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**THE SOCIAL CONSTRUCTION OF A  
'GOOD' CRIMINAL LAWYER**

by  
**Kim T. Sfalcin**

**A Thesis  
Submitted to the Faculty of Graduate Studies and Research  
Through the Department of Sociology and Anthropology  
in Partial Fulfilment  
of the requirements for the degree of  
Master of Arts  
at the University of Windsor**

**Windsor, Ontario, Canada  
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## ABSTRACT

This study examines the social construction of a 'good' criminal lawyer based on self-perceptions of local criminal defence counsels. Particular emphasis has been placed upon the quantitative and qualitative analysis of the necessary attributes of practising criminal counsels, inclusive of: commitment, integrity, competency, and fair and reasonable fees. Exploring how strictly criminal lawyers abide by the Rules of Professional Conduct also provided insight as to the seriousness with which they employ questionable ethical practices. Differences among these perceptions were analyzed using SPSSx (1986). Of the nineteen questionnaire respondents, ten criminal defence counsels participated in personal interviews that revealed: (1) a great majority of local criminal defence counsels stressed the importance of representing the accused based on the premise that the accused is presumed innocent until proven guilty and entitled to fair legal representation; (2) local criminal defence counsels considered themselves to be the most ethical of all lawyers; (3) great importance was placed upon the criminal lawyer abiding by the Rules of Professional Conduct as dictated by the Law Society of Upper Canada (L.S.U.C.); and (4) criminal lawyers who are more likely to breach the Rules of Professional Conduct are influenced by a personal as opposed to a collective breakdown of morals.

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## INTRODUCTION

This study will examine the social construction of a 'good' criminal lawyer as perceived by a sample of well established successful criminal lawyers. It will confine itself to the analysis of factors that lead to one's successful achievement within the legal profession, as provided by the criminal lawyer, and his/her definition of the situation. It is important to note that emphasis will be placed on examining the social constructions of **criminal defence counsels exclusively**. Nevertheless, throughout this paper, reference has not specifically been confined to criminal lawyers. For this research, the Social-Psychological perspective of Symbolic Interactionism has been selected as the analytical framework.

The criteria that constitute a 'good' criminal lawyer do vary according to different competing perspectives (eg. judges, jury, victims, accused, etc.). It is evident that there are several criteria which may satisfy a particular client, and his/her specific needs. Conversely, practices which are characteristic of criminal defence work, which may accredit the lawyer with effectively employing substantive and procedural laws, are arguably noted by some within the community (inclusive of the legal profession) as being underhanded, and deceptive. This inevitably leads to the question: Is a 'good' criminal lawyer one who abides by ethical standards, or one who is smart enough to get away with using ethically questionable standards? The Rules of Professional Conduct which guides the legal profession dictated that lawyers, as "guardians of the law", must be accountable to the community, and recognize that this role, along with its responsibilities, is one of "social privilege" (Kipnis, 1986, p.11). But, it is also very apparent that a fine line exists between the lawyer's responsibility to his/her client (i.e. confidentiality and/or the unspoken rule of stretching the truth), and under what conditions may ethical standards for lawyers be compromised in order to ensure that the lawyer's function within the judicial system is fulfilled in society.

Our criminal justice system involves many participants, all of whom take a particular interest in, and/or are greatly influenced by, the role of defence counsel. For some, this role is scrutinized. For others, a great respect is paid for lawyers whose social standing within the legal community is commended. While the "public" may have certain expectations of the lawyer-client relationship, whether that includes laypersons (eg. victims, witnesses, and jury members), or legal professionals (eg. judges, and lawyers themselves), it is apparent that serving the legal needs of the "public" may entail the use of both ethical and seemingly unethical practices. It is my intention to explore, from the lawyer's own perspective, the various situations under which these circumstances occur, shedding some light on the everyday occurrences that take place in the court process that are often times unquestioned, or seen as common practice. By exploring the various social definitions of a 'good' criminal lawyer, as defined by the respondents themselves, it is my objective to define the function of the criminal lawyer, and the norms relating to the issue of professional ethics.

## REVIEW OF THE LITERATURE

Canadian research on lawyers, as a profession, is well documented, and includes a wide range of subject matter. Some examples include: Professional Conduct (Smith, 1989; Canadian Bar Association, 1987), Women in the Legal Profession (Kay, 1989; Law Society of Upper Canada, 1986), the Lawyer-Client Relationship (Curran, 1985; Smith, 1989), Efficient Marketing and Advertising of your Law Practice (Lee, 1987; Continuing Legal Education Society of B.C., 1982), and the Legal Profession in Canada (Stager and Arthurs, 1990).

There is a failure within criminological research to account for one of the legal profession's major contributors - the criminal defence counsel. Of the empirical studies that have been conducted on lawyers, few specialize exclusively on the perceptions of defence counsels in the field of criminal law (Greenspan, R., 1973; Wice, 1978). Canadian and American researchers have primarily limited their investigations to exploring a broad spectrum of issues that relate to criminal lawyers in general (Wood, 1968; The Canadian Bar Association, 1984). In fact, there is virtually no research which relates directly to the course of investigation proposed by this researcher.

Rosann Greenspan (1973) conducted an extensive study that investigated the attitudes, function, and place of defence counsels within the criminal justice system. Although this descriptive analysis referred exclusively to criminal lawyers, priority was placed on the relationship between defence counsel and his/her client. The constraints of the criminal justice system with respect to the goals of this association were a primary concern. It should be noted that studies have consistently investigated the perceptions of victims, police, and others within the criminal justice system. Examples of such studies include Shapland (1984), Bell (1987), Griffiths (1988), LeBlanc (1984), and Feldman-Summers and Palmer (1980), to name a few. Greenspan's contribution was unique in that the criminal defence counsels' contribution to the criminal justice system was acknowledged,

and explored. This study will further explore attributes which facilitate this contribution.

Research conducted by the Canadian Bar Association (1974) was also instrumental in establishing some consensus as to governing principles for practising lawyers, although specific reference was not made to criminal defence counsel exclusively. In 1974, a review and revision of the Canons of Legal Ethics was deemed necessary by the Canadian Bar Association. A Special Committee on Legal Ethics was appointed the responsibility of establishing criteria which would govern the legal profession. It was hoped that,

the Code [of Professional Conduct would] provide a sound basis for the delivery of competent legal services according to the highest ethical traditions of the profession (Rules of Professional Conduct, 1974, vi)

Every member of the legal profession in Canada was petitioned to critique, and make suggestions to the Committee's proposed draft. Although a prior code of ethics had been in existence since 1920, seventeen criteria were established as relevant areas of concern for practising lawyers. The principle of integrity was established as the fundamental criterion, with the other noted "rules" (eg. competence, advising clients, and avoiding questionable conduct, etc.) serving as extensions of that basic principle. The primary objective of the Canadian Bar Association was to establish guidelines that, in protecting the "public interest", would set a standard for professional conduct within the legal profession. It should be noted that the Canadian Bar Association quite adamantly places a priority on maintaining ethical standards within the legal profession (eg. integrity, competence, responsibility to lawyers individually, and to the profession generally).

The legal profession in the province of Ontario is mandated by its own handbook entitled The Rules of Professional Conduct (1987), which is governed by equally stringent standards (Smith, 1989, p.5). It is important to note that the Law Society of Upper Canada has amended the Rules of Professional Conduct

since 1987, but for the purposes of this study, reference will only be specifically made to the citation above. The intention of the Law Society of Upper Canada to establish guidelines for practising lawyers is notably similar to the aims of this proposed research study. However, the researcher hopes to inquire into, and comprehend the social realities of criminal defence counsels specifically. More importantly, those qualities deemed necessary by the Law Society of Upper Canada may not necessarily correlate with the perceptions of practising criminal defence counsels. Likewise, the attributes of a 'good' criminal lawyer may not necessarily correspond with the Rules of Professional Conduct.

## ATTRIBUTES OF A 'GOOD' CRIMINAL LAWYER

According to Kipnis (1986), a competent lawyer possesses a number of qualities, and meets the specific needs of clients by utilizing, and maintaining ethical practices. There is an underlying assumption in our society that proposes that "good lawyering means, in part, being a good person" (Sammons, 1988, p. 62). Kipnis notes that a "good lawyer" first strives to counsel his/her client in a realistic manner, and avoids portraying "either an unduly pessimistic or overly optimistic picture of the way things are" (Kipnis, 1986, p.34). While attempting to minimize the financial burden of litigation, as well as avoiding any undue anguish for the client, it is imperative that a lawyer remains objective. That is,

the attorney must be careful not to impose his or her own values on the client.... It will be the client's values that must ultimately determine the course selected (Kipnis, 1986, p. 35).

Curran (1985) utilized both Canadian and American survey results of studies that were conducted respectively in the early eighties and mid-seventies, and formulated a consensus regarding the qualities most often sought after by clients when selecting a lawyer. It is apparent that a client's perceptions of a lawyer-client exchange, most notably "the attitude and behaviour of the lawyer towards the client as a person" (Curran, 1985, p.109), sets a precedent for any future successful interactions.

The following attributes were discovered by Curran (1985) to be most favourable. For this proposed research study, these will serve as variables on which to base a qualitative and quantitative analysis. Emphasis will be placed upon criminal lawyers' perceptions of these attributes first, in meeting the personal and legal needs of their clients, and secondly, by drawing a comparative analysis with the tenets espoused in the Rules of Professional Conduct by the Law Society of Upper Canada.



### 1. COMMITMENT

In accounting for the client's personal needs and interests, lawyers are expected to be respectful of, and take a sincere interest in, the client's best interests. Maintaining a "personalized" relationship was noted as important, and involved the lawyer's "attentiveness, capacity and willingness to communicate, and respect for the client's intelligence and judgement" (Curran, 1985, p.109). It is important to note that women, more so than men, expressed greater concern for lawyers' commitment (Curran, 1985, p.109).

### 2. INTEGRITY

The client was primarily concerned with the lawyer's professional behaviour towards others, as well as his/her relation to the client. For example, honesty, trustworthiness, moral and/or ethical standards and behaviour (eg. dirty tricks, not keeping secrets) were noted as concerns. Most notably, women with prior experience in court, and dealings with lawyers, and who had negative perceptions of lawyers' integrity, considered the issue of integrity most important.

### 3. COMPETENCE

Competence deals specifically with a lawyer's professional skills, and qualifications, and may involve the client having to depend on others for opinions (eg. by word of mouth, the number of successful acquittals, or reduced charges). Surprisingly, men were found more likely to identify competence as an important issue, particularly when they had prior dealings with the legal system. It is also interesting to note that gender, in addition to other factors, such as the nature of the offence itself, may appear to jurors to be indicative of greater competency. For instance, a study that examined jurors' verdicts of a hypothetical rape case, found that,

significantly more not guilty verdicts were given when the defense attorney was female (71%) than when the defense attorney was male (49%) (Villemur and Hyde, 1983, p.885 - 886).

As a result of Villemur and Hyde's finding, it is of particular interest to the researcher to explore whether lawyers' perceptions of competency are influenced by their perceptions of others (inclusive of judges, jury members, clients, victims, and other criminal counsel) and vis-a-versa. Consideration will be given to whether gender differences alone account for any preconceptions that lawyers and others within the legal profession hold regarding lawyers' competency.

#### 4. LAWYERS' FEES

Particularly for individuals within a lower socio-economic bracket, who are least able to afford good legal representation, a reasonable fee, along with adequate legal counsel, was desired. Most argued that lawyers' fees are "out of line", in that they question whether other lawyers charge similar fees, or provide equally competent, if not better, legal advice/services. It was found that non-users, as compared to users, more frequently raised the issue of fees. Curran's study also found that men and women equally expressed concerns about fees when selecting a lawyer. A study conducted by Bullard and Skipper (1988) found a positive correlation between advertising and its impact on the prices of professional services, more specifically, legal services. Findings indicated that,

advertising [had] had an impact on the prices of legal services...  
in locations with more advertising, legal services are priced lower  
(Bullard and Skipper, 1988, p.8-7).

Although the issue of advertising is a totally distinct realm, a negative connotation is often associated with this practice, as perceived by a public that sees the potential for greater abuse, and use of unethical and fraudulent claims by practising defence lawyers (Bullard and Skipper, 1988, p.7).

As a researcher, one hopes to gain insight into criminal lawyers' perspectives, and how their perceptions may contribute to their social construction of a 'good' criminal lawyer. A major focus of this study will entail examining a final key issue:

## 5. ETHICAL AND UNETHICAL PRACTICES

Once the lawyer is retained to represent a client, there emerges a danger that the role of an "impartial counsellor" may be transformed into a "zealous advocate". As representatives of their clients, lawyers may place a higher priority on pursuing the client's interests at the expense of jeopardizing their obligation to the profession and society. While it is apparent that, "what attorneys may do on behalf of clients [may] be limited by the way in which their role fits into the adjudicatory procedures of the court" (Kipnis, 1986, p.36), professional ethics must never be compromised. As Kipnis notes,

legal professionalism thus involves maintaining competence and attending to one's responsibilities to clients (Kipnis, 1986, p.36).

The defence counsel may find this particularly hard, as a result of the fine line that exists in the legal profession regarding one's obligation to the courts, and to one's client. The function of lawyers may on many occasions serve opposing interests, whereby the needs of the client directly conflict with the interests of the court. Regardless of this professional conflict, there is an understanding that truthfulness and integrity must be maintained. Freedman (1988, p.133) expressed similar concerns when stating that the criminal defence lawyer may be,

faced with the dilemma of either betraying the confidential communications of his client or participating to some extent in the purposeful deception of the court.

Perhaps, an example may assist in illustrating this important point. Would it not be considered unethical to betray one's confidences to the court if a client chooses to perjure him/herself on the stand, and the defence counsel remains silent about the perjured statement? According to Freedman (1988, p.135), the adversarial system demands that a lawyer "preserve his client's confidences", but not at the expense of committing any, "violations of the law or any manner of fraud or chicanery". On the other hand, the right to a fair trial for the accused may be jeopardized should the lawyer insist on relinquishing his/her responsibility to his/her client. It could be argued that a lawyer, by virtue of being paid (either

through legal aid, or as a personal responsibility of the accused), is obligated to maintain an alliance with his/her client. Thus, at issue, when does a lawyer's obligation to his/her client cease given the complexity of this circumstance?

Criminal lawyers, in particular, have been trained, and have acquired the skills to "become adept in the art of misleading others without even uttering an untruth" (Kipnis, 1986, p.38). As a result, they are capable of finding reputable ways of interpreting the law in order to best serve the needs of their clients. Likewise, McBarnet (1984) viewed the "manipulation" of the law as,

**maximizing any advantage in the law...[while avoiding]... blatantly breaking, any disadvantageous law by careful manipulation of activities to fall just outside the law's ambit, or by careful interpretation of what the law might arguably mean (McBarnet, 1984, p.232).**

Thus, one can see that McBarnet advocated that criminal lawyers can effectively manipulate, use, and constructively avoid the law legitimately. The nature of law encourages, and allows legal professionals to "transform" the law:

to work on the law, to interpret the law, to seek loopholes in it, [and most importantly] to make the law fit the facts of the client's activities and interests (McBarnet, 1984, p.233).

Davis and Elliston (1986, p.59) proposed that a "good criminal lawyer sometimes does otherwise immoral actions for good ends". Since the defendant is presumed innocent, the law entitles his/her client, even if he/she is guilty, to a number of important protections. The Canadian Charter of Rights and Freedom (as noted in the Martin's Annual Criminal Code (1992)), guarantees that the accused has certain fundamental rights. Some of these include the right to:

- a) Retain and instruct counsel without delay and to be informed of that right (S.10(b));
- b) Be presumed innocent until proven guilty according to a law in a fair and public hearing by an independent and impartial tribunal (S.11(d));
- c) Not be arbitrarily detained or imprisoned (S.9);
- d) Have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful (S.10(c));

- e) Be tried within a reasonable amount of time (S.11(b));
- f) ...equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (S.15(1)).

While it may appear as though a criminal lawyer is assisting the accused in evading the consequences of his/her actions (presuming he/she has admitted committing the particular act to his/her lawyer in private), it is still the defence counsel's responsibility to represent the accused with every legally available means. Edward Greenspan (1984), in exploring the future role of defence counsels, was quite adamant in defending the role of criminal lawyers within the legal system.

...defence lawyers and others have undertaken to explain, justify, delimit or deny the propriety, the morality, even the legality of defending an accused person "known" to be guilty, of vigorously cross-examining a prosecution witness "known" to be truthful, of protecting certain confidences of a criminally accused client.... the fact that these questions are asked at all reflects a profound misunderstanding of the role of the defence lawyer in the criminal justice system (Greenspan, 1984, p.205).

Preserving the lawyer's role of "zealous advocate", within the limits of honesty and integrity, was noted as imperative. The function of a defence counsel was, "not to decide but to persuade" (Greenspan, 1985, p.208). By preserving a client's right to counsel, it transcends to an "obligation to serve [a client] rather than to become part of the official machinery that judges them" (Greenspan, 1985, p.218). By the same token, the onus lies with the prosecution to prove beyond a reasonable doubt that the defendant is guilty. But, an important question may be raised that Sammons (1988, p.75) noted: should we equate " 'good' lawyering with proficiency in maximizing selfish interests through *any available means?*" (italics my emphasis).

Trial lawyers, as Saks and Hastie (1978) have noted, are professional applied social psychologists in that,

...they manipulate key variables of social influence: they control information, manage impressions, influence attributions, make or withhold settlement offers (Saks and Hastie, 1978, p.100).

Both law school, and personal intuition, provide lawyers with techniques that they can use in order to persuade an audience to accept their viewpoint. In court, lawyers attempt to modify the beliefs and attitudes of the jury/judge by employing various tactics. For example, lawyers (both Prosecution and defence counsel) state closing arguments that do not allow for open interpretations, but instead, establish a conclusion that they want the judge/jury to adopt. For instance, a defence counsel may state the following in closing arguments:

After considering all the testimony, I think and hope you will all agree with me that there is but one verdict you can render in this case - that my client is not guilty (Saks and Hastie, 1978, p.107).

In fact, whether the lawyer knows of his/her client's guilt or not, a commitment to innocence must be maintained in order to be believed by a jury. It may be argued that jurors are often highly critical, and observant of any indications by the defence counsel that a client is guilty (eg. tone of voice, facial expressions, effective prompt delivery of arguments and counter arguments, etc.).

Greenberg and Ruback (1982) warn that although the judge/jury may be influenced by the various tactics that are employed in court, alternative factors, such as the social exchange relationship between the prosecution and defence counsel, are closely examined by jurors, and play an important role in their reaching a favourable verdict. They note,

Jurors are not machines, they are human beings. They do not only see the evidence. They also see two rivals...the defense attorney and the prosecution each vying for their friendship. If they like you, it will probably be reflected in their verdict; if they dislike you, the road will be uphill all the way.... Make them like you.... One way to build up this friendship is to question and speak to each juror as if he or she is the most important person in the room (Greenberg and Ruback, 1982, p.146).

Consequently, one can see how lawyers can covertly influence jurors of a client's innocence or guilt based not only on the evidence presented in court, but also on some other important factors. These factors may include charisma, professionalism, and genuine concern for one's client (whether superficial for the time being or not). Thus, recognized specialists in criminal litigation may have

considerable influence in the courts based not only on their experience, and knowledge but unique character traits may give them an added edge.

While the fundamental responsibilities of lawyers are counselling and representation, it is in their latter capacity that lawyers may be placed in a difficult position. Generally, the lawyer, in his/her role as legal advisor, becomes obligated to carry out what his/her client is unable to accomplish as a layperson, but this may present a problem particularly when the client's objectives are dishonourable, or unacceptable to the court. Kipnis (1986) provided an overview of the ethical problems that arise in view of the lawyer's responsibilities to a client, but most importantly, sheds new light on how these allegedly unethical practices might be reinterpreted. For instance, why is a common court practice such as entering a false plea of "not guilty" (assuming the accused has admitted guilt) acceptable to the courts when so much evidence appears to suggest an individual's obvious guilt? It may be argued that these are tactics that are used in the courts that allow lawyers to manipulate the system. Instead, Kipnis (1986), like Greenspan (1985), provided a "defense attorney's view", which accommodates their clients, and provides justification for their actions. Examples of common everyday occurrences in the court, that may be misconstrued as unethical, include:

#### 1. THE FALSE PLEA

In a criminal proceeding such as an arraignment, where the accused appears before the judge, and enters either a "guilty" or "not guilty" plea, one would expect an accused to plead guilty if, after all, he/she committed the act, and it appears likely that he/she would be convicted. Likewise, it would be unethical, and professionally dishonest for a lawyer to affirm his/her client's innocence, particularly if he/she was told in confidence that he/she actually committed the crime. But, legal ethics, **unlike moral ethics**, connotes that the plea of not guilty might suggest "not legally guilty" (Freedman, 1986, p.330). Perhaps Kipnis (1986, p.85) sums it up best when he concluded that the plea is,

"... a move in a game, a mere legal formality, carrying none of the weight of a dishonest protestation of innocence." This may also suggest that court participants should hold judgement until all the evidence has been submitted. In addition, since the burden of proof lies with the Prosecution, the accused and his/her lawyer could simply sit on their hands.

#### CONCERTING A FALSE DEFENCE BY BUILDING ON PERJURED TESTIMONY

Clients are often willing to lie under oath, and this is either a conscious decision on their part, with or without their lawyer's knowledge, or by some encouragement or "coaching" by the lawyer. For instance, the client may elect to commit the crime of perjury based on his/her own opinions, and observations regarding the case. Of course, the likelihood is that an intelligent lawyer can decipher whether there is uniformity in a client's testimony with the available facts. As Kipnis (1986, p.89) noted, it is at this stage, that the lawyer employs a technique that is commonly known as "the Lecture". This unethical practice "preserves the face-saving illusion that [the lawyer] hasn't done any coaching", and allows the defence counsel to inform the client of the possible repercussions of the case if the facts are as the client stated them. Instead, an alternative is provided upon a closer examination of the facts by the lawyer, and the client is asked to consider, and "recollect" his/her thoughts concerning the circumstances of the case. Thus one could see how there is a "thin line separating the giving of legal advice and complicity in the fabrication of the lie" (Kipnis, 1986, p.91). Freedman (1988, p.141) held the belief that giving such advice encourages and condones perjury, although he is sympathetic to those who, in a position of *bona fide* confusion and fear, are unable to recollect the particulars of their case and, as a result, are open to any advice. It could be argued that the likelihood of this occurring is slim. Lawyers still have a professional responsibility, and obligation not to mislead the courts. They cannot ignore the fact that misguided loyalties to a client (and his/her bank account) may lead to disbarment and disciplinary action by the Law Society.



What benefits are derived by a lawyer who is willing to breach the Rules of Professional Conduct? What type of person risks violating the code of professional ethics, when there are no guarantees of a successful acquittal? If there are any benefits and/or certainties, might the price be too high knowing that one risks disbarment? While it is apparent that the lawyer's moral character may likely be tainted by his/her associations with contemptible individuals, the likelihood is that a defence counsel, in particular, may be intrigued, and "intoxicated...by the thrills of criminal defence work" (Kipnis, 1986, p.82). For instance, a lawyer describes how his life pales in comparison to his client's, when he states:

With little prompting, my clients would describe their lives in lurid detail - passionate, desperate lives filled with violence, drugs, and sex. I must confess I sometimes feel a vicarious excitement on hearing the exploits of these people so unfettered by the normal restraints. They were living and running on the razor's edge (Kipnis, 1986, p.82).

In criminal proceedings, lawyers partake in, and thrive on, criminal litigation, and enjoy their privileged status as counsellors, particularly when they hold the keys which may clear a client of a charge. Often, the lawyer-client relationship is viewed as an "association" whereby, "the attorney, is ethically, something like an 'accessory after the fact', an accomplice...in the wrongdoing itself" (Kipnis, 1986, p.81). Sammons (1988, p.71) also affirms that lawyers are so disliked as a profession as a result of their associations, and support of these contemptible individuals, that "the public [often mistakenly] associates [lawyers] with their clients." On the other hand, if the public is so suspicious of lawyers, particularly defence counsels, and tend to view their courtroom behaviour/persona as a reflection of their true identities (or at least a template of their corrupt clients), why does the public "grossly exaggerate their power and efficacy..." (Friedman, 1990, p.239)? One cannot deny the fact that, if faced with the remote possibility of spending an even small amount of time in jail, most would prefer to acquire the services of a criminal defence counsel who could

effectively use the law to one's advantage.

Perhaps a distinction should be made between a lawyer's effective interpretation/manipulation of the law, and his/her deliberate unethical/illegal behaviour. Since the profession is self-regulated, the problem may lay with insufficient action by members of the legal profession once detected, as evidenced by a lack of reporting or under reporting. A study conducted by Reasons and Chappell (1985) emphasized how the lack of formal discipline within the legal profession perpetuated the continuation of unethical behaviour. Reasons and Chappell reviewed Canadian accounts of unethical behaviour among lawyers, and identified several factors that related to deviance within the legal profession. The motivation for employing this questionable behaviour was also explored by Reasons and Chappell.

One of the earliest studies of deviance in the Canadian legal profession analyzed the circumstances which led to the disbarment of approximately eighty lawyers from the Law Society of Upper Canada during the period of 1945-65. It was found that, "the large majority of disbarred lawyers violated the financial trust of their clients through illegal actions" (Reasons and Chappell, 1985, p. 207). For example, lawyers were pressured by personal financial difficulties (eg. poor investments, debts, gambling, etc.) to violate ethical codes of professional conduct. Thus, one can see that some criminal lawyers may resort to the use of unethical practices as a result of financial stresses, or greed.

The characteristic behaviour of lawyers who violated ethical codes of conduct were compiled, and these findings suggested the following:

Most lawyers who were disbarred were "marginal" to the profession. For instance, sole practitioners, who were not expected to account to a higher authority, used their privileged position to influence their clients for their specific aims. As a result, there was strong evidence that many clients were unhappy, and questioned the competence of these lawyers, as demonstrated by the finding that,

80 percent had complaints lodged against them by the Law Society prior to, and distinct from, the single event that led to the disbarment (Reasons and Chappell, 1985, p.208).

A significant finding relates to the lawyer's inability to maintain high grades prior to attaining his/her legal status, in that poor school performance was a strong indicator for predicting the likelihood of a lawyer's failure to meet ethical standards. For instance, "85 percent of the disbarred lawyers had a C or lower average in law school" (Reasons and Chappell, 1985, p.208).

Lastly, the authors make note of various problems that contribute to the situation, and these include common everyday problems that must be dealt with, but may appear to be the last straw in a desperate state of affairs. For instance, family and business commitments, mortgage payments, and children weigh heavily on the minds of these individuals, and eventually take their toll, affecting their decisions and performance.

Although the Law Society of Upper Canada recognized the incompetence of these lawyers, which led to their eventual disbarment, professional conduct for Canadian criminal lawyers is still largely unregulated. While the Law Society of Upper Canada, in more recent years, has taken their responsibilities in discipline and competency to heart, "legal incompetence" is tolerated, and often ignored, in spite of constant complaints, as long as the lawyer does not literally steal the money from the client's hand (Reasons and Chappell, 1985, p.209).

## THEORETICAL ORIENTATION

Lauer and Handel (1983, p.7) suggest that social psychologists utilize theory to "understand the world in which we live". Symbolic interactionism, a perspective in social psychology, may be viewed as a "tool for understanding social phenomena" (Lauer and Handel, 1983, p.14), as this study undertakes to explore the social construction of a 'good' criminal lawyer.

Symbolic interactionism, a term originated by Herbert Blumer, focuses primary on the interaction between an individuals' internal thoughts and emotions and their social behaviour (Blumer, 1969). Persons are viewed as actively interpreting, evaluating, or defining situations. The resulting effect being that, "this process of interaction consists in making indications to others of what to do and in interpreting the indications as made by others" (Blumer, 1969, p.20). For instance, it may be argued that the practice of criminal law demands that criminal defence counsels, in providing the best defence for their clients, carefully and effectively evaluate and interpret all the surrounding facts and circumstances of the case, applicable substantive and procedural laws, and the motives of particular participants within the criminal justice system.

There are several key concepts and notions espoused by symbolic interactionism that will serve as valuable tools for examining the realities of criminal lawyers in their relations with others within the criminal justice system, and more specifically, in their associations with fellow criminal lawyers. It must be emphasized that there is a lack of research examining the experiences of criminal lawyers within the context of their own experiences. The following concepts will be employed in an effort to interpret, and analyze the quantitative and qualitative findings, and they include: **concept of self, role taking and role making, reference groups, generalized other, meanings and symbols, definition of the situation, and typifications.**

### CONCEPT OF SELF

In the symbolic interactionist perspective, the 'self' is viewed, "as a social object which the actor acts toward" (Charon, 1989, p.65). An individual's concept of self is one that is socially defined, and open to influence and change when interacting with others (Charon, 1989, p.65). As Mead notes,

...[he] becomes an object to himself just as other individuals are objects to him or in his experience...it is impossible to conceive of a self arising outside of social experience (Charon, 1989, p.65).

Thus, one might argue that a strong correlation exists between one's concept of self and the influence that those within the legal profession have on that conception in one's daily interactions.

One's concept of self is also derived from one's self-judgement, which in turn, is related to both what we do (our actions) and who we are (our identities) (Charon, 1989, p.80). Of particular importance to this study is the notion espoused by Herbert Blumer regarding the self as object, that emphasizes,

Since we can sometimes judge other people, so we can also judge our self... Since we can point things out to our self about other people, so we can actually point things out to our self about self (Charon, 1989, p.71).

