The Criminal Defence Lawyer's Role

David Layton
Gibbons Fowler Nathanson

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Criminal Procedure Commons

Recommended Citation
Defence lawyers often fight to prevent the conviction of people who have committed serious crimes. How can this role be justified? In providing his answer, the author generally accepts the traditional view of criminal lawyering according to which defence counsel "does good" by ensuring that the state does not obtain a conviction in the absence of proof beyond a reasonable doubt based on admissible and reliable evidence. Ethical advocacy in the criminal context is thus heavily influenced by a conception of justice that includes not only the search for truth but also due process rights for accused persons. The author nonetheless argues that defence lawyers must sometimes promote values other than the client's best interests, and routinely bring their own judgment and perspective to bear in addressing ethical issues. Far from being amoral automatons striving to advance a client's interests to the absolute limits allowed by law, defence lawyers apply a personal conception of shared professional values and so make normative decisions that impact on the course of justice. Examples discussed include the release of confidential information to prevent harm to a third party, the process of giving advice to clients, the handling of physical evidence of a crime and, most especially, the cross-examination of a sexual assault complainant who defence counsel knows is telling the truth.

Les avocats de la défense se battent souvent pour empêcher que des personnes qui ont commis des crimes graves ne soient déclarées coupables. Comment est-il possible de justifier ce rôle? Dans sa réponse à cette question, l'auteur affirme accepter le point de vue traditionnel que la pratique du droit pénal par les avocats de la défense est une bonne chose car elle assure que l'État ne peut obtenir de condamnation en l'absence de "preuve hors de tout doute raisonnable" c'est-à-dire une preuve fondée sur des éléments admissibles et fiables. Par conséquent, dans un contexte de droit pénal, l'Éthique de la plaidoirie est fortement influencée par une conception de la justice qui exige non seulement la recherche de la vérité, mais aussi les droits des accusés à l'application régulière de la loi. L'auteur n'en soutient pas moins que les avocats de la défense doivent parfois favoriser d'autres valeurs que l'intérêt supérieur de leurs clients et faire systématiquement appel à leur propre jugement et à leur propre point de vue face aux questions d'éthique. Loin d'être des automates amoraux s'efforçant de faire valoir les intérêts de leurs clients jusqu'aux limites absolues autorisées par la loi, les avocats de la défense appliquent une conception personnelle de valeurs professionnelles communes; ils prennent ainsi des décisions normatives qui influent sur le cours de la justice. Certains des exemples discutés dans l'article traitent de la divulgation de renseignements confidentiels pour qu'un tiers subisse un préjudice, de la prestation de conseils aux clients, du traitement de preuves physiques d'un crime et, plus particulièrement, du contre-interrogatoire de la victime d'une agression sexuelle dont l'avocat de la défense sait qu'elle dit la vérité.

* Of the B.C. bar and Gibbons Fowler Nathanson. Thanks to Zoë Druick, Kim Eldred, Kevin Drolet, Richard Fowler, David Tanovich, Michel Proulx, Jocelyn Downie and Richard Devlin for their input and help.
Introduction

I. The Criminal Defence Lawyer's Special Role

II. Fighting for the Client — Is That All There Is to Being a Defence Lawyer?

III. A Difficult Case: Cross-examination of the Truthful Witness

Conclusion

Introduction

When Dalhousie Law School and the Nova Scotia Barristers' Society invited me to take part in the 2004 Wickwire Lecture, I was struck by a certain irony in my talking to Dalhousie law students about professional responsibility. I had attended the Law School in the mid-1980s. At that time the professional responsibility course was optional, and I didn't sign up. My guess is that, if it were possible to do the impossible, and to bring together people and events from the past and the present, as a student I would not have shown up to hear myself talk.

It was my loss that I did not bother much with legal ethics at law school. But that changed once I started to practice, and especially once I started to practice criminal law. In particular, I had to consider the justification for the criminal defence lawyer's role in the legal system. It is a subject that remains central to my professional life. Undoubtedly I have represented people who have done deplorable and appalling things, things that I would never do myself and would not countenance in my family, friends or members of the community at large. As non-lawyer acquaintances often ask me, albeit couched in respectful terms, how can I live with myself? I want to provide my answer, not because I believe that every defence lawyer should see things exactly as I do, but as an exemplar of an exercise that I am convinced every responsible lawyer should undertake, no matter his or her field of practice.

I. The Criminal Defence Lawyer's Special Role

How I live with myself starts with the standard justification that as a lawyer I take on particular ethical responsibilities by virtue of my special
role in the justice system. We have an adversarial system in which litigants are responsible for presenting their own case in court. Yet this system is highly complex, replete with complicated rules of procedure and substance, thereby necessitating that an accused person must have the help of a lawyer to present the case effectively. It follows, I think, that the lawyer must loyally advance the client’s position in the litigation. By playing this partisan role the lawyer respects the client’s autonomy while furthering his or her legal rights, and ensures that the adversarial system functions properly. Consequently, the lawyer does good simply by fighting for his or her clients. The virtues of their causes are usually of little significance because it is the responsibility of others in the system to present opposing views and to decide each case on the merits.

Academics refer to this justification for the lawyer’s partisan role as the “dominant” or “traditional” view of lawyering. The dominant view is everywhere in Canadian law. Courts use it to explain solicitor-client privilege and to justify conflict of interest rules. Courts also accept that a lawyer must be a partisan advocate for the client, sometimes expressed as the duty of zealous or resolute representation. Support for the dominant

---


3. In R. v. Neil (2002), 168 C.C.C. (3d) 321 at 330 (S.C.C.) [Neil], Mr. Justice Binnie explained conflict of interest law by underlining the systemic justification for the strong duty of loyalty owed by a lawyer to his or her client, writing: “Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies.”

