Chapter 9

THE LAWYER AS ADVOCATE

RULE

When acting as an advocate, the lawyer must treat the tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law.[1]

Commentary

Guiding Principles

1. The advocate's duty to the client "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law"[2] must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.[3]

Prohibited Conduct

2. The lawyer must not, for example:

(e) knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;[8]

(h) deliberately refrain from informing the tribunal of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent;[11]

NOTES

8. Where a lawyer joined in a scheme to mislead the Court by arranging proceedings to result in an apparent acquittal which could then be used to answer prior pending proceedings for the same offence (a justice, a constable and another lawyer being misled in the process), the Court said: "These facts establish a stupid, but nevertheless unworthy, attempt to pervert the course of justice, and most certainly constitute conduct unbecoming a barrister and solicitor in the pursuit of his profession". *Banks v. Hall*, [1941] 2 W.W.R. 534 (Sask. C.A.).
A lawyer counselling false evidence would be guilty of perjury if it were given (*Criminal Code*, ss. 22, 120), and of counselling if it were not (*ibid.*, s.422).

It is an offence to fabricate anything with intent that it be used as evidence by any means other than perjury or incitement to perjury (*ibid.*, s.125).
Similarly, it is an offence wilfully to attempt in any manner to obstruct, pervert or defeat the course of justice (*ibid.*, s. 127).
"The swearing of an untrue affidavit . . . is perhaps the most obvious example of conduct which a solicitor cannot knowingly permit . . . . He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured affidavit upon file . . . . A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act . . .", per Viscount Maugham in *Myers v. Elman*, [1940] A.C. 282 at 293-94 (H.L.).
"[Counsel] had full knowledge of the impropriety of the paragraphs in the affidavit . . . [and] is bound to accept responsibility for [them] . . . . If he knows that his client is making false statements under oath and does nothing to correct it, his silence indicates, at the very least, a gross neglect of duty." , per McLennan, J.A. in Re *Ontario Crime Commission* (1962), 37 D.L.R. (2d) 382 at 391 (Ont. C.A.).

11. Cf. CBA 1(1); N.B. B-3; IBA A-14; ABA EC 7-23, DR 7-106(B)(1).
See *Glebe Sugar v. Greenock Trustees* (1921), W.N. 85(H.L.) for a strong statement by Lord Birkenhead on the duty of counsel to disclose to the court authorities bearing one way or the other: "The extreme impropriety of such a course [withholding a known pertinent authority] could not be made too plain." See also *Plant v. Urquhart* (1922), 1 W.W.R. 632(B.C.C.A.) per McPhillips, J. at 638-39.

The Law Society of Manitoba

La Société du Barreau du Manitoba

CODE OF

PROFESSIONAL CONDUCT

CODE DE

DÉONTOLOGIE PROFESSIONNELLE

Adopted by the Benchers of the
Law Society of Manitoba on February 1st, 1992

Adopté par les conseillers de
la Société du Barreau du Manitoba le 1er février 1992

Undertakings

13. An undertaking given by the lawyer to the court or to another lawyer in the course of litigation or other adversary proceedings must be strictly and scrupulously carried out. Unless clearly qualified in writing, the lawyer's undertaking is a personal promise and responsibility.[25]

25. Cf. CBA 4(3); IBA A-21, A-23; ABA EC 7-38, DR 7-106(C)(5);
N.B. D-5; "Undertakings should be written and the terms should be unambiguous. Counsel when giving an undertaking accepts personal responsibility unless expressly excepted."
"It has more than once been determined by the Court that if attorneys choose to practice upon loose understandings . . . they cannot expect aid from the Court if difficulties arise in carrying them out . . . .", per Barry, J. in *Ferguson v. Swedish-Canadian* (1912), 41 N.B.R. 217 at 220 (N.B.C.A.)
Where solicitors wrote: "on behalf of our client . . . we undertake . . . " it was held that, in the circumstances, the solicitors were personally responsible: Re *Solicitors*, [1971] 1 W.W.R. 529 (B.C.C.A.).

" . . . [O]ne's word should be one's bond . . . . ", Lund, 1950 Lecture to the Law Society (Law Society of Upper Canada, 1956, pp. 33-34).

