1 Practical and Ethical Considerations in Witness Preparation

I. Preparing the Crown Witness

A. Ethical Considerations

Prosecutors in Canada have a unique and difficult role. They are both quasi-ministers of justice and advocates within the context of the adversarial process.[1] The well-known and oft-quoted passage in *Boucher v The Queen*[2] reminds them of their concomitant obligations to press a case to its legitimate strength but to do so firmly and fairly with no notion of winning or losing.[3]

Despite the apt call to be thoughtful and ethical in the exercise of their role, a prosecutor is entitled and obligated to "vigorously pursue a legitimate result to the best of its ability," which "is a critical element of this country's criminal law mechanism."[4] The Crown determines which cases it will prosecute, how it will conduct those cases, and what evidence it will call, all of which are an exercise of Crown discretion.[5]

In exercising discretion, a prosecutor will almost invariably be required to conduct witness interviews, either to determine whether and how to prosecute a case or in preparation for the prosecution. The Supreme Court of Canada has endorsed the appropriateness of a prosecutor interviewing potential witnesses in both a pre-charge and post-charge setting. The Court noted that pre-charge interviews "may advance the interests of justice"[6] by promoting efficiencies, assessing witness credibility, promoting a single decision on whether the Crown will approve a charge, protecting *Canadian Charter of Rights and Freedoms*[7] interests, and by screening out fruitless charges or encouraging proper charges to go forward.[8]

The advantage of meeting with potential witnesses is not exclusively related to making decisions on charge approval or trial conduct. It is necessary for prosecutors to interview witnesses prior to their testifying[9] for the "efficient administration of justice and the truth finding process."[10] Preparation of any witness is not simply a matter of good advocacy, but a duty imposed on prosecutors "in order to present all available legal proof of the facts."[11]

1 *R v Cook*, [1997] 1 SCR 1113 at para 21, 1997 CanLII 392.

2 *Boucher v The Queen*, [1955] SCR 16, 1954 CanLII 3.

3 *Boucher v The Queen*, [1955] SCR 16 at 23-24, 1954 CanLII 3.

4 *R v Cook*, [1997] 1 SCR 1113 at para 21, 1997 CanLII 392.

5 *R v Jolivet*, 2000 SCC 29 at para 16; *R v Darrach*, 2000 SCC 46 at para 69.

6 *R v Regan*, 2002 SCC 12 at para 83.

7 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

8 *R v Regan*, 2002 SCC 12 at paras 84-86.

9 *R v Laird*, 2013 ONSC 5457 at para 424.

10 *R v Trought*, 2019 ONSC 1421 at para 18.

11 *R v Browne*, 2016 CanLII 106224 at para 12 (Ont Sup Ct J).

Despite the general endorsement of witness preparation, there are bounds to the scope of the preparation. The danger in an improper preparation of a witness is significant, and contamination by pre-trial practices may amount to an abuse of process.[12]

The practice of preparation is determined circumstantially and contextually, but a useful starting point is understanding the ethical obligations on lawyers generally and prosecutors in particular.

1. Sources of Guidance

Prosecutors are guided by several sources, beyond jurisprudence, in their conduct with respect to witness preparation. The extent and content of that guidance depends upon the jurisdiction in which the prosecutor normally acts. On occasion, prosecutors may conduct trials in more than one province. You should ensure that you are familiar with, and adhere to, the jurisdictional specific guidance.

While a prosecutor is unique in their role as an agent of the attorney general,[13] this does not insulate a prosecutor from their professional obligations pursuant to their respective law society's standard of conduct. The Supreme Court of Canada has held that there is a "clear distinction between prosecutorial discretion and professional conduct."[14] Actions undertaken in an exercise of prosecutorial discretion are not subject to the jurisdiction of a law society, but those actions that fall within the definition of professional conduct do come under such jurisdiction.[15] Given this, it is imperative that you be familiar with the relevant code of conduct for lawyers in your jurisdiction.

a. Codes of Conduct

In 2017, the Federation of Law Societies of Canada adopted a *Model Code of Professional Conduct*.[16] The Code has a rule that speaks specifically to prosecutors. Rule 5.1-3 reads:

> 5.1-3 When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

This rule, in the context of the preparation of witnesses, is augmented by rule 5.4 of the Code: "Communicating with Witnesses." While this rule is not specific to

12 *R v Spence*, 2011 ONSC 2406 at para 32.

13 *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 23.

14 *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 50.

15 *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 50.

16 Federation of Law Societies of Canada, *Model Code of Professional Conduct* (19 October 2019), online: <https://flsc.ca/national-initiatives/model-code-of-professional-conduct>.

prosecutors, it should be read in the context of the prosecutor's general duty. Rules 5.4-1(a) and (b) are relevant to witness preparation:

> 5.4-1 A lawyer may seek information from any potential witness, provided that:
>
> (a) before doing so, the lawyer discloses the lawyer's interest in the matter;
>
> (b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and
>
> (c) the lawyer observes Rules 7.2-6 to 7.2-8 on communicating with represented parties.

Rules 5.4-2 and 5.4-3 further describe a lawyer's responsibility:

> 5.4-2 A lawyer must not influence a witness or potential witness to give evidence that is false, misleading or evasive.
>
> 5.4-3 A lawyer involved in a proceeding must not obstruct an examination or cross-examination in any manner.

The commentary to rule 5.4-2 suggests that the duty above:

1. applies at all stages of a proceeding;
2. does not stop the advocate in their role of assisting the witness to bring forth the evidence in a manner that ensures fair and accurate comprehension; and
3. allows the advocate to prepare a witness by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and, by discussing admissions, choice of words and demeanour.

Of course, the *Model Code of Professional Conduct* does not apply, in fact, to any lawyers. It is, as its title suggests, a model intended for potential adoption by provincial and territorial law societies. Some have adopted its contents extensively, others to a lesser degree. With respect to the witness preparation rule, the level of adoption can be found at the Federation of Law Societies website, where there is an *Interactive Model Code* that matches it to related provisions in law society codes.[17]

Despite the absence of universal adoption of the *Model Code of Professional Conduct*, the obligation, in the non-adopting jurisdictions, provides at least some guidance to minimum standards of conduct for witness interviews. Of course, for prosecutors, additional guidance may be found in their respective prosecution manuals.

b. Prosecution Manuals

The Public Prosecution Service of Canada and the respective provincial prosecution services provide guidance to those lawyers who act as agents of their attorney's

17 Federation of Law Societies of Canada, *Model Code of Professional Conduct* (19 October 2019), online: <https://flsc.ca/national-initiatives/model-code-of-professional-conduct>.

general through the issuance of written manuals and practice notes. These manuals and practice notes vary in scope and content. The Nova Scotia Public Prosecution Service's *Crown Attorney Manual*[18] includes a practice note that is, for a forward-facing directive, perhaps the most comprehensive. In addition to counselling care in the conduct of witness interviews, and suggesting ideally the Crown attorney would have an observer present at all witness interviews (though recognizing this will not be possible or essential in every situation), it offers the following specific guidance for the interview of all civilian witnesses:

1. The witness should be advised that it is his or her own honest recollection of events that is important. The memory of the witness may be refreshed by his or her prior statements. If the witness is aware that there is evidence which conflicts with his or her recollection, the witness should be assured that it is his or her own honest and independent recollection that is important, and that he or she is free to disregard the other evidence.
2. Witnesses should be interviewed separately.
3. There should be no suggestion to the witness that the evidence of the witness is expected to conform with the prosecution theory. The prosecutor should avoid leading questions and should not otherwise indicate to the witness that a particular answer is desired.
4. Where the prosecutor believes that a witness may be honestly mistaken, the prosecutor may inquire into the circumstances surrounding the present recollection of the witness. The prosecutor should not tell the witness that he or she is wrong.
5. If the witness appears to be deliberately untruthful, the prosecutor may properly confront the witness in regard to apparent discrepancies and may request a clarification or explanation.
6. Where a witness provides information which differs from previous statements or which is not contained in previous statements, that information, along with the general circumstances in which the information came to light, must be disclosed in accordance with the Public Prosecution Service policy on disclosure. Where feasible to do so, the new or different information should be reduced to writing or otherwise accurately recorded.
7. Prosecutors should not conduct investigative interviews. If a matter arises during the interview process which requires investigation, the prosecutor should not pursue the matter further at that time but should request that the police conduct whatever investigation may be necessary.[19]

18 Nova Scotia Public Prosecution Service, *Crown Attorney Manual: Prosecution and Administrative Policies for the PPS* (2021), online: <https://novascotia.ca/pps/crown_manual.asp>.

19 Nova Scotia Public Prosecution Service, *Interviewing Witnesses (Other than Experts or the Police)* (20 January 2006), online (pdf): <https://novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/InterviewingWitnesses.pdf>.

While this is a practice note and is directed to prosecutors in one province, to the extent that it does not conflict with policies or guidelines from your own jurisdiction, it provides a useful framework for ethically appropriate witness preparation.

c. The Kaufman Report

The Kaufman Report[20] into the wrongful conviction of Guy Paul Morin is not the adopted policy of any regulatory body or employer. For prosecutors, however, there is valuable guidance on the issue of witness preparation. While it does not have the force of law, many of its recommendations have been adopted by public prosecution services and have been accepted by courts as instructive on best practices.[21]

With respect to the conduct of Crown interviews, Kaufman J noted the difficult balance between not being suggestive to a witness while allowing for the true facts of a matter to be ascertained. In support of this, Kaufman J offered the following specific guidance:

(a) Counsel should generally not discuss evidence with witnesses collectively.

(b) A witness' memory should be exhausted, through questioning and through, for example, the use of the witness' own statements or notes, before any reference is made (if at all) to conflicting evidence.

(c) The witness' recollection should be recorded by counsel in writing. It is sometimes advisable that the interview be conducted in the presence of an officer or other person, depending on the circumstances.

(d) Questioning of the witness should be non-suggestive.

(e) Counsel may then choose to alert the witness to conflicting evidence and invite comment.

(f) In doing so, counsel should be mindful of the dangers associated with this practice.

(g) It is wise to advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to the witness' own honest and independent recollection and that he or she is, of course, free to reject the other evidence. This is no less true if several other witnesses have given conflicting evidence.

(h) Under no circumstances should counsel tell the witness that he or she is wrong.

(i) Where the witness changes his or her anticipated evidence, the new evidence should be recorded in writing.

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20 Ministry of the Attorney General, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (archived 2 April 2021), online: <https://wayback.archive-it.org/16312/20210402201842/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.html> [Kaufman Report].

21 *R v Spence*, 2011 ONSC 2406 at para 26.

(j) Where a witness is patently impressionable or highly suggestible, counsel may be well advised not to put conflicting evidence to the witness, in the exercise of discretion.

(k) Facts which are obviously uncontested or uncontestable may be approached in another way. This accords with common sense.[22]

B. Legal Considerations

1. Disclosure of Crown Witness Preparation

Any consideration of witness preparation by a prosecutor has to be considered in the context of the Crown's unique duties and obligations, including disclosure.

The Crown has an obligation to disclose to the accused any relevant material or information in its possession or control, whether the Crown intends to rely on the material or not. This obligation is part of the need to ensure that the accused is provided the opportunity to make full answer and defence, a principle of fundamental justice protected by section 7 of the Charter.[23] It does not matter whether the relevant material is exculpatory or inculpatory, whether the Crown intends to call the evidence, nor whether it would be admissible at trial.[24] The obligation is not, of course, absolute, and the Crown is not required to disclose material if "the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law."[25]

Certainly, there are situations in which materials arising from witness preparation interviews will be required to be disclosed. Where a witness, during a court preparation meeting, provides information that is relevant, you, as the Crown, have an obligation to disclose the material. This can include notes made by police officers during witness preparation meetings, regardless of whether the notes contain materials that have already been disclosed.[26] This does not, however, obligate the Crown to produce will-say statements where no notes exist.[27] It also does not obligate the Crown to disclose irrelevant information.[28] Failure, however, to disclose notes in a timely fashion where those notes contained significant differences from an earlier statement and the failure to disclose has prejudiced the accused's ability to make full answer and

22 FPT Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (Ottawa: Department of Justice, 2004) at 44-45, online (pdf): <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/pmj-pej.pdf>; *R v Spence*, 2011 ONSC 2406 at para 26.