4. See e.g. Neil, ibid. at 334 (S.C.C.); R. v. Felderhof (2003), 180 C.C.C. (3d) 498 at 536 (Ont. C.A.) [Felderhof]. The Neil case is especially notable in this regard, as Mr Justice Binnie quotes with general approval the famous description of the duty of loyalty offered by Lord Henry Brougham in the course of his 1820 defence of Queen Caroline against a charge of adultery brought by King George IV: “[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the tortments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion” (ibid. at 330).
view of lawyering runs just as strongly through professional codes used by Canadian law societies. Confidentiality rules justify the need to keep client secrets by pointing to the same systemic considerations relied upon by courts in protecting solicitor-client privilege.\(^5\) Similarly, code provisions addressing conflicts of interest are based on the notion of a strong duty of loyalty to the client.\(^6\) Other code provisions describing the lawyer’s role as advocate speak of counsel’s duty “to fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case, and to endeavour to obtain for the client the benefit of any remedy and defence authorized by law.”\(^7\)

The idea that a lawyer must resolutely advance the client’s position is particularly potent in the criminal context. To begin with, the adversarial system, including the right of an accused to control his or her own defence, is a fundamental principle of justice protected by the \textit{Charter}, with a rationale closely related to the dominant view of lawyering.\(^8\) Solicitor-client privilege also has constitutional protection which, as we have seen, is based on the rationale underlying the dominant view.\(^9\) An accused’s rights to state-funded counsel, counsel of choice and the effective assistance of counsel are likewise guaranteed by s. 7 of the \textit{Charter} based on similar reasoning.\(^10\) Defence counsel’s ethical duty to act resolutely is thus inextricably linked with constitutional rights related to the client’s representation at trial.

Just as important in defining defence counsel’s role are due process rights that shape the very meaning of justice in the criminal law setting. Every accused person is presumed innocent, which means that the Crown has the onus of proving guilt beyond a reasonable doubt.\(^11\) This constitutional guarantee goes hand-in-hand with the right to full answer and defence, which includes the right to test the reliability of the Crown case


\(^6\) See e.g. CBA Code, \textit{ibid.}, c. V and VI, NS Handbook, \textit{ibid.}, c. VI, VIa and VII.

\(^7\) See e.g. CBA Code, \textit{ibid.}, c. IX comm. I; NS Handbook, \textit{ibid.}, c. 10 Guiding Principle.


\(^9\) See generally the cases cited above at note 2.


by cross-examining Crown witnesses. There is also the principle against self-incrimination, which precludes the state from coercing an accused person to aid in building the prosecution case and operates so that the accused generally need not disclose any information to the prosecution. Conversely, the accused has the right to obtain full disclosure from the Crown of all information relevant to the matter. Finally, individuals charged with crimes sometimes have the right to exclude evidence, even reliable evidence pointing to guilt, as a remedy for a violation of Charter rights.

The central concern underlying these and other constitutional rights is that people must be protected from a powerful and sometimes overweening state. We want to limit the ability of the state to exercise power over us. We fear that absent these rights, including the assistance of loyal counsel, the state’s representatives (in particular the police) will abuse their power. So we “over-protect” accused persons in order to keep the state in check. This means that truth-finding is not the only goal of the criminal justice system. It means that a pivotal aspect of defence counsel’s job, as all ethical codes expressly recognize, is to ensure that the state does not obtain a conviction in the absence of proof beyond a reasonable doubt based on admissible and reliable evidence. Ethical advocacy in the criminal context is thus heavily influenced by a conception of justice that includes due process rights and their underlying values.

---


16. The codes invariably state that, to paraphrase, defence counsel’s duty is to protect the client as far as possible from being convicted except upon legal evidence sufficient to support a conviction, and emphasize that, notwithstanding the lawyer’s private opinion as to credibility or merits, the lawyer may properly rely upon all available evidence or defences not known to be false (see e.g. CBA Code, supra note 5, c. IX comm. 10; A. S. Handbook, supra note 5, c. 10 comm. 10.2 and 10.3).

17. This view of defence counsel’s role gains further support from case law stressing the need for an independent bar, the better to ensure that the profession can act as a safeguard against abuse of state power (see e.g. Law Society of British Columbia v. Mangat (2001), 205 D.L.R. (4th) 577 at 600-602 (S.C.C.); Lavallee, supra note 2 at 43-44; Finney v. Barreau du Quebec, [2004] S.C.J. 31 at para. 1; CBA Code, supra note 5, c. XXII).
II. Fighting for the Client — Is That All There Is to Being a Defence Lawyer?

While the dominant view of lawyering has come in for some criticism of late,¹⁸ for the reasons just given I believe that it makes sense in the criminal context.¹⁹ Nonetheless, there is a danger in oversimplifying the description so as to cast defence counsel as an amoral instrument of the client whose single-minded duty is always to push the client’s cause to the absolute limits permitted by law. This completely client-centred account of the dominant view falls flat in two major respects. First, it fails to acknowledge that the practice of legal ethics sometimes requires defence counsel to promote values other than the client’s best interests. Second, it portrays the lawyer as an automaton and fails to describe the extent to


