundation of a building. I then measured one full meter from the shot where I would be shooting. I pressed a piece of cardboard up against the wall sticking out 90 degrees from the wall with the help of a large rock. This cardboard was one meter from the point of impact of the bullet on the steel. I then moved to a point where the bullet would strike at approximately 30 degrees. See attached drawing. I fired four rounds of .22 and four rounds of jacketed 9 mm and four rounds of cast (no jacketed) 9 mm at the steel. The results were all the same. The bullets struck the paper box at one and a half inches to two inches away from the edge of the concrete (after subtracting the thickness of the steel). This equaled a variation of only three and a half degrees from the surface of the steel. The non-jacketed bullets broke up more because they tend to be less restrained without a jacket and therefore separated, but the angle of separation remained the same. I then removed the piece of steel and fired to the exact same point, this time striking the bare concrete. The experiment was repeated with the same guns and loads and yielded virtually identical results. In each case the bullet would crush the concrete slightly but would not change its angle of deflection significantly. Only one round deviation and this was because as it was crushing the concrete it encounter a hard piece of gravel on the concrete which was at a significantly different angle from the wall itself. This was the only exception during the entire course of the test.

Next, I put the steel back in place, changed my firing position so the bullet would strike at a sixty degree angle and repeated the experiment both with and without the steel. Again I used the same guns and loads and got exactly the same results. Logic demands that because the angle of the strike is twice as violent that the bounce/deflection would be twice as large. However, the angle of deflection proved to be so identical that more than one of the bullets passed through or nearly passed through the bullet holes from the thirty degree test. Newton's law dictates that the bullet will transfer more energy to the steel and concrete because of the steeper angle and have less velocity when it strikes the cardboard but the above stated rule was not deviated from. All the bullets deflected at a three to three and a half degrees off the wall. This is the concept for which police truly do not understand. Most naturally police believe that as the angle of strike the angle of deflection increases as well.

What virtually all police officers are taught is that if someone is standing behind an automobile or lean-

ing out from a doorway of a concrete building shooting at them, the police officer can "skip shoot" their attacker. This technic involves aiming at the pavement or wall closer to the person shooting at them at firing. The bullets or pellets will strike the payment/wall and then bounce into their attacker thereby ensuring hits. This technic can be more effective then aiming at the person themselves because the wall or pavement is a very large target and the area of their attacker arm, leg, ankle, hand, head maybe a very small target by comparison. Police have been using the technic of skip shooting since the invention of gun powder. If someone is peeking around a corner with only a pistol and one eye exposed as a target shooting at the police officer, the police officer only need to shoot at an area against the wall three feet closer to the attacker. This is especially easy when using a sawed-off shotgun. The multiple pellets will strike the wall deflect along the edge of the wall and virtually assure multiple hits to the attacker's gun hand, face and possibly eye. While these wounds will many times be less fatal due to loss of energy, I guarantee you that these wounds will spoil the attackers aim.

What I have seen more than once in this business is that this shallow angle of deflection works against innocent bystanders when there are gunfights in the streets. People have the unfortunate habit of either laying completely flat on the ground or flatting themselves up against a wall to make themselves a smaller target. This practice of flattening onself up against a well is extremely counter productive. The problem is a bullet need only strike almost anywhere on the wall at any angle, at almost any level up to the height of the person, and the person against the wall will be stuck by the deflecting bullet. If a person lies down the same is true BUT people tend to lie down facing the danger, first, so they can watch, and two, because it is human nature. The good news is, is that if the bullet does not strike at the correct angle in relation to them and the surface that is struck is not at the correct angle in relation to them, they are much more likely to be missed. The bad news is, if they are hit they are usually hit in the face, or the head, and even though the round has lost some or most of its energy, the wounds are more likely to be severe.

Exceptions to this rule:

Steel shot (used in waterfowl hunting) is harder and therefore will not change it's shape as easily to conform to the surface that it strikes. It will retain slightly more energy because of its unwillingness to deform, and therefore tend to bounce slightly more. Having done some experimentation and I have played around with it a little bit, but I never wrote down much data on this, so I cannot quote you any numbers.