23 *R v Stinchcombe*, [1991] 3 SCR 326 at paras 9-33, 1991 CanLII 45.

24 *R v Stinchcombe*, [1991] 3 SCR 326 at para 29, 1991 CanLII 45.

25 *R v McNeil*, 2009 SCC 3 at para 18.

26 *R v Ampadu*, 2019 ONSC 1785 at paras 31-38.

27 *R v Jalili*, 2018 ONSC 6408 at paras 51-56; see also *R v Machado*, 2010 ONSC 277 at para 121.

28 *R v Flis*, 2006 CanLII 3263, 205 CCC (3d) 384 at paras 114-17 (Ont CA).

defence may result in a remedy, including an award of costs.[29] Where, in the course of a witness interview, the witness provides new or different information, you should immediately consider having the witness speak to the police with a view to providing a new statement. The takeaway is that any new and relevant information disclosed in the course of a witness interview must be disclosed to the accused.

That said, you may also resist a request for the production of notes taken by you of a witness interview on the basis of privilege. The issue of privilege is discussed in Chapter 2, Witness Competence, Compellability, and Privilege.

2. Is the Crown Under an Obligation to Record Witness Preparation?

While the merits of the audio or video recording of witness interviews may be apparent, courts have recognized that "imposing a requirement on the Crown to record and disclose its witness interviews would create significant practical problems that would inevitably be detrimental to daily workings of the criminal justice process."[30] It is not simply a matter of public expediency that obviates the need for the Crown or police to record every interaction with a witness; there is simply no duty to do so.[31]

3. Can the Crown Be Ordered Not to Prepare a Witness?

In cases where counsel for the accused have sought orders for the Crown not to prepare witnesses, courts have refused to do so based upon the Crown's duty to conduct such preparation.[32]

The Ontario Court of Appeal, in *R v Elliott*,[33] expressed concern with a trial judge's order that Crown counsel not speak to another Crown counsel on the basis of a speculative concern of witness tampering. The Court wrote that

> Crown counsel are officers of the court. They are expected to conduct themselves honourably and in accordance with the *Rules of Professional Conduct*. The trial judge had no basis for assuming that Crown counsel would act otherwise and his non-communication orders were ill advised.[34]

An order by a court not to prepare a witness may not only run contrary to the general need and duty to prepare witnesses, but may also be an impermissible judicial intervention into prosecutorial discretion that is only reviewable for abuse of process.

29 *R v Logan*, 2002 CanLII 44927, 59 OR (3d) 575 (CA).

30 *R v KM*, 2015 NWTSC 33 at para 36.

31 *R v Jalili*, 2018 ONSC 6408 at para 55; see also *R v LRS*, 2016 ABCA 307 at para 34.

32 *R v Browne*, 2016 CanLII 106224 at para 12 (Ont Sup Ct J).

33 *R v Elliott*, 2003 CanLII 24447, 181 CCC (3d) 118 (Ont CA).

34 *R v Elliott*, 2003 CanLII 24447, 181 CCC (3d) 118 at para 122 (Ont CA).

While no court has held that the decision to prepare a witness falls within the realm of prosecutorial discretion rather than trial conduct matters, the decision whether to call a witness clearly is a matter of Crown discretion and witness preparation is a likely a corollary necessary to exercise that discretion.[35]

4. Is Witness Preparation Allowed for Charter Applications?

The same considerations for witness preparation generally apply to applications where the accused has sought Charter relief. In *R v Trought*,[36] the Court held that any impediment to the preparation of Crown witnesses on a Charter application could prevent Crown counsel from fulfilling their professional obligations, causing them to be potentially negligent in their duties to the witness and the Court.[37]

C. Practical Considerations

The practical considerations for witness preparation are driven by purposive, ethical, and legal considerations. Understanding the general and specific purposes of a witness's testimony is a foundational step in determining the scope of the preparation of the witness. The actual preparation is then informed by the ethical boundaries and the legal consequences of the preparation.

1. Objectives of Preparation

While the specific purpose of a witness's testimony will be case dependent, the general purpose of a witness's testimony must always be, from the perspective of the Crown, to advance the purposes of the criminal law as discussed in the introduction. The criminal trial is a truth-seeking exercise and witness preparation should be geared to that goal. As a subset of helping the trier of fact determine the truth of a matter, witness preparation has the following objectives:

1. to provide information about the criminal trial process,
2. to minimize the negative impact of testifying, and
3. to ensure that the witness has the best opportunity to provide truthful evidence.

To achieve the above-noted objectives, the preparation of a witness is both contextual and individualized. A senior police officer testifying on a routine matter likely needs significantly less preparation than a vulnerable witness to a serious allegation. The first step in witness preparation, therefore, is witness assessment.

35 *R v Cook*, [1997] 1 SCR 1113 at paras 55-56, 1997 CanLII 392; *R v Jolivet*, 2000 SCC 29 at paras 14-17; *R v Anderson*, 2014 SCC 41 at paras 35-36.

36 *R v Trought*, 2019 ONSC 1421.

37 *R v Trought*, 2019 ONSC 1421 at para 28.

While it would be ideal that each proposed witness be extensively interviewed, the reality is that prosecutors will be constrained in the scope of their preparations by time and resources. To prioritize witness preparation, start your planning by asking these initial questions:

1. Is the witness a police officer, an expert, or a civilian?
2. What is the age of the witness?
3. Does the witness have any vulnerabilities?
4. What is the nature of the offence?
5. What is the nature and potential complexity of the witness's evidence?
6. What is the nature of any relationship between the witness and the accused?

The answers to these questions will inform your subsequent preparation. Some of the guidance below will be crucial for some witnesses; in other cases, it will be completely unnecessary.

Regardless of the nature of the preparation, based upon the obligations and ethical guidance above, you should ensure the following for any interview:

1. Have a third party present where reasonably practicable. The third party should not be a person who will be required to give evidence in the same proceeding that touches on any related subject matter.
2. Never interview witnesses together.
3. Consider, based upon the nature of the witness assessment, having the interview recorded.
4. Be able to provide the witness an opportunity to review any prior statements made by them if required.
5. Have an interpreter present if required.

These steps will allow the interview to proceed in a manner that addresses the three objectives of witness preparation that are dealt with individually below.

a. Introducing the Criminal Trial Process

A witness, particularly one with no previous interaction with the criminal justice system, should be provided with a basic explanation of court procedures and the roles of the participants. This part of witness preparation may not involve you personally, but rather be conducted by victim support personnel. The level of preparation will be determined initially by the answers to the witness assessment, but initial preparation may reveal specific concerns or special needs of a witness. It may be determined that a courtroom tour is necessary, that a physical needs assessment is appropriate (where, for instance, a mobility issue exists), or that testimonial aids will be required.

If you are personally providing information to a witness, then, at a minimum, the following should be addressed:

1. The requirement of an oath or affirmation and the importance of telling the truth.
2. The roles of the participants.
3. The concept of the presumption of innocence.
4. The concept of reasonable doubt.
5. The possible outcomes.
6. The concept of direct examination, cross-examination, and re-examination, and the possibility of judicial questioning.
7. The role of defence counsel in criminal trials, with an emphasis on the recognized importance of their role and the importance of cross-examination in the search for truth.
8. The presence of spectators.
9. The presence of the accused.
10. Where necessary, based upon the witness assessment, the measures available as testimonial aids during the trial.

b. Minimize the Negative Impact of Testifying

Testifying can be a daunting prospect. It is normal for witnesses to have anxiety. Proper witness preparation can ameliorate both the concern before testifying and the subsequent emotional impact of being a witness. Much of the preparation described above serves the objective of truth-seeking, while at the same time ensuring that the experience is, if not a positive one, then at least one with limited long-term negative consequences.

The first step in allaying a witness's concerns is to display competence. This display of professionalism comes from a strong familiarity with the file, the issues that may arise, and the procedures to address these issues. An initial step in assuring the witness that you, as prosecutor, are appropriately invested in the matter is to make contact as far in advance of the anticipated testimony as practicable. Meeting with a witness early, and more than once, can diminish this identified source of trauma and frustration.[38] Of course, it is important to be truthful about the process, especially in the context of the preparation of children and other vulnerable witnesses. As the authors of *Prosecuting and Defending Offences Against Children* note:

> It is important that even if the legal process is difficult for the child they do not feel betrayed by the prosecution. Feelings of betrayal could deter the child from ever reporting any future concerns to authority.[39]

38 I Bacik, C Maunsell & S Gogan, *The Legal Process and Victims of Rape* (Dublin: Dublin Rape Crisis Centre, The School of Law, Trinity College, 1998) at 8, online (pdf): <https://www.drcc.ie/assets/files/pdf/drcc_1998_analysis_legal_process_for_rape_vicims_1998.pdf>.

39 L Joyal et al, *Prosecuting and Defending Offences Against Children* (Toronto: Emond, 2019) at 16.

Witnesses, even those who are not evidently vulnerable or do not meet the presumptive criteria, may seek testimonial accommodations. Addressing this issue may make the witness feel more comfortable even if, ultimately, the accommodation is not available to the witness. Testimonial accommodations will be addressed in Chapter 3, Vulnerable and Child Witnesses.

c. The Best Opportunity to Provide Truthful Evidence

Of course, witness preparation is not just about providing information to the witness; a core purpose is to determine what evidence the witness may offer and to ensure that it serves the truth-seeking function. To achieve this you must provide information to the witness about their obligations and rights as a witness. Specifically, you should do the following:

1. Advise the witness that their testimony must be truthful in that it is their own honest recollection of events.
2. If the witness is aware that their recollection conflicts with other evidence or may be detrimental to the position of either party, advise them they must still relate only their honest recollection of events.
3. Tell the witness that they should not guess or speculate in response to a question, but rather, if they do not know the answer to a question or cannot remember they should say so.
4. Tell the witness that they may advise the court when they do not understand a question.
5. Tell the witness that they may advise the court when they are unable to hear the questioner.

In addition to telling a witness what they should do as detailed above, there are some things you should not do:

1. Ask questions in a suggestive manner.
2. Tell the witness that a particular answer is required.
3. Tell a witness that their evidence is expected to conform with the prosecution theory.
4. Tell the witness that a particular answer is incorrect.

The above permitted and prohibited activities are relatively straightforward. The difficult situations for a prosecutor are where a witness deviates from a prior statement or statements or appears to be deliberately deceptive. In some cases, a witness may express reluctance to testify or will indicate that they are not going to speak when asked questions. Those instances require a delicate balance. You have a right to address inconsistencies, apparent deception, and witness recalcitrance, but you must do so in a manner that does not violate your ethical obligations. In these situations, if

the interview is not already being recorded, you should give serious consideration to taking that step. If you encounter a witness who poses one or more of the problems above, it is crucial to remain within the bounds of your role as lawyer and prosecutor. Here are some of the things you may do:

1. If the witness appears to be deliberately untruthful, you may confront the witness and seek an explanation.
2. If the witness provides information that is inconsistent with previous statements or which is not contained in previous statements, you may inquire into the circumstances surrounding the present recollection of the witness. You may request the taking of a new statement from that witness by police.
3. If the witness expresses a reluctance to testify, you can explain the available testimonial aids.

Of course, the nature of the criminal justice system is such that time and resources do not always allow for a fulsome witness interview. In a busy court system, a prosecutor often has little time to prepare witnesses. Despite this reality, you should still attempt to speak to every witness, and to provide at least foundational information. In such situations you should tell the witness something equivalent to the following:

1. Tell the truth.
2. Testify only to what you remember.
3. If you forget something, tell the judge that you don't remember.
4. If you do not know the answer, tell the judge that you don't know.
5. If you do not understand a question, tell the judge you don't understand the question.
6. If you remember nothing else that I have said to you, remember this: "tell the truth."

While witness preparation is time consuming and occasionally difficult, it is the foundation of successful litigation.

