# Witnesses

# 5



## LEARNING OUTCOMES

After reading this chapter, you should be able to:

- Define competency and compellability as they apply to witnesses
- Identify how witnesses are compelled to attend court
- Discuss special provisions that may be sought to encourage witnesses to provide a full and candid account before the court
- Explain which ethical considerations apply to a paralegal interviewing a witness
- Summarize the rules regarding speaking to witnesses who are giving testimony in a case

# Introduction

This chapter will look at witnesses who *can* testify in court and who may be *forced* to testify in court. We will review procedures used to procure witnesses attendance, as well as the consequences that arise from the failure to appear at a court proceeding. Special provisions for witness testimony in criminal trials will be outlined. Finally, we will discuss the Rules as they apply to interviewing and communicating with witnesses.

# Competence and Compellability of Witnesses

## Competence

**competence**
the ability of a witness to testify and give evidence in court

**balance of probabilities**
standard of proof based on more likely than not

A witness may testify in court as long as he or she is competent to do so. All witnesses are presumed to be competent to give evidence and may do so as long as it is material to the case. The only exception to this is with respect to spouses, as discussed below. The burden of proof is on the party challenging the **competence** of a witness to show on a **balance of probabilities** that the witness is not competent. This is typically done by way of a *voir dire* before the witness is sworn in or affirms to tell the truth.

Witnesses who are under the age of 14 are presumed to be competent to testify. However, if the witness' capacity is challenged and the judge is satisfied that an issue exists, then the judge must inquire into whether the witness is able to understand and respond to questions, pursuant to section 16.1(5) of the *Canada Evidence Act* (CEA). A witness under the age of 14 must promise to tell the truth and does not need to swear an oath or make a solemn affirmation before giving testimony.

Witnesses over the age of 14 who are competent must swear an oath or make a solemn affirmation before being permitted to testify. If the competency of a witness over the age of 14 is challenged, the judge must inquire into whether the witness understands the nature of an oath or solemn affirmation and whether the witness is able to communicate the evidence. If the witness is unable to understand the nature of an oath or solemn affirmation but is able to communicate the evidence, the witness may still testify upon promising to tell the truth, pursuant to section 16(3) of the CEA.

Whether a witness swears an oath or makes a solemn affirmation, both have the same force and effect in law. This means that if a witness lies while giving evidence, he or she may be charged with perjury, regardless of whether the testimony was under oath or solemn affirmation.

### *Spousal Competence*

In common law, there is a presumption that spouses of accused persons are only competent to testify for the defence. Spouses of accused persons are incompetent to testify for the Crown, except in cases that involve the spouse's person, health, or

liberty (*R v Hawkins*, [1996] 3 SCR 1043, 141 DLR (4th) 193 [*Hawkins*]). The traditional justification for this rule was that spouses were deemed to share the same interest; therefore, this would result in a breakdown in marital harmony if one spouse was permitted to testify against the other. The traditional rule did not include common law partners in the definition of spouses. This was recently changed by the Ontario Superior Court of Justice in the case of *R v Hall*, 2013 ONSC 834 [*Hall*], in which Justice Lofchik held that the application of the spousal incompetency rule discriminated against unmarried couples living in common law relationships, which violated section 15(1) of the Charter. Therefore, Justice Lofchik held that common law spouses can also rely on spousal incompetence and may not be called to testify for the Crown. *Hall* is a marked departure from the traditional case law, so paralegals and paralegal students alike should follow subsequent cases and commentary considering *Hall*, as well as any appeals of this decision.

The CEA, while somewhat consistent with the common law rule regarding spousal incompetence, creates exceptions for certain enumerated offences, as discussed in the section on compellability. A distinction should also be made between spousal incompetence and **spousal privilege**: spousal incompetence applies to testimonial evidence, while spousal privilege applies to any communications between spouses. Spousal privilege may be waived by the spouse who is receiving the communication, but spousal incompetence may not be waived.

**spousal privilege**
a legal concept that recognizes that communications between spouses are confidential and do not have to be revealed in court

Interesting issues arise when the accused and his or her spouse get married shortly before the hearing or when there is a breakdown in the relationship—does spousal incompetence still prevent the spouse from testifying for the Crown in these cases? These issues were considered by the Supreme Court of Canada in two cases that were decided over ten years apart from each other: *Hawkins* and *R v Couture*, 2007 SCC 28 [*Couture*]. In *Hawkins*, the Crown's key witness was the girlfriend of the accused, Hawkins. At the preliminary inquiry, the girlfriend, Graham, provided incriminating statements against Hawkins under oath. After the hearing, Graham hired her own counsel and successfully sought to recant key portions of her earlier statements in court.