It is the intention of the researcher to employ this invaluable notion as a means of inquiring into, and attaining criminal lawyers' self-perceptions and conceptions regarding the social construction of a 'good' criminal lawyer. It is also important to attain a better understanding of selfhood, and how criminal lawyers' perceptions are directly, or indirectly influenced by others. For instance, is their concept of self a reflection of other aspiring, or successful, well-established criminal lawyers. Are others within the criminal justice system (eg. the victim or accused, the judge or jury) as likely to influence criminal lawyers' perceptions of self?

### ROLE TAKING AND ROLE MAKING

Role taking is a key concept in symbolic interactionism that is especially relevant to this study. It is defined as, "the process whereby an individual imaginatively constructs the attitude of the other, and thus anticipates the behaviour of the other" (Lauer and Handel, 1983, p.104). Only by adopting an external viewpoint (i.e. by placing oneself in the shoes of the other) can a person control and organize his/her behaviour rationally (Mead, 1934). A criminal lawyer may take the role of the accused when considering an appropriate defence for his/her client. In a courtroom, a lawyer may take the role of the impartial judge or jury in order that he/she can persuade them towards a favourable verdict.

Role taking involves the individual's more deliberate and conscious analysis of expectations before acting. As noted by Charon (1989, p.107-8),

We enter a social situation and know what to do in part by taking the role of the others in the situation and acting in ways expected of us, or by doing things contrary to what is expected but still within the bounds of acceptability of others in the situation, or by purposely upsetting the expectations and the situation.

Consistent with this finding, defence counsels may be found to perform their function as considered appropriate by the profession, with some derivation. This study will place particular emphasis on how strictly criminal lawyers abide by the Rules of Professional Conduct, as they serve to minimally guide lawyers with respect to ethical practices. In addition, it will be interesting to explore whether the legal profession, and its participants (i.e. prosecutors, judges, and other criminal lawyers), as an 'other' in any legal, courtroom or social setting, conjunctively guide counsels' behaviour, arguments and advice.

Conversely, role making enables persons to 'make a role for themselves' in light of roles that are considered relevant, appropriate, and possible in the situation (Turner, 1991). In other words,

each individual in the situation assesses the other's role on the basis of the behaviours the other displays...[and] 'makes' his/her

role...in response to the cues given him/her by those in the situation (Aldous, 1974, p.231-2).

A criminal defence counsel must be cognizant of these "cues" in order that he/she may more effectively litigate, and effectively represent the legal profession.

Turner (1988, p.86) also describes the role making process as a "tentative", and "experimental" process, which suggests that a continual redefinition of one's role is required. Criminal defence counsels, in particular, may attribute an effective role making process as the key to being considered a successful and well-respected member of the legal community.

Role making is also of particular importance when one considers that an individual, in taking the role of the other, is greatly influenced in terms of his/her own self-concept. As an individual "exercise[s] self-control and self-direction by understanding 'the other'" (Charon, 1989, p.107), the role taking process has evolved into the role making process. In this sense, the role making process extends to the personal attributes of the individual as well. For instance,

[an] individual must possess the qualit[ies] of fairly high self-esteem, flexibility, interpersonal sensitivity, and some sense of controlling his/her own destiny...(Aldous, 1974, p.232).

One might argue that these are but some of the qualities that are required of an individual pursuing a career in the field of criminal law.

### EMPATHY

Empathy is very closely related to the concept of role taking. It has been defined by the Gage Canadian Dictionary (1983, p.388) as the "quality or process of entering fully, through imagination, into another's feelings or motives". Thus, criminal lawyers may take the role of the accused by imaginatively constructing the feelings of the client. By being empathetic to any perceived anxiety, concerns, or frustrations the client may be experiencing as a result of being charged with a criminal offence, criminal lawyers may then best decipher how to appropriately meet the client's personal and legal needs.

A criminal defence counsel may also purposely employ tactics in the courtroom through the use of symbols (eg. gestures) or by verbal communication, to solicit judges or juries to empathize with the accused.

### REFERENCE GROUPS

Symbolic Interactionism holds the view that "human beings construct their realities in a process of interaction with other human beings" (Meltzer, Petras, and Reynolds, 1975, p.54). Criminal lawyers may "construct their realities" as a result of several factors among which are their associations and interaction with those who participate in the criminal justice system. Consequently, "each actor has many perspectives, each one associated with a reference group" (Charon, 1989, p.30).

Shibutani (1955, p.109) defines three common usages of the concept reference groups. Firstly, the reference group is a group which provides the person with a frame of reference or social comparison particularly when forming judgements about one's self. Perspectives that lawyers share through their membership to the Law Society of Upper Canada may serve as an example. Secondly, a reference group may also be a group which the person aspires to attain or maintain acceptance. In the latter case, a reference group may be a peer group, a group whose status is similar to one's own (Spencer, 1985, p.167). Thus, a notable distinction will be drawn between experienced and less experienced counsel in this study. Thirdly, the reference group may be a group whose perspectives are assumed, and already constitute the person's frame of reference.

The reference group generally provides the individual with an initial basis for defining the situation (Lauer and Handel, 1983, p.132). Persons also differ in their definitions of the situation by reason of their diverse reference groups.



### GENERALIZED OTHER

As the self incorporates the perspectives of significant others in totality, with a resulting effect of the internalization of societal values, an individual adopts the perspective of the generalized other (Charon, 1989, p.67-69). By taking the role of many significant others, a person has a basis for comparison, and a determination is then made as to what the "average person" thinks (Spencer, 1985).

Furthermore, assuming the perspective of the generalized other requires that the individual view him/herself in relation to a "community of attitudes", and further requires that his/her conduct be adjusted in accordance with the expectations of these communal attitudes (Turner, Beeghley and Powers, 1989, p.446). Thus, continued successful interaction with a reference group demands that their perspectives become the individual's generalized other, at least temporarily (Charon, 1989, p.69).

Since the shared standards of the larger group is reflected in the generalized other, it is important, in this study, to attain some consensus of how criminal defence counsels viewed their own behaviour, and shape their own actions accordingly. As a researcher, arriving at the criminal lawyers' generalized other is most easily arrived at when there is a general agreement as to the necessary attributes of a 'good' criminal lawyer. Upon the determination that the quantitative and qualitative sample will likely arrive at varying points of view as to the necessary attributes of a 'good' criminal lawyer, a determination must be made as to which opinion is most general (Spencer, 1985, p.115).

### MEANINGS

This research will utilize the following theoretical premises espoused by Blumer (1969, p.2) to explore the importance of 'meanings' within a criminal practice:

1. Human beings act towards things (inclusive of persons, categories of persons, and institutions) on the basis of the meanings that things have for them.
2. These meanings arise out of social interaction with others in society.

Social interaction involves contact with a diverse range of persons for criminal defence counsels. For instance, criminal lawyers may have direct or indirect daily contact with other criminal defence counsels, judges, jury members, Crown Attorneys, victims, witnesses, and various court observers and participants, to name a few. Although an interactive process is generally two-sided, it is important to note that this study will place emphasis solely on the perspectives of criminal defence counsels.

3. These meanings are managed and modified through an interpretive process employed by the individual in dealing with the thing that he/she encounters.

Thus, individuals actively interpret and reinterpret these meanings as they come into contact with various persons and perspectives.

### SYMBOLS

Blumer (1969) asserts that human interaction is mediated by the use of symbols. Symbols are "social objects used by the actor for representation and communication" (Charon, 1989, p.40). A person acting or interpreting on the basis of symbols will find him/herself,

in any of [his/her] countless acts...designating different objects to [him/herself], giving them meaning, judging their suitability to [his/her] action, and making decisions on the basis of the judgement (Blumer, 1969, p.80).

Significant symbols are those symbols (i.e. gestures) that have a shared meaning among all persons within a society or social group (Lauer and Handel, 1983). In this study, the social group of interest is the community of local criminal defence counsels. According to Mead (1934), symbols become significant symbols when intentionally utilized by the actor in an attempt to communicate to others and, in addition, when used for the purposes of giving off meaning that he/she believes will make sense to the other.

For instance, the gesture is the first component of the act. By understanding the meaning of his/her act (inclusive of words, non-verbal interaction (eg. gestures), and modes of conduct), the actor will intentionally use symbols. But, to communicate his intention, the gesture must have a shared meaning. Subsequently, another person will perceive what the gesture stands for, thus arriving at its meaning.

By drawing special attention to criminal defence counsels specifically, this study will explore the extent to which criminal lawyers employ and manipulate symbols within the courtroom setting.

#### DEFINITION OF THE SITUATION

Preliminary to any self-determined act of behaviour there is always a stage of examination and deliberation which we may call the definition of the situation (Thomas, 1928, p.317).

Lauer and Handel (1983, p.127) further clarify that, in formulating this definition, Thomas stressed the importance of subjective interpretations underlying our behaviour when defining the situation.

Thus, the individual's response in any particular situation is a function of how he/she defines the situation, rather than how the situation is objectively presented to him/her .

Thus, subjective factors are most important in explaining behaviour.

When defining a situation, a number of factors immediately come into play, greatly affecting the behaviour, actions, and available options for the

individual. For instance, how a criminal lawyer defines the situation may be influenced by whether or not he/she believes in his/her client's guilt or innocence, the defence strategy (eg. the plea, witnesses called, questions posed, etc.), and the lawyer's confidence in receiving an acquittal, or conviction.

By acting in accordance with a "reality actively defined by them" (Charon, 1989, p.125), how others are perceived becomes one's reality. Thus, consideration must be given to the importance of the presumption of innocence in defining the situation. If the criminal lawyer **presumes** his/her client to be innocent of the offence, the lawyer's subjective interpretation of the facts and evidence relating to the client's case may more successfully result in the client's acquittal. One must also consider that an individual's definition of the situation can be subject to redefinition. Given that the accused has already been arrested, and thus subjected to the preconceived notion of guilt, the defence lawyer will seek to present his/her client in a more favourable light. If a lawyer's perception is one of mistrust, Charon (1989, p.126) goes on to explain that, "each individual must define the situation through engaging in mind activity". It may be argued that criminal defence counsels may be particularly prone to this type of mind activity in situations where they are expected to defend an accused person believed to be guilty.

Blumer (1969, p.16) emphasized that collective definitions of the situation are also employed to direct individual behaviour.

The view of human action applies equally well to joint or collective action...as exemplified in the behaviour of groups, institutions, organizations and social classes.... The interpretive process takes place by participants making indications to one another, not merely each to himself. Joint or collective action is an outcome of such a process of interpretative interaction.

Thus, in collectivities, persons also indicate their subjective interpretations when defining the situation to each other.

Since the reference group provides the individual with the an initial basis for defining the situation, individual lawyers may be found to define the situation

as other criminal lawyers likely defined it. Likewise, the influence of colleagues, or other associates lends itself to the existence of a collective definition of the situation. As an associate within a firm, a lawyer may have an obligation to maintain an alliance with the firm's objectives, whether that entails employing ethical or unethical practices. Interaction within the criminal courts may result in defence counsels as a group having a collective definition of the situation, by maintain common perspectives regarding the criminal justice system, and its policies. On the other hand, how the prosecutor and criminal defence counsel define the situation is likely to differ. There is a strong probability that congruent notions of the definition of the situation will also exist between the criminal lawyer and the accused.

Stebbins (1975) presented the definition of the situation as a theory. However, for this research, it will be treated as a concept.

Stebbins (1975) identified three types of the definition of the situation, those being: the cultural , habitual personal, and unique personal definitions. Cultural definitions are collective representations, and members of a particular group are aware that others consensually shared in the definition of the situation, and utilize that definition in the same manner. Once a cultural definition is deemed relevant for the events at hand, it is tailored so as to better serve the user. Habitual personal definitions are non-consensual sharing of meanings. Although a situation holds roughly the same meaning for the particular class of persons, each individual is unaware of other's similar definitions of the situation. Unique personal definitions are a person's interpretation of events which are rarely encountered in the community, and these events hold no cultural or habitual meaning.

Stebbins chronologically described how actors enter the situation, define the situation, and subsequently begin to act in reference to their interpretations. Stebbins (1975, p.16) sequential model indicated the location of the definition of the situation in relation to the individual's initial reaction to the setting.

1. Typical actors in a given identity enter a typical setting with a specific orientation in mind.

2. Certain aspects of these surroundings, some of which relate to the orientation, activate or awaken some of the predispositions the actor characteristically carry with them.
3. The aspects of the surroundings, the orientations, and the activated predispositions, when considered together, initiate further selection of cultural or habitual definitions or further construction of a unique one.
4. This definition directs subsequent goal-directed action in the situation, at least until reinterpretation occurs.

Charon (1989, p.154) provides a diagram which presents a symbolic interactionist's perspective of, "the manner in which *living actors* analyze the situation." This diagram will be utilized in an attempt to demonstrate how local criminal defence counsels define the situation when defending the accused in and outside of the courtroom setting. Since the specific data attained by both questionnaire and interview respondents will be applied, any modifications to Charon's diagram will be seen as reflecting the findings of this study.

## 1. ACTOR ENTERS SITUATION

with Self  
 Mind  
 Symbols  
 Perspective  
 Significant others  
 Reference groups  
 Role taking ability  
 Memory of past

## 2. ACTOR DEFINES SITUATION TO SELF

Determines.. goals	Applies.... appropriate perspective	Takes the... role of the others in the situation	Pulls out, .... points out, defines to self the objects in the situation	Applies.... past experience
(cont'd)...	Considers.... future	Views self in situation		

3. ACTOR DETERMINES LINE OF ACTION TOWARDS OBJECTS  
(INCLUDING OTHER ACTORS)

## 4. ACTOR ACTS OVERTLY (A SOCIAL ACT)

Others give meaning  
to actor's overt act  
according to their  
perspectives and  
definitions of the  
situation (including  
taking the role of the  
other)

Others determine  
line of action

Others act overtly  
(also social acts)

5. ACTOR INTERPRETS OWN ACTS IN LIGHT OF OTHERS' ACTION  
(AND) INTERPRETS THE OTHERS' ACTS (DETERMINES WHAT THEY  
MEAN, STAND FOR-interpretation is based on taking the role of the other6. ACTOR REVISES PERSPECTIVE, DEFINITION OF THE SITUATION, AND  
LINE OF ACTION

Adapted from Charon, 1989, p.154

### TYPIFICATIONS

When defining the situation, socially derived meanings will often manifest themselves in the form of typifications. Schutz (1964) observed that people will oftentimes formulate preconceived notions about others as a result of having prior, or even little to no contact with them. Information is then stored as to how these 'types of persons' will behave, their motives, their values, and how they must be dealt with. Once classified, they adjust their behaviour accordingly.

Mennerick (1981, p.89) considered understanding "actual typifications of others as essential to an analysis of the situation". Likewise, criminal lawyers, in particular, are likely aware that, either within the confines of their offices or a courtroom setting,

...their own acts serve as the basis for typifying them...that specific acts they undertake will be treated by others as cues for typification. They know this...because they do it themselves, seeking in others' acts the 'keys' that will unlock the secrets of their behaviour (Hewitt and Stokes, 1978, p.310).

For instance, criminal defence counsels may utilize these "cues" as a means of discerning the Crown's motives, and trial strategies.

Criminal counsels may also have to contend with the fact that others within the criminal justice system are likely to hold unfair characterizations of a client, which may extend to their perception of the litigator as well. In this case, one can distinguish between typifications and stereotypes in that, in the latter, a person tend to exaggerate the traits of the 'typical' member of a particular group (Spencer, 1985, p.267). On the other hand, by typifying someone, it lends itself to the person further reinforcing a positive or negative impression of the particular individual. As suggested by Mennerick (1981, p.146),

typing based on assessments of the defendant's moral character is reflected in the assumption by prosecutors, public defenders, and judges that the defendant is guilty (Mennerick, 1981, p.146).

Courtroom performance and expertise also extends to the typifications that criminal lawyers hold of others (eg. lawyers, judges, etc.) within the legal profession.



This study aims to identify how local criminal lawyers characterize themselves, and how they perceive they are characterized by others either exposed to or within the legal profession.

## METHODOLOGY

### SAMPLE

The participants in this study involved a sample of local prominent criminal defence counsels. Geographically, the study focused on criminal lawyers who have had dealings in the local jurisdictions of the Windsor Courts, inclusive of their experience in the Provincial and District Courts, Ontario Federal Division and Appeal Courts. Of the recognized specialists in criminal litigation, many had centrally located practices, which provided them with prompt, and easy access to the courts. This study focused exclusively on those litigators whose offices are located in the Windsor area. By restricting myself to criminal lawyers who generally frequented the Windsor courts, it assisted the progress of telephone contacts, mail service, and interviews.

The Windsor telephone directory (i.e. the Yellow Pages, 1993-4, pp. 345-75) clearly established which local practising lawyers specialized in the field of criminal law. Specific focus was directed towards this general population of criminal litigators for a successful completion of the questionnaire. The qualitative aspect of the research entailed a more intensive investigation of select willing participants. Associations with these participants failed to initiate a snowball effect that would provide additional, equally receptive, participants.

An early means of acquiring a sample involved sending a covering letter to prospective respondents, providing detailed objectives of the research, and requesting an interview. An open-ended questionnaire was also enclosed (see **Appendix L**), requesting its completion, regardless of whether or not an interview was declined. By emphasizing the significance, and valued contribution of their opinions to this study, a sample was attained.

Smigel (as noted in Greenspan, 1973, p.7) warns that, particularly when interviewing lawyers, it is imperative that the researcher,

demonstrate knowledge of the law, and the legal profession, and create sufficient interest that the lawyer will give the amount of time required.

Smigel's observation was particularly applicable to gaining initial entry for the purpose of interviewing prospective respondents in that the researcher has concurrently pursued her LL.B. at the University of Windsor while completing her M.A. thesis. Thus, knowledge that the researcher was also a law student may have served to facilitate a greater responsiveness to the study.

My past experience in the courts, as a volunteer for the Victim/Witness Assistance Program, and Reaching Out, was also of great assistance. As a researcher, some familiarity with the court process facilitated a more comprehensive analysis of criminal lawyers.

### SYMBOLIC INTERACTIONISM

When considering the methodology that was employed in this study, consideration must be given to the social psychological perspective of symbolic interactionism.

Heiss (1981, preface viii) asserted that,

the ultimate goal of social psychology is the explanation of the behaviour of the particular types of people under specific conditions.

This study necessitates a critical analysis of the accounts, justifications, and perspectives given by local prominent criminal lawyers. This objective further demonstrates the importance of grasping an understanding of the world from their perspectives. As a researcher, complying with the methodological stance that the "Chicago School" of Symbolic Interactionism adheres to, requires, " 'getting inside' the reality of the actor in an effort to understand this reality as the actor does" (Meltzer et al., 1975, p.54-55). Herbert Blumer, a chief proponent of the Chicago School of symbolic interactionism, asserted that, "[o]nly through intimate association with those who are being studied...can the investigator enter their inner worlds" (Meltzer et al., 1975, p.58). Blumer's stance is one that advocates the importance of qualitative methodology, inclusive of interviews of the "free or non-directive type" (Meltzer et al., 1975, p.58). Lindesmith, Strauss, and Denzin (1975, p.7) further elaborate that,

Some Interactionists...contend that human activity is inherently emergent and indeterminate, hence not entirely open to fixed quantitative statistical modes of inquiry.

The qualitative nature of data collection will serve as an extension of the quantitative aspect of this study. More importantly, the data will provide further insights that are unattainable by using a questionnaire alone.

### QUALITATIVE METHODOLOGY

Qualitative methodology applies a phenomenological stance that advocates a concern with, "understanding human behaviour from the actor's own frame of reference" (Cook and Reichardt, 1979, p.10). It is the ability of the researcher to get close to, and see the world from the perspective of his/her subjects, that makes qualitative methodology more personal. The qualitative paradigm takes a humanistic approach to the understanding of social reality, and as a result, is more concerned with understanding the situation from the perspective of the participant in the situation. For example, in qualitative research,

individuals are conceptualized as active agents in constructing and making sense of the realities they encounter rather than responding in a robot like fashion according to role expectations established by social structures (Cook and Reichardt, 1979, p.36).

Therefore, criminal lawyers themselves are the key to understanding, and for providing explanations for a social reality they encounter, and define. Utilizing a qualitative technique better enabled the researcher to elicit "interpretations" that best describe the criminal lawyer's conduct in court.

Although qualitative techniques are less structured than quantitative methodology, the former allows for the collection of large amounts of data from a limited number of respondents. Qualitative research also allows for "uncontrolled observation", whereby responses are subjective, and discussion allows for the discovery of "rich, real, and deep data" (Cook and Reichardt, 1979, p.10). The researcher enhances the value of the data collected by interpreting the data. The likelihood of attaining a large enough sample to constitute a valid and

reliable research study, will be enhanced by employing a quantitative technique of data collection as well.

### INTERVIEW SCHEDULE

The researcher, in part, employed the following qualitative technique: the semi-structured interview schedule.

This method of data collection elicited information and opinions from respondents by allowing them to respond to open-ended questions. As a result, considerable emphasis was placed upon the skill (eg. manner, order, and wording of questions) and "varying degrees of control...exercised by and over the interviewer" (Stacey, 1969, p.75). This required the researcher to have a clearer understanding of the subject matter, allowing her to,

probe deeply, to uncover new clues, to open up new dimensions of a problem and to secure vivid, accurate accounts that are based on personal experience (Bryman, 1984, p.78).

The primary objective of the interviews was to elicit information regarding the events, actions, and interactions of these individuals within the legal profession. By giving each respondent an opportunity to provide his/her own interpretation, a better understanding of the respondent's point of view, that is, an "insider's perspective" was obtained. Once a rapport had been established, the respondents became more willing to contribute more revealing information. As compared to the questionnaire, herein laid the key to finding significant and undiscovered realities of criminal defence work. More realistic, and personalized account of the effects of the legal system, as well as, their positive or negative associations with criminal lawyers, were obtained. The interviews were transcribed so as to address existing commonalities or dissimilarities in the data. Of course, the identity of all respondents will remain anonymous, and absolute confidentiality was guaranteed.

### QUANTITATIVE METHODOLOGY

Quantitative methodology employs a standardized method of data

collection that is more structured. Emphasis is placed on the collection of reliable data that is replicable. Thus, as Bryman (1984,p.77) notes, there exists a preoccupation with, "operational definitions, causality, and the like". A major weakness of quantitative methodology is its preoccupation with, "seeking the facts or causes of social phenomena with little regard for the subjective states of individuals" (Cook and Reichardt, 1979, p.10). Thus, one might argue that the researcher is unable to derive full meaning and understanding from their respondents, due to the lack of contact and personal interaction.

#### OPEN-ENDED QUESTIONNAIRE

A questionnaire served as the quantitative research tool in this study. It served to facilitate data collection should a large percentage of respondents refuse to be interviewed. An additional concern centered upon whether or not prominent criminal lawyers would be receptive to laborious, and time consuming interviews. The respondents were much less inconvenienced by questionnaires that took considerably less time to complete. Structured questions also allowed the researcher to attain clear-cut responses, that were easily comparable, and replicable. Questions that were pre-established with limited, specified response options were also readily comparable. Statistical procedures (i.e. S.P.S.S.x (1986)) allowed the researcher to analyze the results, and reach conclusions immediately. An obvious limitation of utilizing this research tool was that the structured questionnaire may have failed to ask valid questions, and presumed that categories and responses provided were adequate. Employing an open-ended questionnaire can assist in curtailing this obvious limitation. Pretesting the questionnaire and interview schedule helped avoid the likelihood of asking irrelevant, or biased questions, and greatly enhanced the relevancy of the data. The interviews also compensated for this limitation by enabling the researcher to probe into unexplored issues, or areas of concern.

While advocates of either qualitative or quantitative methodology argue that their preferred methods are best suited for evaluation, the researcher's stance

is one that advocates the complementarity of both qualitative and quantitative methodology. By utilizing both specified research techniques, each built upon the other, and provided insight that neither one alone could provide. Finally, by accounting for the inevitable biases of each technique, their interrelation may have resulted in a more comprehensive analysis of the social construction of a 'good' criminal lawyer.

## **QUANTITATIVE AND QUALITATIVE RESULTS AND ANALYSIS: EXAMINATION of the VARIABLES**

### **QUESTIONNAIRE RESPONDENTS: SAMPLE QUALIFIED OR NOT**

Having obtained a list of criminal legal aid lawyers from Legal Assistance of Windsor, the prospective sample of sixty-one lawyers was subsequently reduced to fifty-one potential respondents. Ten lawyers failed to qualify for the study for various reasons. Five of the ten returned the questionnaire expressing with regret that they did not "qualify" for the study. Four of these five noted that they had minimal or no experience in the area of criminal law. The remaining lawyer had eliminated criminal defence work from his practice altogether. A sole criminal defence counsel was no longer in practice.

The geographical location of four law offices outside of Windsor was cause to eliminate these potential questionnaire respondents. Since the sample was limited to criminal lawyers whose offices were centrally located in the Windsor area, Leamington, Amherstburg, and Kingsville offices were excluded.

The inaccuracy of the list of criminal lawyers who accept legal aid certificates suggests a need for lawyers to keep informed of their proposed availability of services. Clients who are inconvenienced by an inaccurate criminal legal aid list may lose faith in the system. This reflects badly upon the legal system which may be perceived as irresponsible and incompetent. This also raises questions of whether the accuracy of the list of available criminal lawyers accepting legal aid certificates falls upon local criminal lawyers or Legal Assistance of Windsor.

### **THE QUESTIONNAIRE AND INTERVIEW SUBJECTS**

The quantitative results of this study represent the voices of thirty-seven percent of criminal defence counsels who provide a service to legal aid clients in Windsor. Over half of the questionnaire respondents (10 of the 19) agreed to an interview. Thus, the qualitative results represent the voices of twenty percent of practising criminal counsel who accept Windsor-based legal aid certificates.



Of the qualified sample of thirty-nine men and sixteen women, a thirty percent (n=12) questionnaire response rate for the male respondents and a fifty percent (n=6) response rate for the women was obtained. A sole respondent chose to remain anonymous as to gender. Eight of the twelve (66%) male questionnaire respondents, and two of the six (33%) female respondents agreed to personal interviews.

### SOCIO-DEMOGRAPHIC CHARACTERISTICS

#### **AGE**

The majority of the respondents were between the ages of thirty and forty (10 of the 19 or 52% of the study), with an equally high percentage of lawyers between the ages of forty to fifty (42%). Only one of the respondents (a female) was under the age of thirty, which suggests that the sample reflects the maturity and wisdom of the marginally experienced criminal counsel.

Given the length of time and commitment it requires to complete one's legal studies, it is conceivable that upon the completion of Bar Admission courses, most persons would be licensed to practice law by at least twenty-seven years of age. Law school admission requirements only stipulate the completion of at least two years of undergraduate work. Thus, a practising criminal lawyer could conceivably be as young as twenty five. The qualitative results will expand on the views of younger counsel, as opposed to older, and more experienced counsel on the importance and the ease with which they maintain ethical practices.

#### **SEX**

This sample, which has a two to one ratio reflective of males, demonstrates the propensity for the legal profession to be male dominated. Of the total number of respondents (n=19), the males encompassed sixty-three percent (n=12) of the quantitative sample, as compared to a thirty-one percent (n=6) female response rate. A single lawyer did not identify him/herself as either female or male, perhaps to ensure absolute anonymity. The mode (the most frequent number of

respondents) was a male between the ages of forty-one to fifty.

Comparisons will later be drawn between the relatively younger female sample (sixty-seven percent of which are between the ages of thirty and forty) and male sample (fifty-nine percent of which are between the ages of forty-one to fifty) in relation to their ethical views. For instance, would age as compared to years in practice be more determinative of a competent lawyer.

#### **YEARS PRACTISING LAW (YRSPRLAW)**

Upon examination of the number of years the sample had been practising law, forty-two percent (8 of 19) had been in practice between two to five years, while thirty-seven percent (7 of 19) had been practising for a significantly longer period of eleven to twenty years. There is a single lawyer who has been practising law for less than two years, two who have six to ten years of experience, and finally, one lawyer who has litigated for over twenty-one years.

#### **YEARS PRACTISING CRIMINAL LAW (YRSCRIM)**

Of particular importance to this study is the examination of the variable - years practising criminal law. This study will place greater emphasis on the correlation between lawyers who have marginal or moderate experience with criminal defence work (as defined by their years in criminal practice) as compared to those lawyers who have significantly greater experience.

This sample is well represented by more experienced, older male counsel who have at least eleven to twenty years of experience, and younger less experienced lawyers with two to five years of experience. This study will later reveal that the general consensus among the legal profession is that a criminal lawyer is not truly a lawyer until he/she has been in practice for at least five years. As such, the study will focus on the differences of opinions as to the necessary attributes of a 'good' criminal lawyer based on this distinction. There are ten counsels who have been in criminal practice for at least five years or less as compared to nine lawyers who have been in practice for at least six years or

more. This correlation may not truly reflect the distinctive views of lawyers regarding ethical practices, given that less experienced counsel may likely be more in tune with existing ethical constraints. For instance, it has been suggested that those newly exposed to criminal defence work may be **more concerned** about ethics, and the ramifications or consequences of not strictly abiding by the Rules of Professional Conduct

Table 1:

### SEX BY YEARS PRACTISING CRIMINAL LAW

ROW PCT. COL PCT. TOT PCT.	LESS THAN 2	2-5	6-10	11-20	21-30	ROW TOTAL
No Answer		5.3				1 5.3
Male	10.5	10.5	5.3	31.6	5.3	12 63.2
Female	10.5	15.8		5.3		6 31.6
Total	4 21.1	6 31.6	1 5.3	7 36.8	1 5.3	19 100.0

In exploring whether the number of years in practice enhances or desensitizes a criminal lawyers' ability to employ ethical practices, one lawyer noted that the repetitive nature of being faced with similar ethical dilemmas over the past twenty years has enhanced his ability to avoid the pitfalls and traps of employing unethical practices. Thus, more experienced counsel may have an advantage over less experienced counsel.