D. Ethical Take-Aways

- The Crown has a right, and in some cases an obligation, to prepare potential witnesses. This should be directed at obtaining a truthful account of the witness's evidence.
- Witnesses should never be interviewed together.
- The witness's memory may be refreshed by their prior statements.
- Witness preparatory interviews should never be investigative.
- The prosecutor may assist the witness through preparation, but the testimony must be the witness's own truthful memory.

- You may alert the witness to conflicting evidence and invite comment, but only in a manner that does not suggest that counsel is seeking conformity to the Crown's theory.
- You should not tell the witness that they are wrong.
- Any new or different information obtained in a witness interview must be disclosed to the accused.

E. Practical Take-Aways

- Have a third-party present during witness interviews.
- Consider having the interview recorded.
- Be able to provide the witness an opportunity to review any prior statements made by them.
- Have an interpreter present if required.
- Consider and, where appropriate, discuss testimonial accommodations with the witness.
- Have a regular script of key information for short witness interviews.

II. Preparing the Accused to Testify

Preparation for the accused to testify should begin at the first interview. The information received from and given to the client, as well as your notes taken during the interview, should anticipate the possibility that the person may be testifying at trial. That decision will be made by the client, on an informed basis, with the benefit of counsel's advice. The decision might be made early but should be revisited very close to the time of trial and be properly documented. This section of the chapter discusses in more detail considerations made early in the life of the file and as you prepare for trial, as well as planning for the direct examination of the client.

A. Early Interviews

Many clients, from the first meeting, want to tell their side of the story. The information counsel receives imposes ethical limitations upon the defence. For example, if your client admits to committing the robbery, you cannot ethically suggest to the eyewitness that the person they saw was not your client, although you can challenge the weakness of their identification. As a result, some counsel will only question the client on a "need-to-know" basis. Where the client does discuss the facts, you should make careful notes. That will allow you to see whether or how the story changes and help you determine where to probe further.

Defence lawyers have the ethical obligation of due diligence. This includes a duty to investigate and gather additional evidence where appropriate. The police may not have interviewed all relevant witnesses. There may be documents to support the client's version of events. Comprehensive client interviews allow those additional facts

to be discovered. Counsel's failure to investigate and to call evidence may ground a claim of ineffective assistance of counsel.[40] You will only know which witnesses should be interviewed once full disclosure is received, but getting names and contact information early facilitates taking steps before documents or people disappear.

Another part of counsel's due diligence obligation is to not facilitate client perjury. The client may not give counsel the whole truth on an initial meeting. Clients don't always understand or appreciate the purpose and scope of confidentiality and privilege. As the trusting lawyer–client relationship develops and disclosure is reviewed, candour may increase. Your probing questions of the client for details, or your challenge to the client as to the accuracy of information, may lead to better or more reliable information.

As the client talks in those initial interviews, it can be helpful to make notes not only of the substance of the story, but also to make private, marginal notes about their demeanour and presentation: evasive, talkative, tangential, unfocused, and so on. When later preparing that client to testify, those notes will be a reminder about how the client might come across to someone not familiar with them. In preparing for trial, you might discuss those impressions with the client, directly or indirectly. At a minimum, you can be alert for those concerns during the planning for and conduct of the direct examination. For example, it will be your task as the questioner to bring an unfocused witness back to topic.

As you interview your client, assess whether there are any issues with regard to their level of cognitive functioning or literacy. Concerns in these areas might have impacted their interactions with police.

Consider your own cultural competency to properly represent the client. Canadian society is increasingly diverse.[41]

Many accused people do not understand that the prosecutor cannot call them as a witness at their trial. They also don't understand that they have a right, but not an obligation, to testify in their own defence. Informing the client early on may give them comfort and should also get them thinking about their options. The client has a constitutional right to testify. Failure to allow them to make an informed and voluntary choice may be ineffective assistance of counsel.[42]

40 See e.g. *R v DGM*, 2018 MBCA 88 at para 36. In this case, the failure to obtain and call medical evidence in relation to erectile dysfunction contributed to a finding of ineffective assistance of counsel on appeal.

41 Calls to Action 27 and 28 of the Truth and Reconciliation Commission call upon the Federation of Law Societies and Law Schools to address cultural competency: see Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Ottawa: TRC, 2015), online (pdf): <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>. For an excellent discussion of cultural competency, see M Gourlay et al, *Modern Criminal Evidence* (Toronto: Emond, 2022) at 318.

42 *R v DGM*, 2018 MBCA 88 at para 33; *R v Trought*, 2021 ONCA 379 at paras 69-71.

It is often useful to ask the client to prepare a detailed, comprehensive, and confidential statement documenting their fresh memory of the occurrence. Any statement the client prepares should be marked "Privileged and Confidential—for my lawyer" and given to you once completed. Statements should be the product of only the client's memory. If a statement is not sufficiently detailed, ask for more information. The client may not understand why the timing, content, and volume of their alcoholic drinks are important to the case, so they may not offer that information. If not captured early, these details can be lost. The client may have already made some "notes" after the occurrence, but putting the notes into a comprehensive document for your use in the litigation will ensure that the document is not just cloaked with litigation privilege, but also with solicitor–client privilege.[43]

For clients whose first language is not English or French, consider whether the client requires the assistance of an interpreter while testifying. There is a constitutional right to the assistance of an interpreter.[44] Counsel should discuss with the client whether that assistance is required and what form it should take. Witnesses sometimes hide behind purported language barriers to "buy time" during questioning. In some circumstances, that can reflect poorly on the witness's credibility. Some witnesses will not require simultaneous translation, but only intermittent assistance from an interpreter. The decision should be made by the client with the benefit of counsel's advice. Defence counsel must alert the court in advance to the need for interpretation services for the accused and defence witnesses.

Remind the client early on of the importance of not discussing the case with others, particularly not with people who may be called as witnesses. When the client and defence witnesses testify, they may be asked about having discussed the case with other witnesses, which could impact the value of their testimony.[45]

43 The importance of this may become apparent if the witness refreshes their memory from their statement prior to testifying. See *R v Fast*, 2009 BCSC 1671, where the accused was required to produce his own notes after disclosing on cross-examination that he looked at them. In ordering a new trial, the Appeal Court discussed the importance of a trial judge considering the degree to which a document was used to refresh memory, whether it was protected by solicitor–client or litigation privilege, and whether there was an implicit waiver of privilege. Restrictions on use and redaction may be appropriate as probative value and prejudice are assessed. See also *R v Sachkiw*, 2014 ONCJ 287, where the accused person was required to disclose the statement from which their memory was refreshed, the Court finding that the claimed litigation privilege had been waived. In *R v Mitchell*, 2018 BCCA 52, a defence witness refreshed their memory from a document provided by defence counsel and an order for disclosure was made during the witness's testimony. Counsel had made notes of the witness's information during an interview, provided the notes to the witness to refresh their memory before testifying, and the notes were found to be the witness's statement within the meaning of s 10(1) of the *Canada Evidence Act*, RSC 1985, c C-5. That is a dangerous practice, given the risk that counsel could be called as a witness if there is an issue about the accuracy or completeness of the notes.

44 See s 14 of the Charter; *R v Tran*, [1994] 2 SCR 951, 1994 CanLII 56; *R v Rybak*, 2008 ONCA 354.

45 Witness collusion can seriously impact credibility and undermine testimony; inadvertent tainting less so, but it should also be avoided. See e.g. *R v CG*, 2021 ONCA 809 at paras 27-40.

B. Trial Preparation

In preparing the accused to testify, discuss some basic rules. A checklist can help you provide standard advice and can be given to clients between preparation and testifying to remind them of the advice. The Rules for a Testifying Witness Checklist presented here is an example of what might be used.

TABLE 1.1 RULES FOR A TESTIFYING WITNESS CHECKLIST

	You must tell the truth; you will be asked to swear or affirm. The court may allow you to bind your conscience in a way that respects your own cultural tradition, such as with an eagle feather.
	Speak loudly and clearly; do not interrupt the questions or anticipate the answers.
	The lawyer questioning you is simply doing their job; do not get upset with them, don't argue with the lawyer, don't lose your temper.
	Listen carefully to the question and answer only what is asked.
	If you do not understand, say so.
	If you don't know, it is okay to say that.
	Don't guess; if you make an estimation, be clear that's what you are doing.
	If you've made a mistake, say so.
	Be cautious of absolutes, such as words like "never" and "always." Are they really accurate?
	You are being judged so be careful how you act before, during, and after your testimony.
	Dress and behave in a way that demonstrates respect for the court.
	If you need to address the lawyer by name in court, it is "Mrs/Ms/Mr."
	It is the lawyer's role to object to improper questions, not your role.
	Briefly explain hearsay, which is presumptively inadmissible: testify to what you saw or heard or did yourself, not to what someone else told you.
	Explain the difference between examination-in-chief and cross-examination: open questions versus leading questions, to which you should listen carefully.

In this context, it may be appropriate to have a discussion with the client about perjury, which is punishable by a maximum of 14 years imprisonment. Lawyers have an ethical duty not to assist the client knowingly or recklessly in perjury.[46] Although the client has an absolute right to testify, if counsel reasonably believes that the client

46 Federation of Law Societies of Canada, *Model Code of Professional Conduct* (19 October 2019), r 5.1-2(e), online: <https://flsc.ca/national-initiatives/model-code-of-professional-conduct>.

will lie on the witness stand, there may be no option but withdrawal if the client cannot be dissuaded.

Explain that an order of exclusion of witnesses is likely, but that the client will be exempted and must always be present in court for the trial, as per the *Criminal Code*.[47] The exclusion order is made to prevent witnesses from knowing what other witnesses testified to, so the client should not discuss testimony heard in court with anyone who may be called as a witness or who may talk to a witness.

With some testifying clients it may be necessary to discuss evidentiary rules beyond a basic hearsay description as in the chart in Table 1.1, Rules for a Testifying Witness Checklist, above. For example, section 276 of the *Criminal Code* may require explanation so that testimony does not stray into the prohibited area of prior sexual conduct of the sexual offence complainant. Similarly, evidentiary rules generally prevent the prosecutor from leading bad character evidence, so the client must not put character in issue by statements such as "I'm not that kind of person." Also, solicitor–client privilege protects discussions with counsel, so the client should not disclose anything discussed with a lawyer.

Review the client's criminal record with them to ensure that it is correct. If there is a genuine issue about accuracy, as opposed to certain convictions merely being forgotten, follow up with the prosecutor early. Resolve the issue in advance of trial to avoid the client's denial of criminal record entries while testifying, which will distract from the real issues. Counsel may be making a *Corbett* application,[48] but that may not occur until the close of the prosecution's case.[49] Prepare the client for the risk that the entire record will be before the trier of fact and explain the scope of proper questioning on the record.[50]

If the client's statement to the police will be tendered as part of the prosecution's case or will be available to the prosecutor for cross-examination, it is crucial that the client fully review that statement. Provide the client with a transcript, if one is available. If the statement is audio- or video-recorded, give the client a copy of the statement for review. The client will not be able to reasonably explain why something was

47 See *Criminal Code*, RSC 1985, c C-46, s 650(1). See also *Dedam v R*, 2018 NBCA 52, where the accused received a new trial because it was discovered that he was absent from the courtroom for some parts of his trial.

48 *R v Corbett*, [1988] 1 SCR 670, 1988 CanLII 80 upheld the constitutionality of s 12 of the *Canada Evidence Act*, which permits the introduction of prior convictions as they relate to credibility, and confirmed the discretion of a trial judge to exclude evidence of prior convictions in an appropriate case.

49 *R v Underwood*, [1998] 1 SCR 77, 1998 CanLII 839 confirmed that a *Corbett* application should be made and decided immediately after the close of the prosecution case, if necessary, after a *voir dire*.