After the preliminary inquiry, Graham and Hawkins were legally married. At trial, the Crown attempted to have Graham testify. Alternatively, the Crown sought to read in Graham's statements from the preliminary inquiry as evidence. Both the trial judge and the Court of Appeal held that Graham was not a competent witness for the prosecution. The Supreme Court of Canada agreed with the lower courts, ruling that Graham was not a competent witness, but they permitted her evidence from the preliminary inquiry to be read in as evidence, pursuant to the principled exception to the hearsay rule.

Although the Crown argued that the marriage was solemnized after the indictment was issued, the Supreme Court was unwilling to make any changes to the common law rule regarding spousal competence. The Supreme Court went as far as to say that even when a marriage is motivated by a desire to take advantage of this rule, it may still be a true marriage and deserving of the law's protection.

The Supreme Court of Canada had the opportunity to revisit this rule in the case of *Couture* (see Case in Point: *R v Couture*).

CASE IN POINT

# Spousal Incompetence: Nature of the Relationship

*R v Couture*, 2007 SCC 28

### Facts

Before their marriage, the accused's spouse, Darlene Couture, had been his volunteer counsellor in the prison in which the accused, David Couture, had been serving a sentence for other charges. During the course of counselling, the accused confessed to murdering two women several years earlier. These murders were unsolved at the time of the accused's confession. After the accused was released from jail, he began to live with Darlene, and the two of them started a relationship.

Sometime later, Darlene gave two statements to the police about what the accused had disclosed to her, and the police began their investigation into the accused's involvement in the murders. Before the accused's murder trial on the two charges, the accused and Darlene reconciled and were legally married. At the trial, the Crown was not able to call Darlene based on the spousal incompetence rule, but the trial judge allowed her statements to the police as admissible evidence based on the principled exception to the hearsay rule and following the decision in *Hawkins*. The British Columbia Court of Appeal ruled the statements to be inadmissible and ordered a new trial. The Crown appealed to the Supreme Court of Canada.

### Decision

The Supreme Court of Canada dismissed the Crown's appeal, concluding that by permitting the Crown to rely on Darlene Couture's statements, this would violate the rule against spousal competence. The Court distinguished the *Hawkins* case, as the statements made in *Hawkins* were made prior to the marriage and were given in the form of testimony in a related court proceeding. In *Couture*, there was evidence that the accused and his spouse were in a valid and subsisting marriage at the time of trial; therefore, Darlene Couture was neither competent nor compellable to testify for the Crown. To permit the Crown to rely on her statements would result in changes being made to the rule against spousal competence, which the Court was not prepared to do.

### Discussion Question

The rationale behind the traditional common law spousal competence rule was to promote marital harmony and to avoid the natural repugnance of testifying against one's spouse (or common law partner, based on the decision in *Hall*). Is this rule still applicable in society today, or should it be struck down by Parliament? Should the sanctity of relationships have any place in the criminal justice system?

## Compellability

**compellability**
whether a witness may be forced to testify

All witnesses are compellable to give evidence. The only exception to **compellability** is for spouses. A wife or a husband may not be compelled to disclose any communications made during the marriage, pursuant to section 4(3) of the CEA. For criminal offences, spouses are not compellable, meaning that they cannot be forced to testify for the prosecution. However, the CEA makes exceptions for particular offences or attempts, including the following:

- any sexual offence involving a child;
- failing to provide necessities;
- abandoning a child;
- abduction of a child under the age of 16;
- bigamy;
- polygamy;
- unlawful solemnization of marriage;

- procuring;
- sexual assault;
- sexual assault with a weapon or causing bodily harm; or
- aggravated sexual assault (section 4(2) of the CEA).

Furthermore, for the following offences, when the complainant or the victim is under the age of 14, a spouse is compellable for the prosecution, pursuant to section 4(4) of the CEA:

- assault;
- aggravated assault;
- assault with a weapon or causing bodily harm;
- unlawfully causing bodily harm;
- criminal negligence causing bodily harm;
- criminal negligence causing death;
- infanticide;
- manslaughter;
- murder;
- attempt murder; or
- accessory to murder.