Where experience helps is that the inexperienced lawyer, while intending to be completely ethical, are unaware of the possible pitfalls simply because [he/she hasn't] been there before. Older and more experienced doesn't necessarily mean more or less ethical...experience enables a lawyer to deal with ethical dilemmas easier.

**NUMBER OF LAWYERS IN FIRM (NMBRLAWY)**

Contrary to the researcher's assumption that most lawyers frequent large firms, comprised of numerous lawyers, and highly respected partners, criminal lawyers are generally not associated with firms *per se*. Nearly half of the criminal defence counsels were sole practitioners (forty-seven percent or 9 of 19 lawyers). Twenty-one percent of the lawyers were associated with firms comprised of two to four members, with a similar percentage for firms comprised of five to nine lawyers. Large firms comprising of ten to twenty-five lawyers appeared to represent a minority view (10%) for the study. Thus, two-thirds of the questionnaire respondents were either sole practitioners or employed by and associated with smaller firms of fewer than four criminal lawyers.

It was revealed by one lawyer that criminal defence work is conducive to a sole proprietorship for many reasons which include aesthetic, financial, and time considerations. Criminal clientele oftentimes do not "mix" very well with other clientele, nor do the areas of law always complement each other. Business-oriented law practices often view criminal law departments as "less monetarily productive", and criminal lawyers as less business-like. The hours of practice are less favourable in that, by necessity, criminal lawyers are required to prepare for court, interview witnesses, etc. after spending their daylight hours in court.

Sole practitioners are disadvantaged, according to one lawyer, in that they may unknowingly produce substandard work, advise clients wrongly and inappropriately. Through arrangements such as sharing office space and secretarial staff, the "appearance factor" of a large firm enhances the image of the criminal defence counsel. Clients are sometimes given the impression that their lawyer is associated with a large firm, when in actuality these lawyers are independent-- making and spending their own money. It is appealing to clients who feel that they are well-represented by a lawyer who keeps company with a number of prominent criminal litigators.

**PARTNERSHIP STATUS (PARTNER)**

Attaining partnership status does not appear to be a major concern for most practising criminal lawyers. Nearly half of the lawyers were sole practitioners, and seventy percent (n=13) of the sample were not partners. Unlike other fields of law, a criminal practice is more conducive to giving the lawyer greater freedom and independence from the constraints of a large firm setting. Of the six lawyers who attained partnership status, or otherwise formed a partnership with other colleagues, a greater percentage of men (five men to one woman) were able to grab hold of the golden ring of partnership status. This finding is perhaps more significant when consideration is given to the male domination that predominates the 'experienced' group of criminal counsel.

When consideration is given to acquiring new partners, firms bear in mind a lawyer's knowledge and expertise, and how these might contribute to the firm's reputation as legal professionals.

**EXTENT PRACTICE IS DEVOTED TO CRIMINAL LITIGATION (PERCNTCR)**

**More criminal lawyers than not devoted less time and effort litigating criminal cases.** Almost half (47%) of the lawyers noted that less than twenty-five percent of their practice was devoted to criminal law. A unique insight may be attained from the seven defence counsels (5 men and 2 women) who devote over seventy-five percent of their practice to criminal law. Qualitative results will later demonstrate the importance of having at least a minimal amount of knowledge, and expertise in the area of criminal law.

Table 2:

**EXTENT TO WHICH LAWYERS' PRACTICE  
IS DEVOTED TO CRIMINAL LAW**

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUMULATIVE PERCENT
Over 75%	1	7	36.8	36.8	36.8
More Than Half	2	3	15.8	15.8	52.6
Under 25%	4	9	47.4	47.4	100
Total		19	100	100	

Particular attention will later be placed on the importance of devoting one's time or a significant amount of one's practice to the area of criminal law. This is important in the determination of:

1. Whether or not it is crucial to specialize in the respective field (that is, one is better skilled, and have acquired the level of competency required).
2. The lawyer's and/or firm's area of expertise.
3. The driving motivation and interest of an individual.
4. To what extent some knowledge of criminal law complements other areas of law.

#### **SPECIALIZATION (SPECIALZ)**

The lawyers who responded to the questionnaire generally did not exclusively specialize in the area of criminal law. Forty-two percent (8 of 19) of the sample practiced criminal law exclusively. Other areas of law which tended to complement a legal practice included: Family law (20%), Real Estate law (10%), Civil/Corporate/Commercial law (15%), and Immigration law (5%).

Lawyers who specialized in the field of criminal law adamantly confirmed the importance of specialization. Generally, a practice in criminal litigation is

conducive to a specialization in criminal law. The necessity of specialization was emphasized by one lawyer as a prerequisite for criminal litigation **proficiency**: competency, preparedness, and knowledge of the law. A crucial distinction was made when it was noted that a specialization (i.e. devoting more or less time to criminal clients) generally does not reflect upon a lawyer's employment of unethical practices.

#### **SPECIALIZATION IN CRIMINAL LAW (CRIMSPEC)**

There is a greater tendency for criminal lawyers to specialize. Those who specialized generally expressed that legal proficiency with respect to substantive and procedural law may be enhanced by a specialization in criminal law.

Two-thirds of the questionnaire respondents did not limit or confine themselves to any specific area of expertise within the specialty of criminal law, but these were noted by the remaining respondents to include: white collar crime, impaired driving offences, young offenders, and highway traffic offences. In this regard, criminal law appears to be conducive to a general practice. Aside from an area of criminal law specialization, three lawyers also noted that their expertise lay in trial work.

#### **WHY PRACTICE CRIMINAL LAW (WHYCRIM)**

**Interest** in criminal law was overwhelmingly favoured as a motivating factor for entering into, and continuing in the field of criminal law. This response comprised a surprising fifty-two percent (n=10) of the sample. It appears as if maintaining an interest in the field is a prerequisite for maintaining one's sanity on the job, and dealing with the demands of criminal clientele.

Contrary to public perception, and the researcher's own biased opinion as to why lawyers are motivated to practice criminal law, **only a single lawyer admitted to being influenced by monetary considerations**. More emphasis was placed on the **'quality' of the work experience**. That is, some lawyers enjoyed courtroom work, and the concurrent pressures and exhilaration that comes with

having to think on one's feet. The spectrum of individuals (eg. clients, police, judges, lawyers, etc.) whom one interacts with on a daily basis was considered to be very stimulating personally and professionally.

A general legal practice also seems to dictate having some knowledge of criminal law, and having acquired a minimal amount of experience as a defence counsel.

#### **MAJOR FIELD OF STUDY PRIOR TO ENTERING LAW SCHOOL (MAJOR)**

Prior to gaining acceptance into law school, seventeen of the nineteen lawyers received an undergraduate degree in their chosen fields of study. A diverse range of academic interests, which may or may not have complemented their legal career, includes: english (3), political science (3), psychology (3), history (2), philosophy (1), Latin (1), geography (1), and french (1). A sole counsel had attained a Masters degree.

#### **NUMBER OF ATTEMPTS FOR LAW SCHOOL ADMISSION (ATTEMPTS)**

When considering the number of attempts for a successful admittance to their law school of choice, or rather their law school as chosen, seventy percent of the lawyers gained admission after their first attempt. A second attempt, but no more, was required by the remaining persons.

By comparing the number of years in practice by the number of attempts for admittance into law school, the quantitative results revealed that less experienced counsel (2-5 years) were as successful as more experienced counsel (11-20 years). Since it is arguably harder, in more recently years, to gain admission into Canadian law schools by virtue of the quality and number of applicants, this finding may account for younger counsels' abilities as competent legal counsels when compared to more experienced counsels.



#### UNIVERSITY OF GRADUATION (LAWSCHOOL)

It is interesting to note that a large majority (n=15) of the sample were criminal lawyers who graduated from the Faculty of Law at the University of Windsor. This finding first suggests that local firms tend to recruit local students who wish to remain in the Windsor area. Secondly, lawyers must take advantage of pre-established community ties which are crucial for building up a clientele base and name in this community. Of the few who graduated elsewhere (i.e. Western, Osgoode Hall, and Calgary), those persons either began practice in, or relocated to the Windsor area.

When considering the **quality of education** that law schools provide for their students, the responses were favourable overall. Knowing that a law school's reputation often reflects a student's potential, a Windsor graduate was quick to defend the Faculty of Law by saying,

Windsor has a reputation as a 'social but last choice law school' ... (that is) that it is not very heavy on brains. But, there are Windsor graduates who have ranked highest among other students at the bar admission courses.

Specific emphasis was also placed upon the usefulness of criminal law courses offered, and how it contributed to their preparedness for practice. Fifty-two percent of the sample considered their courses useful. Praises were given to professors who were closely associated with the criminal justice system through employment (i.e. judges and lawyers in practice).

A third of the sample found that the criminal law courses offered were unsatisfactory or not useful, suggesting that law school fails to adequately prepare law students for the realities of criminal defence work. On the other hand, some consideration should perhaps be given to the true role of legal educators, and whether their responsibilities should extend to or encompass the realities of legal practice. The inapplicability of course work to the realities of practice was noted by one lawyer as a major disappointment. The implied meaning being that while the law is always changing, "the practice of law is a learn while you earn proposition".

**GRADUATE DEGREES IN LAW AND SPECIALIZATION (GRADEGRE AND GRADSPEC)**

Quantitative findings suggest that practising lawyers rarely obtain graduate degrees in the field of law. Only a single lawyer had obtained an LL.M., specializing in labour law. Expertise-based specializations were also uncommon.

Two local prominent lawyers classified themselves as certified specialists in the area of criminal law. This designation obligates a lawyer to demonstrate some "exceptional ability" in the field (eg. published articles, court of appeal cases, murder cases, etc.) and attempts to "identify to the public who truly is competent". A greater competency may be evidenced by these lawyers.

## NECESSARY ATTRIBUTES OF A 'GOOD' CRIMINAL LAWYER

### MAINTAINS ETHICAL STANDARDS (ETHICAL)

The responses were greatly in favour of the importance of maintaining ethical standards as a necessary attribute of a "good" criminal lawyer. This category ranked **third** overall among all the available variables.

Sixty percent of the sample "strongly agreed", and the remaining respondents "agreed" that a lawyer must meet the specific needs of his/her client by utilizing and maintaining ethical standards. No notable distinctions could be drawn between the sexes, more or less experienced counsel, and lawyers who devote more or less time to criminal litigation.

That **criminal lawyers consider themselves to be the most ethical of all lawyers** was a significant finding. The scrutiny of the courtroom lights, and the open and public nature of defence work were consistently noted as institutional safeguards, although one lawyer considered this notion to be an insult to the profession.

The concept that criminal lawyers are more ethical because what criminal lawyers do is more public is an insult to the profession. You are either an ethical person or you are not.... I do not think this is the hallmark of ethics...where a lawyer is not under the scrutiny of the courtroom lights, maybe that is where I am likely to be unethical, for instance, in my billing practices. I think ethics goes through the full fabric of the whole criminal justice system.

Self preservation of one's dignity and professional status were important considerations as well.

Maintaining high ethical standards translated into different meanings, and included: not lying or misleading the court to the client's benefit, going back on one's word, not knowingly putting forward a false defence, and no longer acting in good conscience with respect to one's responsibility to the Law Society. Although the sample was in disagreement as to whether or not a fine line exists between what is ethical and unethical, a consensus was obtained as to what recourse should be taken when in doubt. In an attempt to "test the water", most

lawyers first consulted another lawyer in their respective area of law. If still uncertain, the Law Society of Upper Canada was then consulted.

**ABIDING BY THE RULES AS DICTATED BY THE LAW SOCIETY OF UPPER CANADA (LSUC)**

Besides maintaining ethical practices, greater importance has been placed upon the criminal lawyer **abiding by the Rules of Professional Conduct** as dictated by the Law Society of Upper Canada. Having distinguished from simply maintaining ethical practices, the lawyers have placed greater emphasis on abiding by the specific guidelines/rules as set out by the Law Society. Ranking **second** as a necessary attribute, seventy-four percent of the sample "strongly agreed", as compared to the remaining lawyers who "agreed".

**NEVER COMPROMISES PERSONAL MORAL STANDARDS (PERSONAL)**

How much of a factor should one's personal moral standards play a part in the construction of an ideal criminal lawyer? The findings revealed that a majority of the lawyers (sixty-three percent) strongly believed that personal, moral standards should never be compromised for a client, nor for ethics. While significant, remaining true to one's own moral convictions was held to be less important than abiding by the Rules of Professional Conduct, and more important than maintaining high ethical standards.

Some lawyers revealed a willingness to compromise their obligation to the Law Society in order that their personal moral convictions are not compromised.

**EMPLOYS UNETHICAL PRACTICES (UNETHICAL)**

Most criminal lawyers (n=15) looked disfavorably upon the attribute of employing unethical practices solely for a client's benefit. For example, one lawyer considered the practice of continually "crank out" guilty pleas to be unethical. Nearly eighty percent of the sample agreed that no lawyer could ever be "smart enough" to employ unethical practices, without eventually being discovered, reprimanded, punished, and/or disbarred.

**PRIORITY ON COMMITMENT (COMMITMT)**

The more experienced (i.e. 11-20 years in practice) male respondents placed greater emphasis on the variable commitment as a necessary attribute of a criminal lawyer. In general, having integrity, and not compromising one's personal, moral standards, were valued more, suggesting that the emphasis has been placed upon personal values/qualities.

**MAINTAINS ALLIANCES WITH ONE'S FIRM (FIRM)**

There was much disagreement as to the quality of maintaining an alliance with one's firm as a necessary attribute. Almost half of the respondents "agreed", as opposed to twenty-six percent of the sample who "disagreed". The disparity in opinions reflected the fact those who were not affiliated with a firm chose not to place importance on one's alliance with a firm. In fact, all five of the lawyers who "disagreed" were sole practitioners.

**INTERPRETS/MANIPULATES THE LAW (INTERPRT)**

The public perception of the criminal defence counsel's role is one of **interpreting** the law to best represent the clients needs on one extreme, and **manipulating** the law on the other. The questionnaire failed to make this distinction in the formulation of the question. The respondents were generally in favour of the lawyer acquiring a skill generally reflective of a lawyer's purpose: interpretation of the law.

Qualitative results revealed that an important distinction must be drawn between the positive and negative connotations inferred by the word "manipulate". Lawyers placing lesser importance on this attribute inferred a negative connotation. This finding suggests that a "good" criminal lawyer would never resort to tactics which could put the legal system into disrepute.

**BEING A GOOD PERSON (GOODPRSN)**

Being a good person was not generally perceived as an important quality

for a criminal defence counsel. When taking into consideration those who either "strongly disagreed" or "disagreed" as to the importance of this quality, being a good person ranked the fifth lowest. Two thirds (n=4) of the female respondents (who agreed), as compared to only one-third of the male respondents (n=4), placed greater importance on being a good person.

Table 3:

### SEX BY BEING A GOOD PERSON

Row Col. Tot. Pct.	NO ANSWER	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY AGREE	TOTAL
No Answer					100	1 100.0
Male	8.3	8.3	25.0	50.0	8.3	12 100.0
Female			66.7	16.7	16.7	6 100.0
Total						19 100.0

Seven of the ten lawyers who were in practice for less than five years looked more favourably (strongly agreed and agreed) towards this attribute when compared to seven of the eight lawyers, who had over eleven years of experience, who disagreed and strongly disagreed.

#### GUARDS AGAINST AN IMPOSITION OF VALUES (OBJECTIVE)

Much importance was placed on the lawyer remaining objective, and not imposing his/her values on the client. With the exception of a single lawyer, most of the lawyers considered the lawyer's obligation as purely advisory, in a legal sense. Thus, **giving "legal counsel" does not necessarily imply giving "counsel"**. Meaning that, criminal lawyers stressed the importance of not giving advice based on their personal values, but consciously choose to counsel clients based on their professional expertise and experience as criminal lawyers.

### PROFESSIONAL DEMEANOUR (PROFAL)

Ninety percent of the sample either "strongly agreed" or "agreed" that exhibiting a professional demeanour was important for a criminal lawyer. The female respondents placed slightly greater emphasis on this characteristic (two-thirds as compared to one-third).

The qualitative results allowed for further elaboration as to the necessity of being well spoken, charismatic, well dressed, and/or presentable in court. For one lawyer, court demeanour reflects a lawyer's respect for the criminal justice system inclusive of its participants (i.e. judges, jury clerks, lawyers, and clients), and the adversarial process. "[A lawyer's] demeanour is fundamental to being not only a good criminal counsel but also being perceived as a good counsel". Another lawyer expressed that a lawyer's ability to persuade the judge/jury is evidenced through his/her personal style.

If a lawyer is cool under pressure, (his/her) English is good, clearly pronounced, not slow or fast, very polite.... A trial judge is more likely to listen to you because [a lawyer] has nice style, demeanour, presentation, not because of theatrics in court.

Table 4

### SEX BY PROFESSIONAL DEMEANOUR

ROW PCT. COL PCT. TOT. PCT.	STRONGLY AGREE	AGREE	DISAGREE	ROW TOTAL
No Answer	100.0			1 100.0
Male	33.3	50.0	16.7	12 100.0
Female	66.7	33.3		6 100.0
Total				19 100.0

COMPETENCY REFLECTIVE OF THE NUMBER OF YEARS IN PRACTICE (COMPETNT)

There was much disparity among the sample as to the importance of competency, not as a necessary attribute of a 'good' criminal lawyer, but in relation to the meaning that competency was given in the questionnaire. At issue was whether or not the number of years in practice was necessarily reflective of one's competency. The qualitative results will later demonstrate that the respondents believe that competency is not necessarily reflective of the number of years in practice, as the questionnaire suggests. This reasoning gives cause to the disparity among the genders. It was alarming to find that both genders held such opposing views. Sixty-six percent of the men were in favour (strongly agree and agree), while an equal percentage of women were not in favour (disagree and strongly disagree). It may be important to note that the distinction may also be attributed to the fact the five of the six female criminal lawyers had five years or less of criminal litigation experience, as compared to the eight of the twelve men who had six years or more.

Table 5:

**Sex  
by  
Competency: Representative of Years in Practice**

ROW COL. TOT.	NO ANSWER	MALE	FEMALE	ROW TOT.
No Answer		100		2 100.0
Strongly Agree		85.7	14.3	7 100.0
Agree		66.7	33.3	3 100.0
Disagree	16.7	33.3	50.0	6 100.0
Strongly Disagree			100.0	1 100.0
Col. Total				19 100.0



### MAINTAINING ABOVE AVERAGE GRADES IN LAW SCHOOL (GRADES)

Surprisingly, maintaining above average grades in law school (and the emphasis must be placed on attaining "above average" grades) was found to be the **most undesirable quality** of a 'good' criminal defence counsel (see Appendix C). Thirty-two percent of the sample strongly disagreed and sixty-eight percent disagreed that grades attained in law school were reflective of the lawyer's competency (see Appendix F). It is noteworthy to mention that there is some evidence that some correlation between poor grades and disciplinary action resulting in disbarment exists (Reasons and Chappell, 1985). Unfortunately, the questionnaire and interview questions failed to explore individual respondent's history regarding disciplinary action being taken by the Law Society of Upper Canada. It was suggested by a few lawyers that grades do not always reflect one's capabilities as a lawyer. For instance, one lawyer disclosed the following,

I got a "D" in evidence, and yet I'm known for my expertise in trial work. What is crucial is the **experience** I have attained as a criminal lawyer.

Grades alone do not account for a person's potential, particularly when consideration must also be given to unteachable skills that a lawyer is required to master.

Marks are a degree of academic ability but that doesn't mean that you can get along with and understand people.... Preparing legal arguments, dealing with witnesses, cross-examination, examination. Keeping evidence in and out is also important.

Other variables were found to be even more undesirable if the rankings assigned to the "strongly disagree" category (see Appendix G) were only taken into consideration. For instance, the following attributes were found to be the **most undesirable** qualities of a "good" criminal lawyer:

1. UNETHICAL (79%)- the lawyer is smart enough to get away with using unethical practises.
2. CLIENT'S INTERESTS SUPERCEDE L.S.U.C. OBLIGATION (68%)- the lawyer places a higher priority on pursuing the client's interests at the expense of jeopardizing his/her obligation to the law society.

3. CLIENT'S WISHES ARE PRIMARY CONSIDERATION (68%)- the lawyer does **whatever** the client wishes.
4. GRADES (32%)- the lawyer maintains **above average** grades in law school.

#### **KEEPS UP TO DATE WITH THE LAW (UPTODATE)**

Keeping up to date with the law, and being informed of precedent setting cases and legal issues was undoubtedly found to be a very important element of maintaining a successful practice. When considering the total number of favourable responses, which either strongly agreed (53%) or agreed (47%), this attribute ranked the **fourth** highest.

This finding suggests that one's knowledge of the law can never be left to stagnate. The Rules of Professional Conduct (1987, p.2) stipulate that,

The Lawyer should serve the client in a conscientious, diligent and efficient manner, and should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.... Competence in a particular matter involves more than an understanding of the relevant legal principles...[but involves maintaining competence through training and education].

#### **MAINTAINS ONE'S SENSE OF INTEGRITY: HONEST AND TRUSTWORTHY (INTEGRITY)**

Being honest and trustworthy do not automatically come to mind when describing a criminal defence counsel. On the contrary, the qualitative results revealed that personal integrity is a quality that a majority of the lawyers regarded very highly, particularly in their dealings with others within the criminal justice system.

Ethics is largely a matter of character. A person's character usually determines if a person is likely to be honest, a person of integrity, fair, straight forward with the courts.

#### **CATERS TO THOSE LEAST ABLE TO AFFORD LEGAL REPRESENTATION (CATERS)**

There was some disparity as to whether or not a lawyer is obliged to provide service to clients, who are least able to afford good legal representation,

with assistance. The general consensus leaned slightly more in favour (58% or n=11) of viewing this attribute favourably, although the female respondents (n=4 of 6 or sixty-six percent of the female sample) generally held the opposite view.

#### LEGAL FEES REFLECTIVE OF QUALITY OF SERVICE (FEES)

Criminal lawyers are professionals who must run a business, account for their expenses, and make an honest income. Therefore, in determining on what basis a lawyer should be compensated, a number of variables were taken into consideration. The sample placed greater emphasis on the **lawyer's fees reflecting the quality and expertise of his/her work**, as compared to the alternative fee variable of **catering to those who are least able to afford adequate legal counsel**. While the sample ranked both categories favourably, seven lawyers "disagreed" as to the latter's significance as compared to seven lawyers who "strongly agreed" as to the former's significance.

Table 6:

#### PERCENT OF PRACTICE THAT IS DEVOTED TO CRIMINAL LAW BY FEES REFLECTING QUALITY OF WORK

Row COL TOT.	STRONGLY AGREE	AGREE	STRONGLY DISAGREE	ROW TOTAL
Less Than 2	25.0	75.0	57.1	4 100.0
2-5		83.3	16.7	6 100.0
6-10		100.0		1 100.0
11-20	71.4	28.6		7 100.0
21-30			100	1 100.0
Col. Total				19 100.0

Fifty eight percent of the sample agreed that "catering" to clients with legal aid certificates, who are least able to afford legal counsel, was important. One lawyer stressed the importance of doing a proper job regardless of the fee.

You have an obligation to take the case, to make sure you do the proper work, to do the best you can for the client. Especially once you have agreed to take the case, money is no longer an issue.

#### **REPUTATION ALONE SPEAKS FOR ITSELF (REP)**

The male and female respondents were again split as to the importance that should be placed on a person's reputation. Two thirds of the female respondents strongly disagreed (17%) or disagreed (50%), as compared to half of the male lawyers who either agreed (42%) or strongly agreed (8%) that one's reputation reflected one's expertise as a criminal lawyer.

In failing in the questionnaire to distinguish between a reputation that may be attained as a result of one's expertise as compared to a reputation that is generally attained, the qualitative sample noted the following. Regardless of one's expertise, a male lawyer had found that one's reputation generally may greatly enhance or diminish Crown counsel's willingness to plea bargain. Associations and communications with lawyer cliques may also be affected. Another lawyer also suggested that those newly exposed to criminal courts may be disadvantaged, in that judges discriminate among lawyers, favouring those who have "proved themselves" as competent, prepared, reliable, and thus reputable. Judges show an amazing ability to be influenced. By the mere fact that a lawyer has a good reputation before the court... [he/she] can sell a suggestive sentence to the judge better than a younger lawyer. Some younger lawyers, with amazing vigour, can influence judges, finally persuade and convince them, which shows who is going to be a great lawyer.

Many lawyers perceived the public to be influenced by a lawyer's reputation. For example, full page ads in the yellow pages were said to often times attract first-time accused persons. Lawyers who had been associated with highly publicized cases in a favourable manner also attested to their effect,

namely, a resulting marked improvement in criminal clientele.

A correlation between the number of years in practice and the importance of one's reputation found no noticeable distinctions between respondents.

Table 7:

### SEX BY REPUTATION

Row Col. Tot. Pct.	NO ANSWER	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY AGREE	TOTAL
No Answer					100	1 100.0
Male	8.3	8.3	41.7	33.3	8.3	12 100.0
Female		16.7	16.7	50.0	16.7	6 100.0
Total						19 100.0

#### HIGHER PRIORITY PLACED ON CLIENT'S INTERESTS: ABOVE OBLIGATIONS TO L.S.U.C. (CLIENT)

Few criminal lawyers are willing to jeopardize their obligation to the Law Society of Upper Canada for the sake of a criminal client. Ranking **third lowest** (of the available attributes), ninety percent of the sample found this attribute to be most undesirable of a criminal lawyer.

#### REPRESENTS CLIENT BASED UPON THE PRESUMPTION OF INNOCENCE (INNOCENT)

As a necessary attribute of a "good" criminal lawyer, the responses were overwhelmingly in favour of the importance of representing one's client based on the presumption of innocence. This category ranked **first** overall among all the available variables (see Appendix D).

Seventy-nine percent of the sample "strongly agreed", and the remaining respondents "agreed" that a lawyer must represent his/her client based on the premise that a client is presumed innocent, and entitled to fair legal counsel.

#### ACCOMPLISHES WHAT LAYPERSON CAN'T (LAYPERSN)

Persons seeking legal advice often rely on their lawyer's assistance on matters that as laypersons they are unable to accomplish. Ninety percent of the sample looked favourably upon this attribute, suggesting that individuals would be better served by having criminal lawyers represent them, given their status and knowledge of the law. Although criminal lawyers are often required to use their legal expertise and contacts to perform less challenging tasks (eg. striking deals with the Crown), any unnecessary pressures are removed from the client.

#### CARRIES OUT WHAT CLIENT WISHES (HEWISHES)

An overwhelming number of criminal lawyers strongly disagreed (n=13 or 70% of the sample) and disagreed (n=5) that criminal lawyers must automatically do whatever their client wishes. As a general category, this attribute was found to be the **second least desirable** attribute of a 'good' criminal lawyer.

Although it would seem that clients assert control by retaining the services of a lawyer, most of the criminal defence counsels interviewed held strongly to the belief that,

...if [a client] chooses not to follow my advice, they can get another lawyer but they won't get me to do whatever they want me to do if I think it to be wrong.

In a situation where the client's wishes contradict the lawyer's obligation to the Law Society, an important distinction must be made. Since criminal lawyers in the sample indicated that there were limits to doing whatever the client wishes, it was further noted that they must often act in the client's best interest, **not only** in the interest of the client. The lawyer has an obligation to **do more than** just advise a client of his/her legal options. Often, a client is told precisely what he/she must legally do. For instance, criminal lawyers may justify telling a client which of his/her available options he/she should choose on the basis that a lawyer has an ethical obligation to spend his/her client's money "reasonably and fairly".

### **PASSION TOWARDS CRIMINAL DEFENCE WORK (THRILL)**

When considering the importance of lawyers actually enjoying their work, and their chosen area of expertise, the findings revealed that it is important to derive some personal satisfaction from the everyday grind of criminal defence work. Less experienced lawyers were perhaps more realistic as to the expectations of a lawyer, and how their personal satisfaction from trial work is derived from a tremendous amount of work and dedication to the profession. Four of the six criminal lawyers who "disagreed" that a lawyer must be "thrilled" by criminal defence work were practising law for less than five years.

The qualitative results revealed that criminal lawyers must at least be fascinated by criminal defence work as opposed to being enticed by the thrill of criminal defence work. As one lawyer noted,

Thrills draw a lot of people to criminal law...but the thrill aspect dissipates as one gains exposure to the criminal justice system and the law. When you do something for a living, after a while, it becomes your job.... You become better at it and thus the anxiety one feels in court decreases. The Provincial Court is almost a production line for minor cases...that is, seventy-five percent of criminal work involves plea bargaining, dealing with people in custody, sentencing issues, pleading not guilty or guilty, and dealing with the Crown.

### **TAKES FULL RESPONSIBILITY FOR ALL LEGAL DECISIONS (FULLRESP)**

Criminal defence counsels generally feel that it is their duty to clients and the legal profession that obligates them to take full responsibility for legal decisions. Three lawyers took exception with "the plea", suggesting that a lawyer should play no part in the clients decision to enter a guilty or not guilty plea. Some interview candidates took exception, noting that it is a lawyer's sole responsibility to explain, clarify, and advise a client of his/her legal status. Experienced counsel (i.e. those with eleven to twenty years of experience) were more likely to assume a greater responsibility in this role.

### **KNOWLEDGE AND EXPERTISE IN CRIMINAL LAW IS PARAMOUNT (KNOWLAW)**

Being knowledgeable about criminal law (i.e. substantive and procedural law) and demonstrating some expertise in criminal litigation was found to be imperative for a criminal defence counsel. As a necessary attribute, one's knowledge of the law was found to be the most significant, and highest ranking variable (n=13 or sixty eight percent of the sample) when isolating the "agree" category (see Appendix E). It is interesting to note that only two of the nineteen respondents ranked "knowledge of the law" as "very important". Lawyers who devoted considerably less time (under 25%) to criminal litigation still stressed the importance of remaining knowledgeable in one's chosen field of expertise. Eight of these nine lawyers "agreed" that one's knowledge of criminal law and procedure was paramount.

