Navigating the Fine Line of Criminal Advocacy:
Using Truthful Evidence to Discredit Truthful Testimony

Jeremy Tatum
University of Windsor
Faculty of Law
2012 J.D. Candidate

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Introduction

The fine line of ethical criminal advocacy and perpetual struggle between the duties to the client, court and profession has received much attention. Defence counsel is tasked with advancing every argument she or he reasonably believes will help with the client's case without misleading the court,[1] relying on any evidence or defences "known to be false or fraudulent"[2] or unduly harassing or intimidating witnesses.[3] Counsel's obligation to tell the truth and be candid with the court is subject only to the rules of confidentiality and privilege.[4]

But there has been very little discussion in Canada about whether it is improper or unethical to use truthful evidence to challenge witness credibility when counsel knows that the client is guilty.[5] In answering this question, this paper advocates that a contextual approach should be taken. It examines the two leading cases in Canadian jurisprudence, *Li* and *Lyttle*, which appear to conflict on this point,[6] professional codes of conduct, Canadian legal scholarship[7] and the comparatively richer American discourse exploring the ethical dimensions

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[1] *Rondel v Worsley*, [1969] 1 AC 191 (UKHL).

[2] *R v Jenkins* (2001), 44 CR (5th) 248 (Ont SCJ). Also *Law Society of Upper Canada v Ross*, 2010 ONLSHP 7.

[3] LSUC, *Rules of Professional Conduct*, Rule 4.01(1) and Commentary [*RPC*].

[4] *Ibid*.

[5] For instructive Canadian and American commentary on when a lawyer knows the client is guilty, see Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 41-47 and Harry Subin, "The Criminal Lawyer's 'Different Mission': Reflections on the 'Right' to Present a False Case (1987) 1 Geo J Legal Ethics 125 at 136-43.

[6] *R v Lyttle*, [2004] 1 SCR 193; and *R v Li*, [1993] BCJ No 2312 (CA), leave refused [1994] SCCA No 209.

[7] Only four Canadian contributions appear to have considered the legal ethics of using truthful evidence to impeach. See Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham: LexisNexis Canada Inc., 2011); Steven Skurka and James Stribopoulos, "Professional Responsibility in Criminal Practice" in *Criminal Law Reference Materials, Ontario Bar Admission Course* (Toronto: Law Society of Upper Canada, 2005) Chapter 1 at 10-11;

of discrediting truthful testimony. Part I discusses the two leading authorities in Canadian jurisprudence. In *R v Li*, the British Columbia Court of Appeal held that truthful evidence in support of a false proposition could be used to test the reliability of witnesses' evidence, even where counsel knew the client was guilty. The Supreme Court of Canada did not directly address the issue in *R v Lyttle*. However, the Court's reasoning can be taken to infer that it is not permissible. Part II looks at the limited direction in the LSUC *Rules of Professional Conduct*. Part III identifies what has been said up to this point in Canadian and American legal scholarship. Finally, in Part IV, two case studies will be used to engage relevant factors that should be taken into account in determining if confidence in the administration of justice would likely be enhanced or reduced if the proposed line of questioning is permitted.

Ultimately, in some circumstances, I contend that it is ethical and in the interests of justice for counsel to use truthful evidence in defence of a guilty client. Trial judges will continue to control the process by monitoring the probative value of the questioning and counsel's treatment of the witness,[8] yet the functioning of the legal system also depends on lawyers independently understanding and respecting those limits.[9]

Part I: The Jurisprudence

R v Li

In *Li*, the accused was convicted at trial of robbery arising out of a jewelry store burglary. On appeal to the British Columbia Court of Appeal, the accused argued that his lawyer had not

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David Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dal LJ 267; and David Layton, "The Criminal Defence Lawyer's Role" (2004) 27 Dal LJ 379.

[8] *Lyttle*, *supra*, footnote 6 at paras 44-45 and 50-52.