Fact-meets-fiction:

I recently watched a piece on the "History Channel" that put a large number of the old west shooting myths to the test. In one of these tests the shooter bounced a bullet off a steel plate, it then flew up and popped a child's balloon (a popular target with many shooters). If you watch the slow-motion camera shot of this trick, you will see the bullet hit the plate (which is almost pointed at the balloon), the bullet flattens, then almost slides off the plate and towards the balloon. The real trick is: That the shooter need only point the plate just below the balloon, then line himself up in a straight line with the plate and the balloon, and then fire. It doesn't matter whether he is very close to the plate, or very far away, the result will be the same-popped balloon. They make it look much more difficult than it really is. I believe the name of the show is "Shootout." And while many of the tricks that the performers do are most impressive (even to me), several are not that difficult at all. Average people can quickly learn to do many of these tricks with just a few hours of instruction and real practice. I learned to throw bottles in the air and shoot them with a pistol in a single day. And I was just 14!

BANZAI!!!!!!!!

QUESTIONS? COMMENTS? COMPLAINTS? CALL ME!!

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2006 THIRD ANNUAL TRIAL PRACTICE COLLEGE HUGE SUCCESS – ATTENDANCE AT ALL TIME HIGH – FEEDBACK FROM STUDENTS EXCITING!!!

The 2006 Third Annual Trial Practice College hit an all time high of 40 students, along with a first ever waiting list. The Trial Practice College offers a golden opportunity to participate in a low-cost week long training program, which facilitates the sharing of practical trial experience by seasoned veterans and promotes zealous defense advocacy. The participants not only learned through lectures by nationally recognized trial lawyers on each stage of a, but are also able to apply what they learned in daily small group training sessions. Under the instruction of the workshop faculty, the participants engaged in individual performances and received feedback and analysis from the work shop faculty. The course materials involved a criminal trial and included relevant discovery, pleadings and exhibits. Participants were provided the materials in advance, and had the opportunity to prepare for each phase of the trial in the evenings, after hearing the lectures. The experience of these types of training colleges cannot be underestimated, spending a week in small groups and preparing during the evenings for the next day's program with others, offers most-valuable camaraderie and training. The program is geared to change not only your methods and style of practice, but your outlook on your clients and career and your life.

First time attendee, Kimberly Fink, summed up the experience quite nicely:

"Like many attorneys I have never been to trial. Not surprising with the 90% settlement rate and my mere two years experience. My perception of what a trial should be was skewed by law school, traditional formalities and public perception. My preconceived ideas are not far from those of most lawyers. Those ideas were challenged during the CDAM Trial College. Five days of being with many attorneys from different areas of the state with different experiences and different practice styles expanded my perception. There were shouts of joy, tears, laughter and even a few nursery rhymes. I was able to do a direct examination of a murder weapon, something I am certain will never occur again. I cross examined the big bad wolf and collaborated about real cases. I leapt out of my comfort zone and took risks I would never be able to in other settings. Somehow in all of these crazy exercises I changed. I have been freed. The blinders removed. No longer do I think of any of my cases in the same manner. I am a better person and a better attorney for having experienced such a quality program as the CDAM Trial College. Thank you to the many excellent attorneys who gave their time and effort to the College. I urge you to participate next year and see the world without the blinders."

Next year's event is already in the planning stages – mark you calendar's now for the second week in August of 2007 – and look for more information in future editions of this publication and on the CDAM website at www.cdam.net. But whatever you do – sign up early – pre-registrations and credit card payments can be taken over the phone by contacting Jeri Hall, Executive Director, at (517) 490-1597. Don't find yourself on the waiting list – take action now. (Registration preference is given to all current CDAM members.)

CRIMINAL PROCEDURE IN CANADA

INTRODUCTION

Since I am often called about clients in the United States charged with offenses in Canada I thought that it might be of some help if I were to prepare an overview of the Criminal Justice System in Canada. The following materials therefore provide such an overview of the criminal court system in Canada generally focusing on the Province of Ontario in particular under the following headings.

a. Jurisdiction, Classification of Offenses, and Prosecution

b. The Court System

c. Following The Criminal Case

d. Immigration Consequences

d. Conclusion

a. Jurisdiction, Classification of Offenses, and Prosecution

Jurisdiction and Classification of Offenses

The enactment of Criminal law is under the jurisdiction of the federal government and thus Canada has one Criminal Code that is applicable throughout Canada. However Constitutional authority for the judicial system in Canada is divided between the federal and provincial governments as the provinces have explicit jurisdiction over the administration of justice in the provinces, including the constitution, organization and maintenance of the Provincial Courts of Justice in which all criminal trials are conducted. Parliament has, as part of its criminal-law power, exclusive authority over the procedure in courts of criminal jurisdiction.