# Compelling Attendance to Court

## Subpoena

Part XXII of the *Criminal Code* deals with procuring the attendance of a witness to court. Section 698 of the *Criminal Code* allows a witness to be issued a **subpoena** to attend court when the witness is likely to give material evidence. For a summary conviction trial, a subpoena issued for a witness who resides within the province must be issued by a provincial court judge or justice. If the witness resides outside of the province, the subpoena must be issued by a provincial court judge.

**subpoena**
a formal court-ordered document ordering a witness to attend a hearing

Pursuant to section 700(1) of the *Criminal Code*, the contents of a subpoena must include the date, time, and place that the witness is to attend, along with an indication to bring anything that he or she has in his or her "possession or control relating to the subject matter of the proceedings." A witness who is served with a subpoena must remain in attendance until he or she is excused by the presiding judge or justice. A template for a subpoena can be found as Form 16 of the *Criminal Code* and is included as Appendix K.

A subpoena must be served by a peace officer, as defined under section 2 of the *Criminal Code*, or by someone who is qualified to serve civil process in the province. The method of service is personal service or by leaving it with someone at the witness' usual place of abode with someone who appears to be at least 16 years of age. Proof of service of the subpoena is satisfied with affidavit evidence. A subpoena

issued by a provincial court judge is effective throughout Canada, while a subpoena issued by a justice is effective throughout the province in which it was issued.

### Material Witness Warrant

When it is apparent that a witness who is likely to give material evidence is either evading service of a subpoena or will not attend court even if served with a subpoena, a justice or provincial court judge may issue a warrant for the witness' arrest, pursuant to section 698(2) of the *Criminal Code*. A warrant issued under this section requires the police to bring the witness to a specified court. A template for a material witness warrant can be found as Form 17 of the *Criminal Code* and is included as Appendix L.

In some cases, a witness may be bound by a recognizance to attend court and give evidence. If a justice is satisfied that the witness either has absconded or is about to abscond, a warrant of arrest may be issued for the absconding witness.

If a witness fails to appear at the proceeding for which he or she has been subpoenaed, or fails to remain at the proceeding, the presiding provincial court judge or justice may issue a warrant for the witness, as long as the subpoena was properly served and the witness has material evidence to give.

A witness who is arrested pursuant to a warrant may be detained in custody by a provincial court judge or justice, or may be released on a recognizance—either with or without sureties—to appear in court and give evidence. However, according to section 707(1), the maximum period of detention for a witness is no longer than 30 days unless the witness is brought before a provincial court judge for a hearing. If the judge is satisfied that further detention of the witness is warranted, the witness may be detained in custody for no more than 90 days. If less onerous methods of ensuring attendance are adequate, such as release on a recognizance with conditions, then the witness should not be detained in custody.

A witness may also be found guilty of contempt of court for failing to attend or remain in court for the purpose of giving evidence. The penalty for contempt of court, under section 708(2) of the *Criminal Code*, is a fine of no more than $100 and/or 90 days imprisonment.

## Special Provisions for Witnesses

Pursuant to section 486.1(1) of the *Criminal Code*, a witness who is under the age of 18 or who has a disability may have a support person present while he or she is testifying. This provision is also available to other witnesses over the age of 18 when the judge is of the opinion that having a support person present would assist the witness in providing a full and candid account, pursuant to section 486.1(2) of the *Criminal Code*. The Crown must make an application under this section before the judge makes an order, and the judge will consider factors such as the age of the witness, any mental or physical disability, the type of offence, the relationship between the accused and the witness, and other relevant circumstances. However, a support person may be prohibited from communicating with the witness during testimony.

A witness under the age of 18 may also testify outside of court or behind a screen, which is sometimes referred to as **obstructed view testimony**, in order to avoid having to see the accused, pursuant to section 486.2(1) of the *Criminal Code*. A witness over the age of 18 may also be permitted to testify behind a screen or outside of court when the judge believes that this is necessary in order for the witness to make a full and candid account. In making the order, the judge may consider the factors mentioned above. However, if the witness is permitted to testify outside of court, arrangements must be made for the judge, the jury, and the accused to watch the testimony of the witness via closed-circuit television.