Relevant Passages from the *Federal Prosecution Service Deskbook*, ch. 20, "Plea and Sentence Discussions and Issue Resolution" (2005)

...

20.3.4 Agreements as to the Facts of the Offence

Where an accused decides to plead guilty, Crown counsel should agree to put before the court those facts that could have been proved by admissible evidence if the matter went to trial. Discussions regarding the facts may properly include the following:

* agreeing not to include in representations to the court embarrassing facts which are of little or no significance to the charge; and

* agreeing to rely on an agreed statement of facts.

The following practices are not acceptable:

* an agreement respecting facts which results in or gives the appearance of misleading the court, such as:

  a. an agreement not to advise the court of any part of the accused's provable criminal record which is relevant or could assist the court;

  b. an agreement not to advise the court of the extent of the injury or damages suffered by a victim;

  c. an agreement to withhold from the court facts that are provable, relevant, and that aggravate the offence; or

  d. an agreement to outline facts to the court which, when measured against the essential elements of the offence to which the accused has pleaded guilty, would cause the presiding judge to reject the plea in favour of a plea of not guilty.

...

20.3.8.1 Openness

...

Where a plea or sentence agreement has been reached, counsel should present the proposal to the trial judge in open court and on the record. In certain circumstances, it may be necessary to discuss some aspects of the agreement with the trial judge privately. This should be done only in rare and compelling situations involving facts which in the interest of the public or the accused ought not to be disclosed publicly. Common examples include cases where the accused is

terminally ill, or has acted as a confidential informer for the police. It is not acceptable, however, to discuss a plea agreement privately with the trial judge in advance of the hearing to determine the court's reaction to it. This does not, however, prevent counsel's participation in a pre-trial conference conducted under section 625.1 of the Criminal Code. Counsel may conduct sentence proceedings before the judge who presides over the pre-trial conference.

...

ESSENTIALS OF
CANADIAN LAW

ETHICS AND CANADIAN CRIMINAL LAW

HON. MICHEL PROULX
Quebec Court of Appeal

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of the Ontario Bar

A Quicklaw Company

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N. AGREED STATEMENTS OF FACT

Somewhat related to, yet distinct from, the client who maintains innocence is the client who is fully willing to plead guilty and admit culpability yet insists on denying certain aggravating facts alleged by the Crown. The usual situation is not that the client wishes to admit to facts that are inaccurate, but that he or she denies facts that the Crown may well be in a position to prove. This common scenario leads one to ask, can counsel act ethically in negotiating a plea agreement that accommodates the client's concerns? Moreover, can counsel proceed with the plea even where the client persists in the denials and the Crown refuses to soften its position?

In Alberta, the rules of professional responsibility expressly state that "a plea agreement may not involve a misrepresentation or misstatement of facts to the court."[171] As we have seen, most other governing bodies simply provide that the client must be prepared to admit the necessary factual and mental elements of the offence, and do not deal with the possibility that the facts might be inaccurate or misleading.[172] However, the Alberta approach appears merely to particularize a prohibition accepted in a more general way by all Canadian governing bodies: counsel is forbidden from participating knowingly in deceiving or otherwise misleading the court, no matter the context.[173] Let us examine this proposition as it relates to agreed statements of fact in the context of two cases, one from the United Kingdom and one from Canada.

In *R.* v. *Beswick*,[174] decided in 1995 by the Court of Appeal for England and Wales, the accused was charged with unlawfully causing grievous bodily harm. Crown witnesses were prepared to state that he had instigated and participated in a vicious assault against the complainant in a fish and chips shop, at one point kneeing the complainant in the nose and completely biting off part of his ear. Defence counsel and the prosecutor worked out a plea agreement to a reduced charge, including an agreed statement of facts. The statement of facts provided that Beswick was not an aggressor and had bitten the complainant's ear only in an excessive attempt to extract himself from the fight. The plea agreement unravelled on sentencing, partly as the result of the judge's

171 Alta. ch. 10, comm. 27.
172 See the rules cited at note 110, above.
173 See note 114, above, and the accompanying text.
174 (1995), [1996] 1 Cr. App. R. 427 (C.A.).

plea inquiries. Witnesses were consequently called on behalf of the Crown, and they testified to aggravating facts inconsistent with the statement of facts previously offered to the court. Beswick was given a stiff sentence, and he appealed.