¹⁹ Writers critical of the dominant view who are nonetheless willing, or at least more willing, to accept it in the criminal context include: Richard Wasserstrom, “Lawyers as Professionals: Some Moral Issues” (1975), 5 Hum. Rts. J. 1 at 12; Deborah L. Rhode, “Ethical Perspectives on Legal Practice” (1985), 37 Stan. L. Rev. 589 at 605; David Luban, “Are Criminal Defenders Different?” (1993) 91 Mich. L. Rev. 1729; Fred C. Zacharias, “Reconceptualizing Ethical Roles” (1997) 65 Geo. Wash. L. Rev 169; Hutchinson, *ibid*. at 22, 144-48. For an unabashed championing of the notion that criminal defenders are different and are justified in acting zealously for their clients see Abbe Smith, “The Difference in Criminal Defence and the Difference It Makes” (2003), 11 J.L. & Pol’y 83, and Abbe Smith & William Montross, “The Calling of Criminal Defense” (1999) 50 Mercer L. Rev 443 *Contra* Simon, *Practice of Justice, ibid.*, c. 7. A recent Canadian case that implicitly suggests that a lawyer’s obligation of client loyalty may be more intense in the criminal context is *Maranda, supra note 2* at 337-38. In *Maranda*, the Court appears to suggest that solicitor-client privilege is broader or more robust in the criminal context because the client is exposed to a prosecution that, “involves the fundamental values and institutions of criminal law and procedure. The rule that is adopted and applied must ensure that those values and institutions are preserved.” These “values and institutions” presumably refer to the matters discussed above in the text accompanying notes 8-17.
which defence counsel are personally and actively engaged in making ethical decisions.

Let me start with the first, and less contentious, point — that values other than the client's best interests form a part of the defence lawyer's ethics. While case law and ethical codes alike accept that defence counsel is a partisan advocate for the accused, they also stress that the lawyer simultaneously owes obligations to the public and the administration of justice. For example, courts staunchly defend solicitor-client privilege, and yet are willing to see the privilege breached where necessary to prevent serious bodily harm or the conviction of an innocent. The same applies to the duty of confidentiality found in ethical codes. More generally, courts and codes have long recognized that defence counsel may properly temper resolute advocacy in the courtroom by reason of obligations owed to other groups and institutions. Probably the most famous expression of this view by a Commonwealth court comes from Lord Reid in the English case of Rondel v. Worsley:

Every counsel has a duty to fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned with the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or standards of his profession require him to produce.

That defence lawyers owe duties to constituents other than the client, and that these duties sometimes conflict with the client's best interests, inexo-
rably leads to my second point, which is that lawyers must actively engage in making ethical decisions, and in doing so bring their own judgment and perspective to bear.

Let me elaborate with a straightforward example. My law society’s *Professional Conduct Handbook* permits me to reveal a client confidence where there exist reasonable grounds to believe that disclosure is necessary to prevent a crime involving serious bodily harm.\(^\text{23}\) Where “reasonable grounds” exist, this future harm rule provides me with discretion in deciding what to do.\(^\text{24}\) This means that it is left up to me whether to disclose. In applying the discretion, inevitably I am going to bring to bear my own views regarding the relative importance of the values at stake.\(^\text{25}\)

I necessarily make a normative choice based on ethical principles that extend beyond the simple assessment of my client’s best interests.

We can look at another facet of the future harm scenario to demonstrate the complexity of the criminal lawyer’s task in acting ethically. Let’s add some specifics to the example, and assume that during a meeting my client tells me about a kidnapping and assault being planned by one of her acquaintances. She wonders if the information should be passed on to the police but fears being labelled as a snitch or “rat.” As her lawyer, I have a duty to counsel her on the advisability and risks of releasing the information.\(^\text{26}\) Accordingly, I will ascertain more precisely her priorities and concerns, educate her as to the workings of the law and relevant non-legal matters,\(^\text{27}\) and listen to her views. I may also give her my candid opinion as


\(^{24}\) Such is the case in British Columbia, my province of practice. In numerous other provinces, however, the future harm exception requires disclosure of confidential information where necessary to prevent serious bodily harm or violence (see e.g. *CBA Code*, supra note 5, c. IV rules 3-4; Law Society of Alberta Code of Professional Conduct (Calgary: Law Society, 2004) [Alberta Code], c. 7. 1.11; N.S. Handbook, supra note 5, c. 5 comm. 5.12).

\(^{25}\) The rule itself contains no guidelines for exercising the discretion, but looking to values articulated more generally in the *Handbook* and the criminal justice system I would take into account numerous factors including: (a) the probability that harm will occur, as well as its type and immediacy; (b) whether my client has created the risk, and if so whether he or she has duped me into unknowingly aiding in the scheme to cause harm; (c) any unavoidable harm that disclosure will cause to the client; (d) any adverse impact on my relationship with other clients if I am seen as a whistle-blower; and (e) the impact of my action or lack of action on a reasonable person’s perception of the administration of justice.

\(^{26}\) See e.g. *CBA Code*, supra note 5, c. II (competence and quality of service), c. III (advising clients); N.S. Handbook, supra note 5, c. 2 (competence), c. 3 (quality of service) and c. 4 (advising clients). As I have already discussed, it may be that I can release the information despite my client’s instructions to the contrary. This does not, however, obviate the need to canvas the matter with her in advance.

\(^{27}\) For the ethical rule permitting a lawyer to take account of non-legal matters, see *CBA Code*, *ibid.*, c. III comm. 10 and *N.S. Handbook, ibid.*, c. 4 comm. 4.10-4.13.
to which option is preferable and why. Where the client is not exactly sure what to do, as is the case here, the manner in which I question her and provide information and advice may well affect her ultimate decision. What emphasis do I place on the danger of being labelled a snitch or the absence of any legal duty on her to take positive action? How do I portray the importance of preventing serious injury to an innocent person or describe steps that might be taken to lessen the possibility of her being revealed as the source of the information? Whether expressed consciously or unconsciously, my personal views may well have some impact on the client's decision. I am not an empty vessel into which the client's aims and interests are channelled, but an advisor whose view of justice including but not limited to my duty of loyalty and the due process rights afforded my client under the Charter is part and parcel of the lawyering process.