The interview candidates were consistent in their belief that one's knowledge of the law must override, or at the very least complement, other qualities (eg. professional demeanour, research skills, etc.). First, it is important that a lawyer be able to recognize, with expedience, relevant legal issues which may assist in his/her questioning of the client. Secondly, providing the client with a general understanding of his/her legal standing helps reassure the client that the lawyer is competent and qualified.

### COMMITMENT

How a criminal defence counsel views his/her commitment to the accused provides insight into the lawyer's self-perceived priorities in his/her dealings with clients. Does empathy for one's client even come into the picture when contemplating one's utility as a "legal" counsel? More importantly, does a lawyer's commitment to the accused centre solely on addressing his/her legal needs, or might it extend to recognizing the client's personal frustration and perhaps humiliation?

The quantitative findings revealed that one's sense of commitment to the accused is best illustrated by the lawyer demonstrating an obvious and real **concern about the client, and his/her problem**. This variable represented the highest percentage of favourable responses, particularly among more experienced counsel. Twenty-six percent of the sample ranked this quality as "very important", and sixty-



three percent as "important" (see Appendix J).

A prominent local criminal counsel expressed that concern for a client manifests itself as both a **real and superficial concern**, in that,

...a deep, real, caring [for] the accused makes you a better lawyer because you argue better, look stronger, and speak with conviction. It is also important that you **look** like you care.

As one lawyer noted, lawyers are obligated to serve their community as officers of the court, which further obligates them to never disclose or reveal their personal feelings about an accused.

You may not agree with the person's ethics, lifestyle, morality, don't like what they are doing, don't like them, but it's a lawyer's professional responsibility to do the job.

Other variables were found to be even more desirable if the rankings assigned to the "very important" category were only taken into consideration. For instance, the highest praises (57% of the sample) were given to criminal defence counsels who **explained or clarified matters** for the client, and openly discussed all facets of the case.

A lawyer's commitment to the client was also best exemplified by the lawyer actively **looking out for the client's best interest** (47% of the sample). Attaining greater financial status ranked the lowest (5% of the sample). In the alternative, over half of the respondents considered attaining greater financial status as very unimportant in determining one's commitment to the accused.

### **INTEGRITY**

A criminal lawyer's intuitiveness for preserving one's personal integrity as well as the integrity of the criminal justice must also be considered. The responses (n=14) were overwhelmingly in favour of the lawyer **being open and forthright with the client regarding the circumstances of the case** (see Appendix I). The general category of **maintaining ethical practices** received similar consideration. The number of years a lawyer was in practice did not minimize the importance placed upon either variable.

Few lawyers were willing to compromise their personal integrity, and **engage**

in illegal or unethical activities for the client's sake. While two respondents would not provide a response, ninety percent of the sample looked disfavorably (i.e. ranking the category "very unimportant") towards employing unethical practices. A lawyer who places greater emphasis on **winning a case, as opposed to the legalities of criminal defence work**, was also generally perceived by the sample as willing to compromise his/her personal integrity. The findings also revealed that less experienced lawyers were no more likely to advocate winning at all costs in order to boost their legal careers.

Aspiring to win cases is a driving force that motivates many criminal lawyers. But, in seeing that justice is served, lawyers recognize that they must never compromise their personal integrity, and risk disbarment for their failure to adhere to the Rules of Professional Conduct. Simply put,

Ethical binders would not exist [that is, a lawyer cannot knowingly mislead the court or employ unethical practices] if the Law Society of Upper Canada condoned winning at all costs.

### COMPETENCY

The questionnaire revealed some interesting findings regarding criminal defence counsels' views of a "competent" lawyer. Competency was best reflective of the lawyer's **knowledge of the law**. Being **knowledgeable, and well-versed in the law** was noted as essential by both genders. Seventy-nine percent of the sample ranked this category "very important" as compared to twenty-one percent who ranked the category "important" (see Appendix H).

Lawyers who **"specialize"** in the field of criminal law were felt to hold a slight advantage over lawyers who merely **handled many similar cases in the past**. Criminal defence counsels typically specialize. Viewed comparably as an "important" factor, eight as compared to six counsels ranked the former as "very important", and thus, indicative of greater competency. Six of those eight lawyers were criminal defence counsels with over eleven years of experience. Lawyers (n=6 of 7) who devoted over seventy-five percent of their practice to criminal litigation stressed

equally the importance of specializing as well as being knowledgeable about criminal law.

Table 8:

**PERCENT OF PRACTICE DEVOTED TO CRIMINAL LAW  
BY SPECIALIZES IN CRIMINAL LAW**

Row COL. TOT.	VERY IMPORTANT	IMPORTANT	UNIMPORTANT	VERY UNIMPORTANT	ROW. TOTAL
Over 75%	85.7	14.3			7 100.0
More Than Half		66.7		33.3	3 100.0
Under 25%	22.2	66.7	11.1		9 100.0
Total					19 100.0

Contrary to the researcher's original premise, the number of years in criminal practice was not found by an overwhelming number of interview candidates to be a significantly determining factor of a lawyer's competency. Although, one lawyer noted that,

younger lawyers have a greater tendency to question themselves in a courtroom. Although they have the ability and the answers, they lack the confidence.

Concerns as to whether or not the lawyer had considered every aspect of the case or available argument were reflected in one lawyer's self-determination of competency. There was great disparity in the sample with respect to competency being reflective of a criminal lawyer who **effectively interprets or manipulates the law for a client's benefit**. For instance, twenty-six percent of the sample ranked the category "very important" and "unimportant", thirty-two ranked the category "important", and sixteen percent ranked the category "very unimportant". The diversity of responses may be attributed to the wording of the category, in that some lawyers later revealed

that a negative connotation is often associated with the word "manipulates". Conversely, it was suggested by one lawyer that "fair and ethical manipulation" of the law is acceptable and necessary.

It is the duty of the lawyer to do everything possible within the parameters of the law for a client, and that includes substantive and procedural defences, and taking a stand even when there is a public feeling that the person is not entitled to that particular defence because it is not meritorious, not moral.... A lawyer has an obligation to manipulate the law, according to the rules of professional conduct, to the extent that one uses the law to the client's best advantage.

Thus, to take a different view of the facts or evidence, and draw inferences that bear favourably upon one's client is a defence counsel's job.

#### GENDER ISSUES IN RELATION TO COMPETENCY

The legal profession clearly exhibits signs of an old boys' network. The female criminal counsel of this study expressed a concern and agitation over the sexist notion that hovers over the courtrooms, namely that men are more suited than women to the hard-nosed area of criminal law. The experience of the female criminal counsel addressed in this study likens to the experience of lawyers recently called to the bar.

In Windsor, there are very few female criminal lawyers who have lasted.... [Women] are disillusioned.... Courts are so tough on women in criminal and family fields...Judges are less exposed to seeing females.... They get a feel for you as you gain experience and have demonstrated your preparedness and responsibility.

There were mixed reactions among the male criminal lawyers. The obvious response being that controlling for sex alone was not a fair indicator of a lawyer's competency. Years of experience, natural ability, knowledge of the law, etc. must also be taken into consideration. Secondly, the general sentiment among legal professionals is that, "experience and respect are earned, and lawyers must pay their dues".

### FAIR AND REASONABLE FEES

A slightly greater percentage (84%) of lawyers were in favour of legal fees reflecting the "quality of the work" as opposed to reducing "expected fees" for "affordable legal fees" (79%). The most consistent response (n=11 or 58% of the sample) noted that it was "important" that a "good" criminal defence counsel's fees reflect the **general trend** among all local criminal defence counsels (see Appendix K). This finding might suggest that the Law Society's guidelines regarding charging policies would supercede individualized billing rates. On the contrary, the questionnaire revealed that lawyers, particularly female lawyers, were more in favour of fees reflecting "quality of work", and thus **individual capabilities**.

Those interviewed placed greater emphasis on these complementary factors: trial work preparation and expertise, complexity of the case, research skills, time management skills, verbal skills, professional demeanour, and degree of importance to the client. Thus, for those who excel in criminal litigation, and who are much more expedient at court preparation, their fees would reflect their competency. Corresponding with this finding, the study revealed that lawyers who devoted over seventy-five percent of their practice to criminal law were more strongly in favour of fees reflecting the quality of their work.

Generally, both genders refuted the statement that criminal defence counsels have no obligation to consider whether or not the accused feels that his/her fees are **excessive**. In the interest of justice, many billable hours are disregarded, and fees are oftentimes only indicative of what a client can afford.

### EMPLOYMENT OF UNETHICAL PRACTICES WITHIN THE LEGAL PROFESSION (EMPLOYMT)

The general view was optimistic as to the employment of unethical practices within the legal profession. Only two lawyers considered the employment of unethical practices as "**prevalent**", as compared to one quarter of the sample who considered them "**uncommon**". More experienced, counsel (seventy-five percent of those who have practiced more than ten years) believed that the employment of unethical practices was more likely "occasional", as opposed to "uncommon" and

"prevalent". This view reflected the general consensus (n=12 or 63% of the sample) that there is "occasional" manipulation of court process.

Lawyers who overlook perjury on the stand by clients and witnesses, ambulance chasing (i.e. lawyers who solicit clients), and inadequate, frivolous and nonsensical defences were noted as unethical practices occasionally employed by criminal counsel.

Table 9:

**YEARS PRACTISING CRIMINAL LAW  
BY  
EMPLOYMENT OF UNETHICAL PRACTICES**

ROW COL. TOT. PCT.	PREVALENT	OCCASIONAL	UNCOMMON	ROW TOTAL
LESS THAN 2 ANSWER		75.0	25.0	4 100.0
2-5	16.7	33.3	50.0	6 100.0
6-10		100.0		1 100.0
11-20	14.3	85.7		7 100.0
21-30			100.0	1 100.0
TOTAL				19 100.0

**THE SERIOUSNESS WITH WHICH THE RULES OF PROFESSIONAL CONDUCT ARE  
TAKEN (SERIOUS)**

All but one of the criminal defence counsels placed extreme importance on abiding by the Rules of Professional Conduct. Over ninety-five percent of the respondents noted that the Rules of Professional Conduct was taken very seriously.

The Rules of Professional Conduct are **legally binding** on all lawyers who practice law within Ontario. The Law Society of Upper Canada is the governing body that disciplines, and has the authority to subsequently disbar lawyers for

breaching the Law Society Act and the Rules of Professional Conduct. Just as lawyers are paid to interpret the law for their clients, the guidelines governing lawyers are subject to interpretation.

Controversial issues and cases in which there was a "potential" for conflict were cited as reasons for making inquiries to the Law Society.

#### PRIMARY OBLIGATION AS LEGAL COUNSEL (OBLIGTN)

A lawyer must often prioritize his/her commitment to the legal profession in order to maintain some semblance of a personal life. The findings reveal that an overwhelming majority of lawyers (n=17) considered their **clients** to be their primary obligation. This was a surprising finding in view of the all the available listed categories (i.e. Canadian Bar Association, Law Society of Upper Canada, law firm, client, community, and oneself). Although this finding may be strongly suggesting that a lawyer is willing to compromise his/her obligation to the Law Society for a client, this was **not** found to be the case. Instead, the study revealed that the lawyer's obligation to the Law Society must coincide with, and never be jeopardized by, one's obligation to a client.

#### GENERAL OBLIGATION TO MEMBERS OF THE CRIMINAL JUSTICE SYSTEM

When asked to rank the importance with which lawyers place their obligation to those within the criminal justice system, the responses were again overwhelmingly in favour of the **accused**. Ninety percent of the sample ranked their obligation to the accused as "very important". Lower ranking "very important" categories included the jury (47%), judge (32%), Law Society (26%), Crown (11%), and employer (11%). A lawyer's obligation to either the jury or the judge (both decision makers of the client's fate) ranked equally important.

Criminal lawyers placed great importance on gaining the respect of judges and colleagues. Conversely, defence counsels generally felt no obligation to the Crown who bears the onus of proving the case. Some lawyers even expressed a professional contempt for Crown counsel.

## THEORETICAL ORIENTATION

### SYMBOLIC INTERACTIONISM

Symbolic interactionists, although aware of the influences of social rules, are primarily concerned with explaining individuals' particular decisions and actions (Wallace and Wolf, 1986, p.189). This chapter seeks to integrate the quantitative and qualitative findings of this study as they reflect upon the realities of local criminal defence counsels in their assessment and analysis of the necessary attributes of a 'good' criminal lawyer. The symbolic interactionist perspective is utilized in this study to address local criminal lawyers' personal realities and their perceived social influences within the criminal justice system.

### CONCEPT OF SELF

The quantitative and qualitative samples' concept of self were found to be strongly influenced by their formal lawyer/client relationships, and their sense of personal and professional obligation and commitment to the accused. In viewing their self as 'criminal defence counsels', the quantitative and qualitative sample clearly prioritized their intended purpose within the legal profession and among accused persons. A strong commitment to the presumption of innocence and the defendants' entitlement to fair legal representation was found by fifteen of the nineteen respondents to be very important. An overwhelming majority of criminal lawyers considered their clients to be their primary obligation, which reflects upon the criminal lawyers underlying nature and character. In addition, if giving consideration to other courtroom participants likely to threaten or defeat the criminal lawyers' self-concept, the criminal defence counsels' self-concept would appear to be fairly strong and stable.

The sample of criminal lawyers were found to have certain personal limits with respect to their professional responsibilities to persons accused and/or convicted of crimes. When asked, in the questionnaire, to consider whether a criminal lawyer



should place a higher priority on pursuing the client's interests over his/her obligation to the Law Society of Upper Canada, it was revealed that absolutely no lawyer felt compelled to compromise him/herself or jeopardize his/her career for any accused person.

Most of the criminal lawyers interviewed took exception to the commonly held belief that lawyers are willing to say anything to make a buck. In fact, many demonstrated a clear intention to never compromise their personal dignity and career in the hopes of winning at all costs, as the following comments illustrate.

One cannot be misled by one's desire to attain greater financial status, since one's ultimate responsibility must be to one's client. If the lawyer is a person who is driven by greed or money...in an effort to get to the almighty buck, you will do a great disservice to your client.

Criminal lawyers, in particular, do not have a great desire to win at all cost, realizing the realities of the legal profession. Lawyers have to play the game by the rules. Losses are not taken personally if the lawyer rationalizes the fact that they advanced every argument, and did everything legally and humanly possible for the client and not at the expense of their personal dignity.

The questionnaire results revealed that only a slightly greater percentage of criminal lawyers conceded that quality of the work (84%), as opposed to the needs of the financially disadvantaged client (79%), influenced their billing practices. In fact, billing practices of local criminal lawyers generally have been found to reflect favourably upon the criminal lawyers' concepts of self in that, lawyers seem to have an implicit understanding of the accused's financial needs and vulnerabilities.

Ninety-five percent of the criminal lawyers do *pro bono* work, have put up the bill for the client. Criminal lawyers are the lowest paid of the legal profession [likely because] they are motivated by the injustices of the system.... Fees may not be determinative of what a client can afford, regardless of the actual profit margin that a lawyer may be aiming for. Some lawyers are simply satisfied to cover all their expenses and make a reasonable fee.

Since the self is socially defined, the study sought to explore how seriously criminal defence counsels' concepts of self are guided and influenced by the perspectives of other criminal lawyers, inclusive of their associates. The study

generally lended support for the proposition that peer group interaction influences criminal defence counsels' self-concepts, although a distinction must be made in this examination between sole practitioners and lawyers associated with a firm. Nearly fifty percent of the quantitative sample was comprised of sole practitioners. Of those lawyers who were associated with a firm, all but one placed importance on maintaining an alliance to the firm's objectives, as compared to six of nine sole practitioners who looked disavourably upon this alliance. On the surface, the latter of the sample seemed disinterested and unaffected by the support that a firm setting may provide. The following statement reflected the general sentiment of these lawyers, "I don't have to tow the party line as a sole practitioner".

Of the ten criminal lawyers who were interviewed, seven were sole practitioners, two were in practice with a single associate, and the remaining lawyer was affiliated with a law firm of twenty-three lawyers. Sole practitioners (six of the seven interviewed) were found to be more directly influenced by their relations with other criminal defence counsels (that is, within the courtroom setting). For instance, one lawyer noted the following: "Even the most competent of lawyers need the assistance of others around him".

Less experienced criminal counsels generally placed greater importance on the opinions and impressions of more experienced colleagues. A highly respected, more experienced counsel was found to appreciate the degree to which other 'junior' members of the criminal bar sought his advice on various ethical and legal concerns. It was known to have a positive effect on his self-concept.

Younger less experienced counsels are keenly aware of ethical considerations but will often times seek the advice of other more experienced counsels. Many lawyers will first consult other lawyers before seeking the advise of the Law Society of Upper Canada. Lawyers consider this a great complement.... Older and more experienced doesn't necessarily mean more or less ethical, but if one is ethical, experience enables a lawyer to deal with ethical dilemmas easier.

This finding also suggests that, in the criminal defence counsels' formative years of practice, their concept of self is more a reflection of well-established criminal lawyers.

Criminal lawyers recently called to the bar considered themselves to be

particular disadvantaged. The public nature of a courtroom setting was found to place heavy demands and pressures on some less experienced criminal counsel who, at times, felt intimidated and uncertain. This view of less experienced counsels was shared by more experienced counsels as well. With only two years of experience as a criminal defence counsel, a criminal lawyer noted the following:

Someone with ten years of experience will get much more respect than a younger lawyer. Judges will not listen to younger lawyers as carefully. Experience and respect are earned, and you must pay your dues.

The study also revealed that if an individual was inexperienced with court procedures or continually lacked self-confidence, it was likely to reflect upon the lawyer's competency. As a result, more experienced lawyers were less likely to refer clients to lawyers who they perceived as less competent or demonstrated questionable certainty. On the other hand, a greater respect was found to be earned by colleagues and judges if lawyers consistently demonstrated legal competency and skill.

Members of the community, as a whole, were found to have a prejudicial impact on some of the qualitative samples' self-concepts. Two of the interviewed respondents felt that, especially in the practice of criminal law, lawyers must be cognizant of the community's tendency to unfairly judge criminal lawyers. But, more importantly, these criminal lawyers were not willing to buy into the philosophy that criminal counsels are dishonest or contemptible individuals as a result of their occupation and/or associations with criminal clientele.

Unfortunately, some of the criminal lawyers who employ unethical practices reflect badly on the profession as a whole, which contributes to society believing that all lawyers are untrustworthy and dishonest. This is wrong. Lawyers get that bad rap just because those lawyers are crooks.

The public perception of lawyers is that they are probably more shadier [sic] than they are. Lawyers, no more than politicians, are considered untrustworthy and dishonest by the public.

An interesting observation by MacKenzie (1993, p.1-2) draws a further distinction defining the existence of inconsistent expectations. "The public's expectation of lawyers generally are different from their expectations of their own lawyers"

### ROLE TAKING AND ROLE MAKING

The research revealed that a large extent of the sample's legal preparation and courtroom work involved role taking. What differed among the sample, was the extent to which criminal counsels designated their behaviour to the role expectations of various participants within the criminal justice system (i.e. clients, judges, jury members, Crown Attorneys, colleagues, and community members).

A specific analysis of the lawyer/client relationship has shown a great propensity, by criminal defence counsels generally, to place themselves in the shoes of the accused person. By placing themselves mentally in the position of each accused person, criminal defence counsels were found to deliberately and consciously emphasize the importance of the following attributes in their relationship to the accused. Of the available necessary attributes of a 'good' criminal lawyer, fifteen criminal defence counsels "strongly agreed" as to the importance of representing your client based on the presumption of innocence, and entitlement to fair legal counsel. This was the highest number assigned to a variable contained within this category. Explaining and clarifying matters for the client, and openly discussing all facets of the case was found to be very important when defining one's commitment to the accused. Professional integrity was best exemplified by the finding that being open, forthright, and honest about the circumstances of the client's case (n=14) was considered very important to the questionnaire respondents.

These specific questionnaire findings underscore the importance that criminal defence counsels generally have placed upon placing themselves in the position of the accused, and imagining how they may react to the various questions asked or legal steps taken by the criminal lawyer.

The questionnaire results were inconclusive with respect to criminal lawyers being empathetic in the role taking process. Of the interview respondents, only four criminal lawyers made reference to their conscious attempt to empathize with the accused, that is, to consider and reflect upon the accused's feelings of apprehension and anxiety. In anticipating the accused's state of mind upon first being criminally

charged, and his/her purpose for initially acquiring the criminal lawyer's services, a prominent criminal defence counsel expressed the importance of always demonstrating an "obvious and real concern" for the client and his/her problem.

Another lawyer considered the criminal justice system to be extremely overbearing, and consequently, he could empathize with the accused state of confusion and vulnerability. In this case, the criminal conviction was truly taken to heart.

The machinery of society is very arbitrary, harsh, and rolls over people. But when you are charged with an offence, you're alone and I can empathize with the clients, especially those accused of criminal allegations. I take it personally...it's like getting cancer.

Two criminal lawyers, both specialists in criminal litigation, suggested that the lawyer's ability to empathize with the accused may subsequently enhance his/her performance, or relationship to the accused.

If you can't empathize with people, which is not taught (i.e. in law school), you may not necessarily be a good lawyer.

It is important that you look like you care....getting to know the client, which generally results in the lawyer developing an empathy, may be a prerequisite for enjoying and enduring a career as a criminal defence counsel.... I have clients who have been charged with triple murders who I have grown to know, like and respect as a person, no matter how heinous the allegation. Lawyers are not human if they are not touched by the human lives that are devastated by criminal allegations and convictions.

By being empathetic to the client's legal, personal, and financial needs (through role taking), the criminal defence counsel was best able to address and resolve his/her client's needs. The underlying concern also being that, given the seriousness of any criminal charge, criminal lawyers wanted their clients to trust them.

Upon examination of the interviews, it was found that roles assumed upon initially meeting with a client were generally much different when compared to meeting a client who was experienced with the legal system, and court procedure.

Upon first meeting with the accused, taking the role of a prospective new client meant, for one lawyer, assigning more weight to both favourable and unfavourable outcomes of the client's case. While being sensitive to the accused

inexperience with court process and uncertainty as to his/her legal standing, many criminal lawyers noted being deliberately wary of making bold and confident assurances in anticipation of clients who demanded guarantees regarding their legal situation.

A defence counsel should never promise clients anything initially. I generally tell them where the case stands, positively or negatively, and how much jail time they may get. Questionably ethical lawyers raise their client's hopes up unrealistically.

Role taking, in some cases, meant being realistic and up front about the client's actual guilt, or potential for conviction.

I tell the client where they stand based on what he tells me. For instance, I'll tell him if I think that the judge or jury will not believe his story or if it sounds reasonable... I'll tell the client if I think he'll be convicted.

These aforementioned views were consistent with the Rules of Professional Conduct (1987, p.2), which specify that,

The lawyer should be wary of bold and confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

Assuming the role of a person who is presumed to be innocent appeared to be fundamental for both questionnaire and interview respondents when defending accused persons. The following accounts by two experienced criminal defence counsels were sentiments shared by many interview respondents, namely that criminal counsels will purposely reassert the importance of the presumption of innocence in their legal arguments as a result of counsel assuming the role of an impartial judge or jury.

Lawyers insist on the presumption of innocence and constantly reminding judges of this right. Judges are predisposed to the distinctiveness of each individual as a result of their exposure to the horrors of the criminal justice system, court, criminal clients, and reoffenders.

It is not an assumption, but rather it is an important preconception that affects how arguments are worded.... I have a built in presumption of innocence as a defence counsel...a mindset when you defend your client. [For instance,] you don't make any admissions, [and] don't tell them what you know. I presume the innocence of my client to be true.

While presenting legal arguments to the court, defence counsels were also found to construct the reality of the accused at the time that he/she may have committed the offence in order to demonstrate a lack of intent. Thus, by assuming the role of the accused, criminal lawyers placed themselves in the shoes of the defendant, and the seriousness of a criminal conviction was taken to heart.

According to Mead (1934, p.138), "the individual experiences himself... indirectly, from the particular standpoints of other individual members of the same social group". This view of the self emerging from a person's social interaction with other criminal lawyers translated quite differently for local criminal defence counsels. Given that the questionnaire results have revealed that Windsor-based criminal lawyers are more likely to be sole practitioners, one may then conclude that the sample of criminal lawyers were less directed by 'internal' peer group influences (that is, associates within a firm). Instead, by observing the fine art of criminal litigation, the courtroom was found to be the most beneficial arena for role taking. For instance, by emulating the mannerisms and effective arguments of other lawyers, some criminal lawyers used the experiences of other (oftentimes more experienced) lawyers to their advantage.

Lawyers are influenced by the other lawyers in court. For example, lawyers will use a successful argument, if it works, in their cases.... This is based on the principle of *stare decisis*. If a lawyer ruins the reputation of the legal profession by their incompetence and failure to present well reasoned legal arguments, I feel embarrassed.

Criminal lawyers, responding to the questionnaire, overwhelmingly favoured (n=15) being knowledgeable about criminal law as being reflective of one's competency as a criminal defence counsel. Lacking competency in the courtroom was perceived by a prominent lawyer, with twenty years of experience, as failing to meet the expectations of many criminal court judges as well.

If a lawyer advertises his expertise in the area of criminal law, he/she should be up to date with the law. A judge will be livid, furious by a lawyer's outright stupidity.... Judges will not allow you to waste the court's time.

The study has also revealed that ethical issues may come into play when one considers that "taking the role of the other helps the individual control the interaction

situation through knowing how to manipulate, direct, or control others" (Charon, 1989, p.108). In their careful assessment of a client's cases, many criminal defence counsels admitted to purposely upsetting the expectations of the trier of fact and Crown counsels in courtroom and out of court deliberations. By using more appropriate wordings, and/or more carefully reasoned arguments, defence counsels hoped to create an impression of the accused that was favourable to the defence. Consider, for instance, the following admission.

Lawyers think arguments through very carefully and know where they want to go. A lawyer must never be dishonest with someone but, if someone chooses to believe something that's not correct, I don't disabuse them of that notion.... They will think one thing and surprise. If a Crown Attorney has a preconceived notion of a fact, the criminal defence counsel can let it slide unless asked directly to have an opinion about it. [Remember,] the Crown Attorney has the obligation to prove the case, while the defence counsel has no obligation to assist the Crown Attorney.

As this counsel has illustrated, criminal lawyers who conduct themselves in a manner which deliberately upsets expectations, but still within the confines of acceptable behaviour, have effectively employed courtroom strategies which, as a criminal defence counsels, were considered to be ethical.

Likewise, a criminal defence counsel admitted to purposely employ tactics in the courtroom to solicit judges' or juries' sympathy or empathy for the accused through non-communicative and communicative means. By drawing some attention to his/her clients through various gestures (eg. by placing his arm on the client's shoulder, and /or verbally and physically consoling the client), he hoped to elicit a public empathy for the accused.

Some criminal defence counsels have suggested that responding to 'cues' or to a client's verbalization of intent to perjure, requires that counsel take the appropriate steps to discourage and prevent false testimony under oath. In preparation for a court appearance (i.e. should clients be required to testify), lawyers advised clients of the repercussions of committing perjury. In cases where the lawyer had prior knowledge of the client's desire to commit perjury, criminal lawyers generally noted the following:



The defence counsel must not knowingly participate: by removing themselves as counsel on the record, and/or not allow the client to testify.

A lawyer's inability to effectively anticipate the behaviour of the client (i.e. should he/she commit perjury on the stand), was found, in some cases, to cause irrevocable damage to the defence counsel's strategy but preserved the client's right to solicitor/client privilege, as this criminal lawyer noted.

If a lawyer discovers after the fact that a client has perjured himself, that is still within the bounds of solicitor/client privilege. Solicitor/client privilege is only broken in advance that he/she will commit a criminal act.... In this case, a lawyer may not ask questions and may not involve himself in any way with the evidence believed to be perjured.

Turner's (1991, p.599) notion of role making suggests that criminal defence counsels continually create and modify their roles so as to 'make' a role for themselves. Role making enables people to "make a role for themselves in light of roles that are considered relevant, appropriate, and possible in the situation". Any deviation from perceived role expectations could also constitute role making.

The finding that sixty-three percent of the questionnaire respondents strongly agreed as to the importance of never compromising one's personal moral beliefs with respect to ethical issues revealed the sample's propensity towards role making. Commonly, persons would be expected to behave as if role expectations are explicit, which would coincide with criminal lawyers strictly abiding by the Rules of Professional Conduct. Instead, the Rules of Professional Conduct have been found by some criminal lawyers to be ambiguous, and open to interpretation. Consequently, for some lawyers, a commitment to being ethical as a criminal defence counsel did not mean totally disregarding what the Law Society and other criminal defence counsels considered to be ethical. Rather, their personal sense of morality took precedence. As one criminal lawyer noted,

A lawyer's personal morality may take precedence over the Law Society's decision on a particular concern in that a lawyer, after consulting with the Law Society, ultimately makes the final decision.

The transition to the role making phase was determined by one lawyer to be

the period in which he first assumed a comfortableness with his/her skill and competency. However, public recognition of his status as a competent and skilled criminal lawyer was found to greatly influence his comfortableness.

...you really don't **become** a lawyer for five years...as you begin to get a grasp for criminal defence work...people really don't **think of you** as a lawyer for ten years.

Thus, continued success as a criminal lawyer was highly attributed to this lawyer being **perceived** as a good lawyer by those within or outside of the legal profession.