**obstructed view testimony**
use of a device in court so that the witness does not have to see the accused, but the accused can see the witness

An accused person is not permitted to personally cross-examine a witness under the age of 18 unless the presiding judge is of the opinion that this is necessary for the proper administration of justice. Pursuant to section 486.3(1), when the accused person is self-represented, the judge shall appoint counsel to conduct the cross-examination of the witness. The same protection is available for witnesses over the age of 18 when the judge is satisfied that the accused should not be permitted to cross-examine the witness in order for the witness to be able to provide a full and candid account. The judge may take into account the same factors mentioned above.

The issue of whether the use of obstructed view or out-of-court testimony infringes an accused person's right to life, liberty, and security interests under section 7 of the Charter has been raised before the courts. In the case of *R v JZS*, 2008 BCCA 401, affirmed 2010 SCC 1, the British Columbia Court of Appeal held that although the use of testimonial aids engages the accused's liberty and security interests, the accused's inability to confront a witness does not offend any principle of fundamental justice. The Court of Appeal held that there are enough safeguards to ensure trial fairness, such as the right of the accused to cross-examine the witness, and that the use of a screen does not undermine the presumption of innocence. A similar issue in balancing the accused's right to face the complainant against the complainant's religious beliefs was considered by the Supreme Court of Canada (see Case in Point: *R v NS*).

For any sexual offences, or other offences upon application by the Crown, the judge may impose an order directing that any information identifying a victim or witness shall not be published in any way, pursuant to sections 486.4 and 486.5 of the *Criminal Code*. The order is mandatory for sexual offences upon application by the Crown or by any victim or witness. For non-sexual offences, factors that the judge may consider in determining whether to make a non-publication order include:

- the right to a fair and public hearing;
- whether there is a real and substantial risk that the victim or witness would suffer significant harm if their identity were disclosed;
- whether the victim or witness needs the order for their security or for protection from intimidation or retaliation;
- society's interest in encouraging victims and witnesses to report crimes and participate in the process;
- whether effective alternatives are available to protect the identity of victims or witnesses;
- the salutary and deleterious effects of the proposed order;

- the impact of the proposed order on the freedom of expression; and
- any other factor that the judge considers relevant.

Breaching a non-publication order is punishable as a summary conviction offence, pursuant to section 486.6(1) of the *Criminal Code*.

CASE IN POINT

## Balancing the Accused's Right to a Fair Trial with a Witness's Right to Freedom of Religion

*R v NS*, 2012 SCC 72

### Facts

Two accused persons were charged with sexually assaulting N.S. The accused persons were relatives of N.S. At the preliminary inquiry, N.S. wished to testify wearing a niqab, which is a cloth that covers the face with just the eyes visible and is worn by Muslim women for religious purposes. The preliminary inquiry judge ordered N.S. to remove her niqab.

The Ontario Court of Appeal ruled that if the accused's right to a fair trial and the witness' right to freedom of religion under the Charter are both engaged and cannot be reconciled, the witness may be ordered to remove the niqab. The Court of Appeal referred the matter back to the preliminary inquiry judge. N.S. appealed to the Supreme Court of Canada.

### Decision

The Supreme Court of Canada ruled that a witness will be required to remove a niqab while testifying if:

1. it is necessary to prevent a serious risk to the fairness of the trial; and
2. the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects.

The Supreme Court indicated that four factors would need to be considered in this analysis:

- the sincerity (and not the strength) of the witness' religious beliefs;
- the nature of the evidence provided by the witness and the risk to trial fairness;
- alternative ways to accommodate both the rights of the accused and the witness; and
- weighing of the salutary effects of requiring the witness to remove the niqab (accused's right to a fair trial and safeguarding the repute of the administration of justice) against the deleterious effects of doing so (harm done by limiting the witness' religious practice).

The Supreme Court ruled that each case will have to be considered on its own merits rather than imposing a strict rule for all situations. In the N.S. case, the matter was sent back to the preliminary inquiry judge.

### Discussion Question

The accused persons in this case were of the same religious faith as N.S. Should this have been a consideration in the Supreme Court of Canada's decision?

# Interviewing Witnesses

There is a common saying that there is no property in witnesses, meaning that any party may speak to a potential witness, whether that witness will be favourable to the party or not. This is true in criminal law, with the only exception being that when a witness is represented by a lawyer or paralegal, the counsel for the opposing side must obtain the consent of the witness' legal representative before speaking to the witness, pursuant to rule 7.02 of the Rules.