Beswick's appeal counsel attacked the failure of the prosecutor to stand by the facts outlined in the original plea agreement. In dismissing this complaint, the court was extremely unimpressed with the agreed statement of facts that had initially grounded the plea, and commented:

> It is axiomatic that whenever a court has to sentence an offender it should seek to do so on a basis which so far as is relevant to the determination of the correct sentence is true. It follows from this that the prosecution should not lend itself to any agreement whereby a case is presented to the sentencing judge to be dealt with so far as that basis is concerned on an unreal and untrue set of facts concerning the offence to which a plea of guilty is to be tendered.[175]

While these observations are directly primarily at the conduct of the Crown, the court's general sentiments suggest a comparable disapproval where defence counsel knowingly presents false facts to the court. Naturally, defence counsel must *know* that the facts are false before this prohibition can apply.[176] As well, the standard of knowledge cannot be set too low, given that a defence lawyer is not responsible for upholding the public interest in the manner of a prosecutor.[177] We also see nothing wrong with defence counsel convincing the Crown to exclude contentious aggravating facts, as long as the wording of the agreed statement is carefully crafted.[178] Nonetheless, there are ethical limits to the form and content of the agreed statement of facts that counsel negotiates and places before the court.

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175 *Ibid.* at 430. To similar effect, see the *Martin Committee Report*, above note 4 at 325.

176 See section F, "Acquiring Knowledge that the Client is Guilty," in chapter 1, and section F(1), "Acquiring Knowledge that the Client Intends to Commit Perjury," in chapter 7. There is no indication that defence counsel in *Beswick* agreed to facts that he knew to be false. More likely is that the client insisted that he had not played the role attributed him, despite the strong Crown case to the contrary. Defence counsel will usually be entitled to put forth an agreed statement of facts based on the client's assertions.

177 See section B(1), "Role as Minister of Justice," in chapter 12.

178 For instance, the wording of the statement, as well as counsel's submissions, may speak of facts that the Crown is in a position to prove and that the parties have agreed will form the basis of the sentencing. See also the *Martin Committee Report*, above note 4 at 323–27.

3) Overcharging

It is improper for Crown counsel to proceed with more charges than are justified on the evidence, merely as a means of providing extra bargaining power during plea discussions. It is especially improper for Crown counsel to offer expressly to drop a charge in exchange for a concession by the accused, where the charge is not justified in the first place. Similarly, a more serious charge than is warranted on the evidence should not be laid in order to pressure the accused to plead guilty to a less serious offence arising out of the same transaction.[222] However, it is not *per se* improper to lay overlapping charges where all are justified by the evidence, for instance, a charge of "over 80" and impaired driving or theft and possession of proceeds.

4) Misleading the Court

Crown counsel can negotiate with defence counsel regarding the facts to be relied on for the purposes of sentencing. It is not acceptable, however, to reach an agreement respecting facts that amounts to misleading the court. In this respect, the FPS Deskbook offers guidance (and seems to place further restrictions on Crown counsel) by prohibiting the following agreements:

> (a) An agreement not to advise the court of any part of the accused's provable criminal record which is relevant or could assist the court;
> (b) An agreement not to advise the court of the extent of the injury or damages suffered by a victim;
> (c) An agreement to withhold from the court facts that are provable, relevant, and that aggravate the offence; or
> (d) An agreement to outline facts to the court which, when measured against the essential elements of the offence to which the accused has pleaded guilty, would cause the presiding judge to reject the plea in favour of a plea of not guilty.[223]

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222 See U.K., Crown Prosecution Service, *Code for Crown Prosecutors*, 4th, ed. (London: Crown Prosecution Service, 2000), s. 7.2, and the *FPS Deskbook*, above note 30 at §20.3.1 both state that it is unacceptable to instruct or proceed with unnecessary additional charges to secure a negotiated plea. See also *United States of America* v. *Cobb* (2001), 152 C.C.C. (3d) 270 (S.C.C.), where an American prosecutor threatened sexual violence against fugitives who persisted in opposing extradition from Canada.

223 *FPS Deskbook*, above note 30 at §20.3.4.