The concept of role making strongly coincided with the notion that criminal defence counsels may continually redefine their roles within the courtroom so as to be perceived as 'good' criminal lawyers.

The questionnaire results have demonstrated that a greater percentage of female criminal lawyers than male (two-thirds as compared to one-third) considered exhibiting a professional demeanour as very important. Although the researcher was given the opportunity to only interview two female criminal lawyers, these interviews revealed the following. For one female lawyer, her manner of speaking was much more forceful in order to first attract the attention of judges, juries, and others so that she could then make a more effective argument in court. For the other respondent, an air of credibility as a criminal defence counsel could be attained if substantiated by being knowledgeable about the law.

There are differences in the manner of speech of men compared to women. Women have to be more aggressive in court than men.

It's more so the way you carry out your job. Certain lawyers have an air of credibility that they develop.... A lawyer's knowledge of the law is primary, and as essential as the demeanour a lawyer brings to the courtroom.

Thus, female criminal lawyers were consciously more aggressive in their attempts to make an impression for themselves as 'good' criminal defence counsels.

Some of the criminal lawyers were also found to 'make their role' after carefully assessing and reviewing appropriate and inappropriate courtroom behaviour by other criminal defence counsels. Although, congruent with Turner's (1988) view of the role making process as being tentative and experimental, it was

discovered that criminal lawyers can not simply emulate the mannerisms and arguments of their colleagues.

[Criminal lawyers] have to be quick on their feet. You must always be prepared and you have to know the law. Since the law is always changing, you must constantly read up on it.

Thus, the role making process is what differentiates a good lawyer from a revered lawyer. While two lawyers may possess the same knowledge of the law and competence, qualities which are unique to a person may distinguish one lawyer as a more effective litigator. These qualities may include charisma, communication skills, and rapport with the judge and jury members as well as the Crown. For some lawyers, these skills can be honed. For others, the standard is set by those who have acquired skills through training and experience, aided by natural ability, to litigate and counsel.

## REFERENCE GROUPS

### Other Criminal Defence Counsels

The questionnaire results seemed to suggest that local criminal lawyers were less 'directly' influenced by the perspectives of other criminal lawyers within a firm setting since a greater propensity towards sole proprietorship has been evidenced by nearly half of the criminal lawyers. In addition, one must also bear in mind that seventy-three percent of the sample viewed maintaining an alliance to one's firm as a favourable attribute. Thus, if associated with a firm, many sole practitioners would prefer to maintain a strong alliance to the firm's objectives, and would also prefer to view themselves as team players.

A comradeship with other criminal lawyers was expressed by many of the interview respondents, simply by reason of their shared clientele, and the difficulties that arise with defending criminal clients. The following responses also illustrate how local criminal lawyers choose to distinguish themselves from other specializations.

The area of law does not blend very well with the other areas of law. The clientele is oftentimes different, and many of the people charged with crimes are in fact criminals, that is, they have committed some kind of offence. This clientele does not mix very well with other clientele... A lot of larger firms do not like criminal clients in their waiting room.

You don't have to like your clients, but you should treat them fairly, and like human beings. Most criminal lawyers know that if you are offended by who they are or how they live, you should stop being a criminal lawyer.

The study revealed that other criminal defence counsels served as one of the sample's primary reference groups. Other practising criminal lawyers, as a group, were found to serve as a basis for comparison for performing litigious functions appropriately, either in a professional capacity and/or within the confines of the criminal courts. Among a community of criminal defence counsels, it is expected that persons within that reference group will identify with the group yet not belong. More experienced counsels were envied by less experienced counsel for their ability

to comfortably manage and comprehend all requisite case law and applicable statutes, as the following criminal lawyer (the sole lawyer with less than five years of experience) suggests,

Having knowledge and being well-versed in the law is very important. [But,] it is very difficult to achieve because the law is always changing. It takes a lot of time. It's just a part of your job. If you presume to know the law, let's hope that you don't get caught by the Crown Attorney or the Judge. Experienced defence counsels know the law with respect that case, and rarely get caught.

Thus, more experienced counsels were perceived by this particular less experienced counsel as being more knowledgeable of the law, and better able to deal with unexpected problems while litigating. Unfortunately, this result is inconclusive given the small sample size. Conversely, an experienced criminal defence counsel was found to admire younger criminal lawyers for their enthusiasm, which he felt reflected poorly on older criminal lawyers, regardless of their experience.

Younger lawyers have an edge on older lawyers because of their enthusiasm.... Experienced lawyers have a lot less naivete. [The latter] are more street smart and knowledgeable about how the system works although older lawyers are hardened, more jaded and more insensitive.

As a specialization, criminal litigators became exposed to and assimilated with perspectives that were slanted towards their specific law specialization.

By necessity, criminal lawyers are required to prepare for court, interview witnesses, visit jails, etc. after spending hours of daylight of time in the courts.... Other specializations may be more business-like, and shun criminal lawyers because they do not view them as business-oriented enough.

Generally, the study revealed that a strong affiliation was maintained among criminal defence counsels as a whole. Although the questionnaire results revealed that criminal lawyers were generally sole practitioners, a comradery was shared among most criminal lawyers. Defence counsels who strictly abided by the Rules of Professional Conduct were viewed favourably, and rewarded for demonstrating a serious concern for the profession as a whole. Lawyers who were perceived as underhanded, unreasonable and unco-operative were less likely to be accommodated

or assisted by other lawyers.

### Judges and Juries

The questionnaire results were inconclusive, as to the significance of judges and juries as reference groups. In defining the seriousness of their obligation to various court participants, judges and juries were equally significant and second only to the accused. Qualitatively, this finding was further explored.

Qualitatively, judges were found to primarily serve as "normative reference groups" (Lauer and Handel, 1983, p.117), establishing and enforcing standards for criminal defence counsels within the confines of the criminal court. As the triers of fact, judges (inclusive of Justices of the Peace) were typically viewed as overseeing conformity to criminal process, as noted by the response of a local prominent criminal defence counsel of nearly twenty years.

Judges look at lawyer based on how they perform in their courtroom. In that respects, judges are a better judge of who good criminal lawyer is. Judges demand respect, and a lawyer does his client a great service by being respectful to the courts. At the same time, they admire lawyers who can competently stand one's ground. Trial work demands that a lawyer present his/her case efficiently. Judges will not tolerate a lawyer wasting the courts time by putting on a show for his/her client or presenting a hopeless argument.

### Crown Attorneys

By virtue of their employment with the Attorney General, it was suggested by a prominent criminal defence counsel that Crown Attorneys may initially adopt the perspective of preserving community values, but were perceived as being persuaded by quotas, increased demand for particular convictions, and community pressures when prosecuting. This particular counsel seemed to pride himself on best remedying the situation so as to reach an amicable resolution to the problem.

Defence counsels view things very differently from Crown counsel. [The latter] often have their hands tied on certain criminal matters (i.e. domestic disputes, sexual assault, impaired driving offences), as opposed to defence counsel who looks to the whole picture- the severity of the offence, the good in the person, the victim's wish....

### Law Society of Upper Canada

Law Society of Upper Canada is the governing body that disciplines, and has the authority to subsequently disbar lawyers for breaching the Rules of Professional Conduct. The qualitative sample confirmed that local criminal lawyers, as members of the Law Society of Upper Canada, looked to this organization as providing lawyers with a legal and ethical framework for identifying and resolving ethical concerns, and avoiding ethical traps.

The Law Society of Upper Canada is my governing body. It is the law and I must abide by it.... It doesn't do a lot for me personally, [but] it can meet the needs of its individual members. I comply with it and it complies with me.

Criminal lawyers, practising in Ontario, would generally be expected, as members of the Law Society of Upper Canada, to promote public confidence in the administration of justice, and in the legal profession (MacKenzie, 1993). Few criminal lawyers expressed being primarily dedicated to preserving the Constitutional rights of the accused solely, and if they did, in most cases, they were not willing to jeopardize their obligation to the Law Society. Conversely, a single criminal defence counsel reported that criminal defence counsels' actions and decisions were not generally influenced by the Law Society of Upper Canada. The quantitative and qualitative results confirmed otherwise.

A lawyer may not be interested in the Law Society of Upper Canada or any other association related to the legal profession, but their primary concern is to be a good criminal lawyer for their client. To defend one's client honourably and to protect them from the injustices of the criminal justice system. The Law Society, as an organization, does not influence a lawyer's actions or decisions.

### Victims and Witnesses

Reference groups generally refer to persons whose significance causes others to measure themselves, drawing comparisons with the group whose significance is preferred and idealized. Charon (1989, p.71) provided a sociological explanation for the criminal defence counsels generally excluding victims and witnesses as reference groups.

...the individual may or may not use people in his or her presence as significant others or reference groups. If people in the present situation are not important, then their perspective is not important.

The study consistently revealed, both quantitatively and qualitatively, that local criminal lawyers minimized their obligation to victims and witnesses.



### GENERALIZED OTHER

It is in their associations with various legal professionals throughout law school, articling, bar admissions, and in practice, that the sample of criminal lawyers have gained unique perspectives of legal customs, and mores. Consequently, criminal lawyers generally sought approval from their peers, namely other criminal lawyers, and drawing from this basis of comparison, came to the determination of what the "average criminal defence counsel" may think. For this study, arriving at the sample of criminal defence counsels' generalized other was most easily attained when general agreement was strongly evidenced with respect to the necessary attributes of a 'good' criminal lawyer.

The quantitative results revealed an overwhelming commitment (n=15) to the presumption of innocence, and the accused's entitlement to fair legal representation. Although nearly eighty percent of the sample ranked the presumption of innocence as the most important quality that all criminal lawyers must possess, the following statement further clarifies the view held by most interview respondents, namely that, notwithstanding the client's moral guilt in many cases, criminal lawyers cannot afford to also neglect the real possibility of the client's legal guilt.

Lawyers defend clients who are presumed to be innocent although this does not mean that the client did not commit the offence....  
Imagine how alone an accused feels, and no one believes him...but a good criminal lawyer will assume that what [a client] is saying is true and operate from that basis.

Therefore, the presumption of innocence was an important preconception - a mind set - that sample perceived the 'average criminal lawyer' to strictly hold when defending clients.

The study, both quantitatively and qualitatively, revealed that local criminal lawyers, for the most part, expected other criminal lawyers to conform to rules and practices generally adopted by the legal professions' regulating body, the Law Society of Upper Canada. The second highest ranking (n=14) was attributed to this variable. By placing a high priority upon abiding by the Rules of Professional Conduct, local criminal lawyers are conveying a message that these guidelines serve as the

conscience of the group that criminal lawyers were expected to follow, and the law expected to be obeyed (Charon, 1989, p.165).

When the sample was asked to consider whether the employment of unethical practices within the legal profession were prevalent or not, the shared standards of the larger community of criminal lawyers were reflected in the determination that the average local criminal defence counsel likely employs unethical practices occasionally. But, personal assessments of the seriousness with which the Rules of Professional Conduct were followed revealed a stronger intention towards conformity, and the internalization of the Law Society's values as evidenced by over ninety percent of the questionnaire respondents noting that the Rules of Professional Conduct were taken very seriously.

Seven of the ten interview respondents have evidenced support for the aforementioned assertion by strongly agreeing that a 'good' criminal defence counsel must place a priority on abiding by the Rules of Professional Conduct as dictated by the Law Society of Upper Canada. The following quotations serve to illustrate the importance generally placed, by the qualitative sample, upon adopting the perspectives of the Law Society of Upper Canada through an internalization of their values, goals and objectives (as affirmed by the lawyer observing the Rules of Professional Conduct).

The Law Society Rules generally say: don't cheat your clients, be honest with the court, be fair to yourself, be candid at all times, and keep the silence where you have to where its a matter of privilege. There are fine lines as to what is ethical or not but, when in doubt, a lawyer should consult the Law Society of Upper Canada.

The Rules of Professional Conduct is a good codification, and you can never get in trouble if you follow it.. It's a rule of law- a law.

Consideration must be given to the Rules of Professional Conduct, which stipulates that lawyers "**should observe the Rules of Professional Conduct...in the spirit as well as in the letter**". A strict interpretation of these rules suggests that disciplinary action may result if "even the appearance of impropriety" exists. The difficulty of strictly abiding by the Law Society of Upper Canada's mandate arose from one lawyer's unwillingness to defend persons accused of certain types of

crimes. The Rules of Professional Conduct stipulate that,

The lawyer has a general right to decline a particular employment (except when assigned as counsel by a court), but it is a right to be exercised prudently if the probable result would be to make it very difficult for a person to obtain legal advice.... the lawyer declining employment should assist in obtaining the services of another lawyer qualified in the particular field and able to act.

A refusal of this kind would be held by the Law Society as being contrary to the fundamental purpose of the legal profession.

The oath says that [criminal lawyers] are required to take any case based on the assumption that if you were the last lawyer on earth, someone must represent this client, but I'm not the last lawyer on this earth. I avoid sexual abuse cases.

Another criminal lawyer preferred, at times, to refuse clients of questionable character but chose to handle the situation with white gloves so as not to offend the Law Society.

Criminal lawyers do not have a right to pick and choose. There may be times when a lawyer does not feel comfortable acting for a client, for example, if I suspect that the client has put together a false alibi... an outright refusal can be avoided by simply suggesting that the client go elsewhere.

For this lawyer, acting in accordance with a generalized set of expectations allowed for a great amount of subjective interpretation, which created some difficulties for other practitioners in criminal practice unless substantiated with proof.

The stability that comes with conducting oneself in accordance with a generalized set of expectations (Meltzer, 1972, p.16) seemed unimportant to the only interviewed criminal counsel who revealed a willingness to compromise his obligation to the Law Society in order that his personal moral values not be comprised.

I do what I do because I think that it's right or I think that it's wrong. Personal convictions take precedence over the oath.

In consideration of Charon's premise, that continued successful interaction with a reference group demands that their perspectives become the individual's generalized other, at least temporarily (Charon, 1989, p.69), the following question was then posed specifically to the interview respondents: To what extent should

criminal defence counsels, as members of the Law Society of Upper Canada, be obligated to maintain their commitment to the Law Society's goals, objectives, and guidelines beyond their professional capacity? Perhaps it is important to first note the position of the Law Society of Upper Canada. The Rules of Professional Conduct (1987, p.1) forewarn lawyers generally of their responsibilities, both personally and professionally.

Dishonourable or questionable conduct on the part of the lawyer in **either private life or professional practice** will reflect adversely upon the integrity of the profession and the administration of justice as a whole. If the conduct...is such that it would be likely to impair the client's trust in the lawyer as a professional consultant, the Society may be justified in taking disciplinary action.... [But,] the Society will not be concerned with...[activities]...which do not bring into question the lawyer's professional integrity and competence.

Although extreme pressures associated with a criminal law practice may ordinarily lead honest and ethical persons to abuse their privilege as counsel, the threat of disciplinary action by the Law Society of Upper Canada served as a personal reminder to most criminal counsels. The general sentiment among five of the ten criminal lawyers was that common sense more commonly determined which practices were ethical or unethical, within the confines of the Rules of Professional Conduct, while their personal commitment to the legal profession determined their reporting practices to the Law Society.

Common sense dictates that lawyers know the parameters of the Code and what [their] obligation is to the Law Society of Upper Canada.... The obligation to report unethical lawyers to the Law Society would likely first be met by a lawyer's deep-felt personal commitment to the legal profession.

Some lawyers took exception to the notion that a person's sense of being must be determined by, and related to one's profession. The strict test that governs the profession as well as the person seemed unfair and unrealistic to some lawyers. To suggest that a lawyer's professional demeanour must be maintained in private life seemed absurd to one lawyer.

What am I supposed to do? Dress in a shirt and tie when I want to have a beer on my porch?

The general view of practising criminal lawyers was shown to consistently give victims and witnesses their least consideration. The questionnaire respondents ranked their obligation to victims and witnesses as follows: important (32% and 32%), unimportant (42% and 48%), and very unimportant (26% and 21%). Incorporating the perspectives of all one's significant others would generally cause a person to exclude, as his/her generalized other, those individuals whose respect and acceptance was least desired, and whose behaviour and conduct a person least patterned him/herself after (Mead, 1934). The following statement demonstrated the general sentiment among all the interview respondents, noting an obvious exception to the rule.

A lawyer's obligation lies with the client and the Court. No where does it indicate by statute an obligation by law to the victim. As a matter of law and principle, defence counsel does not have any obligation to the victim. That does not mean however that the lawyer should not take into account the position of the victim. In fact, generally, counsel would be foolish not to.

Crown Attorneys were classified much like the above mentioned exception to the rule, both qualitatively and quantitatively.

The respondents' obligation to the trier of fact, either the judge or jury, was generally considered equally important, ranking second to the accused. They ranked their obligation to judges and juries as follows: very important (32% and 48%), important (58% and 42%) and very unimportant (11% and 11%). The questionnaire results were inconclusive, as to the significance of taking on the perspectives of judges and juries generally. The study has revealed that, within the confines of the criminal courts, criminal lawyers perceived judges as generally expecting conformity to applicable substantive and procedural laws within the confines of the criminal courts. Failure to meet their expectations would result in serious if not embarrassing repercussions.

### DEFINITION OF THE SITUATION

Exploring the sample's perception of self as well as their perceptions of others in defining the situation is of particular relevance to this study. An examination of the necessary attributes of a 'good' criminal lawyer demands a comparison between these self-assessments and appraisals of other criminal counsels.

Of the sampled questionnaire and interview respondents, the study revealed that local criminal defence counsels were generally found to define situations in a progression of legal circumstances (listed below). These circumstances each coincided with numeric listings found in Table 10 (p.118), and were revealed by the quantitative and qualitative samples to be most indicative of personal concerns and difficulties that arose for local criminal defence counsels when defining the situation of defending the accused. They include:

1. Initially meeting with the accused and considering whether or not they wish to defend the accused.
2. Considering, along with ethical constraints, the possible legal avenues to pursue.
3. Determining the possible legal avenues to pursue, and developing lines of action towards various courtroom participants and players (i.e. Crown, victim, witnesses, police) in light of available facts and evidence.
4. Giving legal advice, and acting publicly as a client's legal counsel.
5. Determining whether the means employed to defend a client are ethical and in accordance with the Rules of Professional Conduct when comparing contrasting perspectives.
6. Considering any modifications or refinements of legal arguments in light of the strength of the Crown case.

Steps one to three illustrate how a criminal defence counsel may have internalized the seriousness of his/her role as a legal professional in light of the seriousness of the client's charge. Steps four to six illustrate the manifestation of the interpretive process (i.e. overt acts). Much of the defining process (steps one to six) required the subjective analysis, interpretation, and adaption of concepts and variables previously listed. It is important to note that Table 10 (p.118) represents a one-sided (from the sole perspective of the criminal defence counsel) interactional process which

transpires when a criminal defence counsel chooses to defend an accused.

#### 1. INITIALLY MEETING WITH THE ACCUSED AND CONSIDERING WHETHER TO DEFEND THE ACCUSED?

The quantitative and qualitative research revealed that, in order to define the situation of providing a defence for the accused, criminal lawyers enter the situation of initially meeting with the accused with certain predispositions.

The criminal defence counsels' thought processes, prior to the actual determination of even considering to defend an accused, were found to be influenced by the following.

##### Self

Given the nature of a criminal practice, criminal defence counsels were found to possess strong and unwavering self-concepts. Quantitatively, the study revealed that no criminal lawyers felt compelled to compromise themselves or their career for any accused person.

##### Mind

In consideration that extreme importance was placed upon the presumption of innocence, both quantitatively and qualitatively, criminal lawyers have revealed that their mindset upon first meeting with the accused, and throughout the lawyer/client relationship, presumed that the client was innocent until proven guilty.

It was originally hypothesized that a criminal defence counsel first defined the situation according to his/her preconceptions as to the person's guilt or innocence. Instead, the qualitative research consistently revealed that a lawyer's personal assessment of the individual's culpability was irrelevant in determining whether or not to defend a potential client.

The criminal defence counsel is more concerned with whether or not the Crown can prove it.... A lawyer is more bothered by the client being wrongly convicted, regardless of the win or loss. A lawyer is not bothered by knowing that a client is guilty because

it is not his job to judge...and he is presumed innocent. In fact, when a client tells the lawyer that he/she is guilty, that is the biggest skill that a lawyer has in that, the lawyer will not allow his/her client to testify.... Admitting guilt [to the lawyer] only means the Crown must still prove his guilt without the accused's assistance. The client does have a right to silence.

Being knowledgeable about criminal law, whether one's specialization was solely in the field of criminal law or encompassed other diverse specializations, was found quantitatively to be the highest ranked variable (n=13) when isolating the agree category.

### Symbols

Given that the specific wording of the questionnaire regarding professional demeanour could be construed as being limited to the confines of the courts, the questionnaire results were inconclusive as to the its employment as a symbol in the confines of a lawyer's office. Portraying an appropriate image upon initially meeting with a client was noted as important by some of the interview respondents. The fact that a person sought counsel from a particular lawyer many times spoke to the image that the lawyer had portrayed to other criminal clientele beforehand (i.e. in the case of a referral). The criminal defence counsels that were interviewed emphasized the use of symbols within the courtroom, as opposed to the office setting. In this sense, they proved to be much more beneficial to the accused in the definition of the situation by the Crown, judges, and juries.

### Perspectives, Significant Others, Reference groups

The questionnaire results have suggested that local criminal lawyers were less 'directly' influenced by the perspectives of other criminal lawyers within a firm setting since a greater propensity towards sole proprietorship has been evidenced by nearly half of the criminal lawyers. On the other hand, as an initial frame of reference, the Law Society of Upper Canada was thought to comprise members of their peers, and the perspectives of the generalized other with respect to the employment of ethical practices.



### Role Taking Ability

The criminal defence counsel enters the situation with his/her experiences of the criminal justice system, and a certain number of years of experience, which the study revealed enhanced the lawyer's ability to take the role of the accused.

In anticipation of the accused's state of mind upon first being criminally charged, some lawyers stressed the importance having the ability to empathize and sympathize with the accused. Having the ability to role take strongly suggested the importance of being able to empathize with any prospective client.

Lawyers are expected to be sympathetic, and regardless of how they feel about the client, they must treat them fairly, and with respect.

Previous attention has been drawn to the fact that, due to an inability to empathize with the plight of the accused given the nature of the offence and general attitude of the accused, some criminal defence counsels refused to defend the accused. Due to their memories of unpleasant clients, some criminal lawyers were wary of clients whom they felt (or could confirm) had produced a false alibi, and wished to deceive the court by lying.

## **2. CONSIDERING, ALONG WITH ETHICAL CONSTRAINTS, THE POSSIBLE LEGAL AVENUES TO PURSUE.**

### Applying the Perspective of Significant Others, Reference Groups and The Generalized Other

The study revealed that most criminal lawyers, both quantitatively and qualitatively, defined the situation of providing a defence for the accused from the perspective of other criminal defence counsels, and coming to the determination that he/she must represent the accused based on the premise that the accused is presumed innocent, and entitled to fair legal representation.

Once operating from this presumption, the subsequent stages of defining the situation centered upon criminal defence counsels first assessing possible defence strategies from the perspective of the client's account of the facts and circumstances. Although, it is important to note that, when marshalling the evidence, an accurate

assessment of the client's case involved consideration of both how the situation was first objectively presented by the client and then subjectively defined by counsel. Thus, a criminal lawyer must, at the inception, place him/herself in the shoes of the client. But, as the client's legal counsel, the lawyer must act in the client's best interest, not only in the interest of the client with respect to available legal options.

In most cases, the initial determination of the client's legal status was dependent upon most criminal defence counsels assuming the perspective of other criminal defence counsels as their reference group, which regarded the Crown as bearing the burden of proof. The general sentiment being that,

[As a lawyer,] I'm not interested in whether the client committed the offence because the Crown has the onus beyond a reasonable doubt. The Crown Attorney has the obligation to prove the case, while the defence counsel has no obligation to assist the Crown.

Although nearly eighty percent of the sample ranked the presumption of innocence as the most important quality that all criminal lawyers must (initially) possess, notwithstanding the defendants' moral guilt in many cases, a conscious awareness of the real possibility of the client's legal guilt could not be ignored. Thus, in these cases, providing the best possible defence for the accused meant giving consideration to the Crown's willingness to plea bargain.

In taking the role of the accused in light of considering possible legal avenues to pursue, criminal defence counsels placed themselves in the shoes of the defendant, and the seriousness of being criminally conviction and/or incarcerated was taken to heart. Ethical constraints discouraged many lawyers from exploring some avenues. For example, upon first meeting with the accused, taking the role of a prospective new client meant, for one lawyer, assigning weight to both favourable and unfavourable outcomes of the client's case.

Conflicting loyalties between the lawyers' obligation to the client and the Law Society of Upper Canada were evident in that some lawyers deliberated over not making bold and confident assurances to the client when he/she demanded answers or guarantees regarding their legal status. In some cases, criminal lawyers preferred being realistic and up front about the client's actual guilt, or potential for conviction.

### Relevant and Applicable Substantive and Procedural Laws are Considered.

As a necessary attribute, local criminal defence counsels (n=13) considered being knowledgeable of criminal law and procedure as the most significant and highest ranking variable, when isolating the "agree" category. Being knowledgeable of the law was generally viewed by those interviewed as greatly facilitating the questions asked and the relevancy of the information received.

When a client consults with a lawyer for the first time, a lawyer is expected to know the law, which reflects the questions which are asked, the crucial issues, and the relevancy of the evidence obtained.

In defining the situation to self, the criminal lawyer would then explore any inconsistencies in the evidence of the accused or the disclosure provided by the Crown so as to better assess the client's case.

It is a lawyer's job to look at the evidence and put it in the most favourable light possible for the client. It can not be a ridiculous conclusion. The very nature of evidence is that it can point to other conclusions. It may not be a true conclusion and it may not apply to this case, but if it could, it may raise a reasonable doubt in the trier of fact's mind.

### Applies Past Experience

The sample seemed divided as to whether or not years of experience would distinguish more experienced criminal lawyers from less experienced counsel when self determinations as to possible legal recourse were explored. Quantitatively, there was an equal distribution of more and less experienced (five years or less) counsel. The questionnaire results revealed that less experienced female criminal lawyers (five of six) as compared to more experienced males counsels (eight of twelve) strongly opposed the number of years of practice being reflective of the number of years of practice. The implication being that, for less experienced counsel, their ability to decipher the relevant legal issues should not solely be determined on the number of years that they have been in practice. Qualitatively, two more experienced lawyers perceived more experienced counsels to generally be less naive and more knowledgeable, but lacking the enthusiasm of less experienced counsel. Both classes of lawyers noted that the seriousness of the charge, the client's past criminal record,

the client's accounts, the strength of the Crown's case against the defendant, and any inconsistencies which appeared to surface at this point were considered relevant to defining the situation to self.

### Considers The Future

Generally, criminal lawyers required consideration to be given to any future ramifications of giving unrealistic, inappropriate, or unethical legal advice. Many of the respondents assessed, with great seriousness, the personal and career-ending expense should they consider employing unethical practices on the client's insistence or behalf. The questionnaire results revealed that few lawyers were willing to jeopardize their obligation to the Law Society for the accused. Ranking third lowest, this variable was generally viewed as a very undesirable quality of the criminal defence counsel. As one lawyer noted,

Clients are often willing to do anything at all cost, which is often times unethical, to be acquitted of the offence. Often times, clients want things that are not in their best interest, and the lawyers are responsible.

Thus, criminal lawyers must consider not only their reputations in light of their obligation to the Law Society of Upper Canada, but also the seriousness of a criminal conviction to the accused. The client's personal freedom, job suspension or loss, and/or monetary penalties may also be at stake.

The sample generally agreed that lawyers, as legal counsellors, must deliberate and advise their clients of all their available legal options. By the same token, the researcher asserts that a lawyer must internalize the seriousness of a criminal conviction to adequately analyze the situation. At issue is whether the criminal lawyer or the client should take full responsibility for every legal decision. Once some determination has been made regarding all the available legal options, who ultimately decides, the criminal defence counsel or the client? The quantitative and qualitative results were inconclusive. The lawyer's sufficient knowledge and adequate consideration of the facts and law would better equip the lawyer, and not the client, to draw evidential and legal comparisons and conclusions. On the other

hand, if a person consults a physician for medical attention, the physician's knowledge and skill does not preclude him/her from presenting all of the possible positive and negative consequences of necessary treatment or surgery. The physician would also be required to obtain the patient's consent before commencing with any treatment. The patient is impacted by risks associated with the surgery (should complications or even death occur) to a much greater degree than the physician. Similarly, in the legal profession, it is the lawyer's obligation to verbalize any legal concerns when advising clients. Perhaps the line should be drawn in the determination of a plea, as suggested by two counsels, in that it is the client who experiences the consequences of the decision. The client pays the set fine or goes to jail - not the criminal lawyer.

**3. DETERMINING THE POSSIBLE LEGAL AVENUES TO PURSUE, AND DEVELOPING LINES OF ACTION TOWARDS VARIOUS COURTROOM PARTICIPANTS AND PLAYERS (I.E. CROWN, VICTIM, WITNESSES, POLICE) IN LIGHT OF AVAILABLE FACTS AND EVIDENCE.**

In the pre-litigation stage, criminal defence counsels were generally found to determine appropriate lines of action towards various court participants, including the Crown, the victim, witnesses, the judge and jury. Since the quantitative results consistently found that criminal lawyers' primary obligation was to the accused, in many cases, this translated to providing the accused with the best available option in light of the legally (and ethically) available courses of action. Therefore, in an attempt to minimize the culpability and penalty of a criminal conviction, most of the criminal defence counsels relied upon the option of initiating or responding to Crown counsel's willingness to negotiate a plea. For many criminal lawyers, it is considered the most realistic option for many clients, but for reasons that may be surprising.