[9] Woolley, *supra*, footnote 7 at 208.

properly represented him by failing to challenge the police testimony about the stolen jewelry being found in the accused's possession and not calling the accused to testify.[10]

The Crown's evidence at trial consisted of two witness accounts and the police seizure of a quantity of the stolen jewelry from the accused's room in his parents' residence the next day. The two store clerks provided in-dock identification. However, the identification in the photo lineup was also done "with something less than 100 percent certainty",[11] and there were "discrepancies" with the earlier identification, particularly "with regard to the accused's hairstyle and manner of speaking".[12] In response, the defence called two independent witnesses that gave truthful evidence about the hairstyle of the accused and his fluency in English to raise doubt about the reliability of the identification evidence given by the store clerks.[13]

In the view of the court, having received an admission of guilt from the accused, the defence was required to "refrain from setting up any inconsistent defence".[14] However, it was entitled, and counsel under a duty, to test the Crown's case in every proper way. McEachern CJBC, writing for the court, held that "it was not improper for [the defence] to call two independent witnesses who gave uncontroversial evidence about the hairstyle of the accused and about his fluency in English" to raise "a doubt about the reliability of the identification evidence given by the jewelry store clerks".[15] The court went on to state that if, for example, "the evidence of the Crown was that an assailant was about 6 feet in height, a counsel defending an accused

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[10] *Li*, *supra*, footnote 6 at paras 19, 47 and 55-57.

[11] The frailties of eyewitness evidence are well reported. E.g. *R v Hanemaayer* (2008), 234 CCC (3d) 3 (Ont CA).

[12] *Li*, *supra*, footnote 6 at paras 4-5 and 57.

[13] *Ibid* at para 66.

[14] *Ibid*.

[15] *Ibid*.

who has privately admitted guilt, could properly call evidence to prove the real height of the accused was less or more than that".[16]

Therefore, the court concluded that counsel did not breach any legal or ethical rule by challenging the discrepancies in the Crown's identification evidence and introducing truthful evidence about the accused's actual height and fluency in English to possibly have the trier of fact draw an exculpatory inference on identification. The court noted that this line of questioning "was the only hope the accused had" of having an active defence to avoid a conviction necessarily following.[17]

R v Lyttle

Ten years later in 2003, the Supreme Court was asked to weigh-in on the general debate about whether disputed and unproven facts can be used in cross-examination to create the impression that the witness is either being untruthful or mistaken if a "good faith" basis exists.

The accused was charged with robbery, assault causing bodily harm, kidnapping and possession of a dangerous weapon. A Crown witness picked Lyttle out of a photo lineup as one of four masked assailants that had attacked him. The defence theory was that the assault and robbery were related to the victim's unpaid drug debt, and that he had identified Lyttle to avoid implicating his associates or himself in a drug ring.[18] At trial, the Crown argued and the trial judge agreed that the defence was prohibited from cross-examining on its theory unless it could provide an evidentiary foundation.[19] The Ontario Court of Appeal upheld the trial judge's decision using the curative proviso under s 686(1)(b)(iii) of the *Criminal Code*. In a unanimous

[16] *Ibid* at para 67.

[17] *Ibid* at para 68.

[18] *Lyttle*, *supra*, footenote 6 at para 20.

[19] *Ibid* at para 21.

judgment reversing both of the lower courts, the Supreme Court concluded that the trial judge's unwarranted restriction of what was a legitimate line of questioning had a fatal impact on the conduct of the defence and rendered the trial unfair.[20] A new trial was ordered.

Although the Supreme Court did not directly address the method of advocacy discussed in this paper, the general reasoning seems to imply that using truthful evidence to cast aspersions on a witness or create a false impression about the accused' guilt is improper.[21] According to the Court, suggesting "what counsel genuinely thinks possible on known facts or reasonable assumptions" is permissible, but "asserting or implying in a manner that is calculated to mislead" cannot constitute good faith and is prohibited.[22] However, the Court did not address how far the defence can go in inviting a trier of fact to form inferences from truthful evidence that nonetheless supports a false proposition.[23]

Part II: The Rules

The *Rules of Professional Conduct* and other professional codes set minimum criteria for how lawyers practice. Defence counsel is tasked with "rais[ing] fearlessly every issue", argument and question, "however distasteful" or contrary to "the lawyer's private opinion on credibility or the merits", that she or he believes will help the client obtain any advantage, "remedy and defence authorized [or not prohibited] by law".[24] However, like the decision in *Lyttle*, the *Rules*

[20] *Ibid* at paras 3, 6-11 and 71-75.