50 *R v Corbett*, [1988] 1 SCR 670 at para 49, 1988 CanLII 80; *R v MC*, 2019 ONCA 502 at para 55.

said or describe the atmosphere of the interview given a long time before without the opportunity to watch it. Whether and how the statement will be the subject of direct examination depends on how the statement will be used by the prosecution. The client may be testifying on a *voir dire* into statement admissibility or in the trial proper, or in both.[51]

The rule in *Browne v Dunn*[52] requires that counsel know how the client's testimony will vary from that of key witnesses so that the necessary propositions can be put to those witnesses during cross-examination. This may require reviewing the client's version of events with them again after a witness has testified in direct examination so that all necessary aspects of the evidence are properly challenged.

Counsel should get instructions in writing about the client's decision to testify.[53] This is the client's voluntary and informed choice, made after receiving advice. The client's inclination could change at any time, so cases may proceed in the expectation that the client will be a witness, only to have the client decline to testify at the last minute. It may be appropriate to have available two sets of instructions, one to testify and one not. The advice counsel gives should be meaningful—the risks and benefits of testifying or not testifying.[54] The client's decision cannot be undone once the choice has been made in court.

Counsel must be cognizant of the ethical line on client preparation, assisting the accused to be the best witness they can be, yet ensuring that the substance of the testimony is the client's own truthful version of events. For example, it would be unethical to tell the client that disclosure makes it clear that it was raining on the date in question, so the client should testify about it having rained, where the client has no memory of that fact. On the other hand, the client's reference to the "chicks at the bar" may lead to counsel's mock cross-examination about why poultry was allowed in the bar. Increasing the clarity of testimony and encouraging the client to use inoffensive language is not inappropriate, so long as the client remains true to their oath. In essence, counsel can assist the client to improve the form of the testimony, but the substance must be the client's.

51 The issues will likely be different on the statement *voir dire* than on the trial proper. "[A] *voir dire* is an 'other proceeding'" for the purpose of s 13 of the Charter: *R v Cochrane*, 2018 ABCA 80 at para 18.

52 *Browne v Dunn*, 1893 CanLII 65, 6 R 67 (UKHL); see Chapter 9, Abiding by the Rule in Browne v Dunn.

53 *R v Trought*, 2021 ONCA 379 at para 76.

54 *R v Trought*, 2021 ONCA 379 at paras 50-53 and cases cited therein. See *R v AWH*, 2019 NSCA 40 at para 58 where counsel's incorrect understanding about the use that could be made of the accused's criminal record impacted advice about testifying and fell below the standard of reasonableness.

C. Planning the Direct Examination

The accused's direct examination should be planned, not spontaneous. Many considerations go into that planning: the principles of primacy and recency; the desire to humanize the client for the trier of fact; the need to "get to the point," but also the need to provide sufficient context so that the "point" will be understood and believed; and the need to deal with weaknesses in your case. Keep your case theme and theory in mind. Incorporate it in your questioning.

One approach to the planning is to first list everything relevant that might be said by the client, then separate what really is important for the case from that which is not. Length is your enemy. It creates more fodder for cross-examination. Irrelevant detail is distracting. Identify the key issues that must be covered. Consider whether you have an evidential burden of proof[55] or a tactical burden.[56] Ensure that those issues are included. Arrange what remains into a logical order—perhaps topical, perhaps chronological. If topical, use headlines to identify the topics both for preparation and during the actual questioning. For example, relevant topics might include:

- personal circumstances,
- relationship with the complainant,
- the date in question,
- post-date events, and
- dealing with the police.

This list creates a roughly chronological outline of topics. Within each topic, there will be multiple areas of questioning. Your examination plan should list those areas at a minimum, and perhaps will include each question. As you transition between topics in the direct examination, use a headline such as "Let's turn to the date in question." Tell the client that is how you will transition between topics. Headlining assists both the witness and the trier of fact.

Trial preparation meetings with the client should include a review of your outline and at least one practice examination. Most people are unaccustomed to the courtroom and may have difficulty with the required formality. During a practice questioning, many clients struggle to answer only what is asked and instead offer extraneous information. Or the opposite—they answer so succinctly that follow-up questions are needed to fill out even the most basic picture. Secondary information can be important support for primary facts, yet such detail is not always offered in the telling of a story. Ask those questions in pre-trial meetings to prepare the client and get them

55 For example, on a Charter *voir dire*, or a case of not criminally responsible by reason of mental disorder, the accused will bear an evidentiary burden of proving facts on a balance of probabilities.

56 For example, there must be sufficient evidence of self-defence to meet the "air of reality" threshold for the defence to be considered by the trier of fact: *R v Cinous*, 2002 SCC 29.

thinking about how to best articulate their answer. For example, ask the reason for their conduct: why did you do that? Elicit their emotions or feelings around what happened and how it impacted them.

The accused's criminal record can be the subject of limited questioning.[57] Often a prosecutor will not put a criminal record to the accused on cross-examination if it is dated or unrelated, and they may tell you whether they plan to do so. If the record will be used and is not excluded or edited under *Corbett*,[58] it is best that you elicit it in direct examination so it doesn't look like you've hidden it when it is raised on cross-examination. Find a place in your questioning to introduce it without giving it undue prominence. Tell the client how it will be put to them—for example, if their two-entry record will be read to them, or if their two-page record will be marked as an exhibit.

Finally, counsel will determine the order in which defence witnesses will be called. The accused often testifies first, but there is no rule or convention.[59] The accused person remains in court throughout the trial, will have seen the disclosure, and should know which defence witnesses are being called and why.[60]

D. Ethical Take-Aways

- Defence counsel has a duty to investigate and, where appropriate, call evidence in support of the client's defence.
- Information received may impose restrictions on the position that can be taken in defence.
- Lawyers have a duty not to facilitate perjury by a witness, including the accused who has a constitutional right to testify.
- The choice to testify is the client's, to be made on a voluntary and informed basis after the benefit of counsel's advice.
- Counsel may assist the client to be a better witness, but the testimony must be the client's own truthful memory.
- Counsel should assist the client in making an informed choice about how best to use their constitutional right to the assistance of an interpreter.
- Counsel must know the client's version of the events so that the evidentiary rule in *Browne v Dunn* is complied with.

57 As noted earlier in this chapter, for the testifying accused person who has not put character in issue, questioning is limited to conviction entry details, not the underlying facts. That is not the case for non-accused witnesses, who can be questioned about the underlying misconduct, uncharged misconduct, and outstanding charges: *R v Pascal*, 2020 ONCA 287 at paras 108-10.

58 *R v Corbett*, [1988] 1 SCR 670, 1988 CanLII 80.

59 *R v Hudson*, 2021 ONCA 772 at para 159.

60 It is inappropriate to question an accused person about not having called a witness who might support their version of events as there is no onus on the accused to call evidence: *R v John*, 2016 ONCA 615 at para 53. Discussions between the accused and counsel about who to call and why would be privileged.

E. Practical Take-Aways

- Capture the client's memory of events early, in a way that is protected by solicitor–client privilege.
- Follow up on additional information gathering and witness interviewing early while documents and memories can be preserved.
- Test the client's version of events in the privacy of your office rather than waiting for the prosecutor to do that for the first time when they're on the witness stand.
- Plan and practise the client's direct examination.
- Create a checklist of important points to discuss about testifying in court.
- Give the client a copy of any statement they gave to the police that might be used by the prosecution.
- Get written instructions about the client's choice on whether to testify or not.

III. Preparing the Accused to Be Cross-Examined

The accused person who decides to testify needs to know that the prosecutor and any other accused's lawyer will be entitled to cross-examine them. They should understand the purpose, nature, and general scope of those cross-examinations. They can be advised about how best to face such a challenge and can practise doing so with a mock questioning before trial.

The purpose of the cross-examination will be to challenge the accused as being mistaken or lying—that is, to undermine their testimony or their credibility or both. In some cases, the purpose may go further, such as rebutting good character evidence where the accused has put character in issue, or even adducing certain bad character evidence where, for example, the defence points to alternative suspects. In joint trials, it is not uncommon to see "cutthroat defences." There, rules of evidence balance with Charter fair trial rights such that co-accused's counsel have greater scope in cross-examination than the prosecutor.[61] In any given case, counsel preparing the witness will have a sense for what the evidentiary limitations will be at the trial.[62] Assure the witness that it is your role as counsel to object to improper questions, not theirs. Unless the judge says otherwise, they must answer the questions. They are not to look to you or anyone else in the courtroom for assistance. As a corollary, you will have researched anticipated evidentiary issues and will be listening carefully

61 See *R v Crawford*, [1995] 1 SCR 858, 1995 CanLII 138 regarding the ability of co-accused's counsel to question regarding propensity and pre-trial silence. A severance application might be made in such a case.

62 In this chapter, see Section V, "Preparing to Cross-Examine the Accused" and Chapter 8, Cross-Examining the Witness, Section I, "The Purpose and Nature of Cross-Examination" for the most common limitations on the prosecutor cross-examining the accused.

for objectionable questions. Concerns might even be raised in advance of the cross-examination to mitigate risk to a fair trial.

Explain to the witness that the nature of cross-examination is different from direct examination. It will likely be predominately leading questions. The questioner will try to put words into the mouth of the witness. That is proper, and they are doing their job. The witness must listen carefully to the question. They should answer only the question and not offer more information. If the question calls for a "yes" or "no," they should not shy away from answering directly. Failure to make reasonable concessions may hurt the witness in a credibility assessment. The opposing lawyer is doing their job, and the witness must not get upset or angry with the questioner. Tell the client that counsel has an ability to re-examine the witness in cases where something new arises in cross-examination that requires clarification. If you haven't reviewed the rules recently, see Table 1.1, Rules for a Testifying Witness Checklist, above in Section II.B, "Trial Preparation."

The client being prepared for testifying will be reminded of the duty to tell the truth and the consequences of perjury. Remind them that this obligation continues throughout cross-examination even though they may not like the questions or the imputations being made, and that their evidence cannot be used "against" them if they testify truthfully.[63]

Depending on the evidence and issues anticipated, discuss with the client case-specific concerns such as the potential use of their statements to the police or their prior testimony from other proceedings. If the statements are not tendered into evidence but available for use in cross-examination, counsel should independently review the statements and point out parts that the prosecution might use to challenge the witness. The witness should refresh their memory from those statements before their testimony and be prepared to speak to why they said what they did. Watching the video of the interview might be necessary.

As counsel, you will have prepared the case, formulated the theory, and considered the opponent's theory. You will know the potential weaknesses of your case and your client's evidence. Explore them in a mock cross-examination in the privacy of your office so that your client can see both the nature and tone of questioning they should anticipate, and also the substance of potential cross-examination. Prior inconsistent statements, after-the-fact conduct, the reasonableness of their perception, and so on, may all be important, depending on the case. As with preparation for direct examination, the substance of the witness's answers must always be their own truthful responses, but a mock cross-examination may get them thinking about their answers to challenges and should help them remain calm and focused during the actual cross-examination.

63 See Chapter 2, Witness Competence, Compellability, and Privilege, Section III.C, "The Accused and Testimonial Privilege."

IV. Preparing to Cross-Examine a Witness

Before engaging in this preparation, counsel should be familiar with the material in Chapter 8, Cross-Examining the Witness, Section I, "The Purpose and Nature of Cross-Examination." Why and how you will cross-examine is integral to proper preparation.

Preparation for cross-examination might be divided into three parts: information gathering, analysis, and organization. This section addresses each of those topics. These phases will necessarily overlap. Analysis should be ongoing. It is separately identified because counsel should carefully assess a witness's expected evidence considering the case as a whole, their theory, their opponent's theory, common sense, and other information that may come into the evidentiary record. Hours of preparation might go into effective cross-examination that takes minutes to carry out.

A. Information Gathering

It is crucial to know how the witness's testimony fits into the entire case, what case facts matter, and why. This means knowing all of the material in the file—all of the likely provable facts and their importance to your case and to your opponent's case. Counsel should never cross-examine a witness having read only that witness's statement. A witness might be capable of supporting or discrediting the testimony of other witnesses even though that is not the reason they are being called. For example, if a group of people similarly located made observations at the same time, a concession by one credible witness that the lighting conditions were "very poor" may be an important fact in supporting or discrediting observations by others and can be used in the cross-examination of those other witnesses.