There is another point that I want to make, and it relates to a lawyer's interpretation of ethical codes and the law. The precise meaning of an ethical rule is often open to different reasonable interpretations on a given set of facts. The same goes for common law or statutory rules that place limits on a lawyer's behaviour in representing a client. In deciding which reasonable interpretation to adopt, a lawyer will be influenced by many factors, including constitutional and case law, law society pronouncements, advice from colleagues and writings on point. But he or she will also apply knowledge gained from previous experience and from his or her own assessment of the factual context and the values thereby engaged. In the act of interpretation, the defence lawyer thus has room to make his or her own values felt. It is not a rote and unthinking process.

The notorious Ken Murray case provides an excellent illustration of what I mean. While representing serial rapist and murderer Paul Bernardo,
Mr. Murray took possession of several videotapes that constituted physical evidence strongly supportive of the Crown's case and highly damaging to Bernardo's chances of success at trial. Murray kept the tapes for seventeen months. In the result, he was charged with obstructing justice. At Murray's trial, the court noted that Ontario's ethical code was silent on the propriety of a lawyer handling physical evidence and that opinions in the profession were not unanimous. Accordingly, while Murray's actions obstructed justice, the court held that he did not possess a criminal intent because he mistakenly believed that he was acting ethically. Murray was acquitted, but the court put the profession on notice that any lawyer who acted similarly in the future would be committing a crime. The criminality of Murray's behaviour was no longer in doubt.

Once Murray's case was over, the Law Society of Upper Canada struck a special committee to draft an ethical rule that would cover the problem. A majority of the committee ended up supporting a rule that would permit lawyers to handle physical evidence in certain restricted circumstances, and on occasion to return the evidence to its source. But dissenters on the committee preferred a much narrower, categorical rule, under which lawyers would have a single option in every case: to turn the evidence over to the authorities immediately. The dissenters strongly believed that the majority's draft rule encouraged lawyers to violate the law as stated by the court in the Murray case. The majority just as adamantly argued that its draft was consistent with the Murray decision.

The Murray saga shows that laws and ethical rules can be open to different reasonable interpretations. The court acquitted Murray largely because ethical rules and professional conventions were seen to be unclear regarding the propriety of his actions. Even after the judgment, there

31. See Law Society of Upper Canada, Report to Convocation, Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence, 21 March 2002 (superseding an earlier report released on 22 March 2001).
32. More recently, the Nova Scotia Ethics and Professional Responsibility Committee took the same view in recommending the addition of a "physical evidence" commentary to the N.S. Handbook (see Kevin A. MacDonald & Crowe Dillon Robinson, "Physical Evidence of a Crime: Rule, Law or No Man's Land", The Society Record 22.2 (February 2004) 6. In August of 2004 the CBA made numerous changes to its Code, but decided against making any additions to address the physical evidence issue (see "Controversial Criminal-Law Rule Left Out of Amended CBA Ethics Code" National 13.3 (May 2004) 57).
33. Faced with opposition from victim interest groups and the Attorney General of Ontario, in the spring of 2002 the benchers of the Law Society of Upper Canada postponed debating the draft rule, deciding instead to obtain independent legal advice as to the legality of the majority's approach. Nothing since has been heard on the matter, and it appears that there no longer exists the political will to adopt a rule of any kind.
remains a spirited debate as to the precise limits of the criminal law and the proper ethical approach regarding the handling of physical evidence. The result is that the lawyer who encounters physical evidence of a crime may well have room to move in deciding how best to balance the interests at stake. The same goes for many other ethical rules and laws relating to defence counsel's role. In the act of interpretation, defence lawyers thus undertake an exercise that is partly normative.

III. A Difficult Case: Cross-examination of the Truthful Witness

The model of lawyering that I favour does not absolve defence counsel from conscious engagement in ethical decision-making, and sometimes requires a lawyer to pull back from pure zealousness on the client's behalf. But the extent to which a lawyer's morality should be relevant can be controversial. A hotly debated example arises when a lawyer is poised to cross-examine a witness he or she knows is telling the truth. Suppose that I represent a client charged with the sexual assault of an ex-girlfriend. My client tells me that she is telling the truth, but he nonetheless wants to plead not guilty and force the Crown to prove its case. I look at the file. I find ammunition that I can use to attack the complainant's credibility. Perhaps she has a motive to lie. Maybe I can exploit a prior conviction for fraud as well as modest inconsistencies in her statements to the police to further weaken her trustworthiness. A skilled cross-examination may stand a chance of raising a reasonable doubt by pointing to aspects of her testimony and character that suggest fabrication. This cross-examination is probably legal, but is it ethical?