Report of the Attorney General's
Advisory Committee
on

Charge Screening, Disclosure, and Resolution Discussions

The Honourable G. Arthur Martin, O.C., O.Ont., Q.C., LL.D.
Chair

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2. Recommendations Concerning Courtroom Practice Following Resolution Discussions

In order to ensure that resolution discussions fulfill their potential to facilitate the administration of justice in a manner that is in the public interest, it is, of course, necessary to set some guidelines for the conduct of these discussions, to ensure that the outcomes are sound, and are arrived at in a fair way. This the Committee has endeavoured to do in the preceding section of this chapter. However, it is also important to ensure that courtroom proceedings that follow resolution discussions serve to verify the propriety of those discussions, and to enhance the public's understanding of both the nature and limits of resolution discussions.[67] The courtroom is an important public forum in which to both affirm and, where necessary, circumscribe the conduct and effect of resolution discussions. The Committee therefore makes the following recommendations with respect to courtroom practice following a resolution agreement with these principles in mind.

54. The Committee recommends that, as a general rule, open to some exceptions, Crown counsel should state on the record in open court that resolution discussions have been held and that an agreement has been reached.

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[66] See *R.* v. *Young* (1984), 13 C.C.C. (3d) 1 (Ont. C.A.), wherein the Court of Appeal imposed a stay of proceedings because the passage of time had obliged the Crown to prosecute the accused for relatively serious *Criminal Code* offences rather than for a less serious provincial offence, due to the expiry of the limitation period under the relevant provincial statute.

[67] As one commentator has succinctly observed with respect to resolution discussions, "openness is rather appealing." See A.W. MacKay, "The Influence of the Prosecutor: Plea Bargaining, Stays of Proceedings, Controlling the Process", in S. Oxner (ed.) *Criminal Justice* (1982), at pp. 73-77.

Resolution discussions may often be most effective when they can be conducted informally, in private, and at the convenience of counsel. The Committee recognizes the need to preserve this aspect of the conduct of resolution discussions. However, on the other hand, the importance of a justice system in Ontario that is open to public scrutiny, and thereby accountable, cannot be understated.[68] In seeking to reconcile these two conflicting factors, the Committee has made the present recommendation.

A general rule requiring resolution discussions and any agreement reached to be acknowledged in open court enhances the accountability of the administration of justice in many ways. For example, such open acknowledgement helps to dispel any lingering misunderstandings in the public mind as to the propriety of resolution discussions. Professors La Fave and Israel comment that:

> At an earlier time, when the legitimacy of plea bargaining was in doubt, the general practice was not to reveal in court that a bargain had been struck.... Today, by contrast, most jurisdictions have moved away from this "solemn charade"....[69]

Acknowledging the fact of resolution discussions and the fact of an agreement also alerts the public, witnesses, and victims[70] that discussions took place, so that they can understand the extent to which these discussions are a part of the every day activities of responsible counsel.

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[68] See Cohen and Doob, "Public Attitudes to Plea Bargaining", *supra*, at p. 102; The Law Reform Commission of Canada, Working Paper No. 60, *supra*, Recommendation 12 and commentary thereon.

[69] W.R. La Fave and J.H. Israel, *Criminal Procedure* (1984), Vol. 2, s. 20.4, at p. 639, as updated. Footnote omitted from quote.

[70] In many cases the victim will already be aware of the resolution discussions and the agreement reached, in accordance with the Committee's recommendations, *supra*, on the victim's entitlement to be kept apprised of the case, and to have his or her interests taken into account.

Acknowledging in open court the fact that a resolution agreement has been reached also assists in creating a record of that agreement, which can prevent subsequent attack on that agreement in the Court of Appeal. Once such an agreement is acknowledged, joint submissions, or other matters relevant to sentencing that are dealt with on consent, can be taken to be terms of the agreement. Transcripts documenting such matters thus become important sources of evidence of the nature of resolution agreements. Counsel may, however, also wish to take additional steps to preserve a record of the terms of the agreement. For example, the United States *Principles of Federal Prosecution*, Part D, s. 5, provide that a prosecuting attorney should ensure that a copy of the terms of the resolution agreement, signed or initialled by the defendant or his or her counsel, should be in the case file.