Consider what information you may be missing:

- Do you have the notes of the police officer to whom the civilian spoke where the witness's oral statement was recorded?
- Do you have newspaper articles reporting the on-scene comments by civilians who spoke to the press?
- Do you have the working notes and the file of the expert witness being tendered?
- Do you have any affidavits by the witness that may have been filed in parallel civil or family proceedings?
- Do you have the witness's criminal record and information about outstanding charges?
- Do you have *McNeil*[64] disclosure relating to the police officers?

64 *R v McNeil*, 2009 SCC 3, confirming that police disciplinary records are part of *Stinchcombe* disclosure.

The prosecution's *Stinchcombe* disclosure obligation has a corollary obligation of due diligence by the defence to request what they are missing. Defence counsel will not request the missing bank documents that the police never obtained that are needed to prove the case, but follow-up requests for police notes and witnesses' criminal records are usually appropriate. In some instances, the prosecution will not have the material you seek or cannot be required to request it,[65] and an application for third-party records might be required.[66] Plan for this prospect so as not to miss filing deadlines.

As you organize your materials, gather all statements made by the witness you are preparing to cross-examine. That includes anything written by the witness, anything recorded on audio (911 calls, telephone interviews) or video (prepare your own transcript if the prosecution doesn't provide one), oral statements recorded in other documents, any interviews on the subject matter, relevant social media posts, prior testimony, and so on. A witness's own prior statements relative to the case are the best source of refreshing memory or impeaching the witness.

Where a witness has given more than one statement, consider preparing a witness statement chart. This is a useful tool to collate information and highlight inconsistencies. The chart breaks down what the witness has previously said on a point, and when and where this information can be found. The chart should be detailed and include all information relevant to the case. There may be no prior inconsistency, but if the witness testifies differently at trial, the chart will allow you to quickly find what they've said before to demonstrate the current inconsistency. Table 1.2 shows a snapshot of part of a witness statement chart referencing one fact.

TABLE 1.2 WITNESS: MARJORIE SANDSTROM

	Statement to police Dec 1/20	Video interview Dec 18/20	Preliminary inquiry March 2/22
Suspect height	At least 6 feet *page 2, para 2*	Quite tall, between 6′ and 6′3″ *14:53, transcript page 73, line 3*	Tall, but shorter than my husband who is 5′10″ *page 73, line 19*

65 In *R v McNeil*, 2009 SCC 3 at para 3, the Court confirmed that in appropriate cases, the prosecutor will be obliged to make reasonable inquiries of other Crown entities and third parties regarding records in their possession relevant to the case being prosecuted.

66 For example, s 278.3 of the *Criminal Code* deals with access to records in sexual offence cases, and *R v O'Connor*, [1995] 4 SCR 411, 1995 CanLII 51 governs the common law regime to apply for third party records.

B. Analysis

Thinking about both your case and your opponent's case is an ongoing part of preparation. It informs information gathering and impacts how you organize your cross-examination and supporting materials. Reading a witness statement to see the facts offered is one step. Further analysis of those facts and consideration of the rest of the case are crucial. Initial facts may take on different significance when greater context and other facts are considered.

You will have formulated a theory of your case early in the file, which theory might initially shift as information is discovered. You may have distilled that theory into a theme. That theory and theme must be at the forefront as you prepare to cross-examine witnesses. If you are defence counsel, the trier of fact will not hear your opening statement or your witnesses until after the prosecution's case has been heard, if even then. You may not call evidence. But you still have a case theory. You inform the trier of fact about your theme and theory and prove the facts in support of them through your cross-examinations.

As you review the witness statements, list facts the witness can offer or facts about the witness and the circumstances that are important and where you can find them in the materials. An example might be the colour of a traffic light as recorded in the witness statement; the witness's sobriety recorded in the officer's notes; the poor lighting conditions as recorded by another witness standing beside this witness; or the length and nature of the witness's relationship with the accused, as your client has informed you of it. The list should cross-reference the sources of the facts or the material to be used to qualify facts, should you need to find this information during the examination.

Consider what the witness may say that does not assist your case and which you must seek to neutralize, qualify, diminish in importance, or discredit, be it a fact or the witness entirely. Using the witness to help your case, directly or indirectly, is a discrete goal from mitigating damage by demonstrating the unreliability of something said or impeaching the witness. The latter is more difficult, as it may be perceived as a personal attack. The damage mitigation goal requires some careful reflection about when and how that might be achieved. Impugning the observational abilities of an honest but mistaken eyewitness will require a very different approach than attacking the character, lifestyle, motive, and credibility of the unindicted accomplice.

Consider whether sections 10 and 11 of the *Canada Evidence Act*[67] governing prior oral and recorded statements are applicable and whether you will need to prove a statement in case a witness denies it. If so, will you adduce the witness's oral statement to the police, recorded in notes, through the officer testifying before the witness, in case the witness doesn't recall or admit what they said to police?

67 *Canada Evidence Act*, RSC 1985, c C-5.

Consider whether the material you possess and plan to use may require any judicial screening. *Criminal Code* sections 278.92 to 278.94, enacted in December 2018, require advance permission to use certain records in which a sexual offence complainant has a privacy interest.[68] The common law also conceives of instances where a witness may raise a privacy interest in documents used and seek counsel to make representations.[69]

Consider whether you may call other evidence to challenge the witness's version of events or make submissions to that effect that will require you to comply with the rule in *Browne v Dunn*.[70]

- Does the witness's evidence accord with common sense or with the preponderance of the evidence in the case?
- Is there independent support for or against the fact you seek to prove or qualify?
- Has the witness previously said different things such that you will try to have them adopt one version, or will you use the inconsistency to impeach them?

Remember that witnesses prove facts and the factual foundations for inferences. Inferences are drawn by the trier of fact. They are not put to witnesses but urged by counsel in argument.

C. Organization

Lawyers have different organization and trial preparation practices to suit their advocacy style and work habits. But this basic approach can be modified to suit different styles.

In preparing your cross-examination of a witness, regroup that list of facts you've made note of into discrete topic areas.[71] Keeping topics discrete allows for greater clarity as you analyze the importance of facts, how they are interconnected, and how you might best order those topics in your examination. Topics can be subdivided even further. Breaking a large picture into smaller pieces often allows one to see how parts relate and take supporting details into consideration. For example, first-level topics in a sexual assault case might include:

- relationship with the accused,
- the party both attended,

68 *R v JJ*, 2020 BCSC 29, 2020 BCSC 349 and *R v Reddick* (*sub nom AS v Her Majesty the Queen*), 2020 ONSC 7156 challenge the constitutionality of these provisions and were argued in the Supreme Court of Canada in October 2021.

69 *R v Shearing*, 2002 SCC 58.

70 See Chapter 9, Abiding by the Rule in Browne v Dunn, for a full explanation of what the rule requires and how to comply with it.

71 See e.g. L Posner & R Dodd, *Cross-Examination: Science and Techniques*, 2nd ed (Newark, NJ: Matthew Bender & Company, 2004). This text is a very detailed and scientific approach to cross-examination; see, in particular, ch 9, The Chapter Method of Cross-Examination.

- state of sobriety,
- the sexual contact,
- disclosure to others,
- dealings with the police,
- refreshing memory, and so on.

All of these can be further divided. These topics are chronological, but that is not likely the order in which questioning will occur. Your cross-examination will not merely elicit the facts in random order, or in the order direct examination proceeded, which is likely to be chronological.

Using separate pages for each topic area gives increased flexibility to add points, reorder topics, and even abandon topics during the actual examination. What you plan may be modified during trial, based on the witness's actual direct examination. By using separate pages, you can:

- quickly add a new and related fact that arose in the direct examination,
- make immediate note of a new inconsistency,
- easily reorder your intended sequence of examination, or
- determine that a topic need not be covered as it is no longer relevant.

Each topic page may contain an outline of points, cross-referenced to source material, or a detailed list of questions, or something in between. As counsel, the detail of the script you create will depend on your experience, habit, style, witness importance, and a multitude of other factors. Having a script for every question may be useful to even the most experienced cross-examiner, so long as counsel is prepared to go off script as and when necessary. A trial is a dynamic event and witnesses can be unpredictable. For example, if an unexpected inconsistency arises, counsel may consider immediate memory refreshing or impeachment.

Sequencing the topics of your planned examination is important.[72] Many considerations go into that decision. How best to order your cross-examination is case and witness dependent and may also be impacted by whether trial is by jury or judge alone, and whether you are before the trier of fact or at a discovery-like hearing such as a preliminary inquiry or a pre-trial motion. Some considerations include:

- use the principles of primacy and recency (start and end strong),[73]
- get to important information early to engage the listener,

72 See L Posner & R Dodd, *Cross-Examination: Science and Techniques*, 2nd ed (Newark, NJ: Matthew Bender & Company, 2004) where they address this consideration in detail in ch 11, Sequences of Cross-Examination.

73 See L Posner & R Dodd, *Cross-Examination: Science and Techniques*, 2nd ed (Newark, NJ: Matthew Bender & Company, 2004) where they address these concepts in ch 12, Employing Primacy and Recency.

- fill out context such as relationships before the significance of other facts can be appreciated,
- demonstrate your case theory early for the trier of fact, and
- quickly demonstrate that the witness has no credibility.

Organize the material you may need to use during the examination, and have enough copies to use efficiently and effectively when you're on your feet in court. Consider using a binder or folder for each witness that contains all the statements they previously gave, and be sure there are enough copies to provide the witness, your colleague opposite, and the court, if necessary, during the examination. If you will be using material that is likely to be marked as exhibits, organize your trial book so that you can identify the exhibit numbers of photos or reports when you need to make use of them. You may be using trial preparation software or electronic documents such as Excel spreadsheets. Consider how that preparation material can be easily used and accessed when the witness is testifying, which may depend on whether they will be present in court or testifying remotely. Be organized so you can use your materials effectively.

V. Preparing to Cross-Examine the Accused

It has been said of prosecutors that they are far better at direct examination than cross-examination because they get so few opportunities to practise the latter. The first part of the saying is, like most stereotypes, inaccurate, but the latter is less so. The nature of the criminal trial means that prosecutors may not get to cross-examine any witnesses and certainly will have far fewer cross-examinations than direct examinations. A good cross-examination by a prosecutor is as likely, however, as a good cross-examination by counsel with effective preparation.

A review of the proposed preparatory steps discussed in Section IV, "Preparing to Cross-Examine a Witness" is the starting point for a good cross-examination. Those steps are applicable to any witness, at least in concept. There are, however, significant constraints on the cross-examination of an accused that are crucial for the prosecutor to recognize. Failure to adhere to restrictions on the cross-examination of an accused can lead to critique through objection by opposing counsel; curtailment by the trial judge; or, more concerning, a mistrial or successful appeal.

The line between advocate and minister of justice may be difficult to reconcile,[74] but as Cory J noted:

> There is no reason why a cross-examination cannot be conducted by a Crown prosecutor with some measure of respect for a witness which would not be inconsistent with a skilful, probing and devastating cross-examination.[75]

74 *R v Henderson*, 1999 CanLII 2359, 134 CCC (3d) 131 at para 28 (Ont CA).

75 *R v Logiacco*, 1984 CanLII 3459, 11 CCC (3d) 374 at 383-84 (Ont CA).

A. Improper Cross-Examination[76]

A cross-examination can be improper for a number of reasons, many of which merit some judicial intervention rather than an appeal. With respect to the accused, however, an improper cross-examination can have serious consequences. The most common types of improper cross-examination, and how to avoid them, are discussed below.

1. The Right to Silence

The right to silence is deeply rooted in Canadian law and pre-dates the Charter.[77] After the Charter, a residual protection was afforded to the pre-trial right to silence under section 7.[78] An accused person has the right to remain silent, both at the pre-trial or investigative stage and at trial. The trier of fact is not permitted to draw any negative inference from the exercise of that right. The Crown is precluded from putting "evidence that the accused clearly exercised his right and remained silent in the face of a question which suggested his guilt."[79]

In the context of the cross-examination of the accused, any question that invites an inference that the accused should be disbelieved or that an inference of guilt should be drawn from the exercise of the right to silence is improper. Indeed, to allow such questions would allow the exercise of the right to remain silent to "constitute a trap."[80]

In planning your cross-examination, you can avoid ultimately imperilling the accused's right to silence by ensuring that you do not ask a question that suggests that the accused was not entitled to be silent and to remain silent up to the moment they chose to waive the right by testifying. If the accused testifies and provides inculpatory evidence that they had not previously related, you may challenge that evidence in cross-examination, but you may not do so by reference to:

1. the recency of the disclosure,
2. the fact that the accused had not provided the information to the police, or
3. the fact that the accused refused to answer questions put to them by the police.