[21] *Ibid* at paras 44-45.

[22] *Ibid* at paras 47-48.

[23] Harry Subin, "Is This Lie Necessary? Further Reflections on the Right to Present a False Defense" (1987) 1 Geo J Legal Ethics 689 at 691.

[24] *RPC* R4.01 and Commentary.

do not directly speak to the practice of using truthful evidence to challenge a witness' credibility when guilt is known.

On one hand, it could be said that the *Rules* preclude this method. Counsel is expressly prohibited from knowingly attempting to deceive a court or tribunal.[25] With truthful evidence, although the evidence offered may not technically be false, its use still causes a witness or party, including the accused, to be presented in a false or misleading way[26] by virtue of the false proposition it supports and inference the trier of fact is being asked to draw.[27] Counsel is at the very least suggesting the witness is mistaken about an essential element of the offence, or material matter, and using evidence to raise doubt about the accused's guilt. This could be argued amounts to misstating evidence[28] and does no more to promote "the integrity of the profession"[29] or "respect for the administration of justice".[30] While counsel is permitted to test the evidence of every Crown witness and argue that as a whole it is insufficient to convict,[31] the defence is barred from suggesting that some other person committed the offence or setting up an affirmative case inconsistent with the admission.[32]

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[25] *Ibid* at R4.02(e).

[26] *Ibid* at R4.02(j).

[27] *Ibid* at R4.02(g).

[28] *Ibid* at R4.02(f).

[29] *Ibid* at R6.01(1) and 6.03(1).

[30] *Ibid* at R4.06(1).

[31] *Ibid* at R4.01(1) and Commentary. Also Federation of Law Societies of Canada, *Federation Model Code of Professional Conduct*, R4.01(1) and Commentary [*FLS Model Code*] and the New Brunswick, *Code of Professional Conduct*, Chapter 8, R14(d) [NB *Code of Professional Conduct*].

[32] *Ibid* at R4.01(1) and Commentary. Also *CBA Code*, Chapter 9, Commentary 11 and British Columbia, *Code of Professional Conduct*, Chapter 8, R1(e.1).

On the other hand, it could be asserted that the *Rules* permit using truthful evidence to test the credibility and reliability of a witness' evidence for the limited purpose of arguing that the Crown has failed to discharge its burden of proof. Defence counsel is tasked with protecting "the client as far as possible from being convicted" except by sufficient reliable evidence "to support a conviction for the offence charged".[33] In performing this role, counsel is authorized to use any evidence, defences or technicalities "not known to be false or fraudulent".[34] Demonstrating or suggesting that a witness is mistaken through truthful evidence is not misleading in that sense. The suggestion is supported by truthful evidence designed to ensure that the accused is not convicted except by sufficient truthful evidence to support a conviction. Unless defence counsel goes further to set up an affirmative case or defence inconsistent with the admission, then counsel is not relying on evidence or a defence known to be false or fraudulent.

Part III: The Legal Scholarship

The question of whether it is ethically permissible to lead evidence or make submissions in support of a false proposition has generally elicited three responses in legal scholarship: (a) the rules and adversary system require unbridled partisanship by the defence lawyer to offer her or his client every possible advantage that is not perjurious or illegal [The Freedman Approach]; (b) presenting truthful evidence to test and raise doubt in the Crown's case is distinct from conduct designed to mislead the trier of fact or setting up an affirmative defence [The Layton-Proulx Approach]; and (c) the permissibility of the proposed course of action should be assessed by looking at its legal merit, utility and harm, and impact on attaining a legal correct

[33] *Ibid* at R4.01(1) and Commentary. Also *CBA Code*, Chapter 9, Commentary 10.

[34] *Ibid at* Commentary to R4.01(1). Also FLS *Model Code*, Rule 4.01(1) and Commentary; NB *Code of Professional Conduct*, Chapter 8, R14(c); and NS *Code of Professional Conduct*, Chapter 4, R4.01 and Commentary.

result [The Tanovich Approach]. The common justifications relied on to support each viewpoint will now be looked at to provide additional considerations for the contextual study in Part IV and this paper's overall conclusion.