According to rule 4.02(1) of the Rules, a paralegal may interview a witness whether that witness is under subpoena or not. However, according to guideline 12, section 12 of the *Paralegal Professional Conduct Guidelines*, the paralegal must disclose his or her interest, along with the name of the client he or she is representing and the stage of proceedings the matter is in. The paralegal should also take great care in not suppressing any evidence or not procuring the witness in staying out of the way.

**PRACTICE TIP**

When interviewing a witness who may potentially become adverse or hostile at trial, it is best to have a third party present during the interview to avoid any allegations of improper influence. The third party may be advised to take detailed notes during the interview.

It may also be beneficial for the paralegal to record the interview; however, the witness should be notified if the interview is being recorded.

The paralegal should also consider whether to produce a written summary or statement of what the witness has said during the interview and have the witness review and sign the statement. This may provide a safeguard against the witness later attempting to change his or her version of events. A written statement may also be used to impeach and cross-examine the witness should he or she give contrary evidence at trial.The paralegal should also obtain the contact information of the witness should the paralegal wish to subpoena the witness for trial.

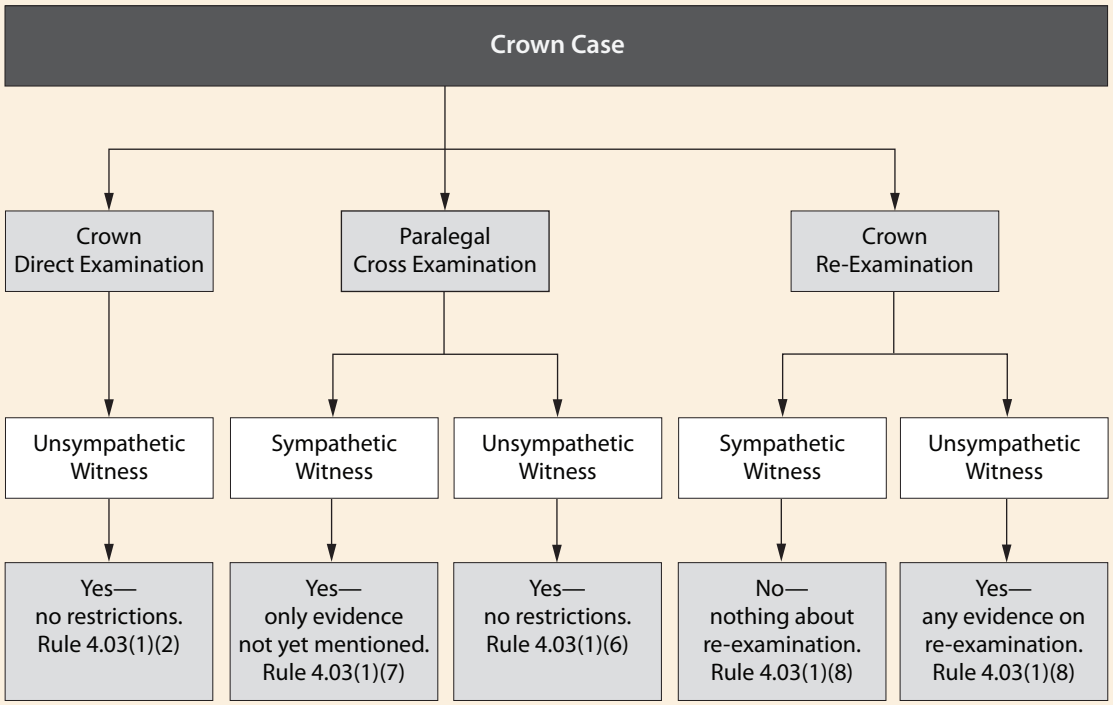
During all dealings with witnesses, the paralegal should abide by rule 4.01 of the Rules, which deals with the duties of the paralegal as an advocate before the court.