There are some areas of cross-examination that, while permitted, bring you close to the line. Be extra careful in those situations and, if in doubt, default to ethics over effectiveness. With respect to an allegation of recent fabrication, the accused may be

76 See M Gourlay et al, *Modern Criminal Evidence* (Toronto: Emond, 2022) at 364 for a discussion of specific issues in cross-examination.

77 *Rothman v The Queen*, [1981] 1 SCR 640 at 683, 1981 CanLII 23; *R v Singh*, 2007 SCC 48 at para 24.

78 *R v Hebert*, [1990] 2 SCR 151, 1990 CanLII 118; *R v Singh*, 2007 SCC 48 at para 24.

79 *R v Chambers*, [1990] 2 SCR 1293 at para 60, 1990 CanLII 47.

80 *Regina v Robertson*, 1975 CanLII 1436, 21 CCC (2d) 385 at 400 (Ont CA), dissenting reasons of Dubin JA.

asked when the accused and the other person first discussed the matter,[81] but this does not allow you to explore why the accused did not reveal their alleged defence to police. Similarly, when offering exculpatory testimony for their co-accused, a person cannot be asked why they did not offer such evidence to the police when questioned.[82]

Another area of inquiry that requires delicacy in cross-examination is when the accused has provided a statement but their trial testimony differs from that statement. While inconsistencies between trial testimony and prior statements are fruitful areas for cross-examination, the unique position of the accused must be remembered. A useful demarcation line may be drawn between inconsistencies and omissions.

If an accused gives inconsistent versions, then cross-examination on these is clearly permissible. Cross-examining on an omission to have told the police something, on the other hand, may be more dangerous. In some cases, such a cross-examination, while challenged on appeal, has been held to be acceptable. Where the accused, having provided a statement to police, later testifies to more details and provides an explanation in direct examination about the reason for the omissions, they can be cross-examined on that explanation.[83] If the prosecutor, however, asks questions that suggest that there was an obligation on the accused to provide the information to police, or if the questions suggest that a negative inference should be drawn regarding the accused's silence, such questions will likely be held to be impermissible.[84] Likewise, an accused who has chosen to speak to the police about some matters but chooses to remain silent on others cannot be cross-examined on the matters on which they have chosen to remain silent.[85] If you are considering questioning the accused on the latter, seeking a ruling from the trial judge on its permissibility is the least you should do.[86]

There are some instances where evidence of silence may be admissible. If you can establish that there is a "real relevance and a proper basis" for the admission of the evidence of silence, then it may be admitted in evidence, including through cross-examination of the accused.[87] Some instances where the foundation for the admission of the evidence might exist include:

1. where silence is inextricably bound up with the narrative or other evidence and cannot easily be extricated;[88]

81 *R v Cones*, 2000 CanLII 5677, 143 CCC (3d) 355 at para 36 (Ont CA).

82 *R v Paris*, 2000 CanLII 17031, 150 CCC (3d) 162 at paras 41-42 (Ont CA).

83 *R v Hill*, 2015 ONCA 616 at paras 44-48; *R v L (W)*, 2015 ONCA 37 at para 23; *R v McNeil*, 2000 CanLII 4897, 144 CCC (3d) 551 at paras 34-35 (Ont CA); *R v Wu*, 2018 BCSC 266 at paras 28-34.

84 *R v Paris*, 2000 CanLII 17031, 150 CCC (3d) 162 at para 42 (Ont CA); *R v L (W)*, 2015 ONCA 37 at paras 24-25.

85 *R v GL*, 2009 ONCA 501 at para 39; *R v Kwandahor-Mensah*, 2006 ABCA 59 at paras 18-21.

86 *R v Paris*, 2000 CanLII 17031, 150 CCC (3d) 162 at para 42 (Ont CA).

87 *R v Turcotte*, 2005 SCC 50 at para 47.

88 *R v Turcotte*, 2005 SCC 50 at para 50.

2. where the defence seeks to emphasize the accused's cooperation with the authorities;[89]
3. where the accused testifies that they, upon being confronted with an accusation, protested their innocence but other evidence suggests the accused remained silent upon the accusation being made;[90] and
4. where the accused has failed to make timely disclosure to the Crown of an alibi.[91]

2. The Right to Disclosure

The accused has a constitutional right to receive disclosure from the Crown.[92] Just as with the right to silence, the right to disclosure cannot become a trap for the accused. A suggestion in cross-examination that the accused tailored their evidence to correspond to the disclosure is generally impermissible.[93] The same logic applies to both judge and jury and judge-alone trials.[94] Such questions may be allowed if the accused "affirmatively relied on that disclosure in aid of their defence when testifying."[95] The Crown may also cross-examine on tailoring of evidence to substantiate a claim of recent fabrication or concoction of an alibi by the accused.[96]

As with questions on the right to silence, the prudent course, if you are considering this line of questioning, is a judicial vetting in the absence of the jury.[97]

3. The Veracity of Other Witnesses

No witness should be asked about the veracity of another witness,[98] and this is particularly so of the accused.[99] In addition to being irrelevant, it has the potential to shift the burden to the accused and the "risk of such a course of reasoning undermines

89 *R v Lavallee*, [1980] OJ No 540 (QL), 1980 CarswellOnt 1799 (CA).

90 *R v GO*, 1997 ABCA 268 at para 13.

91 *R v Cleghorn*, [1995] 3 SCR 175, 1995 CanLII 63.

92 *R v Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45.

93 *R v Peavoy*, 1997 CanLII 3028, 34 OR (3d) 620 (CA); *R v White*, 1999 CanLII 3695, 132 CCC (3d) 373 at para 20 (Ont CA); *R v Fraser*, 2021 BCCA 432 at para 51.

94 *R v Thain*, 2009 ONCA 223.

95 *R v Fraser*, 2021 BCCA 432 at para 52; *R v White*, 1999 CanLII 3695, 132 CCC (3d) 373 at para 22 (Ont CA).

96 *R v Khan*, 1998 CanLII 15007, 126 CCC (3d) 523 at paras 51-52 (BCCA), leave to appeal to SCC refused, [2001] SCCA No 126 (QL); *R v Marshall*, 2005 CanLII 30051, 77 OR (3d) 81 at paras 69-75 (CA), leave to appeal to SCC refused, [2006] SCCA No 105 (QL).

97 *R v White*, 1999 CanLII 3695, 132 CCC (3d) 373 at para 23 (Ont CA).

98 *R v Markadonis*, [1935] SCR 657, 1935 CanLII 44.

99 *R v Ellard*, 2003 BCCA 68 at para 21.

the presumption of innocence and the doctrine of reasonable doubt."[100] An accused should also not be asked about the motive of a complainant to lie.[101]

4. A Failure to Confront

A cross-examination can be offensive for what it does not do as much as for what it does. The rule in *Browne v Dunn*[102] requires a party intending to impeach a witness called by an opposite party to "give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence."[103] The rule is grounded in fairness to the witness, the opposing party, and the trier of fact.[104] Not all matters need to be put to a witness, but the witness should be confronted on "matters of substance" upon which counsel seeks to impeach their credibility "and on which the witness has not had an opportunity of giving an explanation because there has been no suggestion whatsoever that the witness's story is not accepted."[105]

In deciding what issues with which to confront the accused in cross-examination, consider whether the potential area of cross-examination is a central feature of the witness's testimony. If you intend to impeach a witness by challenging a part of their evidence, you must "provide clear notice to the witness" and "give the witness an opportunity to answer these challenges."[106] A failure to do so can result in the trial judge engaging a number of discretionary remedies or an appeal court overturning a conviction. For an extensive review of the rule in *Browne v Dunn*, see Chapter 9, Abiding by the Rule in Browne v Dunn.

5. Witnesses and Evidence Not Called

An accused cannot be cross-examined on why certain witnesses were not called or why evidence was not submitted.[107] As with questions on the veracity of other witnesses, such questions have the potential to shift the burden of proof or violate solicitor–client privilege.

100 *R v Ellard*, 2003 BCCA 68 at para 22; *R v MA*, 2021 BCCA 215 at para 10.

101 *R v Bernier*, 2021 ABCA 27 at para 19.

102 *Browne v Dunn*, 1893 CanLII 65, 6 R 67 (UKHL). For a full examination of *Browne v Dunn*, see Chapter 9, Abiding by the Rule in Browne v Dunn.

103 *R v Quansah*, 2015 ONCA 237 at para 75.

104 *R v Quansah*, 2015 ONCA 237 at para 77.

105 *R v Giroux*, 2006 CanLII 10736, 207 CCC (3d) 512 (Ont CA), leave to appeal to SCC refused, [2006] SCC No 211 at para 46.

106 *R v SCDY*, 2020 ABCA 134 at para 70.

107 *R v Bouhsass*, 2002 CanLII 45109, 169 CCC (3d) 444 at para 12 (Ont CA).

6. Abusive Questioning or Attacks on Character

While a cross-examination can be probing and challenging, it will be found to be improper when the prosecutor becomes abusive. Questions about the character and lifestyle of an accused may be completely relevant, but when the questions go "far beyond the bounds of relevancy and legitimate credibility impeachment,"[108] the likelihood of censure increases. In *R v Rose*,[109] a cross-examination of the accused that consisted of questions about the accused's level of education, whether he had filed income taxes, who purchased the jacket he was wearing in court, where he obtained his jewellery, and what kind of dwelling he lived in was held to be improper. The Ontario Court of Appeal found it to have "transgressed the limits of relevance" and required the accused to "defend against vague and irrelevant suggestions of improper conduct."[110]

A cross-examination that demeans the accused, takes a contemptuous tone, or is overzealous may also be held to be inappropriate.[111]

7. Editorial Comment During Questioning

It is inappropriate for any counsel, but particularly prosecutors, to insert personal belief into questioning. Assertions that the accused is a "bare-faced liar"[112] or that the witness "wouldn't know the truth if [they] tripped over it"[113] are improper.

8. The Facts Behind Prior Convictions

At section 12, the *Canada Evidence Act* allows a witness, including the accused, to be cross-examined on prior convictions. Such an examination has been held to be relevant to a witness's credibility in that prior convictions may be an indication of a witness's character and thus reliability.[114] The questioning is, however, limited to the offence of which the accused was convicted, the date and place of the conviction, and the punishment imposed; it may not include the "conduct on which the conviction was based."[115] There may be flexibility in this limitation if the accused has put their character in issue.

108 *R v Rose*, 2001 CanLII 24079, 153 CCC (3d) 225 at para 24 (Ont CA).

109 *R v Rose*, 2001 CanLII 24079, 153 CCC (3d) 225 (Ont CA).

110 *R v Rose*, 2001 CanLII 24079, 153 CCC (3d) 225 at paras 25-26 (Ont CA).

111 *R v AJR*, 1994 CanLII 3447, 94 CCC (3d) 168 (Ont CA); *R v Hill*, 1986 CanLII 4722, 32 CCC (3d) 314 (Ont CA).

112 *R v Logiacco*, 1984 CanLII 3459, 11 CCC (3d) 374 at 383 (Ont CA).

113 *RSL v R*, 2006 NBCA 64 at paras 77, 78-80.

114 *R v Corbett*, [1988] 1 SCR 670 at 685-66, 1988 CanLII 80.

115 *R v MC*, 2019 ONCA 502 at para 55, citing *R v Corbett*, [1988] 1 SCR 670 at 696-97, 1988 CanLII 80.