Openness and accountability are the virtues that require, in the Committee's view, a general rule that resolution discussions should be acknowledged on the record in subsequent courtroom proceedings.[71] However, there are occasionally circumstances where the administration of justice requires other interests to be protected. For example, in some cases, the need to preserve the identity of confidential informants may make any reference in open court to resolution discussions involving that informant undesirable. It is none the less important that counsel refrain from mentioning the fact that resolution discussions occurred and resulted in an agreement only where the need to do so is compelling.

[71] The requirements in the United States in this respect may in some instances go further than simply requiring the court to be informed that resolution discussions have been held and an agreement has been reached. For example it was held in *State* v. *Draper*, 162 Ariz. 433, 784 P. 2d 259 (1989), that the prosecutor and defence counsel have a responsibility to reveal to the sentencing court *all* of the terms of any resolution agreement.

57. The Committee recommends that it is improper for the Crown to withhold from the Court any relevant information in order to facilitate a guilty plea. In cases where not all matters are admitted, the Crown should advise the Court of the allegations and then proceed upon the admitted facts. In such cases, the Court will sentence on the admitted facts only.

The Committee has made the foregoing recommendation in the interests of ensuring that there is placed on the record in open court all information that assists the public, victims, and witnesses in understanding how the charges initially laid by the police following a criminal act resulted in the plea and disposition proposed by counsel following resolution discussions. There is, in the Committee's view, a risk of undermining public confidence in the administration of justice if an offence which appeared very grave at the time of the arrest is, when disposed of by an agreed-upon plea, treated as a less serious offence with no explanation offered for the change in position.[82]

For example, a crime initially charged as murder may subsequently be disposed of by a plea of guilty to manslaughter, with a joint submission for a sentence at the low end

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[81] O.E. Fitzgerald, *The Guilty Plea and Summary Justice* (1990), at p. 239.

[82] See, *The Dewar Review: A Report Prepared by the Honourable A.S. Dewar at the Request of the Attorney General of Manitoba, October, 1988*, at pp. 52-3; *Sentencing Reform: A Canadian Approach*, *supra*, at pp. 422-423, 426.

of the manslaughter range. In circumstances such as these, the difference between the perception of the crime at the time of charge and the time of plea is marked; it may not escape notice by the public, members of the victim's family, witnesses, or other interested persons and, as such, will inevitably raise questions in the minds of those persons. In the Committee's view, the questions in the public's mind that such a change in course would prompt, manifestly call for an explanation on the record. It is the Committee's opinion that this is best accomplished by Crown counsel reading the initial allegations into the record, followed by Crown or defence counsel stipulating which of those allegations are admitted for purposes of sentencing.

In the murder/manslaughter example provided, it may be that, due to intoxication, Crown counsel has concluded that a necessary element of the intent required for murder cannot be proven. In these circumstances, the allegation of murder should be read into the record, following which it is appropriate for Crown counsel to acknowledge that, due to intoxication, the prosecution is unable to prove all of the essential elements of the offence of murder. The accused could then properly plead guilty to the lesser and included offence of manslaughter, with the consent of the Crown, which plea may be accepted by the Court. See s. 606(4) of the *Criminal Code* and *R.* v. *Naraindeen* (1990), 80 C.R. (3d) 66 (Ont. C.A.).

Similar examples may arise during prosecutions for crimes of violence committed within a family, where a prosecution is clearly in the public interest, but where complicated family dynamics, or the victim's psychological fragility make the proof of all of the allegations against an accused unlikely. In these cases, provided there has been adequate consultation with the victim, Crown counsel would also read in the allegations in their entirety, and then indicate to the Court the circumstances that have led him or her to proceed on less serious facts.

Following such a proceeding, it is clear that the sentencing judge may pass sentence on the basis of the admitted facts only. The Supreme Court of Canada has held, in *Gardiner* v. *The Queen* (1982), 68 C.C.C. (2d) 477, that sentencing proceedings can be quite informal,

with statements read in by counsel forming the evidentiary foundation for the passing of sentence, *provided counsel consent to such a course of proceeding.* Absent such consent, however, the usual rules of evidence and burdens of proof apply. Therefore, if an allegation is read into the record at a plea and sentencing hearing, but not admitted by the defence, it is not evidence. It cannot be relied upon in sentencing the offender unless the Crown then discharges its burden of proof by calling properly admissible evidence.