Professional codes do not yield an unambiguous answer to this question. True, they prohibit counsel from misleading the court, and say that counsel's knowledge of guilt limits the extent to which he or she can attack the prosecution case. But the codes also state that counsel who knows that the client is guilty is permitted to test the evidence given by each Crown witness and to argue that the evidence taken as a whole is insufficient to prove guilt. Together, these provisions undoubtedly stop a

---

34. See e.g. CBA Code, supra note 5, c. IX comm. 2(b), (e) and (g); N.S. Handbook, supra note 5, c. 14 guiding principles (b), (e) and (g).
35. CBA Code, ibid., c. IX comm. 11; N.S. Handbook, ibid., c. 10 comm. 10.7.
36. See the code provisions cited in the proceeding footnote. See also Alberta Code, supra note 24, c. 10 comm. 14.2, which perhaps goes furthest, stating that the lawyer with such knowledge, whether acting in a civil or criminal matter, "may otherwise attack the case of opposing parties, including the credibility of witnesses through cross-examination" (emphasis added).
lawyer from asserting as true facts known to be false — here, that the complainant consented. But they do not clearly prevent counsel from attacking the complainant’s character in cross-examination, putting questions to her that highlight elements of her story that could be consistent with consent, and then arguing to the judge or jury at the end of the case, not that the client is innocent, but rather that the Crown has not proven guilt because there is a reasonable doubt as to whether the complainant is telling the truth.37

For the sake of brevity, I am going to call the method of cross-examination just described “aggressive cross-examination.” There is not a lot in the way of Canadian case law that helps to flesh out the ethical code provisions so as to indicate with any precision whether aggressive cross-examination is proper.38 It so happens, however, that the Supreme Court of Canada recently commented on the relationship between defence counsel’s factual knowledge and ethical cross-examination in a case called R. v. Lyttle.39 There is absolutely no suggestion that counsel in Lyttle knew that her client was guilty. But the Court was asked to address an issue related to the propriety of aggressive cross-examination, namely, the level of knowl-

37. Canadian ethical codes contain other rules bearing on the issue, see e.g. CBA Code, supra note 5, c. IX comm. 1-2, 10, N.S. Handbook, supra note 5, c. 10 and 14, rules and guiding principles, comm. 10 3-10.61 However, those paraphrased in the text above most directly address my specific scenario. Contrast the American Bar Association’s Standards for Criminal Justice, Defense Function, 3rd ed. (1993), Std. 4-7.6(b) [ABA Defense Std. 4-7.6(b)] and commentary, which expressly condone the aggressive cross-examination of a truthful witness and state that failure to do so where the lawyer cannot otherwise provide the accused with a defence violates the ethical duty to provide a client with zealous representation. The first edition of the Standards, published in 1971, took a very different tack, stating that a lawyer, “should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully” (emphasis added). Also see the American Law Institute’s Restatement of the Law, The Law Governing Lawyers B106 (1998), comment “c”, which states that even if legally permissible a lawyer, “is never required to conduct such examination, and the lawyer may withdraw if the lawyer’s client insists on such a course of action in a setting in which the lawyer considers it imprudent or repugnant” (emphasis added). The associated Reporter’s Note implies that aggressive cross-examination of the truthful witness garners more support in the criminal context, and states that comment “c” as worded represents the prevailing norm in civil cases.

38. The most relevant case on point is R. v. Li (1993), 36 B.C.A.C. 181 at paras. 66-68, leave refused [1994], 178 N.R. 395 (S.C.C.). Li held that counsel who knew of his client’s guilt nonetheless acted ethically in calling evidence to show that, at the time of the robbery charged, the client’s hairstyle and fluency in English were at odds with the descriptions given by two robbery victims. In the court’s view, raising a reasonable doubt as to the reliability of the identification through the use of this evidence and similar evidence brought out in cross-examination was not tantamount to putting up a defence inconsistent with the facts believed by counsel to be true.

edge or supporting evidence necessary to permit defence counsel to put a suggestion to a witness in cross-examination.\textsuperscript{40}

The Court's short answer was that it is unethical for counsel to put questions to a witness absent a "good faith basis."\textsuperscript{41} The Court went on to say that:

\begin{quote}
... a "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible: to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.\textsuperscript{42}
\end{quote}

I have heard it suggested that \textit{Lyttle}'s "good faith" precondition clarifies the otherwise ambiguous ethical codes so as to sound the death knell for aggressive cross-examination by prohibiting any questions that "imply in a manner that is calculated to mislead." But I disagree. I accept that, in case there was any doubt, \textit{Lyttle} precludes putting a suggestion to the truthful witness that directly posits as true something defence counsel knows to be false. "I put it to you that you are lying to the court and that you in fact had consensual sex with my client" is thus forbidden. But putting suggestions to the witness that counsel knows or suspects are true in order to raise a reasonable doubt is a very different exercise. \textit{Lyttle} expressly states that the purpose for which counsel uses information bears upon good faith, and thus upon the propriety of a line of questioning. Aggressive cross-examination simply tests the Crown’s case to ensure that no conviction occurs absent proof on the criminal standard, which does not imply that such cross-examination is conducted in a manner that is calculated to mislead.

\textsuperscript{40} The issue arose when defence counsel sought to cross-examine several Crown witnesses so as to suggest that the complainant had falsely identified the accused as his attacker in order to divert attention from the true perpetrators, his associates in a drug-dealing enterprise. The trial judge held that counsel was forbidden from putting these suggestions to Crown witnesses absent an undertaking to call defence evidence in support of the theory.
\textsuperscript{41} \textit{Lyttle, supra} note 12 at 489.
\textsuperscript{42} \textit{Ibid.}. 

If my interpretation of \textit{Lyttle} is accurate,\textsuperscript{43} then defence counsel faced with the possibility of conducting an aggressive cross-examination must look beyond the codes and case law to examine arguments from principle. In this regard, we can start by reviewing the justifications for conducting this sort of cross-examination, which mirror the arguments that I have already made in favour of resolute partisanship in the defence of an accused.\textsuperscript{44} That is, the state, with its immense resources and a propensity to abuse power, must prove guilt beyond a reasonable doubt, and the accused has a right to test the prosecution case to ensure that the criminal standard is met. Aggressive cross-examination simply relies on accurate information, not falsehoods, to raise a reasonable doubt, and counsel never states that a fact known to be false is true.\textsuperscript{45} While the practice may hinder the search for factual truth, determining factual truth is not the sole aim of the criminal justice system. Furthermore, in the long run, truth may actually be better served by aggressive cross-examination, because the police and the Crown will be more diligent in investigating and prosecuting all cases knowing that the defence will always vigorously test the evidence. The chance of wrongful convictions will thereby be reduced across the board.