The Freedman Approach

Professor Monroe Freedman is perhaps the most well known advocate of zealous advocacy of the client's interest. In his commentary on the *Professional Responsibility of the Criminal Defense Lawyer,*[35] Freedman argues that the nature of the criminal justice system and lawyer-client relationship requires that defence counsel take advantage of every opportunity on behalf of the client that does not run afoul of the law.[36] It is the Crown that has the onus of proof, and cross-examining a truthful witness or making an argument to test the reliability and adequacy of the prosecution's case is merely a way of forcing the Crown to carry that burden.[37] Defence counsel is "obligated" to attack, if she or he can, the reliability and credibility of witnesses' evidence, whether or not the client is known to be factually guilty.[38] Failure to do so because counsel knows the client is guilty is "wrong", a consequent "violation of the client's confidence", and contrary to the "essential administration of justice".[39] Freedman and others opine that the legal system "cannot tolerate" a result where the client is effectively prejudiced because of special knowledge gained as a result of the solicitor-client relationship.[40]

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[35] Monroe Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64 Mich L Rev 1469.

[36] *Ibid* at 1471 and 1474-5.

[37] *Ibid*. Also John Mitchell, "Reasonable Doubts Are Where you Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's 'Different Mission'" (1987) 1 Geo J Legal Ethics 339 at 358-59.

[38] *Ibid* at 1475.

[39] *Ibid* at 1474-5.

[40] *Ibid* at 1472 and 1475. Also Mitchell, *supra*, footnote 37.

The question of and policy behind discrediting a truthful witness has been the subject of extensive commentary in U.S. scholarship, most notably the often-cited Subin-Mitchell[41] and Luban-Ellmann[42] exchanges. Not surprisingly, the view that defence counsel must provide "client-centered" advocacy to protect against overreaching by the state and advance the individual dignity of the accused[43] is not universally held. In fact, Professor Simon has challenged each of the justifications of the Freedman Approach as "implausible".[44]

Others' concern is primarily with the impact that discrediting truthful witnesses has on the justice system's goal of ascertaining the truth. In response to Mitchell's claim that aggressive cross-examination of truthful witnesses merely acts as a "screen" within the legitimate boundaries of testing the Crown's case, Professor Subin and others argue that defence lawyers, as officers of the court, have a paramount duty to advance the truth.[45] There is no right to put forward a false defence or "truth-defeating devices"[46] such as evidence or suggestions designed to have the trier of fact knowingly draw false inferences.[47] Untrue or mistaken testimony should not be exploited for its probative value and instead only be used to show that the Crown failed to discharge its burden.[48]

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[41] Subin, *supra*, footnote 5; Mitchell, *supra*, footnote 37; and Subin, *supra*, footnote 23.

[42] David Luban, *Lawyers and Justice: An Ethical Study* (New Jersey: Princeton University Press, 1988); Stephen Ellmann, "Lawyering for Justice in a Flawed Democracy" (1990) 90 Colum L Rev 116; and David Luban, "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004.

[43] David Luban, "Are Criminal Defenders Different?" (1993) 91 Mich L Rev 1729 at 1730-52 and 1755.

[44] William Simon, "The Ethics of Criminal Defense" (1993) 91 Mich L Rev 1703 at 1726-28.

[45] Subin, *supra*, footnote 5 at 149-152.

[46] *Ibid* at 126.

[47] Subin, *supra*, footnote 23 at 697.

[48] Murray Schwartz, "Making the True Look False and the False Look True" (1988) 41 SW LJ 1135 at 1146.

Moreover, Subin, Simon and Schwartz are seen to take the position that counsel should not cross-examine truthful witnesses in a way that supports a theory of the facts known to be false, that harms the witnesses' reputations, or attempts to cast blame on innocent persons. Once counsel knows guilt, Subin suggests that she or he is limited to a role to ensure that a conviction is based on adequate competent and admissible evidence.[49] Although Subin has accepted that counsel "may nonetheless suggest to the jury alternative explanations of the facts, for the purpose of assisting the jury to measure the weight of the evidence,"[50] provided the jury receives proper instruction on "the limited purpose for which these alternative explanations, made without a good faith basis, are being offered."[51]

Conversely, zealous advocates such as Mitchell contend that an acceptable aspect of putting the Crown to the test is enabling the "effective defender" to "introduce and embellish plausible alternatives to the prosecutor's explanations,[52] as it is "the level of certainty and doubt, not the question of 'truth' or 'falseness', with which the [legal] system is concerned".[53] However, Professor Luban counters that "to say zealous advocacy should be a professional norm" of defence lawyers "is not to say that they should never deviate from it"[54] or using "forms of deception", including impeaching a witness known to be testifying truthfully.[55] Luban argues that zealous advocacy must soften in sexual assault cases, where the "moral limits to the advocate's role […] must be designed to maximize the protection of jeopardized individuals"

[49] Subin, *supra*, footnote 5 at 146-47.