The Supreme Court has observed, in *R.* v. *Stinchcombe*, *supra*, at 347, that "We operate on the principle that a judge trained to screen out inadmissible evidence will disabuse himself or herself of such evidence...." In light of this principle, the Committee is confident that the recommendation it has made with respect to reading in the entire set of allegations against an accused in the interest of public accountability will cause no prejudice to an accused on sentencing, if it is subsequently made clear that sentencing is to proceed on the basis of a more limited set of admitted facts. In the event that trial judges depart from the duty to consider only that which is properly evidence on sentencing, there is, in the Committee's view, an error subject to correction on appeal, pursuant to the *Gardiner* principles.

It follows from the Committee's recommendation that it is inappropriate for counsel, in private discussions, to tailor the facts of an event for purposes of achieving the plea or sentence that appears to counsel to be desirable. This is treating the Court with less than the full candour which counsel's professional obligations require, and may even be said to bear some considerable resemblance to manipulating the Court.

It may be that, in the entire set of circumstances presented by a particular prosecution, it is both responsible and desirable to accept a plea of guilty to a lesser offence than what was charged, or even to a lesser offence than the evidence might support. As discussed at some length above, the public interest in the administration of justice as it pertains to resolution discussions involves much more than simply proceeding to trial on the available evidence. If the prosecution is one that can be responsibly resolved short of a full

trial on all of the offences charged, this should be acknowledged in open court, and, if necessary, reasons given on the record for the plea agreement reached. Counsel should not try to justify a resolution agreement by rewriting the facts of an event that has already occurred and which neither counsel has observed.

There will be, in the Committee's view, rare exceptions to the above recommendation where it is not appropriate to read in the entire set of allegations and then advise the court what is admitted for purposes of sentencing and why. One example is where a victim, perhaps understandably traumatized at the time of giving an initial statement immediately after the crime in question, provides an account of the offence that is more serious than what actually occurred. If such a victim, upon further reflection, provides a more accurate account that reveals that the crime is less serious than initially indicated, it is appropriate to provide only the latter information to the court during the course of any sentencing hearing that follows resolution discussions. This course of proceeding saves the victim from what may be the public embarrassment of Crown counsel informing the court that the initial statement made was inaccurate and had to be revised.

Another example of where it would not be in the public interest to read in the original allegations, and then advise the court as to what more limited allegations are being admitted as facts for sentencing, is where an accused is receiving lenient treatment on one offence in exchange for assistance in another investigation which is ongoing. Clearly, the secrecy and, thus, the integrity of the ongoing investigation would be jeopardized by publicly identifying the informer.

The foregoing are examples only. They are not exhaustive. And they do not supplant the need for Crown counsel to exercise sound judgment in ascertaining how the principle of public accountability following resolution discussions that result in a plea to a less serious matter is to be reconciled with the need to protect privacy interests of victims, informants, and others. However, in exercising that discretion, Crown counsel must keep

in mind that public accountability through reading in the full allegations is a rule with limited exceptions.

58. The Committee is of the opinion that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest.

As discussed above, the law is clear that a joint submission as to sentence is entitled to great weight, but does not bind the sentencing judge, who is the ultimate arbiter of what sentence should be imposed at first instance. See *R.* v. *Rubenstein*, *supra*, (Ont. C.A.). This rule ensures that sentences will always be meted out by an impartial decision-maker, and prevents inappropriate inducements to an accused person to plead guilty in exchange for a promise of a given sentence. However, in light of the recommendations that the Committee has made on both the practice and procedure respecting resolution discussions, the Committee thinks it appropriate to comment on what it means to give a joint submission great weight in the context of resolution discussions conducted in accordance with those recommendations.