Plea bargains are a common practice and they keep the system going. Defence counsels view plea bargaining as a means of regulating police practices of overcharging in order to obtain a guilty plea.

Another lawyer likened the strategy of the defence counsel, with respect to its prospective participants, to a game strategy.

...sixty to seventy percent of the cases are plea bargained [a finding confirmed by three other lawyers]. The system is not a black and white system. The law is a human endeavour. We get one side from the accused, one from the victim, Crown, and the defence play a game of chess in theory. If you do this, I'll do that.

In some cases, plea bargaining may be a final step in the assessment of the client's legal predicament. Conversely, plea bargaining presented an ethical dilemma for one lawyer in that,

the client must admit his/her guilt to obtain the plea bargain [and will be forced to] admit to things that he/she did not do so that he/she can get a deal.

The Rules of Professional Conduct obligates a lawyer to take every offer to the client.

An inherent bias against police officers was also evidenced by this criminal lawyer, who considered the incompetency and abuse evidenced by members of the Windsor Police Department as a concern. This comment further illustrates the manner in which antagonistic witnesses may be handled so as to raise a reasonable doubt.

When the Police breach a client's Charter rights, they go against the supreme law of the land. Police use illegally obtained evidence to convict a client and yet, lawyers who made a Charter application to deny that evidence are manipulating the law?.... Interpreting the law entails advancing a point of view.

Given that few circumstances in criminal litigation are clear cut or predetermined, an appropriate line of action towards any actor was best determined by legal preparation. Determining an appropriate line of action (eg. legal advice and arguments) with respect to the strength of the Crown's case involved having knowledge of essential and often particularly damaging facts, and applicable substantive and procedural laws. Experience in the courtroom was determined by one counsel, in practice for nearly twenty years, to greatly enhance a lawyer's preparedness for the unexpected.

The interview respondents emphasized their use of symbols, among other techniques, within the courtroom to influence judges and juries. This will be further explored in the next stage.

#### 4. WHEN GIVING LEGAL ADVICE AND ACTING PUBLICLY AS THE LEGAL COUNSEL FOR THE ACCUSED.

From the commencement to the completion of every public proceeding, defence counsels were found to first define the situation from a perspective that presumed the accused's innocence, and subsequently, their actions were aimed at placing the accused in the most favourable light. For instance, by pleading not guilty at an arraignment, defence counsels publicly set the stage for reinstilling the presumption of innocence. Furthermore, the act of pleading not guilty was generally viewed as a means of advising the court and triers of fact that either the Crown has the obligation and burden of proving his/her case beyond a reasonable doubt or a further exploration of the facts will result in the client being vindicated of the charge. Even if the client has actually committed the offence, it was found to still be in the client's best interest to affirm his/her innocence.

Effective legal argumentation involved the use of specific and carefully delivered wordings in the courtroom. In understanding the meaning of their acts, criminal defence counsels oftentimes consciously and purposely intended to influence the triers of fact, as well as discredit victims and witnesses.

Criminal lawyers are careful about what they say. They have to be very precise in their wordings with respect to legal arguments, even more so in the court of appeal. The lawyer develops a thick skin, and attains a whole new stress level. Jury trials require that the lawyer speak audibly, clearly, precisely.... It is crucial that the lawyer be able to relate well to the jury.

For one lawyer, the use of his professional demeanour as a symbol was intended to communicate a message that ethically could not be verbalized but this lawyer perceived that others, namely the triers of fact, would arrive at its intended meaning.

The rules emphasize that a criminal lawyer can never state their [sic] personal opinion but a lawyer's personal opinion about a client can be conveyed to a jury or judge through his professional demeanour without breaching the ethical rules.

The physical and verbal presentation of a lawyer was found by one lawyer to be crucial to the lawyer's ability to persuade judges or juries.

Lawyers have an amazing ability to persuade and convince because of their personal style. You want to captivate the judge's and jury's attention...you want their eyes to follow you, to pay attention, listen to every word you say.... [For example,] Greenspan's words are chosen very well, even if he reads, and he speaks very well...

Conversely, another lawyer warned that defence counsels must be careful not to be unnerved or deceived by jury members who appear not to be listening, or in agreement with their arguments, as evidenced by their body language ( eg. looking at their shoes, waiving their heads, crossed arms) and facial expressions (eg. eye contact or the lack thereof). Some criminal lawyers attributed meanings to these gestures that were either favourable or unfavourable to the defence. For instance, the same lawyer perceived these juries as trying to communicate a message of either being opposed to or supporting the position of the defence counsel. Whether or not the accused had legally or morally committed an offence, court observers were perceived as often giving pessimistic meanings to the defence counsel's social act (that is, advocating for the rights of the accused to be heard and to receive a fair trial). His perception being that jurors, like Crown counsel, hold the view that a criminal charge connotes guilt. Criminal defence counsels, in this study, were well aware of these views, and stood committed to the rights of the accused.

A female criminal defence counsel perceived juries to be somewhat influenced by a lawyer's attractiveness, although, to have meaning, the act had to be substantiated through words (i.e. communication of one's knowledge of the law).

Attractiveness influences how (lawyers) are listened to in court, if they can follow it through with their intelligence.... If you are clean and well presented, people will listen but you don't have to be attractive. Large firms will likely hire an attractive, young, female articling student in order to make their clientele feel as if they are being catered to....

##### **5. MEANS EMPLOYED TO DEFEND THE CLIENT ARE ETHICAL WHEN COMPARING CONTRASTING PERSPECTIVES?**

There was strong agreement among the interview respondents that clients often engaged in perjury in the hopes of redefining a legal situation that appeared favourably for the prosecution, and disadvantageous to the accused. By giving new



meaning under oath to the facts and evidence, knowing that it was false, the accused had, at times, placed some of the interview respondents in a position that threatened their obligation to the Law Society and the accused simultaneously. Consequently, the conduct of the accused raised ethical concerns for the criminal defence counsel, in terms of how to best handle the situation.

Counsels who were interviewed drew a distinction between circumstances in which they had prior knowledge of a client's desire to perjure him/herself on the stand and those where a failure to anticipate perjury existed. In the former case, several lawyers noted that the Rules of Professional Conduct dictate that, "a lawyer can never participate in perjury knowingly". Most criminal defence counsels chose to handle the situation in the following manner,

The advantage in criminal work for defence counsels is that [the criminal lawyer] doesn't have to call evidence...therefore the client doesn't have to testify [i.e. take the stand]. You don't have to worry about a client perjuring himself because he won't be testifying.

Another lawyer suggested, if a client commits perjury, and the lawyer had no way of anticipating the client's unethical behaviour, "a lawyer may not ask questions, and not involve himself in any way with the evidence believed to be perjured."

The system essentially provides checks and balances through a duality of roles. Both the Crown and defence counsel have an implicit understanding of their own and their counterpart's responsibility to present the strongest possible case. Like an athlete studying his/her opponent, lawyers cannot succumb to underestimation. With the lives of individuals in the balance, simple mistakes can have a tremendous personal cost. To this end, the criminal lawyer not only has an ethical obligation to defend his/her client but more importantly has a duty by law and conscience as an advocate to,

...raise fearless every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence [including so-called technicalities not known to be false or fraudulent" (Rules of Professional Conduct, 1987, p.27) authorized by law (Rules of Professional Conduct, 1987, p.25).

In order for the system to work effectively criminal lawyers need to avoid falling prey to the easily made mistake of making value or societal judgements on the accused.

I don't know if they're guilty, that's for the judge to decide.... I don't defend, I advocate. I advocate his defence...see where his defence is factually and assist him in presenting his defence within the confines of the court's rules.

Trial work also involved a collaboration of some theatrics with precise and constructed arguments worded with a premeditated attempt to persuade judges and jury members of a client's perspective. As one lawyer noted,

Lawyers think arguments through very carefully and know where they want to go....

When defending clients, the presumption of innocence is an important preconception that affects how arguments are worded. The Crown has the perception of guilt on his/her side with the client being formally charged with the offence. By putting holes in the Crown's accusation of guilt, and raising a reasonable doubt, criminal lawyers attempt to redefine the Crown's definition of the situation. Most importantly, the facts and evidence, which can not be disputed, are open to subjective interpretation, which will undoubtedly lead to differing opinions of the legitimacy of the charge.

The general sentiment among criminal defence counsels is that the law is malleable and open to interpretation. While the lawyer's ultimate obligation is to his/her client, with the only exception being to the Law Society perhaps, many lawyers expressed little reservation about using the law to their client's advantage.

#### **6. CONSIDERING ANY MODIFICATIONS OR REFINEMENTS OF LEGAL ARGUMENTS IN LIGHT OF THE STRENGTH OF THE CROWN'S CASE.**

A large percentage of criminal defence work entails revising perspectives that coincide with the accusation that a client has legally committed the offence. In these cases, a greater emphasis is placed on raising a reasonable doubt, as opposed to confirming the client's innocence.

Cross-examination also gives counsel the opportunity to revise and challenge

the definition of the situation created by the Crown Attorney.

Counsel may also rely upon his/her ability to obtain a plea bargain, which the sample has revealed often depends upon the rapport that a lawyer has established with local Crown Attorneys. One lawyer perceived some Crown Attorneys as being driven by political agendas which aim at keeping conviction rates high or focus on specific offences (eg. spousal abuse).

Finally, criminal lawyers may revise their perception of the definition of the situation based on the outcome of the trial.

### COLLECTIVE DEFINITION OF THE SITUATION

It was originally hypothesized that criminal lawyers are influenced by a collective definition of the situation. A collective action implies that lawyers, as a group, direct and control the individual lawyer's behaviour. As members of the Law Society of Upper Canada, most criminal lawyers acknowledged their responsibility to the profession and its mandate generally. A few lawyers noted that, since the profession is self-regulated, it is not uncommon to see lawyers consulting amongst themselves as to proper professional conduct before consulting with the Law Society. Although aware of the threat of disbarment and penalties, some criminal lawyers expressed that only a sense of personal conviction and morality guided their behaviour. For instance, one of these lawyers noted the following:

Lawyers have nothing but their name in the legal profession.... What was immoral before I became a defence counsel is still immoral.... A job does not classify a person.... The Law Society, as an organization, does not influence a lawyer's actions and decisions.

Given that the lawyers interviewed were sole practitioners, the researcher was unable to determine whether the influence of colleagues or associates within a firm setting lends itself to a collective definition of the situation.

### TYPIFICATIONS

As this study sought to identify how criminal defence counsels typify or characterize themselves, the quantitative and qualitative findings either verified or denounced what criminal defence counsels' also perceived to be characterization of themselves by those persons within or exposed to the criminal justice system.

The study revealed that classifying 'most' criminal lawyers as 'greedy' seemed an unfair categorization, given that only a single questionnaire respondent admitted to being influenced by monetary considerations when deciding to practice criminal law. In fact, only two criminal lawyers admitted to feeling no obligation to consider whether the accused felt that their fees were excessive.

A manner of questioning failed to differentiate between criminal lawyers' interpreting or manipulating the law for the client's best interest, and consequently, attempts to classify criminal lawyers as 'manipulators of the law' met with mixed reactions. One lawyer preferred to characterize himself as a "fair and ethical manipul[at]or...[making]the law work for his/her client to the client's best advantage". The implication being that society should not unfairly characterize lawyers for using the law to the client's best advantage, and essentially doing their job. All but one lawyer interviewed took offence to the term used. Most lawyers applying a negative connotation to the term, and thus, a negative connotation to its intended user. As the following comment suggests, criminal lawyers, in this case, brought an element of fairness to the legal circumstance, and chose to characterize themselves as,

interpret[ors] of the law- which entails advancing a point of view.  
Both the Crown and the defence counsel will advance their argument  
on how they interpret the law with respect to the particular and  
specific facts...and the judge and jury must decide the outcome.

By drawing a distinction between less and more experienced counsel, this experienced counsel tended to characterize less experienced colleagues as referring to the Rules of Professional Conduct more often, which coincided with the general characterization of less experienced counsels being less assertive, and more cautious in their application of substantive and procedural laws.

More experienced lawyers do not refer to the Rules [of Professional Conduct] often, although younger lawyers may refer to the Code more often.

Many of the criminal lawyers approached have suggested that a common perception exists. Essentially what is held in the minds of the community at large is a stereotype that views lawyers as inherently dishonest, untrustworthy, and manipulative of legal constructs and procedures. Many lawyers espoused the belief that individuals having infrequent to no contact with the criminal justice system will more likely, than not, have negative preconceptions and stereotypical attitudes about the ethical practices of criminal lawyers.

People are very condescending, and yet, lawyers are often held in high regards by 'sceptical' clients who have had dealings with the defence counsel. Once the client has had the opportunity to experience the norm of criminal defence work, to act honourably and reasonably, their perceptions change.

This view was confirmed by MacKenzie (1993, p1-1-2), in that the public perception of lawyers is one of ambivalence, marked by praise and criticism.

...lawyers, paradoxically, are often envied and, at least for some of their qualities, are respected and even admired.... [For example,] lawyers are intelligent, logical, and disciplined.... A good legal education and the practice of law develop articulateness, scepticism, ability to reason, independence of mind, and other intellectual virtues that are of value to clients and to society.... [although] clients prefer lawyers 'with just a touch of scoundrel in them.'

One criminal lawyer perceived society as attributing unfavourable qualities to criminal lawyers generally based mainly on their ignorance of the system.

Persons who perceive lawyers as dishonest and untrustworthy do not appreciate the system, and do not appreciate historically what the lawyer's function is. They must be careful not to arrive at a conclusion too quickly or overlook basic rights of the individual. The rights of the individual would be lost without the assistance and commitment of the accused.

When asked specifically if they viewed themselves typically as "advocators for the accused", all of the interview respondents agreed with this favourable characterization.

One lawyer noted that characteristics used by the accused and public to often

typify lawyers are relied upon in order to avoid being convicted. Sometimes, counsel can never win, as the following reply suggests;

If the lawyer wins the case, then the client didn't need him anyways. If the lawyer loses the case...then he didn't do a good job.

One lawyer expressed concern about victims of crimes who unfairly characterize lawyers for doing their job. Specific acts undertaken to adequately defend a client (eg, vigorous cross-examination in an attempt to leave no stone unturned) are misconstrued as counsel being more interested in winning at all cost. Those interviewed confirmed that many persons hold the acts of the accused as the basis for typifying lawyers. For instance, one lawyer felt that representing the criminal element of society publicly undermined his character and reputation. Essentially, the criminal lawyer's moral character comes into question through guilt by association. However, most of the lawyers involved in the study have suggested that a person's sense of morality generally remains constant in both a personal and professional capacity.

Berger and Luckmann (1967, p.30-31) placed emphasis on the personal, reciprocal nature of employing typification schemes, whereby "others are apprehended and 'dealt with' in face-to-face encounters". Thus, the lawyer/client relationship should lend itself to a more personal assessment of the criminal lawyer. In fact, generally, the interview respondents perceived persons having minimal to extensive experience in the criminal courts as attributing both favourable and unfavourable qualities to criminal defence counsels as a whole. These qualities ranged from intelligent to manipulative, hard-working to greedy, and sharp to deceptive. More importantly, one lawyer perceived those persons lacking a personal relationship with the lawyer, and inexperienced with the criminal justice system as being superficial and unfair in their characterizations of criminal lawyers. This criminal defence counsel felt that lawyers associated with larger firms, financially successful (i.e. drives a Jaguar), and publicly recognizable (i.e. associated with cases that have received media coverage) appealed to those less familiar with the criminal justice system.

To find that criminal lawyers placed a high priority on maintaining ethical standards, whether self-imposed or aided by the governing rules of the Law Society of Upper Canada, speaks to the sense of professionalism, integrity, and commitment that criminal defence counsels have towards the profession. By attributing this variable the second highest ranking of the necessary attributes, criminal lawyers are sending a strong message to the those within the legal community as to how they wish to be perceived and characterized. For instance, all but one lawyer interviewed confirmed that local criminal defence counsels consider themselves to be the most ethical of all lawyers.

This favourable view was noted by one lawyer as extending to their perceptions of the views of local judges.

Judges are more apt to believe criminal lawyer...accept what is stated as true.... Particularly in smaller cities like Windsor, those in the criminal justice system deal with the same individuals on a daily basis. Lawyers have nothing but their name in the legal profession. Word will travel fast if a lawyer is known to be a liar.

## CONCLUSION

For those who generally perceive criminal lawyers as dishonest and manipulative, an appreciation for the criminal justice system and the function of criminal lawyers is lacking. The primary role of the criminal defence counsel is to advocate for the accused, regardless of innocence or guilt. Criminal lawyers also speak for those who cannot speak for themselves within the confines of a legal setting. By defending the client's rights, criminal defence counsels bring to light the client's reality ensuring due process. In fact, the rights of the individual would be lost without the assistance and commitment of criminal defence counsels.

As a result of this quantitative analysis of nineteen criminal defence counsels and the in-depth study of ten interview subjects, this study has revealed that those qualities deemed necessary by the Law Society of Upper Canada, as reflected by the Rules of Professional Conduct, failed at times to correspond with the realities of criminal defence work. In attempting to provide a comprehensive account of the necessary attributes of a 'good' criminal lawyer, qualities or traits that were specifically explored and examined were found to reflect the actual realities of local criminal defence counsels as opposed to ideal situations or characterizations as reflected by the Rules of Professional Conduct. The rules appear to lose their sacredness as criminal lawyers, faced with the realities of criminal defence work, attempt to amalgamate prohibitions and statements of objectives and goals set out as ideals by the Law Society of Upper Canada. These practical and legally significant findings may prove beneficial to other criminal defence counsels, and law students who are contemplating pursuing a career in the field of criminal law.

### INTEGRITY

The principle of integrity has been established as the fundamental criterion upon which the Rules of Professional Conduct were based. Integrity connotes a firm commitment to moral principles, which has been strongly evidenced by counsels in this study in both a personal and professional capacity. Not a single lawyer



expressed a desire to "live or die" for one case. For most lawyers, the practice of criminal law is their only livelihood, and as such, a single client is never worth jeopardizing one's career. Greater importance was placed upon the seriousness with which a breach of the Rules of Professional Conduct reflected upon counsel as a person in conjunction with the profession as a whole.

#### COMMITMENT

In meeting the needs of their clients, the study revealed that some criminal lawyers felt torn between their commitment to their clients and the Law Society. Knowing that the client is already being faced with an inherent bias that permeates every aspect of a client being criminally charged, many lawyers asserted that their ultimate responsibility was to their clients. It is important to note that regardless of this professional conflict, there is an understanding that truthfulness and integrity must be maintained.

#### COMPETENCY

Generally, a practice in criminal litigation was found to be conducive to a specialization in criminal law. Practising criminal law exclusively was generally found to increase a lawyer's competency, and was found to better assist lawyers in their dealings with the rigorous demands of criminal defence work.

Counsels with less than five years of experience generally looked disfavoured upon the number of years in practice being indicative of a lawyer's competency. On the other hand, eight of the nine counsel, with over six years of experience, held the opposing view. The number of years in practice may better reflect a lawyer's competency, but individual experience, exposure, and capabilities should not be ignored. To assume that younger lawyers have an edge on older lawyers because of their enthusiasm, and experienced counsel have a lot less naivete about people and the system, is an unfair generalization. In addition, age may not always be indicative of one's life experiences, nor the value of a lawyer's contribution to the legal profession.

Procedurally, it is a proper use of the rules for a criminal counsel to 'manipulate' the law for an accused's benefit and advantage. Consistent with the view held by McBarnet (1984), counsels must maximize any advantage in the law in accordance with their duties as advocates. This is not to suggest a willingness to maximize selfish interests through any available means, a view held by Sammons (1985). Therefore, within the confines of the Rules of Professional Conduct, legal competency reflects a lawyer's effective interpretation of the law, with the prerequisite of being knowledgeable of criminal law and procedure.

As indicated earlier, a lawyer's professional demeanour is fundamental to not only being a 'good' criminal defence counsel but also being perceived as a 'good' criminal defence counsel. This is not to suggest that wearing a nice suit, and being mindful of one's manners will draw special attention to any lawyer. Instead, the consistency with which a criminal lawyer effectively presents him/herself to the courts may be partly evidenced by his/her personal 'professional' style. As a result, having credibility with the court enhances the perception held by judges and justices of the peace.

### LEGAL FEES

It was revealed in the study by Reasons and Chappel (1985) that, during the periods of 1945-1965, a large majority of lawyers were disbarred for violating the financial trusts of their clients. In 1993, sixty percent of the charges relating to professional misconduct involved lawyers' failures to submit fees or financial reports to the Law Society of Upper Canada as opposed to such offences as stealing a client's money (The Windsor Star, 1993, Nov.20, A18). While these reports place emphasis on lawyers generally, this study reveals a different outlook for criminal lawyers specifically.

The questionnaire results revealed that a slightly greater percentage of criminal defence counsels (83% as compared to 79%), particularly those who devoted over seventy-five percent of their practice to criminal law, favoured billing practices being

reflective of the quality of the work as opposed to reducing fees to reflect affordable legal fees. This reasoning was further explored by the interview respondents, who generally suggested that, in reality, billing practices were found to be affected by a number of circumstances.

Firstly, the interview subjects revealed that a lawyer's financial difficulties may oftentimes be attributed to the client's inability to pay for legal services. In addition, it was the dismal financial position of a large percentage of criminal clients that placed them before the criminal courts. Criminal lawyers were also less likely to have access to their client's money given the services that they provide their clients. Secondly, if overcharging reflected the lawyer's potential to take advantage of their clients, criminal lawyers were found to base a major percentage of their work upon those clients who qualify for Ontario Legal Aid certificates. The hourly rate for these clients is sixty-seven dollars, as compared to fees generally ranging anywhere from one hundred to five hundred dollars an hour. Although few people are willing to work for free, the sample of criminal lawyers often reduced or waived fees in order not to deprive certain persons of legal advice and representation. On the other hand, good legal representation deserves credit where credit is due, and thus payment when payment is due. This view is consistent with the quantitative finding that legal fees should reflect the quality of the work. Thirdly, the quality of service may be compromised if payment were to be based upon a win/loss arrangement, whereby a "win" could be categorized as plea bargaining to a reduced charge (inclusive of less jail time or fines) or being acquitted. For instance, the lawyer may place a greater emphasis upon obtaining a plea bargain (which may not always benefit the client), and in failing to do so, an increase in the employment of unethical practices may result.

In sum, a lawyer will do his/her client a great disservice if he/she is driven by money or greed alone. One's ultimate responsibility must lie with one's client, while giving consideration to the values affirmed by one's colleagues.

### NECESSARY ATTRIBUTES OF A 'GOOD' CRIMINAL LAWYER

The study revealed that no single attribute will distinguish any one lawyer as a better criminal lawyer or a more effective litigator. Emphasis should be placed upon those attributes that received "very important" to "important" rankings (see Appendix B), and quantitatively these include:

**1. Representing a client based on the premise that the accused is presumed innocent, and entitled to fair legal representation.**

As a necessary attribute of a 'good' criminal defence counsel, the quantitative and qualitative respondents were overwhelmingly in favour of the importance of instilling and holding that the accused is presumed innocent until proven guilty, and entitled to fair legal representation. In fact, the presumption of innocence was viewed by many criminal lawyers as the cornerstone upon which criminal defence work is based. To overcome or meet the presumption, the State must garner evidence that will amount to proof beyond a reasonable doubt. Some interview respondents considered it unfortunate that defence counsels must continuously reinstill the importance of this presumption to societal members, and judges (inclusive of Justices of the Peace). On occasion, counsel expressed concern that the latter seemed immune to the distinctiveness of each individual case.

Accepting a role that values and attempts to maintain the presumption of innocence in no way undermines an attempt to seek the truth. To be aware of alternate realities is not to suggest that defence counsels must readily accept these realities.

**2. Abiding by the Rules of Professional Conduct as dictated by the Law Society of Upper Canada.**

Perhaps the most surprising finding of this study was the discovery that criminal defence counsels themselves believe that they are the most ethical of all lawyers. The researcher attributes this finding to the seriousness with which criminal lawyers accept their dual responsibilities to the Law Society as well as the accused. A determination regarding the acceptable parameters of the Rules of Professional

Conduct and criminal lawyers' obligation to the profession were more commonly determined by the interview respondents to be an exercise of common sense. In addition, their commitment to the legal profession obligated them to place this variable as one of their highest priorities. While being reminded daily that they can not take each case personally, the study revealed that ethics, on the other hand, must be taken personally.

**3. Meeting the specific needs of clients by utilizing and maintaining ethical standards.**

This study has shown that regardless of the number of years in practice, lawyers strongly believed that a criminal counsel has to be ethical as a person, which determines whether or not one is ethical as a lawyer. A person's basic moral fibre remains the true test of how he/she will decipher a legal ethical dilemma.

**4. Keeping up to date with the law (inclusive of the importance of continuing legal education).**

Lawyers are required to know the law, which means being on top of every statutory amendment or revision, and applicable common law rulings. At the same time, the value of experience should never be underemphasized.

**5. Never compromising one's personal moral standards with respect to professional ethics.**

Maintaining one's sense of personal integrity strongly reflected upon each criminal defence counsel's moral character. This variable was found by the quantitative respondents to closely relate to the variable of meeting the specific needs of clients by utilizing and maintaining ethical practices. Some interview respondents, in exploring the reasoning behind its importance, attributed this finding to a strong sense of personal conviction.

Consideration must also be given to the fact that oftentimes what distinguished one lawyer from another was his/her personal sense of style. Those interviewed emphasized additional attributes considered essential when dealing with

accused persons, and those included: street smarts, common sense, the ability to think on one's feet, and social (inter-personal) skills.

Realistically, one does not have to be a criminal to be a good criminal lawyer. However, criminal lawyers must be able to relate to all people on a professional and personal level. Their ability to deal with different people under varying circumstances was a skill for which local criminal defence counsels felt they received very little credit. It is also essential that the lawyer demonstrate a real concern for the client's welfare, as evidenced by the lawyer's handling of the case as well as the person. Techniques may include the lawyer getting to know the client, which generally results in the lawyer developing an empathy for the person. By drawing some attention to the client through gestures (eg. arm on shoulder, verbal and physical consoling) a defence counsel inspires a public empathy and sympathy, and 'humanizes' the 'criminal' accused. In fact, remaining non-judgemental and respecting one's client, no matter how heinous the allegation, may be prerequisites for enjoying and enduring a career as a criminal defence counsel. Of course, having a true dislike for the client is an understandable and legitimate consideration.

Unlike lawyers who were associated with firms and influenced by colleagues and associates, criminal lawyers were less directed by a collective definition of the situation. Criminal court interaction was found to present an arena for some legal interplay, but generally, criminal defence work is much more individualistic. As earlier indicated, many lawyers often first consulted with other criminal lawyers before seeking (anonymously or not) the advice of the Law Society's Ethics Committee. But, in many cases, even after these consultations, a lawyer's personal morality would take precedence. Thus, criminal defence counsels who were more likely to breach or bend the Rules of Professional Conduct were influenced by a personal, as opposed to a collective breakdown of morals.

Reporting practices revealed a much different reality. This study has revealed that the close connectedness of a community like Windsor reflected upon their reporting of unethical practices. In practice, the Rules of Professional Conduct obligate lawyers to be accountable for their colleagues, associates, lawyers, and

articling students. Thus, if a lawyer was aware of another lawyer breaching a duty as required by the Law Society of Upper Canada, it would be his/her obligation to report another lawyer. Only three interview respondents agreed with the Law Society's position. Instead, the study revealed that reporting questionable ethical conduct presented a great difficulty for one prominent criminal defence counsel, and the researcher suspects that this view was a general sentiment shared by many local practising criminal lawyers. This prominent criminal lawyer was unwilling to report any unethical practices to the government, the police, or the Law Society, but noted confidently, "of course I follow the rules of professional conduct because the Law Society tells me to" (as he winked twice). Although adequate regulation is necessary, some criminal lawyers simply do not feel that it is their responsibility to "police" their colleagues.

Table 10:

**INTERACTIONAL CHART OF DEFINING THE SITUATION OF DEFENDING THE ACCUSED**

THE CRIMINAL DEFENCE COUNSEL ENTERS THE INITIAL MEETING  
WITH THE ACCUSED WITH ELEMENTS OF  
self, mind, symbols, perspectives, significant others, reference groups,  
role taking ability, empathy, and memory of the past.

THE CRIMINAL DEFENCE COUNSEL DEFINES THE SITUATION OF DEFENDING THE ACCUSED  
AS ONE IN WHICH LEGAL AVENUES AND ETHICAL CONSTRAINTS MUST BE CONSIDERED.

1. The criminal defence counsel takes the role of other criminal defence counsels and comes to the determination that he/she must represent the accused based on the presumption of innocence and entitlement to fair legal representation.
2. The criminal defence counsel takes the role of the accused, other criminal defence counsels, and the Crown, etc. in an effort to determine what defence would be most beneficial to the accused.
3. Relevant and applicable substantive and procedural laws are applied to available facts and evidence to explore crucial issues, and the relevancy of the evidence.

CRIMINAL DEFENCE COUNSEL DETERMINES THE LINE OF ACTION TOWARDS THE VARIOUS  
COURT PARTICIPANTS (EG. THE VICTIM, WITNESSES, THE POLICE, CROWN, ETC).

ACTING PUBLICLY AS THE LEGAL COUNSEL FOR THE ACCUSED AND INCORPORATING  
ELEMENTS OF SYMBOLS WITHIN THE COURTROOM.

CRIMINAL DEFENCE COUNSEL MAY REVISE THEIR PERCEPTION OF THE DEFINITION  
OF THE SITUATION BASED ON THE OUTCOME OF CERTAIN EVENTS  
OF THE TRIAL, OR THE TRIAL GENERALLY.

Adopted by Charon (1989).



The possible shortfalls of employing quantitative and qualitative research methods were revealed in the study in retrospect.