[50] Subin, *supra*, footnote 23 at 690.

[51] *Ibid*.

[52] Luban, *supra*, footnote 43 at 1760.

[53] Mitchell, *supra*, footnote 37 at 343.

[54] Luban, *supra*, footnote 43 at 1757.

[55] *Ibid* at 1760.

against both the state and network of practices that "encourages male sexual violence".[56] Refusing to cross-examine on consent avoids "pressing a false case", and counsel still retains discretion over other tactics and truthful witnesses to call.[57]

Proulx and Layton: a Modified Freedman Approach

In their book on *Ethics and Canadian Criminal Law*, Michel Proulx and David Layton argue that the need for defence counsel to zealously cross-examine truthful witnesses only becomes limited when counsel knows, because of a "reliable admission" or "irresistible conclusion of falsity from available information",[58] that the accused is guilty or there is a risk of undue prejudice to the witness.[59]

Leaving aside the continuing duties of confidentiality and loyalty to the client, regardless of whether the accused is guilty or not, they argue that the law allows the defence to "insist that the Crown prove its case according to the justice system's applicable standards and rules, and to […] test the Crown case within an adversarial setting."[60] Defence counsel can "properly take objection to jurisdiction", "the form of the indictment" or "the admissibility or sufficiency of the evidence", but "should go no further than that" to conduct a false defence or knowingly mislead by relying on "evidence or assertions to the contrary" of what counsel knows to be true.[61]

In his article on *The Criminal Defence Lawyer's Role*, Layton distinguishes between presenting false evidence or suggestions intended to mislead the witness or court from using

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[56] Luban, *supra*, footnote 42 at 1028-30.

[57] *Ibid* at 1031.

[58] Proulx and Layton, *supra*, footnote 5 at 40-47 and 370.

[59] Layton, *supra*, footnote 7 at 387.

[60] Proulx and Layton, *supra*, footnote 5 at 36.

[61] Commentary to *RPC* R4.01(1) and *CBA Code*, Chapter 9, Commentaries 10 and 11.

evidence that counsel knows or suspects is true in order to ensure that no conviction necessarily follows unless the criminal standard is met.[62] He argues that counsel should only challenge the evidence to the point of suggesting that the witness is unintentionally mistaken rather than trying to make him or her out as a liar or person of bad character.[63] It must never be suggested that the witness is deliberately being untruthful, as unintentional mistake causes substantially less harm to the witness' reputation and disincentive for other victims, particularly with sexual assault, to come forward.[64] However, it is not clear from Layton when a sexual assault complainant could not be cross-examined using truthful evidence.

Layton justifies the limited use of truthful evidence on the Crown's onus of proving all essential elements of the offence, state propensity to abuse its power, for guilty and innocent clients to have absolute confidence in the lawyer-client relationship, and the need to combat injustice or discrimination.[65] However, in recognizing that juries may have particular difficulty with distinguishing testing versus impugning evidence, Layton recommends the ethical line might be where counsel "knowingly risks misleading the trier of fact" or cause a disproportionate amount of "direct prejudice" to the truthful witness.[66] Likewise, in submissions, Proulx and Layton suggest that counsel can put a "possibility to the [trier of fact], despite knowing it to be false, but in so doing cannot assert that the possibility is in fact true".[67] There is nothing wrong

[62] Layton, *supra*, footnote 7 at 386.

[63] *Ibid* at 389.

[64] *Ibid* at 387.

[65] *Ibid* at 386.

[66] *Ibid* at 387.

