STEERING COMMITTEE ON JUSTICE EFFICIENCIES AND ACCESS TO THE JUSTICE SYSTEM

REPORT ON THE SELF-REPRESENTED ACCUSED

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INTRODUCTION

The rights of the accused[1] are best protected and the criminal justice system functions most effectively and efficiently when the accused is represented by counsel. However, self-represented accused (SRA) are increasingly coming before the courts. Some SRAs have counsel early in the process but because of poor interpersonal skills (e.g., as a result of mental or emotional problems) are no longer represented.[2] The purpose of this report is to recommend ways in which the criminal justice system can best address the challenges posed by SRAs.

Many accused do not retain counsel because of a lack of financial means. When these accused are facing significant consequences in the event of conviction, it is important that they have access to a legal aid plan resourced in accordance with the government's fiscal capacity and priorities. It is also important that law societies continue to promote *pro bono* work. Some accused choose not to be represented and this is their right. It is important that these accused make an informed choice.

The access to justice of an accused should not be limited based on the fact that the accused is self-represented. The criminal justice system must continue to adapt to improve its efficiency in cases involving SRA and to facilitate their access to justice.

Responsibility for facilitating the access to justice of SRAs and improving the efficiency of cases involving SRAs is shared by all criminal justice system participants.

1. PRE-TRIAL PROCEDURES INVOLVING THE SELF-REPRESENTED ACCUSED

The judge[3] before whom a SRA appears should explain to the SRA how important it is to be represented by counsel. The judge should ask the accused why he is unrepresented. If the SRA wants to be represented, the trial judge should find out if there is any reasonable measure that could be taken to assist the accused in getting representation. The SRA should also be told that it is his responsibility to retain counsel or an agent and the proceedings will not be unduly delayed by a failure on the part of the accused to exercise due diligence.

The judge or the clerk should inform the SRA of how to contact the provincial or territorial legal aid programme as well as, where applicable, the resources available in legal assistance centres or

[1] In this text, the masculine includes both men and women.
[2] With proper awareness and training, counsel can minimize the impact of many of these behaviours. Consequently, the Steering Committee suggests that law societies and professional organizations develop practical advice to pro-actively address some these issues to help maintain the solicitor/client relationship with difficult clients.
[3] In this text, "judge" refers to a judicial officer any may refer *inter alia* to the justice of the peace, the provincial court judge or the superior court judge, as the case may be.

on the Internet[4]. This could be done *inter alia* by giving the accused an information pamphlet prepared, for example, by the legal aid programme. [5]

Brief standardized legal information remarks should be prepared for the judge to make to the SRA at different stages of the trial process (e.g. see the excellent work of the Committee on the Self-represented Accused in the context of the *Access to Justice Initiative* in Saskatchewan)[6].

2. THE ASSIGNMENT OF A PROSECUTOR

Ideally, a prosecutor should be assigned to every SRA file. However, in many jurisdictions this will not be possible. The Steering Committee recommends that, where possible, a prosecutor be assigned to any SRA file anticipated to take longer than one day, in accordance with so-called "vertical prosecution" procedures (*file ownership*).

The contact information of this prosecutor or of the person designated by the prosecutor[7] should be given to the SRA to facilitate communication when necessary. However, this communication may be subject to security measures where the circumstances warrant.

3. CHALLENGES REGARDING EVIDENTIARY DISCLOSURE

The SRA has the same right to disclosure of the evidence as an accused who is represented by counsel.[8]

The Committee acknowledges that providing disclosure to the SRA may pose special challenges[9].

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[4] Nova Scotia, for example, has on its web site a great deal of information regarding the different courts and their procedures in civil and family matters. Quebec has done the same on its Éducaloi site, which addresses civil and family matters as well as criminal and penal matters: http://www.educaloi.qc.ca/en/cotecour/court_quebec/criminal_penal_division/proceedings.

[5] There is an example of such an initiative in the *General Guidelines on the Conduct of a Criminal Jury Trial for Parties Representing Themselves* of the Supreme Court of the Northwest Territories (Schedule B).

[6] The remarks of the judge could *inter alia* explain the different procedural choices offered to the accused as well as the most significant stages of the judicial process.

[7] Juridictions may wish to consider administrative measures to protect Crown counsel, the accused and their respective interests.