9. Withdrawn Guilty Pleas

Where an accused has entered and then withdrawn a guilty plea, or the plea has otherwise been set aside, it may not be entered against the accused at trial.[116] This also prohibits the prosecutor from cross-examining the accused on the inadmissible prior guilty plea.[117] The prohibition extends to cross-examination on statements made to a probation officer in preparation for sentence arising from a guilty plea later struck,[118] statements made by the accused during a plea inquiry,[119] and an agreed statement of facts.[120]

B. Proper Cross-Examination

While not doing the things that are improper may not make a cross-examination a successful one, it will at least avoid making it a source of disapprobation or appellate reversal. The steps for avoiding such problems are rooted, fortunately, in the same foundation as the steps to a probing and productive cross-examination: strong preparation. Avoiding the pitfalls above and crafting a successful cross-examination is the result of good preparation.

A Crown prosecutor's preparation for cross-examination is undeniably more difficult than it is for defence counsel. There is no reciprocal requirement for disclosure, the accused may have remained silent, and what the accused might say during testimony is often a mystery to the prosecutor until the words come out of their mouth.

Despite this, there are avenues to preparation that are open to you. In a lecture to law students at the University of Calgary Faculty of Law, Ferguson J identified a framework for preparation:

> Firstly, identify the issues that have the potential of advancing your case whether it be through some admission supportive of your case or on some matter detrimental to the case for the opposing side, upon which the witness to be cross-examined has evidence to give.
>
> Secondly, analyze the background evidence that must be established through the witness in order for the crucial question to be asked and *not avoided*.
>
> Thirdly, formulate the strategic questions and order of strategic questions that will hopefully lead to the desired answer and *none other*.[121]

116 *Thibodeau v The Queen*, [1955] SCR 646 at para 26, 1955 CanLII 57.

117 *Thibodeau v The Queen*, [1955] SCR 646 at para 26, 1955 CanLII 57.

118 *R v B (DM)*, 2005 CanLII 1487, 74 OR (3d) 603 at para 4 (CA).

119 *R v Tayongtong*, 2017 ONSC 6027 at paras 28-36.

120 *R v Branco*, 2018 ONSC 7789.

121 Fred Ferguson, QC, "Advocacy in The New Millennium" (2003) 41:2 Alta L Rev 536.

There are practical aspects to the preparation that are necessary. While familiarity with the file is fundamental, certain aspects of the file are particularly relevant to cross-examination. The first of these, of course, is any statement provided by the accused. If the statement is being offered as evidence in the Crown's case, it will be available for cross-examination.

If the statement is not being offered in the Crown's case, the accused may still be cross-examined on the statement if the Crown has obtained a ruling, after *voir dire*, that the statement is voluntary.[122] While there is no clear authority on the issue, deciding to wait until the testimony of the accused is complete to determine to seek such a ruling runs the risk of the statement being held to be inadmissible on the basis that the Crown has split its case and that the use of the statement would violate the "case to meet principle."[123]

A useful organizational step in the preparation for cross-examination is the witness statement chart suggested in Section IV.A, "Information Gathering." This can be adapted to the accused as witness by including columns that address "limits on cross-examination" or "evidence required to be established." How the chart is organized is a function of your style of work, but beyond being a tool for organization, it also provides a process of analysis.

Other practical applications of the preparation for cross-examination are contextual. If the potential defence to a charge is self-defence, for instance, familiarizing yourself with the factors that inform that defence is crucial. It would also be important to understand the evidence that may impact those factors. The relative physical size of the parties, the physical environment where the events occurred, and the presence of other people may all be important considerations. In preparing for potential legal or evidentiary issues, it is useful to include short written reminders on potential subjects of concern. These serve the dual purpose of the familiarization exercise noted above and creating a case-specific trial book.

While cross-examining the accused can be daunting, it is not an insurmountable task: an effective, appropriate cross-examination is grounded in diligence and preparation.

C. Ethical Take-Aways

- You cannot ask an accused a question that invites an inference of guilt or incredibility drawn from the exercise of the right to silence.
- You should not ask a question of the accused that suggests their evidence was tailored to correspond to disclosure.

122 *R v Pappajohn*, 1978 CanLII 2363, 45 CCC (2d) 67 at 74 (BCCA), aff'd *Pappajohn v The Queen*, [1980] 2 SCR 120, 1980 CanLII 13; *R v Lizotte*, 1980 CanLII 2957, 61 CCC (2d) 423 at paras 19-20 (Qc CA).

123 *R v EA*, 2021 ONSC 1048 at para 22.

- The accused should not be asked about the veracity of another witness.
- An accused cannot be cross-examined on why certain witnesses were not called or why evidence was not submitted.
- You should be careful not to be abusive and not to editorialize in cross-examination. The use of sarcasm in questions is also unwise.
- Questions about an accused's prior criminal record should be limited to the offence, the date and place of the conviction, and the punishment imposed.

D. Practical Take-Aways

- Create a statement chart.
- Consider creating a case-specific trial book.
- Consider seeking a voluntariness ruling on any statement of the accused even if you don't anticipate seeking its admission during the Crown's case.

VI. Interviewing an Adverse Witness

The term "adverse" is used here in the sense known to criminal practitioners from reference to *Canada Evidence Act* section 9(1), as interpreted in the leading cases: opposed in interest, or unfavourable in the sense of being opposite in position.[124] For more advice on a prosecutor interviewing an adverse witness, refer to Section I, "Preparing the Crown Witness." The defence may want to interview an adverse witness, such as a complainant in a domestic violence allegation, who is being called by the prosecution. Chapter 4, The Uncooperative and Discreditable Witness, deals with the preparation of uncooperative or discreditable witnesses, a different category from "adverse witnesses," although there may be overlap.

It is trite that there is "no property in a witness" but that there are ethical and practical considerations when counsel seeks to interview a witness who is adverse, whether or not the witness will be called to testify by the opposing party. The *Model Code of Professional Conduct*[125] is a good starting point and provides the following in chapter 5 at rule 5.4-1:

> 5.4-1 A lawyer may seek information from any potential witness, provided that:
>
> (a) before doing so, the lawyer discloses the lawyer's interest in the matter;

124 *Wawanesa Mutual Insurance Co v Hanes*, 1961 CanLII 28, [1961] OR 495 at para 28 (CA), rev'd on other grounds [1963] SCR 154, 1963 CanLII 1; *Regina v Cassibo*, 1981 CanLII 1593, 39 OR (2d) 288 (CA).

125 Federation of Law Societies of Canada, *Model Code of Professional Conduct* (19 October 2019), r 5.4-1(e), online: <https://flsc.ca/national-initiatives/model-code-of-professional-conduct>. The Federation of Law Societies of Canada website includes an *Interactive Model Code* that allows users to access codes of professional conduct in other jurisdictions, but it may not be up to date. Check your own jurisdiction's published rules of professional conduct.

(b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and
(c) the lawyer observes Rules 7.2-6 to 7.2-8 on communicating with represented parties.

Consider whether it is necessary to interview the adverse witness. You should not do so simply because you can. If you are going to do so, first determine whether the witness is represented by counsel. As rule 5.4-1(c) above indicates, if the witness has counsel, you must not contact the witness directly, but through their counsel. If you don't know whether the witness is represented, that is one of the first questions to raise in the interview, which might then have to terminate until counsel is involved.

Adverse witnesses are, by virtue of being adverse, potentially risky to interview. The lawyer should take steps to protect themself from later accusations of impropriety or from the witness resiling from the position they took in interview. This may mean adopting a script of introduction that meets your ethical obligations and either recording the interview or having a witness to the conversation present. If an adverse witness tells you one thing in an interview but testifies to another, you may have difficulty challenging them on the inconsistency, as you cannot become a witness yourself in the proceedings.

If you have determined that there is a good reason to interview the adverse witness, consider using a script:

- Introduce yourself and tell the witness who you represent.
- Determine whether the witness has a lawyer.
- Explain why you are calling.
- Tell the witness that they do not have to speak to you; you can tell them why they should speak with you, but be clear that there is no obligation.
- Confirm that this is not a confidential conversation.
- If you are recording a telephone conversation or have a witness present, consider whether you should disclose that to the person being interviewed.

If you are interviewing a witness who was previously represented in connection with the matter, be cautious not to infringe privilege. For example, a former accomplice or co-accused may have cooperated with the police in providing information, thus becoming a prosecution witness.[126]

126 In M Proulx & D Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 685, the authors warn against the prosecutor digging from such a witness information that might reveal defence strategy or confidential information shared and protected under a joint defence privilege.

VII. The Significance of the Accused's Failure to Testify

Determining whether to testify is an important consideration for any accused who proceeds to trial. As observed in an earlier portion of this chapter, defence counsel and their client will undoubtedly be required to have a full and frank discussion about this decision. In discussing the advantages and disadvantages of testifying, an important consideration must be canvassed: what is the significance of an accused's failure to testify in a criminal trial?

It is a cornerstone of Canadian criminal law that an accused person has the right to remain silent. This right is enshrined in sections 7, 11(c), and 11(d) of the Charter.[127] Section 11(c) of the Charter specifically provides that a person is not compellable in proceedings against them. Indeed, it is common for an accused to proceed through the entirety of a criminal trial without testifying or calling any defence evidence. Instead, an accused may remain silent, test the prosecution's case, attack its shortcomings, and argue that the prosecution has not met its high burden of proving guilt beyond a reasonable doubt. Similarly, an accused may remain silent and rely on exculpatory evidence contained within the Crown's case. To that end, the decision to remain silent inevitably raises a question regarding what, if any, inferences can be drawn from the accused's decision to abstain from testifying. This very question was squarely before the Supreme Court of Canada in *R v Noble*.[128]

As a starting point, it is worth distinguishing between pre-trial silence and silence at trial. Where an accused remains silent during the pre-trial investigation and refuses to answer any questions from police, no adverse inference can be drawn against the accused for exercising their right to silence.[129] Understandably, the right to silence would be hollow if it were otherwise. With that in mind, the Supreme Court of Canada has concluded that the same reasoning applies to the accused's silence at trial, with the exception of alibi evidence, which is discussed below in Section VIII, "The Right to Silence in the Context of Alibi Evidence." That is, no adverse inference can be drawn against the accused for remaining silent throughout the trial process and their silence does not constitute a piece of inculpatory evidence.[130] As a result, where the prosecution fails to meet its burden, a trier of fact may not supplement the prosecution's case by relying on the accused's silence as a factor that assists in proving culpability.[131] Put bluntly, it would be "snare and a delusion" to grant the accused

127 *R v Noble*, [1997] 1 SCR 874 at paras 70, 76, 1997 CanLII 388.

128 *R v Noble*, [1997] 1 SCR 874 at para 53, 1997 CanLII 388.

129 *R v Chambers*, [1990] 2 SCR 1293, 1990 CanLII 47; *R v Noble*, [1997] 1 SCR 874 at para 71, 1997 CanLII 388.

130 *R v Noble*, [1997] 1 SCR 874 at paras 84-85, 1997 CanLII 388.

131 *R v Noble*, [1997] 1 SCR 874 at para 75, 1997 CanLII 388.

a right to remain silent at trial yet then proceed to use that silence as a make-weight to support guilt.[132] As will be seen below, the bottom line is that silence is not a piece of inculpatory evidence nor a piece of exculpatory evidence.[133] It has no place on the evidentiary scales.