[67] Proulx and Layton, *supra*, footnote 5 at 72.

with presenting all available truthful evidence to the court and inviting the trier of fact to draw exculpatory inferences from that evidence.[68]

Additionally, in certain circumstances, Layton recommends that defence counsel's duties to the client and the administration of justice could favour more aggressively attacking a witness' character to raise reasonable doubt and combat greater harms such as inequality and discrimination in the criminal justice system.[69]

The Tanovich Approach

In his article on the reconstruction of lawyers' role morality in Canada, Professor Tanovich argues that all lawyers should adopt a pervasive justice-seeking ethic that has as its purpose "the correct resolution of legal disputes or problems in a fair, responsible and non-discriminatory manner".[70] Tanovich suggests that the pursuit of justice "demands that lawyers engage in a behaviour that will enhance a fair, other-regarding and non-discriminatory process of problem-solving that will protect the right of the client to obtain the remedy he or she is entitled to under the law properly interpreted."[71]

According to Tanovich, the question is not whether the accused has the right to a defence but what kind of defence can be advanced on behalf of anyone, whether known to be guilty or not.[72] Several factors informing the contextual approach include: (a) the nature of the work and client; (b) the legal merit of the claim or conduct; (c) whether there is a power imbalance between the parties; (d) whether the anti-discrimination norm is engaged by the procedure or

[68] *Woolley*, *supra*, footnote 7 at 308.

[69] *Ibid* at 390.

[70] Tanovich, *supra*, footnote 7 at 284.

[71] *Ibid* at 289.

[72] Subin, *supra*, footnote 5 at 146.

process; (e) the nature and extent of the harm that has been or will be caused by the client or to the dignity of other individuals; and (f) whether there are any other factors that will impact on the ability of the process or procedure to produce the legally correct result.[73]

Tanovich provides a more concrete approach than Layton to decide what ethical lawyering requires in a particular situation and draws a brighter line in cases involving truthful sexual assault complainants and racialized accused. In cases where there is "no air of reality" to a defence of consent, Tanovich contends defence counsel are legally prohibited under *Lyttle* and barred ethically under the non-discrimination rule from proceeding with that avenue of questioning. Lawyers have a special obligation to "protect the dignity of individuals",[74] and that kind of cross-examination serves primarily to "further the historical discrimination [stereotypical assumptions] and disadvantage faced by women."[75] On the other hand, Tanovich posits that defence counsel "have a substantial licence to engage in zealous advocacy when representing accused from racialized or other marginalized communities" because the "criminal justice system is inherently biased towards racialized groups".[76] Thus, even where a good faith basis does not exist, social context could favour permitting the proposed line of questioning.

While cross-examination in both cases arguably departs from counsel's role as a "truthful advocate" and the good faith requirement in *Lyttle*, these examples lay important groundwork for the final part of this paper. After all, the adoption of a professional or evidentiary rule that permits obscuring or preventing truthful evidence requires powerful justification.[77]

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[73] William Simon, "'Thinking Like A lawyer' About Ethical Questions" (1998) 27 Hofstra L Rev 1 at 4 in Tanovich, *supra*, footnote 7 at 286.

[74] *RPC* R1.03(1)(b).

[75] Tanovich, *supra*, footnote 7 at 282-83.

[76] *Ibid* at 288.

[77] Schwartz, *supra*, footnote 48 at 1140.

Part IV: The Need for a Contextual Approach Instead of an Absolute Ban

The need for a contextual approach in determining the permissibility of using truthful evidence to challenge credibility and/or reliability in a particular case does not deny the need for clear rules and boundaries governing lawyers' practice. *Lyttle* and the *Rules of Professional Conduct* provide a starting point and ethical boundaries. But, in actuality, no hard rule can take into account all of the competing values and contextual subtleties when it comes to challenging witness testimony and representing one's client to the fullest extent possible. The criminal justice system is an adjudication model that encompasses different actors playing varied roles for competing causes. This gives rise to multiple considerations in deciding if a particular witness can ethically be discredited. Two case studies illustrate this point.

<u>The truthful sexual assault complainant with a conviction for fraud</u>

> The accused is charged with sexual assault. He has privately admitted to his lawyer that he is guilty but nonetheless wishes to contest all aspects of the Crown's case. The only witness for the Crown is the complainant. She has testified truthfully on all elements of the offence but has a recent conviction for fraud, which, to blur the ethical boundaries a bit more, we will pretend involves the accused. Defence counsel wants to use the conviction and possible motive to attack the credibility of the complainant and, in turn, raise reasonable doubt in the Crown's case.