A different sort of argument in favour of an aggressive cross-examina-

\textsuperscript{43} My interpretation is of course influenced by my assessment of the interplay between the various values engaged, an assessment that plays out in the remainder of this paper.


\textsuperscript{45} Contrast the position of Monroe Freedman and Abbe Smith, who suggest that counsel must argue to the jury that the complainant \textit{in fact} consented. Presumably, their argument is that otherwise the jury will pick up on the failure of counsel to do so, assume that counsel believes the client to be guilty and convict without properly applying the standard of proof beyond a reasonable doubt. See Monroe A. Freedman & Abbe Smith, \textit{Understanding Lawyers' Ethics}, 2d ed. (Newark, N.J.: LexisNexis, 2002) at 216, n. 8.
tion is that if the lawyer uses knowledge of guilt obtained from the client to restrict the defence, then clients will quickly learn that they cannot be completely candid with their lawyers without risking adverse consequences. Whether guilty or innocent, clients will react by withholding information from their lawyers, to the general detriment of their defences. Moreover, in cases where a Crown witness is in fact truthful the lawyer will never learn of this from the client and an aggressive cross-examination will occur in any event. In other words, forbidding aggressive cross-examination will do nothing to stop the practice, while hampering the quality of defence work in cases where the issue does not even arise.

Not surprisingly, there are counterarguments — arguments for the position that aggressive cross-examination is unethical. First, the practice runs a serious risk of misleading the finder of fact by suggesting that the complainant is not telling the truth. Granted, defence counsel does not actually say that the complainant is lying, and frames the final submissions in terms of a failure by the Crown to meet its heavy onus. But a jury may not appreciate this distinction. Maybe the right to test the Crown’s case through cross-examination must therefore stop at the point where counsel knowingly risks misleading the trier of fact, just as the right to

---

46. It is worth pointing out that, while there is undoubtedly an intuitive appeal to the argument that reducing protection for client confidences will lead clients to be less candid with their lawyers, there is scant empirical evidence to support the contention as a blanket proposition (see e.g. Swindler & Berlin v. United States, 524 U.S. 399 (1998); Fred C. Zacharias, “Rethinking Confidentiality” (1989) 74 Iowa L. Rev. 351). I am willing to accept on faith that no protection whatsoever would have a substantial negative impact on the amount of information given by clients to lawyers. But I am not open to the contention that any and every reduction in protection will have such an impact, or will have an unacceptably detrimental impact.

47. The key proponent of this argument is Monroe Freedman, whose early views on the subject are found in Professional Responsibility; supra note 1. For his current views, see Freedman & Smith, supra note 45, c. 8. Some colleagues with whom I have raised this hypothetical tell me that they intentionally conduct interviews so as to prevent the client from disclosing guilt. This response clashes with Professor Freedman’s reasoning. It also implicitly concedes that knowledge of guilt — and thus of the truth of the complainant’s allegations — places restrictions upon the manner of cross-examination. In any event, a strong case has been made that selective ignorance on the part of the lawyer is not a convincing response to this problem (ibid. at 153-54, 221-22).

make full answer and defence does not allow a lawyer to bribe a witness or intentionally present perjured evidence.  

As for the argument that aggressive cross-examination serves the systemic purpose of checking state power and protecting the innocent, perhaps this misses the point in a case where defence counsel knows the Crown has presented truthful evidence and there is no risk of a wrongful conviction. Applied in these circumstances, aggressive cross-examination arguably impedes the state's ability to convict the guilty without affording any significant protection to the innocent.

Finally, it is vital to emphasize a critical part of the calculus, which is that aggressive cross-examination causes direct prejudice to the complainant. It suggests that she is a perjurer, causes her emotional upset and harms her reputation. And there is a broader harm as well, because the practice is likely to discourage other genuine victims from coming forward.

Different people may find one set of arguments more compelling than the other. I would guess that many members of the public, perhaps even a majority, would be opposed to aggressive cross-examination. My experience in teaching legal ethics is that, leaving aside for a second the loaded issue of sexual assault complainants, students are split in their views as to whether a lawyer should aggressively cross-examine the witness who is known to be truthful. Practicing defence lawyers are more likely to favour permitting an aggressive cross-examination, which as a general proposition is my view as well. But I grow uncomfortable with the suggestion that every counsel must always conduct an aggressive cross-examination whenever it is in the client's best interests to do so. After all, ethical codes do not clearly mandate this result. But if defence counsel is to have some discretion, how is it to be exercised? I want to return to the sexual assault scenario and look at some different proposals.

A suggestion that has spawned much debate in the United States comes from Professor David Luban of Georgetown University. Luban appears

49 That is, the fact that due process rights are important in the criminal justice system does not mean that the search for truth is unimportant or is always trumped. Note, however, that this argument carries less force where the trier of fact is a judge, given that a judge is eminently able to appreciate the distinction mentioned in the text above.

50 See Simon, Practice of Justice, supra note 18 at 175.

51 While I believe that public opinion should be taken into account in developing a legal ethic, the focus should be on the view of a reasonable layperson who is knowledgeable about the principles underlying the criminal justice system.