[8] The policies and guidelines of the Public Prosecutions Division of Newfoundland and Labrador provide: "An unrepresented accused is entitled to the same disclosure as a represented accused. However, the precise means by which disclosure is provided to an unrepresented accused is left to the discretion of the Crown Attorney based on the facts of the case."

[9] Instructions to prosecutors in various jurisdictions call for specialized access to disclosure documents for self-represented accused. Alberta's *Prosecution Guideline on Disclosure* references "controlled and supervised, yet adequate and private" access to disclosure materials in circumstances where the safety, security or privacy of individuals may be at issue if the self-represented accused has unfettered access to documents and the ability to disseminate them freely. Alberta also has a specific *Practice Memorandum on Disclosure of Material Which Constitutes the Offence Itself*, which reinforces the need for controlled disclosure.
British Columbia has several Practice Bulletins on disclosure and each makes a reference to access for self-represented accused:

- *Practice Bulletin Disclosure of Criminal Records Information of Crown Witnesses* (seek court order re restrictions to access but only after consulting with Administrative or Deputy Crown Attorney);

In determining whether a copy of all or part of the disclosure materials should be given to an SRA and/or whether terms and conditions should accompany the SRA's possession of, or access to the disclosure information[10], consideration should be given to whether such measures are necessary in the circumstances, including consideration of the need to protect the security and right to privacy of the witnesses and victims or the integrity of the evidence.

In determining whether disclosure information should be provided through electronic means the prosecutor should give consideration to the skills and resources required of the SRA to access the disclosure information.

The prosecutor should inform the SRA of the permitted uses of the disclosure as well as the limits on its use.[11]

4. COMMUNICATIONS BETWEEN THE PROSECUTOR AND THE SRA

Settlement discussions between the prosecution and defence are a crucial part of all criminal proceedings. The vast majority of cases do not proceed to trial because of settlement resolutions. Settlement discussions often benefit the accused and result in the prosecution seeking a lower sentence in return for a guilty plea. If settlement discussions do not result in a case resolution, trial efficiencies are often gained when the parties have an opportunity to discuss the case in order to, *inter alia,* attempt to better define the issues and agree on admissions. These discussions should take place even where the accused is not represented. The Steering Committee recommends that national guidelines be developed to govern settlement discussions involving SRAs.

The prosecutor and the SRA are acting within an adversarial system and it may be necessary to take measures to protect the interests of the parties. It is strongly recommended that duty counsel or counsel appointed in a *pro bono* program assist the accused[12] for the purposes of these communications.[13] Among other things, this participation will help to:

- *Practice Bulletin on CORNET Client History Reports* (not to be given to SRAs, instead, Crown may provide the information in a different format or have probation officer go over the report with accused);
- *Practice Bulletin on Child Pornography - Evidence required and Disclosure* (evidence to be kept secure, SRA may review at police premises).

[10] For example, the *Practice Bulletin* dated November 18, 2005, from the Criminal Division of the Department of Justice of British Columbia states regarding controlled access of the unrepresented accused to evidentiary disclosure: "In circumstances involving an unrepresented accused], disclosure can still be controlled. Crown Counsel can, for instance, arrange for disclosure to occur in a controlled setting such as arranging for videotapes or other material to be viewed in the Crown's offices or, preferably, at the local RCMP or city police detachment."

[11] The policies and guidelines of the Public Prosecutions Division of Newfoundland and Labrador provide: "Counsel should consider where disclosure is made to an unrepresented accused, the inclusion of a written explanation of the appropriate uses and limits upon the use of disclosure material."

[12] It is recognized that if an SRA has been unable or unwilling to previously retain counsel, it will be challenging for duty counsel to become familiar with the file and receive instructions.

[13] In this country, there are examples of SRA assistance services offered by counsel working "*pro bono*". For example, through the cooperation of the defence bar, the Criminal Lawyers Association and Legal Aid Ontario, the Ontario Court of Appeal has developed a duty counsel program for self-represented inmate appeals. According to information provided by the Court, counsel are paid for their expenses but otherwise act *pro bono*. Counsel will, *inter alia*, review the file and assist the appellant to make argument or obtain additional material where necessary.

- Facilitate discussions about possible admissions and issues, without potentially compromising the accused's right to silence;
- Facilitate plea bargaining;[14]
- Discuss, if necessary, the means of disclosure of the evidence (e.g.,What will be the effect, where applicable, of electronic disclosure of the evidence? Is it necessary to control the access of the accused to the evidence and, if so, how will this access be supervised?);
- If the accused is planning a guilty plea, ensure that the plea is informed and that the accused understands its scope and consequences.