The *Rules of Professional Conduct* and *Lyttle* prohibit counsel from arguing that the complainant consented or lied to implicate the accused. But, as noted by Layton, neither clearly precludes putting questions that highlight elements of her story that could be consistent with consent, that are mistaken about identification or are internally consistent, then focusing final submissions on reasonable doubt about whether the complainant is telling the truth.[78]

The Freedman Approach would advocate that defence counsel is obligated to attack the credibility of the witness using the conviction, the possible motive to lie and any other legal

[78] Layton, *supra*, footnote 7 at 387.

avenues of inquiry to obtain an acquittal. Conversely, Layton's decision to challenge the credibility of this witness is more balanced but would ultimately turn on the strength of the Crown's case and the perceived harm caused to the client's case and witness. Layton would advise the client to plead guilty if the Crown's case was so overwhelming that aggressive cross-examination was futile, and likely withdraw if the client rejected this advice. However, if aggressive cross-examination of the complainant could lead to acquittal, Layton would challenge the witness in a manner that suggests she is mistaken on key elements of the offence rather than portraying the victim as a liar and creating disincentive for other victims of sexual assault to come forward.[79] As such, Layton would not cross-examine on the issue of consent. From this it can be inferred that Layton would not cross-examine the complainant on her conviction for fraud or possible motive to lie, for either would portray the complainant as a person of character less worthy of belief and that may be lying.

Equally, all of the relevant factors in Professor Tanovich's justice-seeking model favour ethically barring the use the complainant's record to challenge her credibility. Considerable power imbalance already exists between the guilty client and the victim. Challenging the witness on her record will not contribute to a legally correct result, and allowing the process would perpetuate the discrimination norm.[80] A disproportionate amount of harm would be caused to the dignity of the complainant if she were portrayed as a person of bad character capable of lying, which would also discourage genuine victims of sexual assault from coming forward. The only

[79] *Ibid* at 389.

[80] The Supreme Court recognized the link between vulnerability to sexual assault and social and legal disadvantage in *R v Seaboyer* [1991] 2 SCR 577 at 665-674, L'Heureux-Dube J.

interest being served by defence counsel's cross-examination is that of the accused. No other positive contribution would be made to relevant legal values.[81]

As noted by Selinger, the policy of the law is "to encourage witnesses to come forward and give evidence" as part of the truth-seeking function of the justice system. If "subjected to needless humiliation throughout the process and when [testifying], the existing human tendency to avoid becoming involved will be increased".[82] Accordingly, Luban takes the view that it is unethical to permit cross-examination that poses persistent threat or harm to individual well-being as part of a "patriarchal network of cultural expectations and practices that engenders and encourages male sexual violence".[83] The Supreme Court has recognized that sexual assault is one of the most unreported offences because of the fear of trial procedures, publicity and embarrassment, and trepidation of treatment by police and prosecutors[84] and defence counsel.[85]

The truthful witness that is in error about time or an aspect of identification

> The accused is charged with armed robbery. The victim testified that the accused robbed him at 1:00 p.m. Yet, the accused previously confessed to defence counsel that he robbed the victim, stole the watch and struck the victim unconscious at 2:00 p.m. The victim is mistaken about the time, and the accused has an alibi witness that will truthfully testify that the accused was with him at 1:00 p.m. The accused will not testify in order to avoid having to respond to questions about the actual time of the robbery. The question is whether it would be ethically proper for the defence to call the alibi witness.[86]

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[81] See William Simon, *Practice of Justice: A Theory of Lawyers' Ethics* (Massachusetts: Harvard University Press, 1998) at 191 and Layton, *supra*, footnote 7 at 388.

[82] Chris Selinger, "The 'Law' on Lawyer Efforts to Discredit Truthful Testimony" (1993) 46 Okla L Rev 99 at 101.

[83] Luban, *supra*, footnote 42 at 1028.

[84] *Canadian Newspapers Co v Canada (Attorney General)*, [1988] 2 SCR 122.