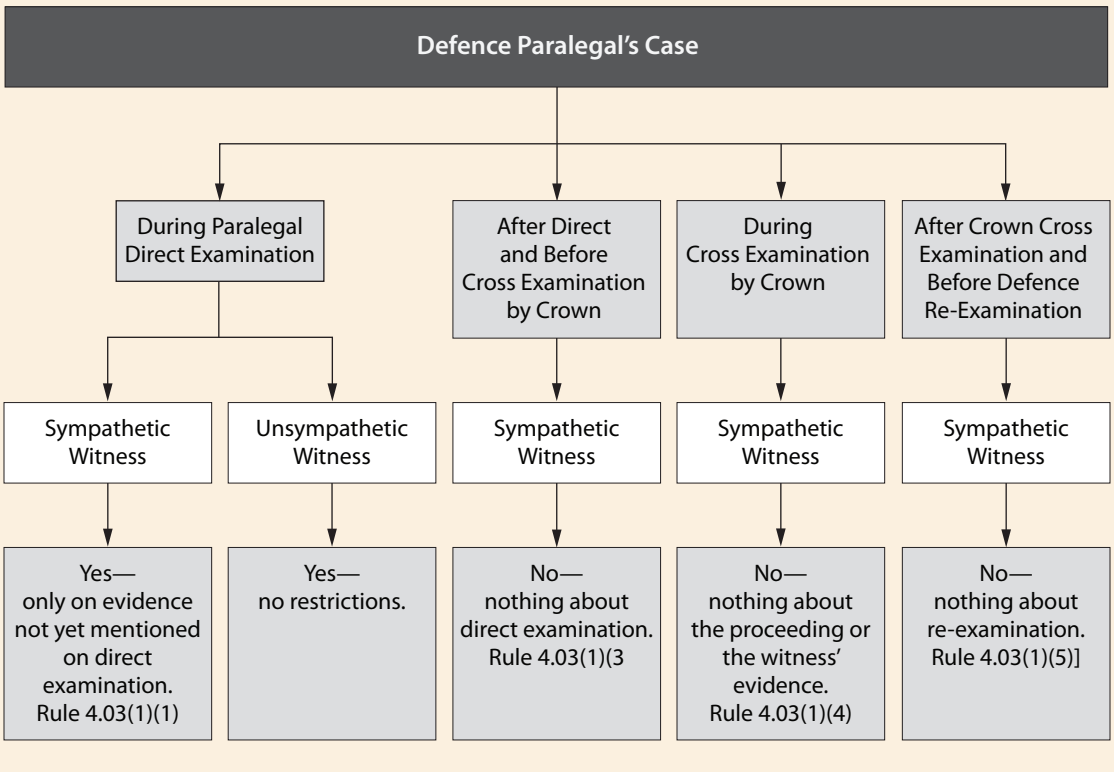
# Communicating with Witnesses Giving Evidence

Rule 4.03 of the Rules describes the various circumstances in which a paralegal may or may not speak to a witness who is giving evidence in court. These situations are best illustrated in Figures 5.1 and 5.2. It should be noted that a **sympathetic witness** to the defence is not necessarily the defence paralegal's witness and an **unsympathetic witness** to the defence is not necessarily the Crown's witness. The situations are listed in the order that they occur in a criminal trial.

**sympathetic witness**
a witness whose testimony supports a party, even though the party may not be calling the witness to testify

**unsympathetic witness**
a witness whose testimony supports the opposing party, even though the witness is not necessarily being called by the opposing party



# CHAPTER SUMMARY

Witnesses are competent if they are able to testify and give evidence in court. Witnesses must swear an oath or make a solemn affirmation before they can testify. All witnesses may be compellable, meaning that they can be forced to testify, with the exception of spouses. Spouses are neither competent nor compellable for the prosecution, except for certain criminal offences.

A subpoena is issued in order to procure a witness' attendance in court. Evading the service of a subpoena or failing to attend court after being served with a subpoena may result in a material witness warrant being issued. A witness who is arrested on a warrant may be held in custody for up to 30 days.

Having a support person present, testifying behind a screen or from outside the courtroom, and non-publication orders are some of the special provisions available for witnesses under the age of 18 or for witnesses with special circumstances. These provisions allow for the witness to be able to give a full and candid account to the court.

The Rules outline ethical considerations in interviewing witnesses. When a witness is represented by a lawyer or licensee, the permission of the lawyer or licensee is required before the defence paralegal may interview the witness.

The Rules also apply to a defence paralegal who wishes to communicate with a witness who is giving testimony in court. Whether the defence paralegal may speak to a witness is dependent on the stage of the proceeding, which party is questioning the witness, and the nature of the witness.