5. JUDICIAL PRE-TRIAL CASE MANAGEMENT CONFERENCE

The courts in most jurisdictions hold judicial pre-trial case management conferences in complex or lengthy matters, where the parties request a conference, or where a judge is of the view that a conference would be in the interests of the administration of justice.[15] It is recommended that these criteria apply in cases involving SRAs and the conference takes place after the prosecutor and the SRA have had an opportunity to communicate with one another.

In the absence of exceptional circumstances, the judge who holds the case management conference should be different from the judge who presides over the trial.

It is recommended that the management conference be held in open court and that these discussions be "on the record".

The Committee strongly recommends that duty counsel or counsel appointed in a *pro bono* program assist the accused for the purposes of these communications.[16]

The case management judge discusses *inter alia* with the parties:

- Issues and admissions (including a statement of the facts admitted by the parties). If need be, the judge notes this information in the court's record;
- Issues relating to disclosure of the evidence, including its content, the means of disclosure, the schedule and the supervision of the access of the accused, if need be;

[14] Prosecutors' guidelines in various jurisdictions contain general cautions about the potential ethical issues in dealing with self-represented accused. Some jurisdictions caution that a third person should be present for resolution discussions with SRAs and that the Crown should make clear notes to file following any such meeting. For example, British Columbia's "Crown Counsel Policy Manual" provides, regarding the unassisted accused: "In general, Crown Counsel should not initiate negotiations with an unrepresented accused (this does not include providing an Initial Sentencing Position document to the accused). Crown counsel should encourage the accused to seek the advice of counsel to assist in any resolution discussions. If the accused declines to seek the advice of counsel and wishes to undertake resolution discussions, where practicable Crown counsel should arrange for a third person to be present during the discussions or conduct the discussions in writing." The guidelines for counsel in Newfoundland and Labrador provide: "*In general, Crown Attorneys should not initiate negotiations with an unrepresented accused".* In the Northwest Territories, pre-hearing conferences are avoided when the accused is not represented,

[15] The rules of practice of the Court of Appeal of Québec, for example, already provide for such a conference, convened *ex officio* or on request of one of the parties (section 64).

[16] See footnote 13.

- Expert evidence, where applicable; and
- The anticipated duration of the proceedings and the process for summoning witnesses.

6. TRIAL PROCEDURES INVOLVING THE SELF-REPRESENTED ACCUSED

There are cases that cannot proceed to trial with an SRA without unfairness.[17] If the trial judge is satisfied that the case before him is not such a case, it is important that the trial judge take the following steps[18] in trials involving a SRA:

- Provide the SRA with as much information as is necessary for a fair trial, recognizing the difference between explaining procedural choices available to the accused and advising as to what decision to make;
- Explain the charges and what the prosecution is required to prove as well as the applicable burden of proof;
- Explain that the accused has the right to remain silent and will have the opportunity, but is not obliged, to present evidence after the prosecution's case;
- Explain briefly the mechanics of the trial. This includes, for example, the right of each side to call witnesses, introduce documentary evidence, object to evidence adduced, the choice to testify or not, and that if the persons chooses to testify they will be cross-examined, and the right to make submissions at the appropriate junctures during the trial;
- The same should be done if a *voir dire* is held. And if one is held, the function of a *voir dire* should be explained;
- Ask if the SRA needs pen and paper to take notes during the trial;
- Explain the role of the judge vis-à-vis the SRA – to ensure the SRA has a fair trial - and that the judge can offer some guidance regarding the procedures of the trial, but that the judge cannot defend the interests of the SRA by offering advice on the appropriate steps to take;
- Ask if the SRA has read the legal information pamphlet provided to SRAs;
- Ask if the SRA has any questions about the pamphlet or the information the judge has provided. Tell the SRA to ask if during the trial there is something that they do not understand;
- Make an order for the exclusion of witnesses.

[17] These unusual cases entitle the SRA to a so-called *Fisher* order (*R. v. Fisher*, [1997] S.J. No. 530 (Sask. Q.B.)). For discussion see, for example, *R. v. Peterman*, [2004] O.J. No. 1758, 70 O.R. (3d) 481 (Ont. C.A.).
[18] See, *inter alia*, *R. v. Messina*, [2005] O.J. No. 4663.