The provinces do have enumerated powers and can pass legislation related to those enumerated powers that provide for penalties including fines, and imprisonment, examples of such legislation being the Highway Traffic Act of Ontario, and Ontario's Occupational Health and Safety Act.

The Criminal Code of Canada does not distinguish between misdemeanors and felonies. Rather, crimes are broadly classified as either indictable offenses (more serious and roughly analogous to felonies) or offenses punishable by summary conviction (less serious crimes and roughly analogous to misdemeanors). Generally, the punishment for a summary offense is no more that two thousand dollars or imprisonment for six months, or both, although for certain offenses the maximum has been raised to imprisonment for eighteen months.

More serious crimes are prosecuted as indictable offenses and are punishable by higher fines and lengthier prison sentences. The maximum penalty for indictable offenses is life imprisonment with no possibility for parole for 25 years (first degree murder). There is no death penalty in Canada. The penalty for second degree murder is life imprisonment with no possibility of parole for at least 10 years which can be raised by the trial judge up to 25 years. There is a provision in the Canadian Criminal Code to allow prisoners the right to ask a Jury for early parole after 15 years in prison despite the original sentence.

Some crimes have the hybrid character of potentially being prosecuted as an indictable offense or a summary conviction offense with different potential penalties. For these offenses the Crown Attorney (the Prosecutor) has the absolute right to select how the offense will be prosecuted.

Canadian Prosecution Authority

Power of Policing

Despite federal authority over criminal law and procedure, Canadian provinces retain authority over the administration of justice within the province. Each province administers most of the criminal and penal law through a provincial and municipal police forces. Most municipalities of any size have established their own police forces. In

addition Ontario (as do many other provinces) have established their own provincial police force the Ontario Provincial Police which supplements the work of the local police department and in fact act in much the same way as the State Police of Michigan. The Royal Canadian Mounted Police, the Federal police force handle the policing of much of Northern Canada as well as handling matters of national security and policing of federal statutes other than those under the Criminal Code e.g. The Controlled Drugs and Substances Act.

Provincial Power to Prosecute

In Canada, prosecutors are appointed by the provincial government, and are known as Crown attorneys or Assistant Crown attorneys. They undertake prosecutions of violations of the federal Criminal Code. The Crown Prosecutor is the Agent of the Provincial Attorney General.

Federal Power to Prosecute

For offenses that violate federal statutes other than the Criminal Code, prosecutions are handled by the Department of Justice of the Federal Government. Federal prosecutors may either be full time or employed for specific cases or on a contractual basis with the Department of Justice.

b. The Court System

As noted although the enactment of Criminal law is under the jurisdiction of the federal government the provincial Governments are responsible for the administration of justice and therefore provincial courts are set up to deal with all criminal offences.

The Federal Court's principal areas of jurisdiction relate to cases arising out of decisions and orders of federal boards, commissions, and other tribunals, and to such matters as copyrights, patents and inter-provincial railways. In addition tax courts are set up by the Federal Government that have exclusive jurisdiction over civil tax matters. Criminal tax offences are tried in the courts set up by the provinces as described above.

There are no elections for judges at any level, whether Provincial or Federal as all Judges are either appointed by the Provincial Government for the Ontario Court of Justice, or the Federal Government for the Superior Court of Justice, the Provincial Courts of Appeal, the Federal Courts and the Supreme Court of Canada.

Provincial Court System

Ontario Court of Justice

The Ontario Court of Justice (roughly equivalent to the State District Courts) was designated to preside over cases involving either federal or provincial laws. All criminal cases commence in The Ontario Court of Justice which has exclusive jurisdiction over summary conviction offenses as well as certain indictable offences set out in the Canadian criminal code. In addition, all preliminary inquiries – hearings to determine whether there is enough evidence to justify a full trial in serious criminal cases – take place in the Ontario Court of Justice. This court also has jurisdiction over indictable offences where the accused so elects. Judges of the Ontario Court of Justice are appointed by the Provincial Government. There are no jury trials allowed for summary conviction offenses, nor for indictable offenses tried in the Ontario Court of Justice.

The Provincial Offenses Division of the Ontario Court of Justice is set up to hear minor offenses including municipal bylaws and traffic violations by Justices of the Peace. In addition, provincial offenses such as offenses contrary to the Occupational Health and Safety Act, and the Environmental Protection Act are also heard in this court. Appeals from this court are to the Ontario Court of Justice.