[85] The Supreme Court admonished the "whack the complainant" strategy in *R v Mills*, [1999] 3 SCR 668.

[86] The second scenario is based on a case reviewed by the Michigan State Bar Committee on Professional and Judicial Ethics, online: http://www.michbar.org/opinions/ethics/numbered_opinions/ci-1164.html.

The Michigan State Bar on Professional and Judicial Ethics Committee concluded that "it is perfectly proper" for a "defence lawyer to present any evidence that is truthful" in defending the client. The role of defence counsel is to "zealously defend the client within the boundaries of all legal and ethical rules". It is not his or her the responsibility to "correct inaccurate evidence introduced by the prosecution or to ignore truthful evidence that could exculpate his [or her] client". However, the Committee also observed that ultimately the alibi evidence could backfire or make no difference if the victim's positive identification of the accused caused the trier of fact to disbelieve the alibi witness on the time, a non-essential element of the offence. The victim might also realize his mistake and change his evidence, thereby rendering the alibi irrelevant.[87]

Much of the American commentary supports the argument that it is entirely proper for the defence to attempt to procure an acquittal of the guilty client by demonstrating that the Crown's evidence is inadequate or erroneous in any essential respect.[88] Additionally, Professor Woolley has argued that forbidding the defence from presenting the truthful alibi evidence "subvert[s] the operation of the legal system" by having the state obtain a conviction based on false evidence, which is what "the rule restricting defence advocacy is intended to avoid".[89] Therefore, the defence could argue from the flawed testimony that the opportunity of the witness to observe the accused at the time of the encounter was limited or that the witness was confused during the incident. It could also introduce expert evidence to show the hazards of eyewitness identification,[90] which would be consistent with counsel's responsibility to test the Crown's case

[87] *Ibid*.

[88] Subin, *supra*, footnote 5 at 146-47.

[89] Woolley, *supra*, footnote 7 at 305.

[90] Subin, *supra*, footnote 5 at 134.

and ability to argue that the evidence as a whole is insufficient to support a conviction.[91] However, the defence could not offer false evidence to argue that the crime occurred when the mistaken witness stated or support the accused testifying as to his innocence. This reasoning is entirely consistent with *Li*, where the court held that it would be entirely proper for defence counsel to both cross-examine Crown witnesses and lead uncontroversial evidence on identification where the Crown's evidence is inconsistent with the identification of the accused.[92]

While it can be said that the presentation of truthful evidence could facilitate a false result, the policy considerations that were present with the sexual assault complainant do no exist here. No known power imbalance exists between the accused and mistaken witness. There is no identifiable discrimination engaged by the process, nor will the witness be directly prejudiced if counsel suggests the witness is unintentionally mistaken rather than intentionally being untruthful. Attacking the credibility and reliability of witness' evidence may be the only viable defence, and the accused likely faces a custodial sentence if convicted.

Conclusion

In a justice system that has as one of its primary objectives ascertaining truth to punish the guilty and spare the innocent, the tactic of discrediting a truthful witness appears to be counter-productive. Yet, while it can almost universally be said that no legitimate interest will be served by using fraudulent means to precipitate a false conclusion or legal result, using truthful evidence to test the credibility of truthful testimony is more controversial. The law in this area will remain unsettled until the Supreme Court next has the opportunity to clarify if the *Lyttle* or *Li* line of reasoning will be adopted.

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[91] *RPC* R4.01(1) and Commentary.

[92] *Li*, *supra*, footnote 6 at paras 66-68.

The main contribution this paper has attempted is to identify the current governance gap that exists in Canadian jurisprudence and the various professional codes, and to draw on the discourse that exists in American and Canadian legal scholarship. Using this legal-ethical framework and coherent theories of ethical lawyering, case studies have been incorporated to analyze the competing values and interests, and demonstrate that a contextual approach should be taken in deciding if, and to what extent, the practice can be used in a specific instance. In some circumstances, the pursuit of justice will give defence counsel a licence to discredit truthful testimony and advance legal norms such as equality, anti-discrimination and fairness. In other situations, it will not. Nonetheless, adopting a contextual approach using factors and considerations such as those outlined in this paper will assist both with navigating the fine line of ethical criminal advocacy and promoting greater confidence in the administration of justice.

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