The Committee has, for the reasons discussed above at some length, concluded that resolution discussions are inherently desirable, and of considerable practical benefit to the administration of criminal justice in Ontario. Recognizing that the practice of resolution discussions, even though inherently desirable, is open to some misuse and to some misunderstanding by the public at large, the Committee has formulated a series of recommendations aimed at eradicating the problems, both real and perceived, that are associated with unrestrained resolution discussions. Accordingly, if the recommendations of the Committee are followed in their entirety, there will be in place in Ontario, in the Committee's view, a regime whereby the benefits of resolution discussions and the resolution agreements they lead to can be enjoyed without any residual concern that the resolutions arrived at are the product of a flawed process. It is in the context of this state of affairs that the Committee recommends that a sentencing judge should depart from the

joint submission offered only where it would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

The Committee recognizes that an important, sometimes the most important, factor in counsel's ability to conclude resolution agreements, thereby deriving the benefits that such agreements bring, is that of certainty. Accused persons are, in the Committee's experience, prepared to waive their right to a trial far more readily if the outcome of such a waiver is certain, than they are for the purely speculative possibility that the outcome will bear some resemblance to what counsel have agreed to. And likewise, from the perspective of Crown counsel, agreed upon resolutions that have a stronger, rather than weaker sense of certainty to them, are more desirable because there is less risk that what Crown counsel concludes is an appropriate resolution of the case in the public interest will be undercut.

Since certainty of outcomes facilitates resolution discussions and agreements, and since resolution agreements, as the Committee views them, are beneficial and fair, it follows, in the Committee's view, that certainty in outcomes of resolution discussions should be promoted. Naturally, the outcomes of resolution discussions would be perfectly certain if there were a rule that a judge could not depart from them. As discussed above in the introduction to this chapter, other jurisdictions approach this state of affairs by permitting the plea to be struck if the sentencing judge does not accept the joint submission. But this is not the law in Ontario, nor, in the Committee's view, should it be. It is fundamental to our system of justice that the court, not the parties, have the last word.

While the presiding judge cannot have his or her sentencing discretion removed by the fact of there being a joint submission, it is none the less appropriate, in the Committee's view, for the sentencing judge to have regard to the interest of certainty in resolution discussions when faced with a joint submission. Accordingly, where there is no reason in the public interest or in the need to preserve the repute of the administration of justice to depart from a joint submission, a sentencing judge should, in the Committee's opinion, give

effect to the need for certainty in agreed upon resolutions by accepting the joint submission of counsel.

In *R.* v. *Wood*, *supra*, at 574, the Ontario Court of Appeal noted that serious consideration should be given to recommendations of Crown counsel "where the facts outlined, following a guilty plea, are sparse." The Court went on to observe that the sentencing Court "has to recognize that Crown counsel is more familiar than itself with the extenuating or aggravating circumstances of the offence which may not be fully disclosed in the summary of the facts." The Committee wishes to emphasize that it is not making the present recommendation in order to increase such reliance by the Court upon counsel's bare recommendation as to sentence. The Committee is of the view that the record created in sentencing proceedings should not be sparse, but, rather, must always fully support the submissions made. The Committee so recommends below, where the issue is discussed in greater detail. In encouraging the sentencing judge to place appropriate emphasis upon a joint submission, the Committee is thereby placing a corollary obligation upon counsel to amply justify their position on the facts of the case as presented in open court.

Proceeding in a manner consistent with the present recommendation at a sentencing hearing where a joint submission is proposed accords, in the Committee's view, appropriate weight to the "ample"[83] discretion possessed by the Crown as to the conduct of any given prosecution. The Court of Appeal has recognized in *R.* v. *Naraindeen*, *supra*, at 72, that sentencing courts should not be " gratuitously interfering with a prosecutorial decision." Yet, proceeding in this manner also continues to ensure that the sentencing judge remains the ultimate arbiter of the propriety of the sentence, and that the sentence is demonstrated to be fit in the circumstances. The sentencing judge will not, in the Committee's view, have committed any error in principle in accepting a joint submission, as recommended above, provided he or she arrives at the independent conclusion, based upon an adequate record, that the sentence proposed does not bring the administration of justice into disrepute and

[83] *R.* v. *Naraindeen*, *supra*, at 72.

is otherwise not contrary to the public interest. Indeed, this recommendation embodies the essence of the sentencing judge's obligations in passing sentence. In so recommending, the Committee has endeavoured to define the discretion of the sentencing judge in sufficiently broad terms to ensure that the sentence imposed is ultimately just, but at the same time has accorded the parties as much assurance as can be had that their agreed-upon resolutions will find favour with the Court. In this way, it is hoped that the justice system and the community as a whole can profit to the greatest extent possible from the benefits of resolution discussions.