Although an accused cannot be prejudiced by their decision not to testify, there are some limited scenarios wherein a trial judge may refer to the accused's silence. The Supreme Court of Canada has clarified that if a trial judge is convinced beyond a reasonable doubt of the accused's guilt, they may refer to the fact that the accused has not testified and, as such, refer to the fact that there is an absence of evidence that could raise a reasonable doubt.[134] In other words, "[i]f the Crown has proved its case beyond a reasonable doubt, the accused need not testify, but if he doesn't, the Crown's case prevails and the accused will be convicted."[135] In addition, a trial judge may indicate that they will not speculate about possible defences that might have been offered had the accused testified.[136] Notably, this permissible reference is consistent with the notion that a trial judge must not engage in impermissible speculation when determining the outcome of a trial. These references to the accused's silence are permissible because they do not offend the right to silence, nor do they prejudice the accused for deciding not to testify. The accused's silence, however, cannot be used to reject exculpatory inferences that arise as a result of the evidence or absence of evidence and which may raise a reasonable doubt.[137] For example, where exculpatory evidence is adduced throughout the Crown's case, a trier of fact may not simply reject it because the accused did not testify. This, of course, is consistent with the notion that a trier of fact must consider the totality of the evidence before them when determining whether guilt has been proven beyond a reasonable doubt. When summarizing the above, Sopinka J, writing for the majority in *Noble*, explained that

> [c]ontradictions [to the prosecution's case] that have not been offered cannot be supplied. No inference of guilt is drawn from the silence of the accused. Rather, the silence of the accused fails to provide any basis for concluding otherwise, once the uncontradicted evidence points to guilt beyond a reasonable doubt.[138]

In addition to the above, the decision not to testify has distinct applicability in the appellate context. Appellate courts may consider the accused's silence at trial when

132 *R v Noble*, [1997] 1 SCR 874 at para 72, 1997 CanLII 388.
133 *R v Noble*, [1997] 1 SCR 874 at para 89, 1997 CanLII 388.
134 *R v Noble*, [1997] 1 SCR 874 at para 77, 1997 CanLII 388.
135 *R v Noble*, [1997] 1 SCR 874, 1997 CanLII 388.
136 *R v Noble*, [1997] 1 SCR 874, 1997 CanLII 388.
137 *R v Noble*, [1997] 1 SCR 874 at para 78, 1997 CanLII 388.
138 *R v Noble*, [1997] 1 SCR 874 at para 82, 1997 CanLII 388.

being asked to apply the curative proviso on appeal pursuant to section 686(1)(b)(iii) of the *Criminal Code*.[139] In brief, the curative proviso allows a court of appeal to affirm a conviction despite an error in law where the court is satisfied that no miscarriage of justice occurred as a result of the error. An appellate court may consider the accused's silence at trial when faced with evidence connecting them to the crime.[140] Further, the accused's silence at trial may be considered on appeal where it is alleged that the verdict of guilt is unreasonable.[141] To be clear, the Supreme Court of Canada did *not* endorse the view that silence could be used as circumstantial evidence of guilt on appeal. Rather, the Court reasoned that the accused's silence, assessed in light of the entire evidentiary record, is a relevant factor to consider when determining whether the verdict of guilt was, in fact, unreasonable or whether the curative proviso should be applied. Put simply, the accused's silence becomes a relevant consideration on appeal when determining whether to uphold a conviction.

With the above in mind, when deciding whether to testify, an accused can remain confident that the prosecution's case cannot be strengthened by a decision to abstain from providing sworn testimony before a trier of fact. A judge sitting alone will instruct themself on this issue, and a jury will likewise be instructed. On that very point, section 4(6) of the *Canada Evidence Act* was the subject of *obiter* comments by Sopinka J writing the majority decision in *Noble*, but the Supreme Court of Canada subsequently confirmed that section 4(6) does not prohibit a trial judge from affirming the accused person's right to remain silent.[142] A discretionary instruction may be appropriate where there is a risk that the jury might place evidential value on the decision not to testify.

VIII. The Right to Silence in the Context of Alibi Evidence

As observed, silence has no place on the evidentiary scales. However, there is a narrow exception to this rule. Where an alibi defence is raised, the trier of fact may draw an adverse inference against the credibility of the alibi defence from the accused's failure to testify and be subjected to cross-examination.[143] Similarly, where an accused does not give sufficient notice to the Crown regarding an alibi defence and does not

139 *R v Noble*, [1997] 1 SCR 874 at paras 99-109, 1997 CanLII 388; *Avon v R*, [1971] SCR 650, 1971 CanLII 133.

140 *R v Leaney*, [1989] 2 SCR 393, 1989 CanLII 28; *R v Noble*, [1997] 1 SCR 874 at para 100, 1997 CanLII 388.

141 *R v Noble*, [1997] 1 SCR 874 at para 101, 1997 CanLII 388; *R v Corbett*, [1975] 2 SCR 275, 1973 CanLII 199.

142 *R v Prokofiew*, 2012 SCC 49 at para 3.

143 *R v Noble*, [1997] 1 SCR 874 at paras 110-13, 1997 CanLII 388; *R v Vézeau*, [1977] 2 SCR 277, 1976 CanLII 7.

provide the Crown with sufficient particulars regarding that defence, an adverse inference may be drawn against the accused by the trier of fact when weighing the credibility of the alibi defence.[144] Sufficient notice requires particulars, at an early time, so that the police may investigate the defence prior to trial.[145] One of the rationales behind this rule is that an alibi defence may be fabricated with relative ease with perjuring witnesses. Accordingly, advancing an alibi without testifying engages the risk that an adverse credibility inference may be drawn against the accused's defence.[146]

Where the accused wishes to raise an alibi defence, counsel should be cautious to investigate the defence, give proper notice, and advise the accused person to testify or risk an adverse inference against the defence. An additional factor for defence counsel to consider relates to the Crown's right to call rebuttal evidence. Where an alibi defence is raised by the accused, the Crown will generally be permitted to call rebuttal evidence in order to respond to the defence. This is because the Crown is not obligated to anticipate an alibi defence and negative the defence as part of their case-in-chief.[147] However, the Crown's rebuttal must not constitute an unfair surprise that prejudices the accused.[148]

IX. Adverse Inferences Against the Crown for the Failure to Call Witnesses

When preparing for trial, prosecutors have an obligation to ensure that they are calling sufficient evidence in order to establish their case beyond a reasonable doubt. In doing so, prosecutors must meticulously go through their file and determine what evidence they will call. This raises the question as to whether a prosecutor has an obligation to call any particular witness as part of their case. This question was squarely before the Supreme Court of Canada in *R v Cook*.[149] The Court concluded that it was entirely within the Crown's discretion to determine what evidence it calls.[150] As a result, there is no obligation on the prosecutor to call any specific witness to testify.[151]

144 *R v Cleghorn*, [1995] 3 SCR 175, 1995 CanLII 63; *R v Noble*, [1997] 1 SCR 874 at paras 110-13, 1997 CanLII 388.

145 *R v Noble*, [1997] 1 SCR 874 at para 111, 1997 CanLII 388; *R v Cleghorn*, [1995] 3 SCR 175, 1995 CanLII 63.

146 *R v Noble*, [1997] 1 SCR 874 at paras 110-13, 1997 CanLII 388; *R v Vézeau*, [1977] 2 SCR 277, 1976 CanLII 7.

147 *R v Harris*, 2014 ABCA 61 at paras 2-4; see also *R v RD*, 2014 ONCA 302 at para 19.

148 *R v Harris*, 2014 ABCA 61 at paras 3-4.

149 *R v Cook*, [1997] 1 SCR 1113, 1997 CanLII 392.

150 *R v Cook*, [1997] 1 SCR 1113, 1997 CanLII 392 at paras 19, 55; *R v Jolivet*, 2000 SCC 29 at paras 16-17.

151 *R v Cook*, [1997] 1 SCR 1113, 1997 CanLII 392 at paras 19, 55; *R v Jolivet*, 2000 SCC 29 at paras 16-17.

Rather, the prosecutor must only call evidence sufficient to adequately establish the essential elements of the offence, and it is within their discretion to determine what evidence need be called in order to prove their case. Accordingly, in a case where numerous witnesses have provided statements to the police, there is no obligation on the Crown to call *all* witnesses who have relevant testimony.[152] This principle of law remains a key component of the Crown's discretion.[153]

As a practical matter, prosecutors may find comfort in this principle of Crown discretion because it avoids the need for them to call repetitive evidence. For example, where a prosecutor is dealing with an assault prosecution committed in the context of a bar fight, with numerous witnesses to the fight, there is little utility in calling every witness who observed the altercation. Rather, you would be best served by identifying key witnesses who are capable of providing the court with the best evidence available instead of needlessly calling every available witness only to have them repeat the same evidence. Further, it is possible that the fight was captured by video surveillance. Where the accused wishes to hear from a particular witness that the prosecutor does not call to testify, they may call that witness in order to support their case.

Importantly, this component of Crown discretion includes the fact that the prosecutor is not obligated to call the specific victim of an offence to testify. However, as the Supreme Court of Canada explained, failing to call the victim to testify may significantly blunt the Crown's case and result in the Crown falling short of establishing guilt beyond a reasonable doubt. Accordingly, where the Crown decides it will not call the victim of an offence, it must ensure that it provides some other form of compelling evidence in order to prove guilt beyond a reasonable doubt.[154] This is an important consideration for a prosecutor to keep in mind. It is not uncommon for prosecutors to deal with a matter wherein the victim of the offence is a particularly vulnerable or difficult witness. For example, due to the devastating effects of domestic violence on a victim, it is a possibility that, due to fear or extreme vulnerability, a victim is not willing to testify against an abusive partner who has previously assaulted them. However, if a particular assault takes place in a public setting, or a in a private setting where another witness or witnesses observe the assault, the Crown may relieve the victim from testifying by adducing evidence of the assault through the other observers. In this example, the Crown is acting in good faith and within its ethical boundaries by not calling the victim to testify but is nonetheless adducing sufficient evidence in order to establish its case beyond a reasonable doubt.

Although the Crown has no obligation to call any specific witness, including a victim, some caveats are important. Where no good reason has been provided for the

152 *R v Rybak*, 2008 ONCA 354 at para 172; *Cormier (JRJ) v R*, 2019 NBCA 7 at paras 11-12.

153 *R v Owens*, 2018 MBCA 94 at paras 33-38; *Cormier (JRJ) v R*, 2019 NBCA 7 at paras 11-12; *R v Rybak*, 2008 ONCA 354 at para 172.

154 *R v Cook*, [1997] 1 SCR 1113 at paras 50-52, 1997 CanLII 392.

failure to call an essential witness, the Supreme Court of Canada has recognized that "legitimate questions would arise in the minds of the trier of fact where a victim was willing and able to testify, yet without any explanation, was not called on behalf of the Crown."[155] The Court went on to explain that, where an essential witness such as a victim has not testified and no legitimate explanation was offered for the absence of that evidence, the trier of fact may adversely consider the absence of the evidence when determining whether the Crown has proved its case beyond a reasonable doubt.[156] This caution is of vital importance for prosecutors. Decisions regarding whether to call an essential witness, such as a victim, must be made in good faith. Where a prosecutor, in good faith, has decided not to call an essential witness, the prosecutor should put serious thought into ensuring the trier of fact is provided a logical and reasonable explanation for that decision. If none is provided, defence counsel should not hesitate to raise the issue and seek an adverse inference from the trial judge. That said, the trial judge must give the Crown the opportunity to address the issue because the Crown's explanation is a crucial consideration for the trial judge when determining whether an adverse inference is warranted.[157] Further, the Supreme Court of Canada has made it clear that it will rarely be appropriate for the trial judge to comment on the Crown's failure to call a particular witness.[158] This strongly suggests that there must be a firm basis to support the request for an adverse inference.

Bearing the above in mind, Crown counsel must always be mindful of their legal and ethical obligations as quasi-ministers of justice. Crown counsel's decision not to call a witness must not be for any improper or oblique motive and must always be made in good faith. Deciding not to call an essential witness for the sole reason of attempting to deprive the trial judge of important exculpatory evidence is not a good faith decision. Additionally, from a practical perspective, prosecutors must remember the high burden of proof they must meet in a criminal trial. While they retain the discretion to build their own case at trial, prosecutors should generally call the evidence they require in order to prove their case. And this will often consist of calling all essential witnesses. As indicated, failing to call an essential witness, such as a victim, may not only significantly weaken Crown counsel's case, but may also result in the trier of fact drawing an adverse inference against the case.

155 *R v Cook*, [1997] 1 SCR 1113 at para 51, 1997 CanLII 392.

156 *R v Cook*, [1997] 1 SCR 1113, 1997 CanLII 392.

157 *R v Maxie*, 2014 SKCA 103 at para 40.

158 *R v Jolivet*, 2000 SCC 29 at para 39.