Generally, quantitative research should involve a rather substantial body of information/data. With a questionnaire response rate of nineteen lawyers (of a prospective sample of sixty-one lawyers), the sample size was too small for any meaningful evaluation or sociological contribution. The sample was also limited to those criminal defence counsels who accepted legal aid certificates, excluding those criminal lawyers who were either not listed due to a failure to update the list or refused legal aid certificates. A more comprehensive study of local criminal defence counsels should reflect all prospective respondents practising criminal law, to some extent. By soliciting all the member of the Law Society of Upper Canada to complete the questionnaire (and participate in interviews), a more comprehensive study of the necessary attributes of a 'good' criminal lawyer would be attained. An overall larger sample would allow for deeper probing and examination of the variables, inclusive of those specifically focused upon in this study.

In light of this exploration of local criminal defence counsels and the realities of criminal defence work, some final consideration should be given to how legal communities and institutions can best accommodate students currently in law school, and considering a criminal law specialization. Persons generally interested in a legal career may also benefit.

In recent years, our legal community and educational system has placed greater emphasis on providing greater social and legal awareness to students, and future lawyers about ethical concerns. The Faculty of Law at the University of Windsor has attempted to implement change within the legal educational system by offering students weekly seminars and optional course selections on varied topics relating to professional responsibility. Law schools would be best advised to implement mandatory course offerings pertaining to ethics and the legal profession.

It is becoming increasingly important to specialize due to the demands (as well as out of need) to stay constant with the law. There is also an increased pressure on current articling students with today's poor economy and lack of available

employment with local firms to demonstrate early a proclivity towards competency. In addition, akin to other law specializations (eg. labour law, taxation, copyright law, etc.), students-at-law expressing an interest in the area of criminal law may also be disadvantaged by their articles in that they may comprise minimal or no exposure to criminal litigation. It has been suggested that local firms tend to accommodate more revenue-generating business-related specialties precluding a deeper commitment to criminal litigation. Today's law student may tend to steer away from specializing in criminal law because of what he/she believes are inherent disadvantages as previously discussed. Nevertheless, proponents of the current system emphasize that each area of law is a distinct specialization and not one area should be given greater importance be it in law school, articling or in the Bar Admission courses.

Further research is needed to distinguish whether specializations which are conventionally grouped for practical reasons impact on the opportunity to practice criminal law. In addition, another area of interest worth examining would be the possible impact of increasing articling students' exposure to criminal law and the effect on that students' level of competency in that specialization as a lawyer. Ideally students who want to specialize in a particular area of the law should be given the opportunity to do so, although realistically firms may not be so accommodating. Instead, perhaps arrangements could be made to allocate a greater percentage of their articles to criminal law.

Furthermore, it may be of value to increase law students' exposure and awareness to ethical dilemmas and quandaries nationwide by having mandatory course requirement on Ethics and Professional Responsibility throughout Canadian law schools. By dealing with ethical problems first hand, students can practically assess the specific ethical problems that arise within their chosen area of expertise as articling students and lawyers.

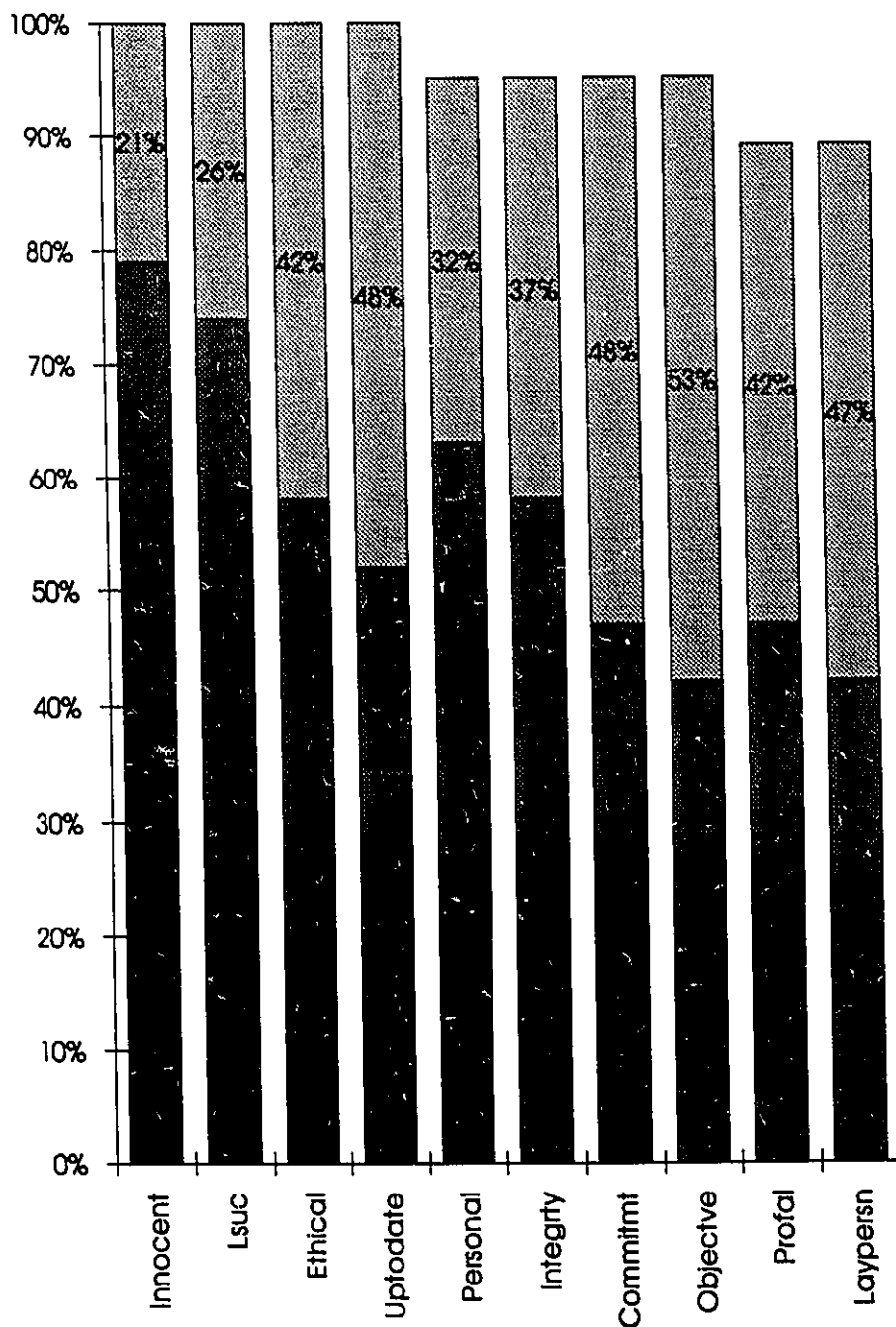
## Appendix A:

CODIFICATION OF VARIABLES

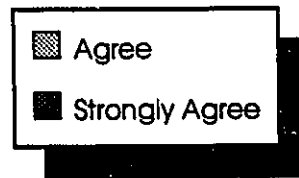
<u>CODE</u>	<u>VARIABLE DESCRIPTION</u>
AGE	
SEX	
YRSPRLAW	Years practising law
YRSCRIM	Years practising criminal law
NMBRLAWY	Number of Lawyers in firm
PARTNER	Partnership status
PERCNTCR	Percent practice devoted to criminal law
SPECIALZ	Specialization
CRIMSPEC	Specialization in criminal law
WHYCRIM	Why practice criminal law
MAJOR	Major field of study prior to entering law school
ATTEMPTS	Number of attempts for law school admission
LAWSCOOOL	University of graduation
GRADEGRE	Graduate degrees in Law and specialization
ETHICAL	Maintains ethical standards
LSUC	Abiding by the Rules as dictated by the Law Society of Upper Canada
PERSONAL	Never compromises personal moral standards
UNETHICL	Employs unethical practices
COMMITMT	Priority on commitment
FIRM	Maintains alliances with one's firm
INTERPRT	Interprets/Manipulates the law
GOODPRSN	Being a good person
OBJECTVE	Guards against an imposition of values
PROFAL	Professional demeanour
COMPETNT	Competency reflective of the number of years in practice
GRADES	Maintaining above average grades in law school
UPTODATE	Keeps up to date with the law
INTEGRTY	Maintains one's sense of integrity: honest and trustworthy
CATERS	Caters to those least able to afford legal representation
FEES	Legal fees reflective of quality of service
REP	Reputation alone speaks for itself
CLIENT	Higher priority placed on client's interests: above obligation to LSUC
INNOCENT	Represents client based upon the presumption of innocence
LAYPERSN	Accomplishes what layperson can't
HEWISHES	Carries out what client wishes
THRILL	Passion towards criminal defence work

<u>CODE</u>	<u>VARIABLE DESCRIPTION</u>
FULLRESP	Takes full responsibility for all legal decisions
KNOWLAW	Knowledge and expertise in criminal law is paramount
<b>COMMITMENT:</b>	
BESTINT	Looks out for client's best interest
INDIV	Concerned about the individual and his/her problems
CLARIFY	Explains/Clarifies matters for the client
MONEY	Attaining greater financial status dictates commitment
<b>INTEGRITY:</b>	
HONEST	Honest, open, forthright about the case
ETHICSTD	Ethical standards are maintained
ILLEGAL	Uses illegal or unethical practices to assist client
WINNING	Winning a case is more important than the law
<b>COMPETENCY:</b>	
KNOWLEDG	Knowledgeable about the law
CAPABLE	Capable due to past experience with like cases
SPECTZN	Specializes in criminal law
MANIPULA	Manipulates/Interprets the law for client's benefit
<b>FEES:</b>	
FEESGENL	Fees reflect general trend among criminal lawyers
FEESQUAL	Fees reflect the quality of work
VOLUNTER	Affordable legal fees eg. pro bono and legal aid work
EXCESSIV	Considers client view of excessive fees
EMPLOYMT	Employment of unethical practices within the legal profession
SERIOUS	The seriousness with which the Rules of Professional Conduct are taken
OBLIGTN	Primary obligation as legal counsel

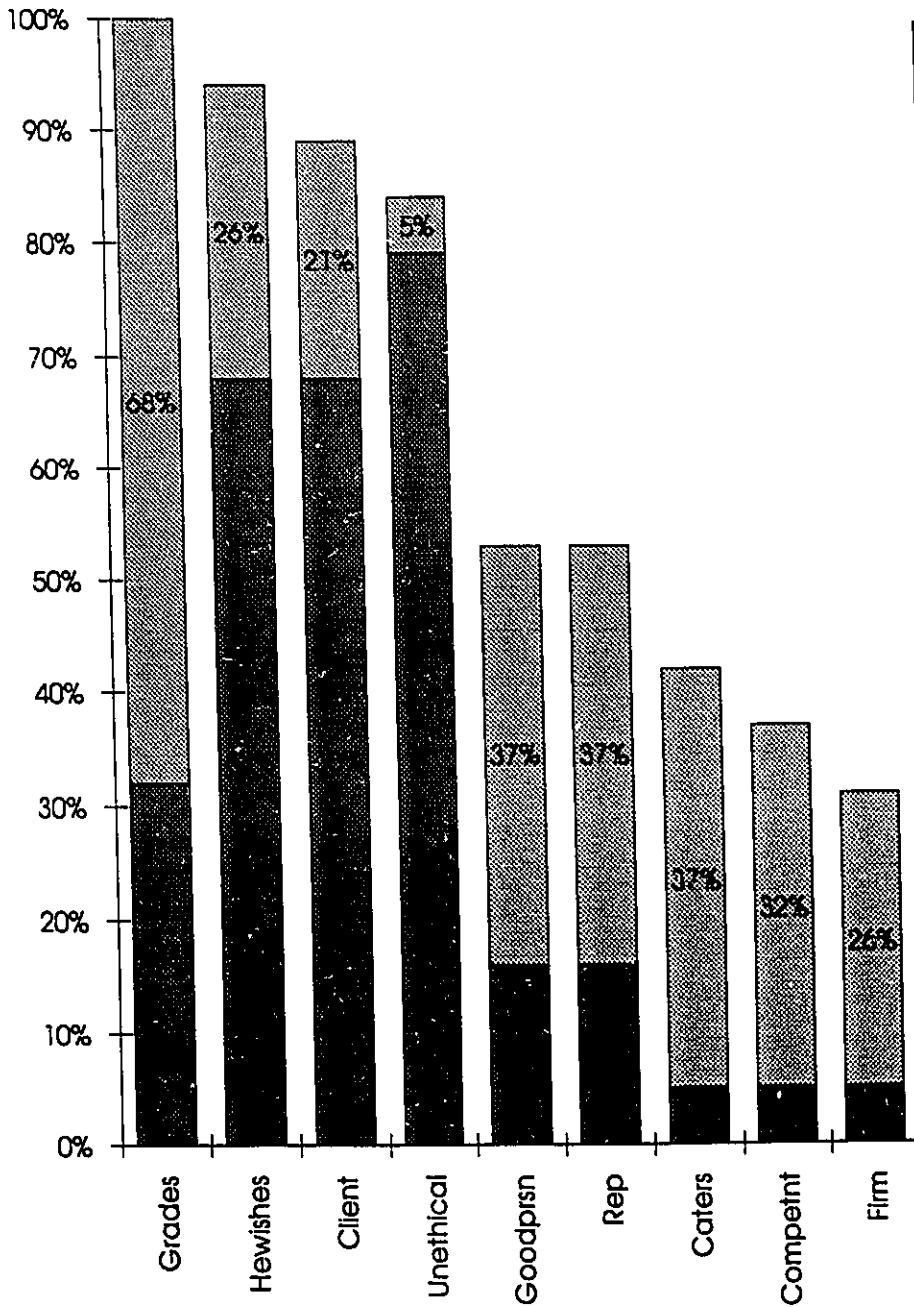
### Most Favourable Necessary Attributes - Cumulative Responses to Variables



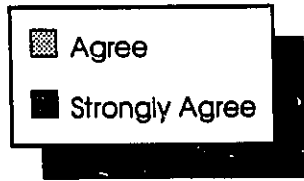
The chart to the left helps illustrate the strength of responses to each specific variable. For example 79% of respondents "strongly agree" in the importance of maintaining the presumption of innocence. Another 21% "agree". The total of the two are only used to rank the variables not as an absolute percentage of the total responses.



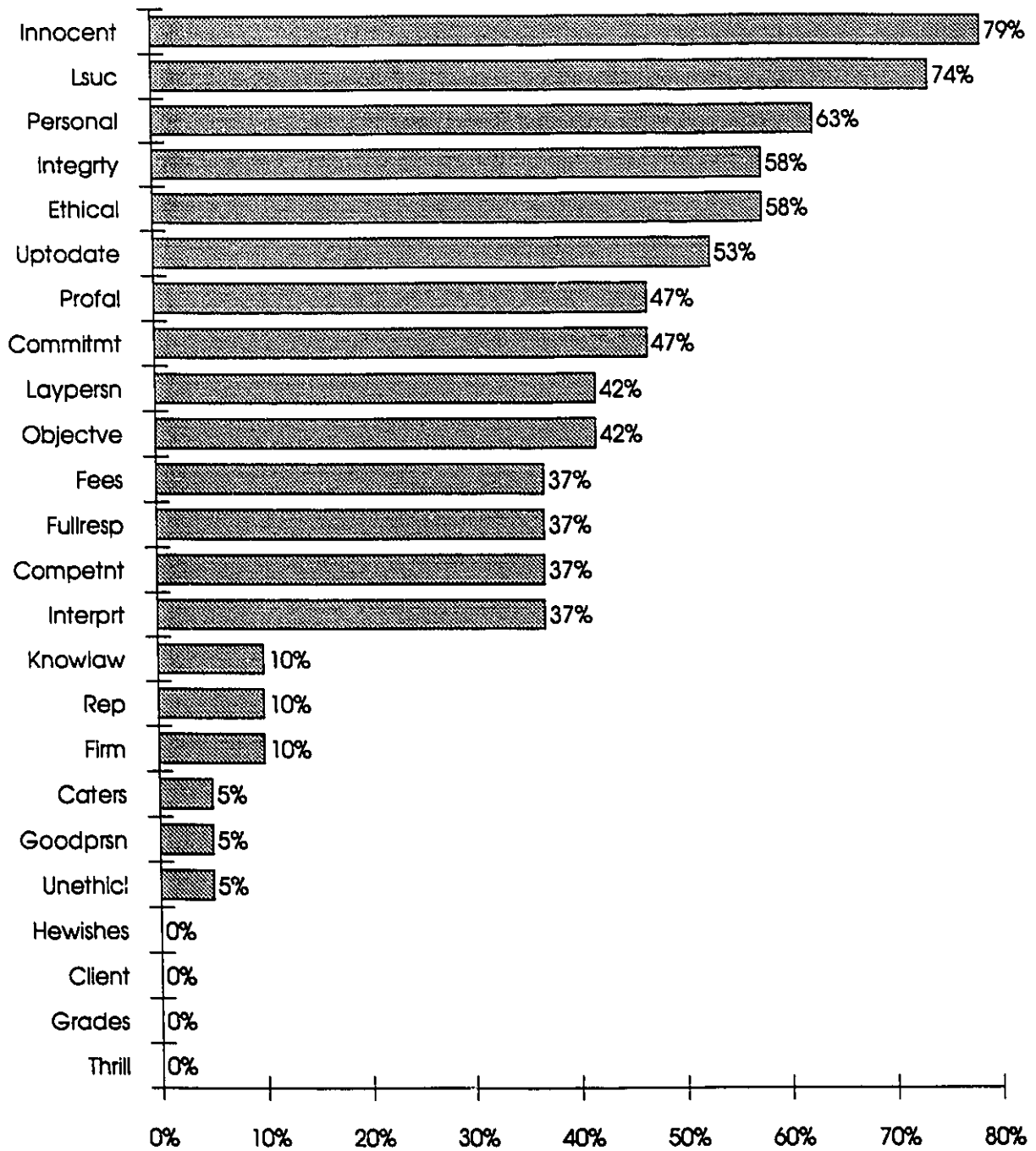
### Least Favourable Necessary Attributes - Cumulative Responses to Variables



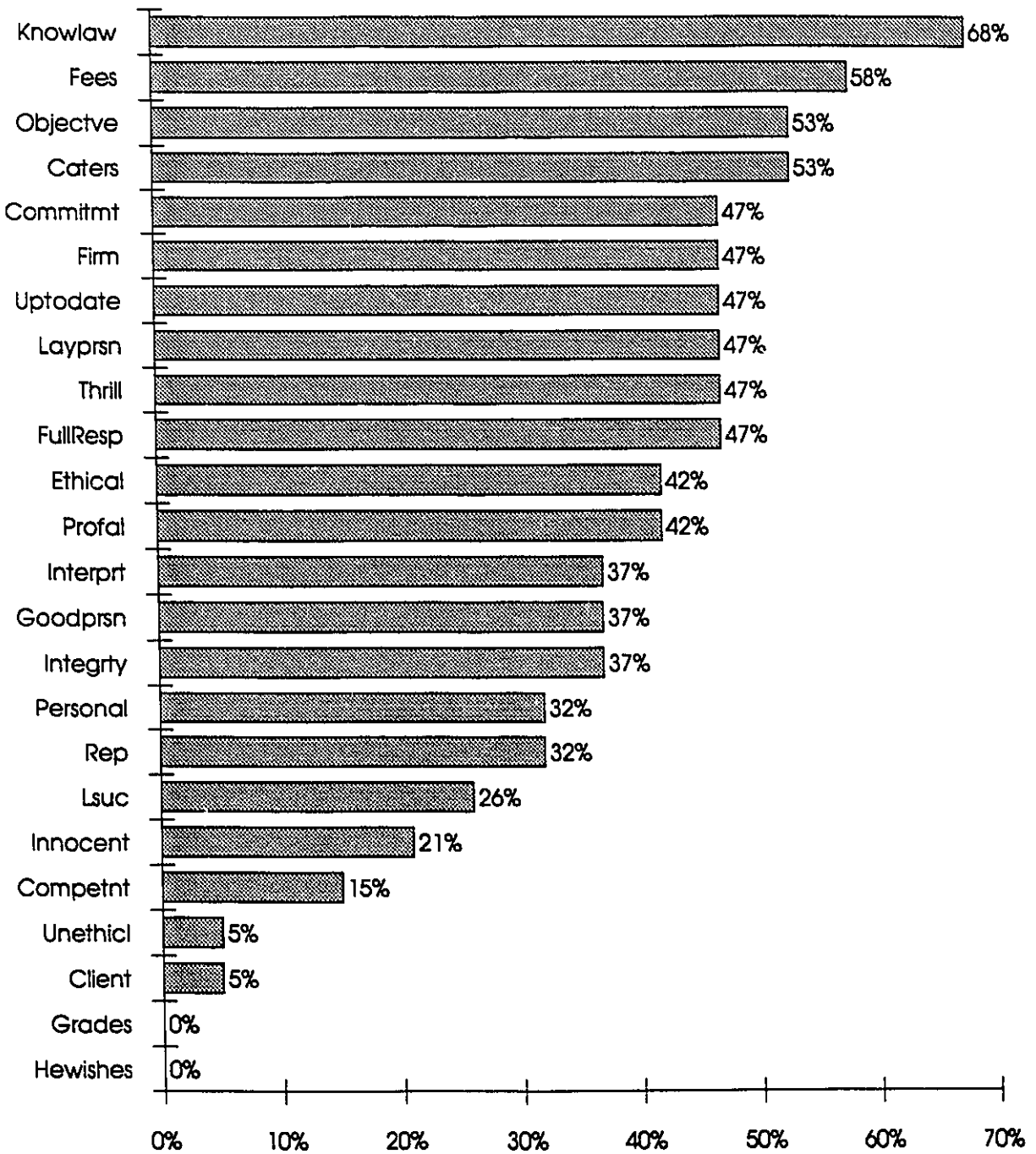
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### Necessary Attributes of a Good Criminal Lawyer "Strongly Agree" Category

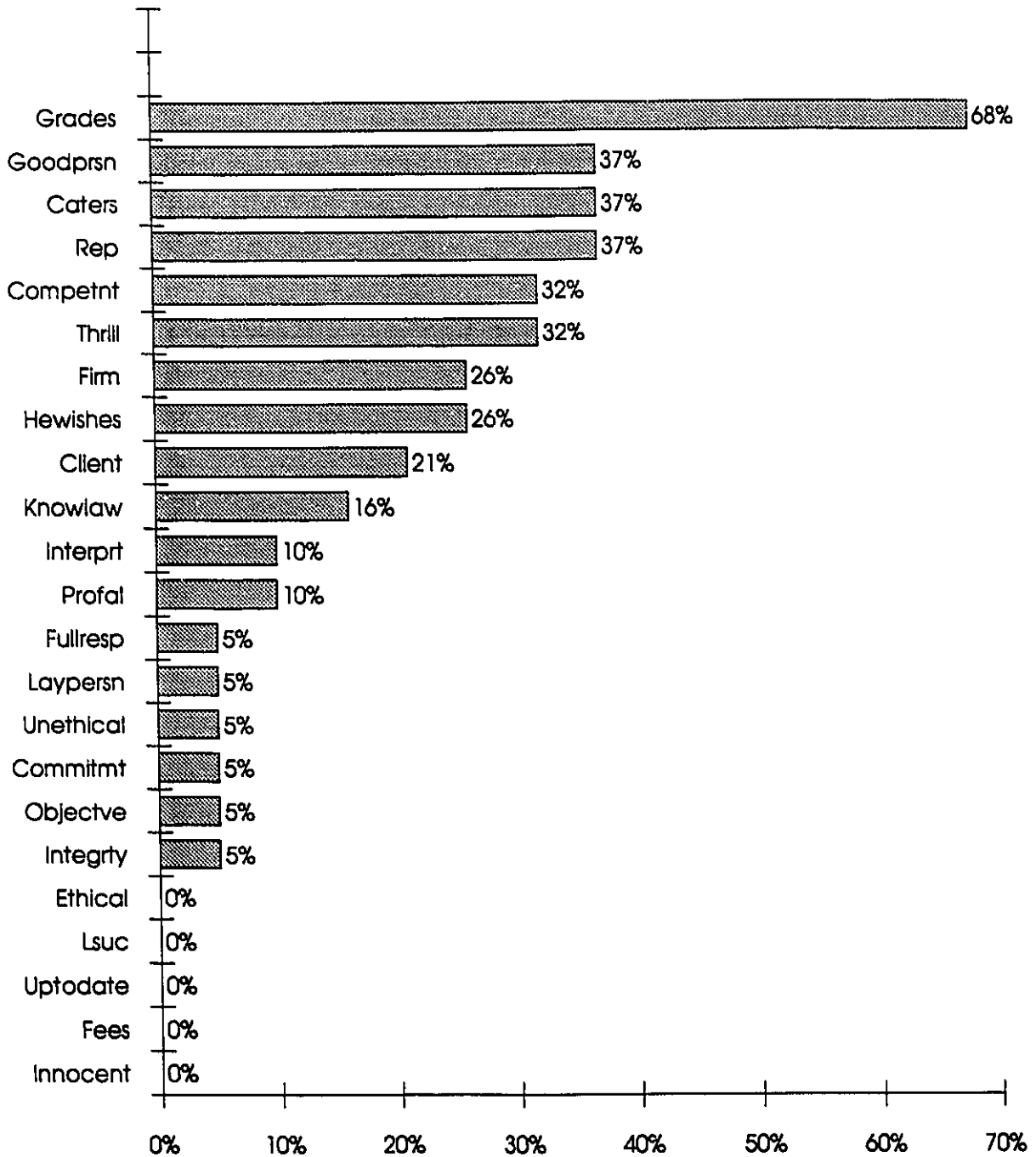


### Necessary Attributes of a Good Criminal Lawyer "Agree" Category

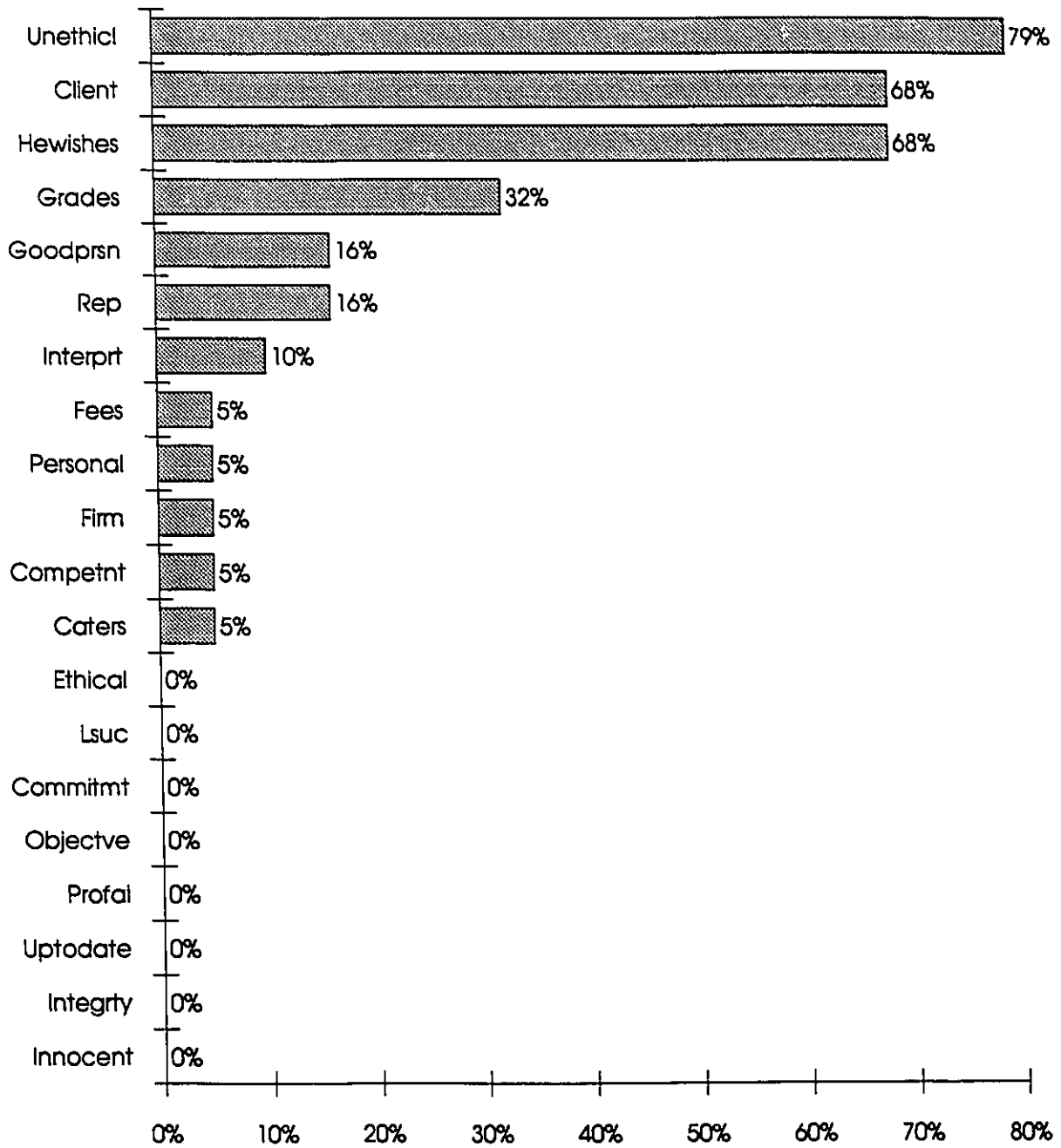




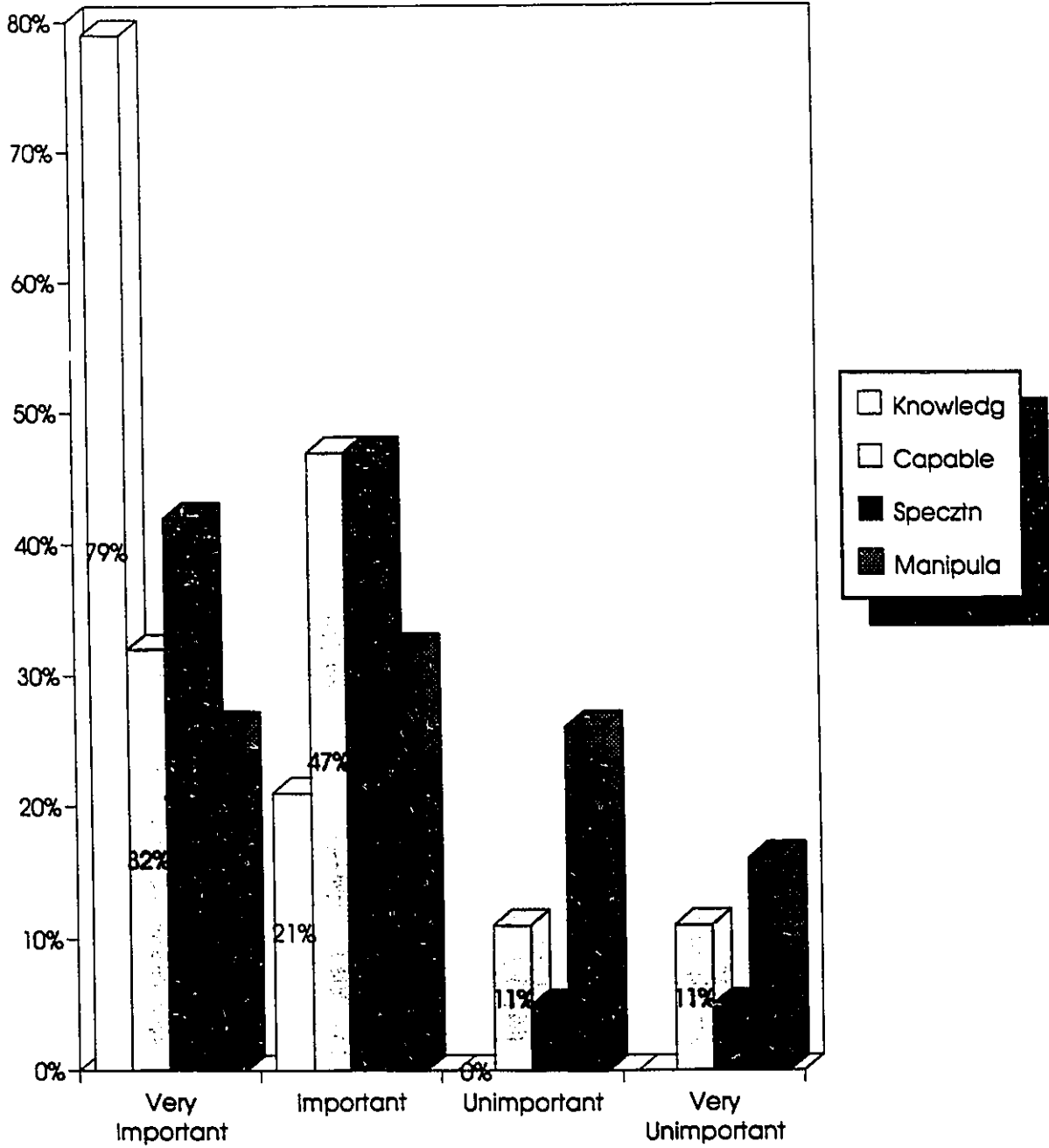
### Necessary Attributes of a Good Criminal Lawyer "Disagree" Category