52 Students interested in practising criminal law, whether for the defence or the Crown, are much more likely to reject a rule that categorically bans aggressive cross-examination. Some of these criminal law aficionados become uncomfortable with the practice, however, in the context of the sexual assault hypothetical.
prepared to accept the aggressive cross-examination of a truthful witness in some circumstances, on the basis that the ability to attack the Crown case is a necessary check on the abuse of state power. But he argues that the cross-examination is always unethical where the result would be to further an institution that "poses chronic and persistent threats to individual well-being, threats that are an inherent part of the institutional culture and not just an accident of human wickedness." When it comes to cross-examining the truthful sexual assault complainant, Luban therefore says that the defence lawyer must take into account not only the need to protect the accused against the powerful state, but also the patriarchal network of cultural expectations and practices that engenders and encourages male sexual violence. He concludes that the cross-examination should not be aggressive, because defence counsel must respect the need to protect truthful female victims of sexual assault. To hold otherwise would deter women from reporting rapes and perpetrate the myth that women frequently invite sexual advances or lie about them occurring.

Luban’s view has met with the objection that the lawyer is imposing his or her moral or political views on the accused. His critics argue that any given lawyer could use Luban’s “threatening institution” test to justify

53 In “Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann” (1990) 90 Colum. L. Rev. 1004 at 1031 [Luban, “Partisanship”]. Luban says that he would “reluctantly” permit aggressive cross-examination as long as it does not violate his “institutional threat” standard. In his subsequently published article, “Are Criminal Defenders Different?” (1993) 91 Mich. L. Rev. 1729 at 1762, he seems less comfortable with the practice, stating “I am ambivalent about the propriety of arguing that the evidence supports conclusions that I know are false and even more ambivalent about impeaching truthful witnesses, particularly in ways calculated to damage or humiliate them. in my view, this is perhaps the most difficult of all dilemmas of advocacy” (emphasis added).

54. Luban, “Partisanship,” ibid. at 1029, n. 90.

55. One suspects that this view holds attraction for Richard Devlin, given his comments supra note 18 at 935. Note that Luban’s earlier position, formulated prior to the establishment of rape shield laws, was that aggressive cross-examination aimed at bringing out the complainant’s prior sexual history would be unethical even in cases where she falsely denies having consented. See Luban, Lawyers and Justice, supra note 18 at 151-52. He viewed the deleterious chilling effect on the reporting of sexual assaults by victimized women as outweighing any harm done to the innocent accused.

restrictions on cross-examination in almost any case (e.g., all wealthy clients fall within the exception, all high-level drug-dealing clients fall within the exception, no minority clients fall within the exception, no police witnesses can be protected by the exception). Disturbed by the overt application of a lawyer's own morality, some argue that aggressive cross-examination must be implemented whenever it is in the client's best interest.

In short, there's a duty to launch an attack. Others who make the same criticism would nonetheless allow lawyers to choose never to represent individuals charged with sexual assault, so as to avoid ever having to cross-examine the truthful complainant.

Professor William Simon of Stanford University similarly faults Luban's approach on the ground that each individual lawyer's moral view will lead to a different result. But Simon generally opposes aggressive cross-examination. Far from requiring the practice in every case, he would only allow aggressive cross-examination where it would "subvert punishment that, though required by law, is unjustly harsh and discriminatory in terms of more general norms of legal culture." Simon therefore encourages the limited use of aggressive cross-examination "in the interests of justice," as a means to effect ad hoc or what he calls "retail" nullification of laws that lawyers view as unjust. He would not allow aggressive cross-examination in my example, because there is nothing unjust about the punishment meted out to male sexual assault offenders.

Simon believes that his proposal is preferable to Luban's because the

57. A central point in this paper is that I do not fully accept this criticism, which is based on the view that a lawyer's morality is irrelevant to the task of legal representation and must always give way to the client's best interests provided that the lawyer does not break the law.


59. See Freedman & Smith, supra note 45 at 167-68. In the current edition of his book, Professor Freedman maintains his decision not to take on rape cases, but his co-author Abbe Smith states that she continues to accept such cases, though she "does not always find it easy to handle [them]." She would only refuse to conduct an aggressive cross-examination of the truthful rape complainant if such a strategy was not advantageous to the client (ibid. at 218).


61. See Simon, Practice of Justice, ibid. at 189-90.
The Criminal Defence Lawyer’s Role

lawyer is guided by basic values underlying the justice system.62 Crucially for him, sentencing principles (e.g., any punishment must be reasonably proportionate to the gravity of the crime) and anti-discrimination doctrine (e.g., criminal laws should not disproportionately impose harsh punishment on minority groups and the poor) — not the lawyer’s personal morality — provide guidance in deciding whether to undertake an aggressive cross-examination.63 Simon admits that this approach will lead to controversial decisions and discrepancies from lawyer to lawyer. However, he argues that strict universality of application is not the standard by which to measure success. Any more than it is the measure we apply to assess the propriety of decisions made by police officers about when to arrest, Crown counsel about when to prosecute and judges and juries about when to convict.64 What is important is that on the whole lawyers’ decisions make a positive contribution in terms of the legal values that we believe are relevant.65 Indeed, the current lack of any clear direction in ethical codes means that discrepancy from lawyer to lawyer is already the case. Simon thus views his proposal as being no worse than the present system while providing a more convincing link to substantive justice.66

Where do I come down on the issue of cross-examining the truthful sexual assault complainant? I should begin by saying that I have never done so in circumstances where my client had admitted his guilt to me. My hunch is that clients who wish to contest guilt are especially unlikely to confess to their lawyers in sexual assault cases. If this means that my cross-examination may cause harm to a truthful complainant, so be it. Unless I know that my client is guilty, I am willing to run the risk in the course of fulfilling my function as defence counsel in an adversarial, rights-based criminal justice system. I should emphasize that, for me, knowledge in this context demands more than an objectively held belief beyond a reasonable doubt. Given my role as loyal advocate, it means irresistible

62 For Luban’s response, see “Reason and Passion in Legal Ethics” (1999) 51 Stan. L. Rev. 873. Luban stresses that his conception of a lawyer’s personal morality draws extensively from principles of justice imminent in the legal system. He takes issue, however, with Simon’s claim that personal morality is irrelevant to the process. Ultimately, I prefer Luban’s view, although it must be said that the two academics share much common ground.