Superior Court of Justice

Superior courts (roughly equivalent to the

State Circuit Courts) handle all indictable offenses unless the accused elects to have the charge tried in the Ontario Court of Justice. An accused is entitled to elect to be tried in Superior Court by a Superior Court Judge with or without a jury and without the consent of the prosecutor. Superior Courts also hear appeals in summary conviction cases from cases heard in the Ontario Court of Justice. Superior court judges are appointed by the federal government for life, but must be chosen from the bar of the province in which the court sits.

Appellate Courts

Each province and territory has a court of appeals or appellate division presiding over appeals from the Superior Court of Justice and the Ontario Court of Justice. In Ontario this Court is known as the Court of Appeal of Ontario. An appeal of an indictable offense, whether tried by jury or by a judge alone, must be taken directly to the court of appeal for the province. Appellate courts also hear appeals from summary convictions after they have been heard by the Superior Court of Justice. Appellate court judges are appointed by the federal government for life.

Supreme Court of Canada

The Supreme Court consists of a Chief Judge and eight associate justices, all of whom are appointed by the federal government. Prior to being heard by the Supreme Court, a case must generally have used up all available appeals at lower levels of the judiciary. Even then, the Supreme Court must grant permission or "leave" to hear an appeal before it will preside over the case. Leave applications are usually made in writing and reviewed by three members of the Court, who then grant or deny the request without providing reasons for the decision. Leave to appeal is not given routinely – it is granted only if the case involves a question of public importance; if it raises an important issue of law or mixed law and fact; or if the matter is, for any other reason, significant enough to be considered by the Supreme Court.

In certain situations, however, the right to appeal is automatic. For instance, no leave is required in criminal cases where a judge of a court of appeal has dissented on how the law should be interpreted. Similarly, where a court of appeal has found someone guilty who had been acquitted at the original trial, he or she automatically has the right to appeal to the Supreme Court.

c. Following the Criminal Case
Commencement of Criminal Process

Initial Steps: Observations or Reported Crime

As in the United States law enforcement officers may become aware of criminal activity through their own observations, through reports of the activity by witnesses, or through an investigation.

The Search Warrant

For a provision of a search warrant to be valid, it must be established under oath that there are reasonable grounds to believe that an offence has been committed, and that there is evidence to be found at the place to be searched. The most important principle is that the information upon which the warrant is based must disclose sufficient facts to permit the justice of the peace to make a determination that the warrant should issue.

The Decision to Charge

Once the police believe that a crime was committed, and know who committed it an information (i.e., written complaint) will be sworn to under oath before a justice of the peace. In most cases, the informant is a police officer who has already prepared an information which is presented to the justice of the peace to be sworn. If the judge determines that the accused should be made to come and answer the accusation, the justice will issue either a summons or a warrant for the accused's arrest. There is also provisions for a private complainant to attend to lay an information before a justice of the peace.

The Arrest

An arrest can be made by the police under the following circumstances:

If they discover an individual committing an indictable offense;

If an individual attempts to flee from a lawful pursuit after committing a crime;

If they believe that an individual is about to commit an indictable offense;

If they believe there is an outstanding warrant for the individual's arrest;

If they have a warrant for the arrest of the individual;

If they have probable cause to make an arrest.

As a general rule, the mere statement by the police officer to an individual that he is under arrest is not sufficient to constitute a legal arrest unless it is accompanied by either a physical touching of the person, or words which would compel an accused to acquiesce in the deprivation of his liberty and reasonably believe that the choice to do otherwise does not exist. The Canadian Charter of Rights and Freedoms guarantees that upon arrest, every person has the right to be informed promptly of the reasons for the arrest, and to promptly be informed of the right to retain and instruct counsel.

A summons is an alternative to arrest usually used primarily in instances of low risk of non attendance and for more minor offenses or traffic offenses. A summons is a written order notifying an individual that he or she has been charged with an offense, directing the person to appear in court to answer the charge. If the offense charged is one that can be proceeded with pursuant to an indictment, the accused may also be ordered to appear at the police station for fingerprinting. Failure to show up for finger printing can lead to the issuance of an arrest warrant. The summons must be signed by the issuing justice of the peace, and served personally by a peace officer.

Booking

During the booking process, the police create an administrative record of an arrest listing the offender's name, address, physical description, date of birth, and employer; the time of arrest; the offense; and the name of arresting officer. Photographing and fingerprinting of the offender are also part of the booking process.