# KEY TERMS



# REVIEW QUESTIONS

## Short Answer

1. When interviewing a Crown witness or complainant, what must you advise them of first?

   **You must advise the witness of who you are, the name of your client, and the stage of the proceedings the matter is in. This is pursuant to rule 4.02(1) of the *Paralegal Rules of Conduct*.**

2. What must a party establish before a justice or provincial court judge will issue a warrant for a witness' arrest?

   **A party must establish that the witness has material evidence to give and is either evading service of a subpoena or will not attend court in response to a subpoena, pursuant to section 698(2) of the *Criminal Code*. A justice or provincial court judge may also issue a warrant for a witness who has failed to attend a hearing or has failed to remain at a hearing for which he or she has already been served with a subpoena.**

3. What *Criminal Code* provisions exist to encourage witnesses to provide full and candid testimony before the court?

   **Section 486.1(1) of the *Criminal Code* provides for the use of a support person for a witness who is under the age of 18 or who has a disability, or for witnesses who are over the age of 18, when having a support person would help the witness in testifying.**

   **The use of obstructed view testimony or out-of-court testimony is available for a witness under the age of 18 and for a witness suffering from a mental or physical disability, pursuant to section 486.2(1).**

   **Self-represented accused persons may not be permitted to cross-examine witnesses under the age of 18, according to section 486.3(1).**

   **For any sexual offences, a non-publication order is mandatory under sections 486.4 and 486.5. For non-sexual offences, a non-publication order is discretionary and may be considered by the court.**

## Apply Your Knowledge

1. With reference to the specific sections of the Rules that apply, decide whether the following statements are true or false:
   a. You may interview any Crown witness without the consent of the Crown prosecutor.
   b. You may interview any witness represented by another paralegal or lawyer without the consent of such paralegal or lawyer.
   c. During a short break after the Crown's cross-examination of your witness, you want to ask the witness a question in order to determine whether you will need to re-examine her. This is permissible.
   d. You ask for a break during your direct examination of a witness so that you can gather your thoughts. You walk over to get a coffee and the witness is in line in front of you. He asks you if you have change for a $20 bill. You are not able to speak to him at all since you are in the middle of your direct examination of this witness.
   e. The Crown is conducting a re-examination of a Crown witness who has given favourable testimony to your client. The judge calls a short recess and leaves the courtroom. The Crown has also left the courtroom. The witness approaches you to tell you that she is nervous about a particular area of testimony that the Crown will ask her about. You can speak to her about this since she is a Crown witness.

   **a. True. Rule 7.02 of the Rules requires a paralegal to obtain the consent of the witness' legal representative before speaking to the witness. However, a witness in a criminal proceeding is not represented by the Crown, and a paralegal may interview the witness with the witness' consent. The Crown does not need to be informed of this.**

   **b. False. Rule 7.02 of the Rules requires a paralegal to obtain the consent of the witness' legal representative before speaking to the witness.**

   **c. False. After the Crown has cross-examined a sympathetic witness, the defence paralegal may not speak to the witness before re-examination, pursuant to Rule 4.03(1)(5) of the Rules.**

   **d. True. For an unsympathetic witness, there are no restrictions on speaking to the witness. For a sympathetic witness, the defence paralegal may discuss matters not yet examined upon, pursuant to rule 4.03(1)(1) of the Rules.**

   **e. False. During the Crown re-examination of a witness who is sympathetic to the client, the defence paralegal may not discuss anything about the re-examination, pursuant to rule 4.03(1)(8) of the Rules.**

2. George and Gina have been married for two years. While they were engaged, George told Gina about his elaborate plan to rob a jewellery store. One week after their wedding, George and his best friend, Robert, carry out the robbery. The Crown wants to call Gina as a witness in George's trial and in Robert's trial, as they want to ask her about what George said to her about his plans to rob the jewellery store. Is Gina competent and/or compellable as a witness? Which legal principles would apply?

   **Gina would not be a competent witness in George's trial, as the common law rule against spousal competence would apply since George and Gina are in a valid and subsisting marriage. With respect to the conversation between George and Gina during their engagement in which George disclosed his plan to rob the jewellery store, this occurred prior to the marriage. Therefore, the protection given to spouses under section 4(3) of the CEA would not apply to Gina. However, given that she is not competent, she would not have to testify against George.**

   **With respect to Robert's trial, Gina would be both competent and compellable, as Robert and Gina are not spouses. However, it is unlikely that the Crown would be able to use Gina's evidence at Robert's trial against George in George's trial, given the Supreme Court of Canada's decision in *Couture*, as it would defeat the rule against spousal competence.**