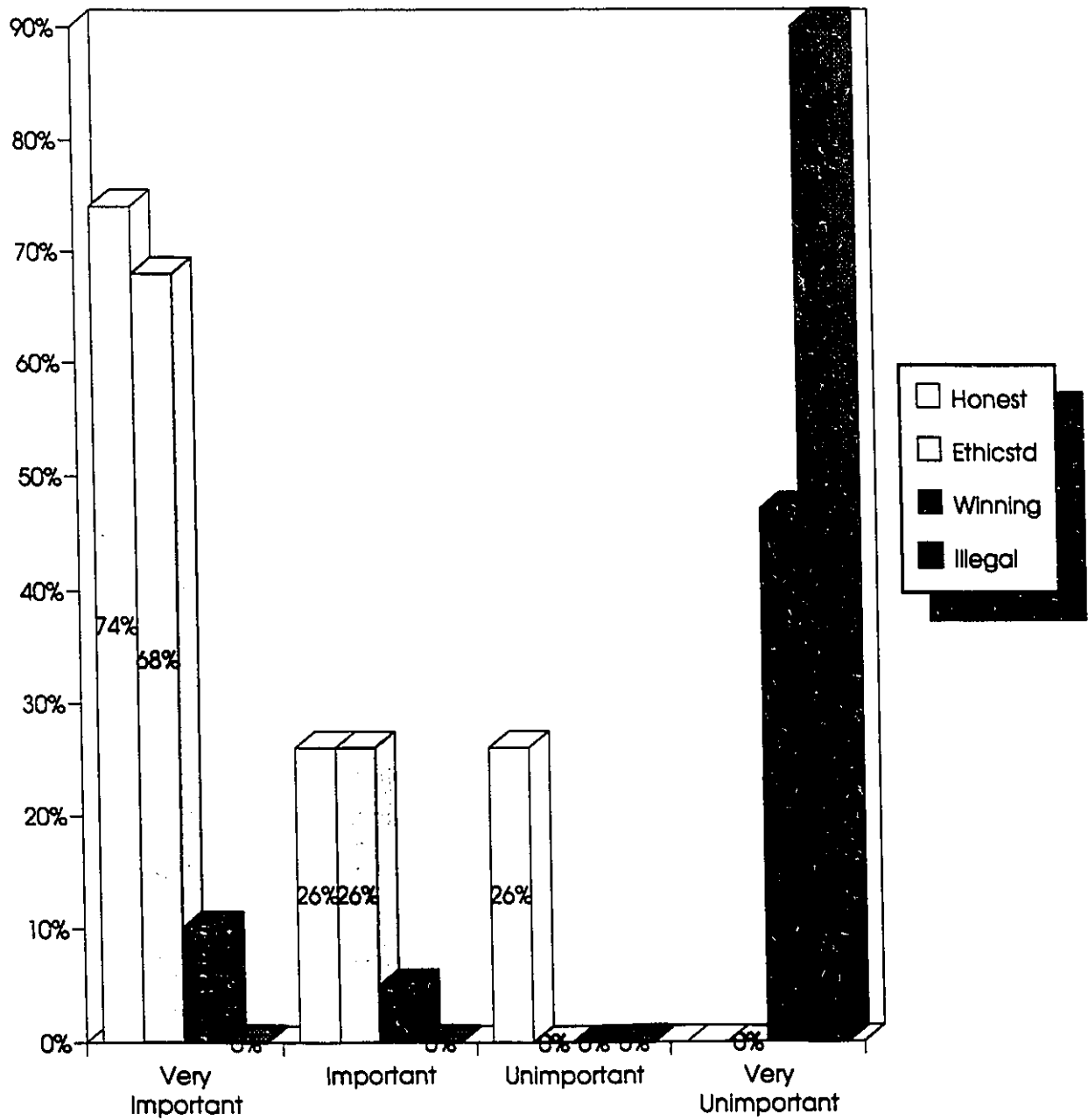
### Necessary Attributes of a Good Criminal Lawyer "Strongly Disagree" Category



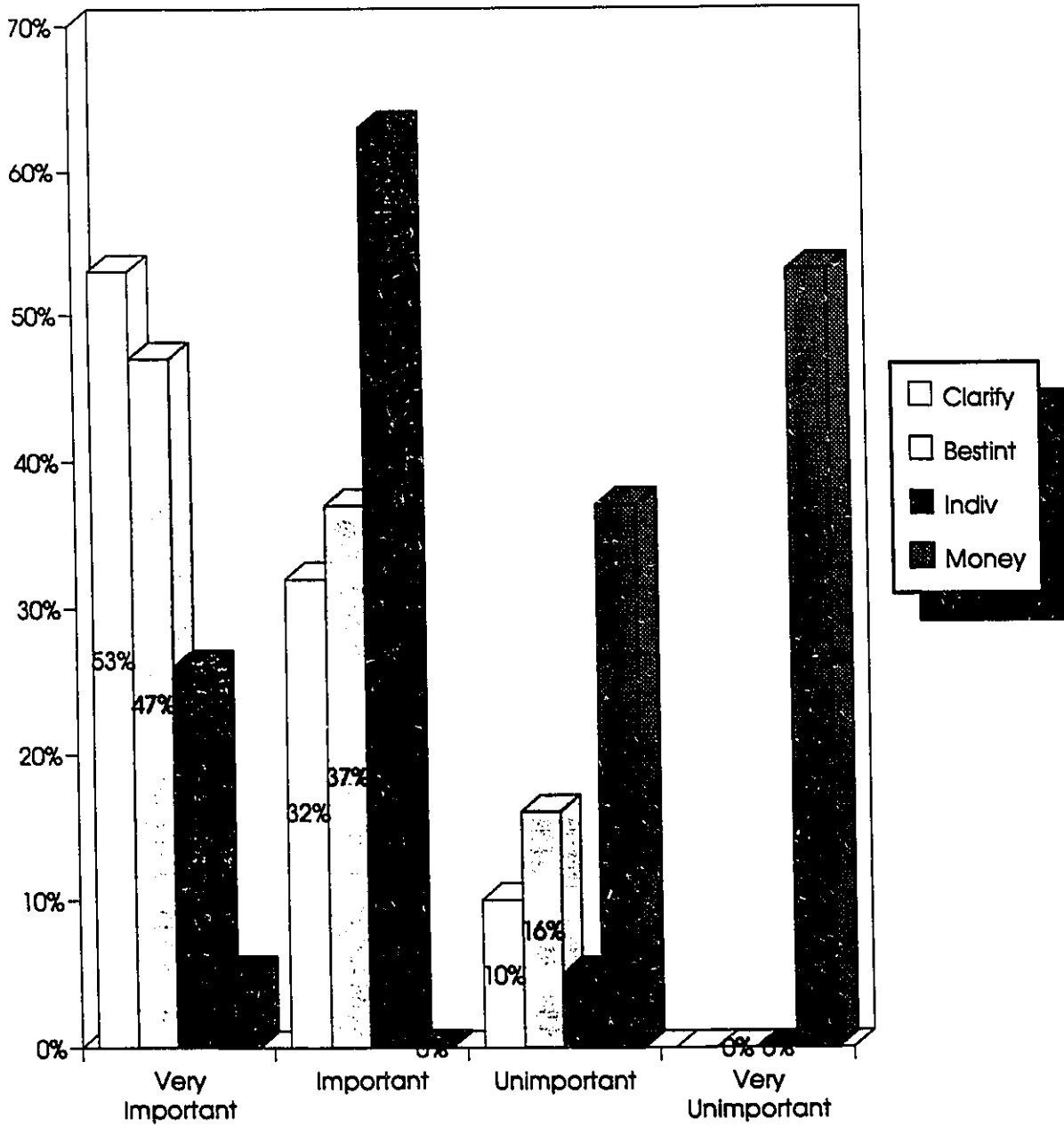
### The Role of the Lawyer as it Relates to Competency



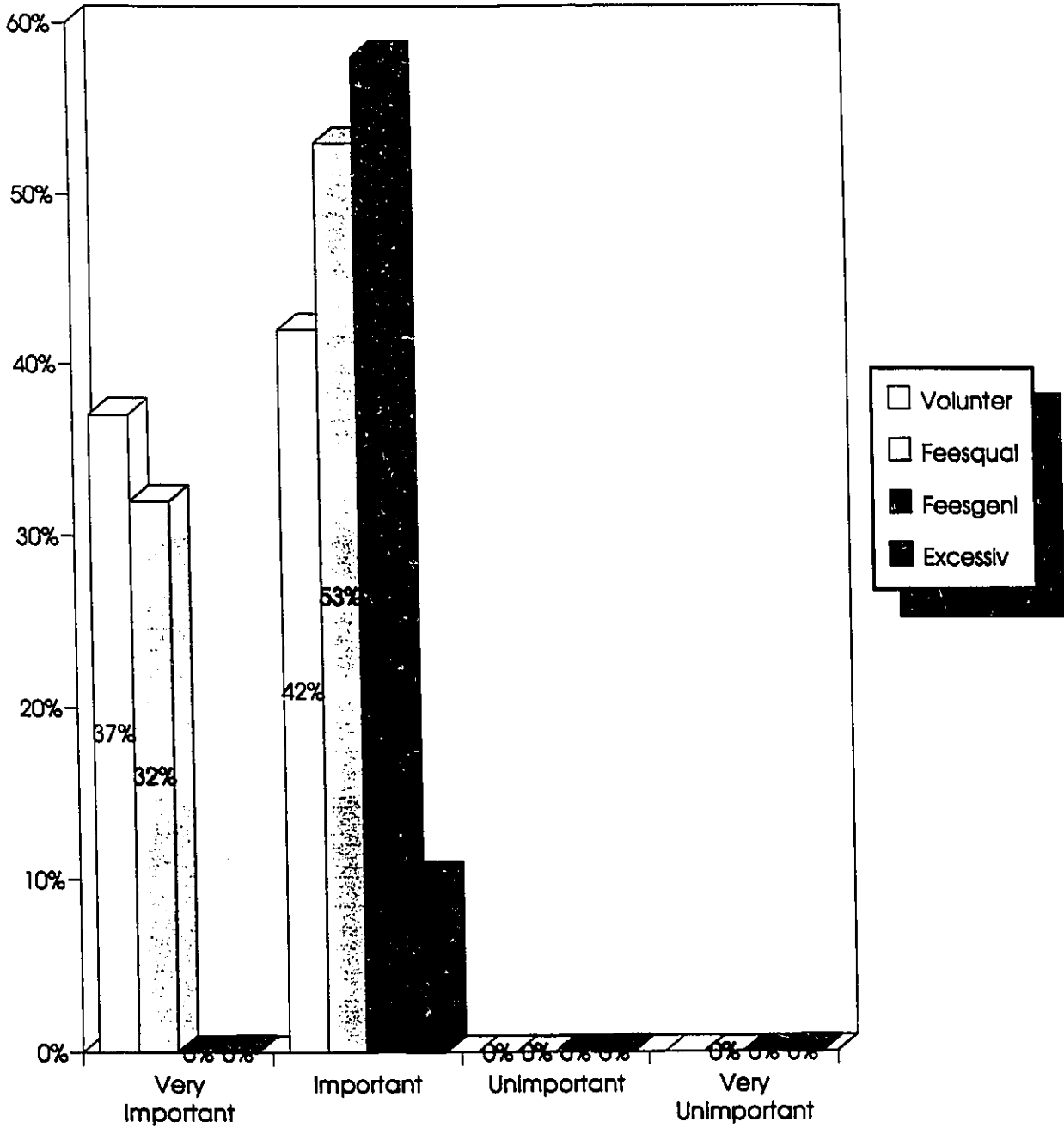
### The Role of the Lawyer as it Relates to Preserving the Moral Principle of Integrity



### The Role of the Lawyer as it Relates to Commitment to the Accused



### The Role of the Lawyer as it Relates to Legal Fees



Appendix L:

QUESTIONNAIRE

ID1: \_\_\_\_\_

- 1) Age: a) under 30 b) 30-40 c) 41-50 d) 51-65 e) over 65
- 2) Sex: a) male b) female
- 3) Years practising law: a) less than 2 b) 2-5 c) 6-10 d) 11-20 e) 21-30  
f) more than 30
- 4) Years practising criminal law: a) less than 2 b) 2-5 c) 6-10 d) 11-20 e) 21-30  
f) more than 30
- 5) Number of lawyers in firm: \_\_\_\_\_
- 6) Are you a partner? a) yes b) no
- 7) To what extent is your practice devoted to criminal litigation?  
a) over 75% b) more than half c) less than half d) under 25%
- 8) In what area(s) of law do you specialize?  
\_\_\_\_\_
- 9) In what area(s) of criminal law do you specialize?  
\_\_\_\_\_
- 10) Why did you decide to practice criminal law?  
\_\_\_\_\_  
\_\_\_\_\_
- 11) Major field of study prior to entering law school: \_\_\_\_\_
- 12) Did you receive an undergraduate degree? a) yes b) no
- 13) Number of attempts for a successful admittance to the faculty of law:  
a) one b) two c) three d) four or more
- 14) What law school did you graduate from? \_\_\_\_\_
- 15) Do you have any graduate degrees in the field of law? a) yes b) no
- 16) If so, what degrees, and in what area of concentration?  
\_\_\_\_\_
- 17) How useful were the criminal law courses taught in your law school as preparation for the criminal law work in which you now are engaged?  
a) very useful b) useful c) not useful d) very unuseful

Comment:

18) Rank the following categories as to your perceptions regarding the necessary attributes of a "good" criminal lawyer.

1=STRONGLY AGREE 2=AGREE 3=DISAGREE 4=STRONGLY DISAGREE

1 2 3 4 A "GOOD" CRIMINAL LAWYER:

- \_\_\_\_\_ 1) meets the specific needs of clients by utilizing, and maintaining ethical standards
- \_\_\_\_\_ 2) abides by the Code of Ethics as dictated by the Law Society.
- \_\_\_\_\_ 3) never compromises his/her personal, moral standards with respect to professional ethics
- \_\_\_\_\_ 4) is smart enough to get away with using unethical standards
- \_\_\_\_\_ 5) places a priority on commitment: e.g. one's ultimate responsibility is to one's client
- \_\_\_\_\_ 6) maintains an alliance to one's firm/partner(s) and its objectives
- \_\_\_\_\_ 7) interprets/manipulates the law in order to best represent your client
- \_\_\_\_\_ 8) means being a good person
- \_\_\_\_\_ 9) does not impose his/her values on the client, but remains objective
- \_\_\_\_\_ 10) exhibits a professional demeanour: well spoken, charismatic, well dressed, and presentable in court
- \_\_\_\_\_ 11) is competent (e.g. numbers of years in criminal practice determines the competency of the lawyer)
- \_\_\_\_\_ 12) maintains above average grades in law school
- \_\_\_\_\_ 13) keeps up to date with the law (continuing legal ed.)
- \_\_\_\_\_ 14) maintains one's sense of integrity: honest, and trustworthy
- \_\_\_\_\_ 15) caters to those who are least able to afford good legal representation (e.g. pro bono work, duty counsel, legal aid)
- \_\_\_\_\_ 16) maintains legal fees that are representative of the quality and expertise of the criminal lawyer's work
- \_\_\_\_\_ 17) reputation alone speaks for itself
- \_\_\_\_\_ 18) places a higher priority in pursuing the client's interests at the expense of jeopardizing one's obligation to the L.S.U.C.
- \_\_\_\_\_ 19) represents his/her client based on the premise that an accused is presumed innocent, and entitled to fair legal representation
- \_\_\_\_\_ 20) carries out what his/her client is incapable of accomplishing as a layperson
- \_\_\_\_\_ 21) does whatever the client wishes
- \_\_\_\_\_ 22) is fascinated by the thrill of criminal defence work, and one's involvement in the criminal justice system
- \_\_\_\_\_ 23) takes full responsibility for decisions and procedures regarding the criminal law (e.g. plea, conducting the trial, witnesses, etc.)
- \_\_\_\_\_ 24) one's knowledge and expertise of criminal law is paramount
- \_\_\_\_\_ 25) other (please specify) \_\_\_\_\_



Rank the following statements using the provided scale. Space has been provided for each category, allowing for further elaboration on a specific issue. Feel free to comment.

1=VERY IMPORTANT 2=IMPORTANT 3=UNIMPORTANT 4=VERY UNIMPORTANT

19) One's sense of **commitment** to the accused, from a criminal defence counsel's perspective, is best illustrated by the following statement:

1 2 3 4

\_\_\_\_\_ a) looks out for his/her best interest

\_\_\_\_\_ b) concerned about the individual, and his/her problem(s)

\_\_\_\_\_ c) explains/clarifies matters for the client, and openly discuss all the facets of the case

\_\_\_\_\_ d) attaining greater financial status dictates one's commitment to the case

e) other \_\_\_\_\_

20) One's sense of **integrity**, as a litigator, is best illustrated by the following statement:

1 2 3 4

\_\_\_\_\_ a) one is open and forthright, and is honest with the client regarding the circumstances of the case

\_\_\_\_\_ b) maintains ethical standards

\_\_\_\_\_ c) engages in unethical and/or illegal activities to help any client (affluent or destitute) avoid a jail term

\_\_\_\_\_ d) more interested in winning the case, than the legalities of criminal defence work

e) other \_\_\_\_\_

21) One's sense of **competency**, as a criminal defence lawyer, is best illustrated by the following statement:

1 2 3 4

- \_\_\_\_\_ a) knowledgeable, and well versed in the law
- \_\_\_\_\_ b) capable as a result of having handled many similar cases in the past
- \_\_\_\_\_ c) specializes in the field
- \_\_\_\_\_ d) effectively interprets/manipulates the law for the client's benefit
- \_\_\_\_\_ e) other \_\_\_\_\_

22) One's sense of **fairness and reasonableness of fees**, as a litigator, is best illustrated by the following statement:

1 2 3 4

- \_\_\_\_\_ a) his/her legal fees are representative of the general trend amongst criminal lawyers
- \_\_\_\_\_ b) the expense of legal fees is representative of the quality of the criminal defence lawyer
- \_\_\_\_\_ c) feels a sense of "giving to those who are least able to afford adequate legal counsel", by occasionally volunteering as duty counsel, available through legal aid services, or accepting cases pro bono
- \_\_\_\_\_ d) feels no obligation to consider whether the accused feels his/her fees are excessive
- \_\_\_\_\_ e) other \_\_\_\_\_

23) Do you consider the employment of unethical practices within the legal profession as: a) very prevalent b) prevalent c) occasional d) uncommon

EXPLAIN:

24) How seriously do you take the Rules of Professional Conduct which governs your profession? a) very seriously b) seriously c) not seriously

d) not very seriously at all

WHY?

- 25) Your primary obligation, as a criminal defence counsel, is towards:
- a) Canadian Bar Association
  - b) your law firm
  - c) Law Society
  - d) your client
  - e) community
  - f) yourself
  - f) other \_\_\_\_\_

WHY?

- 26) How would you define the obligation you have, as a criminal defence counsel, to the following persons/institution:

**1=VERY IMPORTANT 2=IMPORTANT 3=UNIMPORTANT 4=VERY UNIMPORTANT**

1 2 3 4

- \_\_\_\_\_ a) victim
- \_\_\_\_\_ b) witness
- \_\_\_\_\_ c) accused
- \_\_\_\_\_ d) judge

1 2 3 4

- \_\_\_\_\_ e) jury
- \_\_\_\_\_ f) Crown Attorney
- \_\_\_\_\_ g) Law Society of U.Can.
- \_\_\_\_\_ h) employer/ law firm

- 27) How do you differentiate your loyalty to the Law Society of Upper Canada as compared to your loyalty to your client (e.g. would you jeopardize your loyalty to the profession for the sake of professional advancement/financial gain?)?

- 28) Where do you draw the line in defending a client?

- 29) If you have any additional comments, please feel free to make additional remarks below or over.

- 30) Would you be agreeable to an interview? a) yes b) no  
If yes, please print:

Name:

Business Address:

City:

Postal Code:

Phone:

**Thank You for your assistance and co-operation**

Appendix M:

INTERVIEW SCHEDULE

LAWYER'S PERSONAL DATA

Start time \_\_\_\_\_

Finish time \_\_\_\_\_

Date \_\_\_\_\_

- 1) Defence Counsel \_\_\_\_\_
  - 2) Address \_\_\_\_\_ Tel. No. \_\_\_\_\_
  - 3) Age:
  - 4) Sex:
  - 5) Years practising law:
  - 6) Number of lawyers in firm:
  - 7) Are you a partner? a) yes b) no
  - 8) To what extent is your practice devoted to criminal litigation?  
a) over 75% b) more than 50% c) less than 50% d) under 25%
  - 9) In what area of law do you specialize?
  - 10) Why did you decide to practice criminal law?
  - 11) Major field of study prior to entering law school:
  - 12) Did you receive an undergraduate degree prior to entering law school?  
a) yes b) no
  - 13) Did you receive any graduate degree(s) prior to entering law school (e.g. M.A.)?
  - 14) Number of attempts for a successful admittance to the faculty of law:
  - 15) What law school did you graduate from?
  - 16) Do you have any graduate degrees in the field of law?  
a) yes b) no
  - 17) If so, what degrees, and in what area of concentration?
- (p.1: Adapted from Greenspan, R., 1973)

## SOCIAL CONSTRUCTION OF A 'GOOD' CRIMINAL LAWYER

**COMMENT ON EACH OF THE FOLLOWING QUESTIONS:**

How would you define your role as a criminal defence lawyer?

Do you feel that participants whom you encounter within the criminal justice system (i.e. victims, witnesses, accused, judge, jury, lawyers in general) maintain a fair or accurate perception of your role as a criminal litigator?

How would you define the obligation you have, as a criminal defence counsel, to the following persons/institution:

- |            |                                      |
|------------|--------------------------------------|
| a) victim  | e) jury                              |
| b) witness | f) firm                              |
| c) accused | g) Law Society of Upper Canada       |
| d) judge   | h) other practising criminal lawyers |

When counselling clients, is that advise always professional (as a criminal defence lawyer), or personal (from the perspective of a concerned individual)?

In protecting the rights of the individual/accused, do you feel as a criminal defence lawyer that you should be afforded any special privileges?  
Should the accused?

Does good lawyering mean, in part, being a good person?

How much of an influence are others (e.g. victims, witness, accused, judge, jury, Crown Attorney, other practicing criminal lawyers) in terms of one's defence, arguments, performance, etc. in court?

How might you react, or modify your behaviour in the following scenarios:

- a) if a judge is not sympathetic to your cause as a defense counsel
- b) if a jury member appears to be very cynical
- c) if a Crown is especially tough
- d) if the accused perjures himself/herself on the stand
- e) if a victim/witness demonstrates obvious pain/anger/frustration on the stand
- f) if the strength of the case is mediocre
- g) if one is faced with the dilemma of compromising one's moral values for the sake of winning a significant case

**COMMITMENT**

To be a "good" criminal defence lawyer, must one's commitment to the legal profession be paramount (e.g. must the profession consume your life or is it a job)?

Where do you draw the line in defending a client?

Which is more of a priority/personally fulfilling: Winning a criminal case where you gain recognition, and financial benefits, or winning a case when you know that justice has truly been served (e.g. the accused is wrongly accused, and avoids conviction)?

**INTEGRITY**

As a litigator, do you place a priority on maintaining ethical standards?

There is a preconception by many in our society (e.g. police, victims of crime, public, and lawyers themselves) that lawyers are untrustworthy, and dishonest.

How do you feel about this?

Are these public perceptions/judgements accurate in your opinion?

Given that unethical conduct within the legal profession is a violation of the Rules of Professional Conduct, would you still allow/advise your client to perjure himself/herself on the stand?

If you knew that your client was perjuring himself/herself on the stand, as his/her lawyer, what would you do?

How would you advise your client?

Has your sense of morality changed as a result of your integration into the legal profession?

**COMPETENCY**

How useful were the criminal law courses taught in your law school as preparation for the criminal law work in which you now are engaged?

a) very useful b) moderately useful c) not very useful

**COMMENT:**

How beneficial was law school in terms of preparing you for the "realities" of criminal defence work? For one's integration into the legal profession?

How accurately do you feel grades attained in law school and articling experience reflect on the overall ability of a criminal lawyer's ability to defend an accused? In terms of the social construction of a "good" criminal lawyer?

Do you feel that the number of years in criminal practice enhance or diminish one's ability to maintain ethical practices?

Do you feel, as a male/female, that you are taken more or less seriously in terms of one's competency to defend an accused? In terms of the social construction of a "good" criminal lawyer?

### **LEGAL FEES**

Do you feel that your fees are comparable (more or less expensive) as compared to other practicing criminal lawyers?

Does this necessarily reflect the "quality" of the defence counsel's work? (e.g. do you feel that the fees you charge are reflective of one's reputation, one's skill, one's status, etc.?)

How personally responsible do you feel for those who are least able to afford adequate legal counsel?

Have you ever served as duty counsel? If so, do you view this responsibility as an obligation/requirement, an inconvenience, or as an enhancement of your self worth?

How much of your practice is devoted to assisting Legal Aid?

### **ETHICAL PRACTICES WITHIN THE LEGAL PROFESSION**

How seriously/stringently do you/others within the legal profession (i.e. Crowns, other practising criminal lawyers) abide by the Rules of Professional Conduct which governs your profession?

How strongly do you feel about the maintenance of ethical standards within the legal profession in general? In your personal legal cases/defenses?

Do you consider the employment of unethical practices within the legal profession as: a) very prevalent b) prevalent c) occasional d) uncommon

WHY?

Is a good criminal lawyer one who abides by ethical standards, or one who is smart enough to get away with using unethical standards?

Do you feel a conflict exists regarding one's professional obligation as a criminal defence lawyer, and one's conventional human values?

How much of an influence are others within the criminal justice system (i.e. victim(s), witness(es), judge, jury, accused, Crown, and other criminal lawyers) as to your employment of ethical and/or unethical practices?

Ethically, where do you draw the line in defending a client?

The function of a criminal lawyer is three part: an advocate for the accused, a representative of the legal community (i.e. Law Society of Upper Canada), and an employer/employee of an established/small-scaled law firm. How does the employment of ethical or unethical practices play a part in each of these roles?



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