Initial Appearance

A peace officer who arrests a person, with or without a warrant, or receives an arrested person in his or her custody, must present that person to a justice:

(a) Where a justice is available, as soon as possible and without unreasonable delay, and in any case within 24 hours; or

(b) Where a justice is not available within the 24 hour period, as soon as possible thereafter unless prior to the time stated above, the peace officer or officer-in-charge releases the person either conditionally or unconditionally.

The *Initial Decision to Hold or Release Accused*

Presentation to Justice of the Peace

As noted after being arrested, every individual is entitled to appear promptly before a justice of the peace (within 24 hours) to answer charges. The person is entitled to have a lawyer to speak as to whether the person should be released and, if so, whether there should be bail.

This first court appearances may result in the following:

The justice may decide to order that the person remain in custody pending a "show cause" hearing to

determine if the accused should be released;

The judge may require that the person deposit money or property with the court to ensure appearance in court if released;

An adjournment to allow time for the person to speak with a lawyer or relatives or friends before pleading; If the accused intends on proceeding immediately by way of a "guilty plea" on a "summary charge" the court may either accept the plea if it is within the jurisdiction of the judicial officer or remand the accused to a court for that purpose;

The *Pre-Trial Process*

Attendance
After release from custody the accused is not required to attend court save for contested matters in regards to summary conviction offences as he may appear by agent unless ordered to attend by the Court. In regards to all other offences accused may also avoid attendance save for contested matters by filing a Designation of Counsel wherein his counsel may appear on his behalf for arraignments, adjournments etc.

Disclosure
In Canada disclosure is very broad and is required upon request by the defense. All evidence that may be relevant is required to be produced at an early date whether the evidence is exculpatory or inculpatory. Only evidence that is not reasonably capable of being relevant can be withheld. If there is a dispute in that regard applications can be made to the Court.

Arraignment and Election

In regards to a summary conviction offense after the accused is arraigned he or she will be asked how they wish to plead. If the accused is not ready to enter a plea, or requires an adjournment to obtain disclosure (discovery) then normally an adjournment will be granted.

When the accused is charged with an indictable offence, the accused has an election totally within the accused's own discretion. She may elect to be tried by a Judge alone in the Ontario Court of Justice and then will be required to enter her plea as if the matter was proceeding by way of summary conviction. The accused may also elect to be tried by a Superior Court Judge with or without a jury. If he chooses to be tried by a Superior Court Judge or by a Superior Court Judge and jury she will not enter a plea until she reaches Superior court but is entitled to have a Preliminary Hearing if she advises the court that she desires one.

Pleas

The accused when called upon to plead may plead guilty, not guilty, or enter one of the special pleas of autrefois acquit (already been indicted, tried, and acquitted of the same offense), autrefois convict (already been convicted of the same offense) or pardon. If the accused refuses to plead, the court automatically enters a not guilty plea on the accused's behalf. There is no plea of nolo contendere in Canada.

Preliminary Inquiry

Where an accused elects to be tried by a Superior Court Judge with or without a jury, or the alleged offense is one within the absolute jurisdiction of the Superior Court of Criminal jurisdiction, the accused may then request to have a preliminary inquiry.

The purpose of the preliminary inquiry is to determine whether the accused should be ordered to stand trial. Both the prosecution and defense may call evidence, although much like the United States the defense rarely does. After examining the evidence, the judge who conducts the

inquiry is required to decide whether there is sufficient evidence to put the accused on trial, or to dismiss the information. This decision is not a guilt or innocence determination but is a determination as to whether there is any evidence upon which a properly instructed jury could convict.

Grand Jury

The grand jury has been eliminated in the Canadian system.

The Trial

Presumptions and Burdens

As in the United States, there is a presumption in all cases that the accused is innocent until proven guilty. Additionally, the burden is on the Crown prosecutor to prove beyond a reasonable doubt that the accused is guilty and this must be done in a fair and public hearing.

Defendant's Rights

As noted and with some exceptions, the accused has the waivable right to a jury trial for all indictable offenses. If a jury is summoned, it must reach a unanimous verdict to either acquit or convict. Further, the Crown prosecutor cannot compel the accused to testify in the trial. Finally, illegally obtained evidence must be excluded.

Trial Process

Trials proceeding by indictment typically proceed in the following manner:

Voir Dire (questioning of jurors by Judge. This is much more limited in Canada than in the United States state courts and is more akin to the questioning by judges in the Federal Court System. Rarely do the lawyers do the actual questioning of jurors in Canada.)

Selection of jury. Twelve jurors are selected. Both sides are given peremptory and challenges for cause. Often alternates are selected.

Opening statements by the prosecution and defense (defense may reserve to open after prosecution's case is complete);

Examination of witnesses and presentation of evidence (prosecution calls evidence first, and defense may then cross examine, then defense may if it chooses call evidence, with the prosecution having right to cross examination. After both sides complete their cases the prosecution has the right of rebuttal subject to the discretion of the trial judge;

Closing statements. In Canada there is only one address for each side, however if there is more than one defendant each counsel for each defendant may address the jury. In any event the prosecution is only entitled to one address. The order of addresses depends upon whether the accused elects to call evidence or not. If the accused does not call evidence, the prosecutor addresses the jury first, and then the defense addresses the jury. If the defense does call evidence, the defense must proceed first followed by the prosecutor. There is no right to a rebuttal address in any event.

Charging the jury. After the closing addresses the Judge provides the jury with instructions regarding the law and often reviews the evidence presenting the positions of both the accused and prosecution;

Verdict rendered by the jury after due deliberation which must be unanimous; and

Entering of the verdict (either guilty, guilty of a lesser included or related offense, or not guilty).

Sentencing (where applicable)

After a verdict is issued, the defendant may not file post trial motions, such as a motion for a new trial. Any issues that arise after the trial must be dealt with in the Court of Appeal.

Sentencing

If the accused is convicted, the court must then turn to sentencing. Typical sentences include fines, probation and/or prison. In Canada, much discretion is given to judges in determining sentences. There are no sentencing guidelines as in the United States however general principles of sentencing are set out in the Canadian Criminal Code.

Although some offenses have mandatory

minimum sentences, most penalties are within the court's discretion. Court's generally consider the criminal's previous criminal record, the conduct of the accused, and any other mitigating factors in determining an appropriate sentence. Specific sections of the Criminal Code deal with the factors to be taken into account in sentencing.

In appropriate cases, the courts also have discretion to impose a sentence that avoids a criminal conviction for the accused. The Court may do this, following a plea of guilty or a finding a guilty by granting the accused a Discharge, either Conditional (on conditions) or Absolute. In such cases no conviction is registered.

The Courts may also sentence an accused who would be sentenced to a term of less than two years (normally to be served in the Provincial prison system) to a conditional sentence where the accused would in fact serve his term under house arrest with appropriate conditions.

Appeals

After sentencing, the defendant has the right to appeal the conviction on a question of law, or mixed fact and law with leave of the Court of Appeal or on any other ground that appears sufficient to the Court of Appeal. The accused may also appeal the sentence. The prosecution may also appeal the decision but must do so on a question of law and may appeal a sentence with leave of the Court of Appeal. The first appeal in indictable offenses is to the provincial appellate court and then to the Supreme Court of Canada with leave. If the offense was a summary conviction offense the first appeal is to the Superior Court of Justice.

d. Immigration Consequences

Effect of Criminal Conviction on Entry into Canada

In general, non Canadian citizens are considered to be inadmissible to Canada due to past criminal activity if they were convicted of an offence in Canada or were convicted of an offence outside of Canada that is considered a crime in Canada. In order to enter Canada in the future, these people need to obtain a Temporary Resident Permit or Approval of Rehabilitation at a Canadian Consulate or Embassy. If five years have not passed since the end of the sentence imposed, an individual must apply for a Temporary Resident Permit to enter Canada.

An individual may apply for Approval of Rehabilitation if five years have passed since the end of the sentence imposed. Rehabilitation means that an individual can show that he/she has a stable lifestyle and that it is unlikely that an individual will be involved in any further criminal activity. Approval of rehabilitation permanently overcomes inadmissibility arising from the offence declared. In order to determine inadmissibility, foreign convictions, acts, or omissions are equated to Canadian law as if they occurred in Canada. An individual has to provide complete details of charges, convictions, court dispositions, pardons, photocopies of applicable sections of foreign law(s), and court proceedings. Then a determination will be made on whether or not an individual is inadmissible to Canada.

e. Conclusion

Hopefully the above is of some help in understanding the Canadian system of criminal justice. Although the underlying principles of both the American and Canadian systems of criminal procedure are the same, both being based on British common law there are also a great number of differences especially in regards to the procedures of the individual Courts. In regards to Canadian law it is of course also important to be aware of the Constitutional Protections, as well as the Rules of Evidence however I will leave that to another time along with the article on the Judges and their dispositions.

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