63 Some would undoubtedly argue that Simon’s view of “justice” stretches established legal doctrine to such an extent that the result amounts to little more than an application of his personal view (not the view of the courts) as to what is and is not just.

64 See Simon, Practice of Justice, supra note 18 at 191.

65 Ibid.

66 Ibid. at 192.
knowledge that even an honest partisan cannot deny, and will usually require a reliable admission of guilt from my client.67

But if my client did admit guilt to me, what would I do? If the prosecution case was overwhelming, I would probably advise him to plead guilty. Not doing so, and conducting a futile aggressive cross-examination, would risk alienating the judge and resulting in a higher sentence. The point here is that I would never conduct an aggressive cross-examination if doing so would be clearly against my client’s best interests. My client would of course be free to reject my advice on the advisability of a guilty plea, in which case I would likely withdraw, because in my view the rejection would represent a fundamental breakdown in the relationship. Admittedly, withdrawing amounts to refusing to help the client exercise his constitutional right to plead not guilty and test the Crown’s case. But given my view of the client’s best interests, the breakdown in the professional relationship and the uselessness of causing harm to the complainant, I can live with the result.

Let’s narrow my options further, and assume that the Crown’s case is not insurmountable and that aggressive cross-examination might conceivably lead to an acquittal. In this case, I draw a distinction between challenging a complainant in a manner that suggests she is lying, and challenging her so as to suggest that she may be mistaken. For instance, if the identity of the perpetrator is the key issue, not consent, I would be willing to cross-examine so as to suggest that her identification of my client is not sufficiently reliable to ground a conviction. Attacking the dependability of the identification suggests an unintentional mistake. It is less problematic for me because I am not portraying the complainant as a person of bad character who may be lying. My cross-examination causes substantially less harm to her reputation, and creates much less of a disincentive for other victims of sexual assault to come forward.

But what if my client insists on pleading not guilty, in circumstances where attacking the complainant’s character offers the only viable defence? On this scenario, given the absence of unequivocal guidance from Cana-

67. In this respect, I take a different position from Simon, who would have defence counsel refrain from aggressive cross-examination whenever she is of the view that his or her client was guilty beyond a reasonable doubt (ibid at 173). For a more detailed discussion of the “knowledge” issue, see Proulx & Layton, supra note 44 at 37-51.
dian codes of professional conduct,68 I believe that every defence lawyer should have discretion in determining how to respond. For my part, I would consider the factors mentioned by Professor Luban, and would probably decline to conduct an aggressive cross-examination. But I would borrow from Professor Simon in approaching the issue in terms of relevant legal values.69 The Supreme Court of Canada has recognized that the accused’s right to full answer and defence does not invariably trump the equality rights of women.70 The Court has also held that an accused’s right to cross-examine a complainant will be curtailed where the prejudicial impact substantially outweighs any probative value.71 If a court can legitimately balance these legal values in deciding a case, why can’t I consider the same values in making my choice? This is not to say that I should balance the values in the same manner as would a court. That would be a grave mistake, given that defence counsel plays a different role, and owes the client a strong duty of loyalty, a duty that is not imposed on judges. But in weighing the harm caused by aggressive cross-examination — something that Canadian ethical rules surely allow defence lawyers to do — my view of equality rights and prejudicial impact is certainly not irrelevant.72

68. There is another question here, one that I am more or less ducking in this paper: should law societies amend ethical codes to narrow a lawyer’s discretion? My tentative response is “no.” For one thing, I am fearful of overly detailed categorical rules that prevent lawyers from taking into account the contingencies of particular situations encountered in practice. I am also attracted to an approach where lawyers play an active role in ethical decision-making, being of the view that one’s ethical compass works better when subject to frequent use. Moreover, knowing the ability of lawyers to interpret legislation and codes in innovative ways, I am doubtful as to whether a black and white rule will necessarily lead to clarity in practice.

69. I must stress that, unlike Simon, in deciding whether to conduct an aggressive cross-examination I would not confine myself to instances where the punishment following a conviction would be unduly harsh or discriminatory. Nor would I use aggressive cross-examination only to effect the ad hoc nullification of laws that I viewed as unjust. What is important in my view is that any lawyer exercising the discretion to decide whether to conduct an aggressive cross-examination be guided by the values underlying and informing our legal system, and in particular our criminal justice system.

70. In R. v. Mills (1999) 139 C.C.C. (3d) 321 (S.C.C.), the Supreme Court of Canada held in the context of an application for production of third party records that the right to full answer and defence does not necessarily trump the privacy interest of a sexual assault complainant, and in doing so held that the equality rights of women bear upon the proper balance between these sometimes conflicting rights. While it is hard to reconcile this decision with the earlier — and in my view preferable — balance struck by the Court in R. v. O’Connor (1995), 103 C.C.C. (3d) 1 (S.C.C.), what is important is that the right to full answer and defence may be tempered by countervailing values found in the justice system.

71. See Shearing, supra note 12 at 251-52, 259-68.

72. Another possibility is that a lawyer concludes that his or her personal views render him or her unable to conduct an effective aggressive cross-examination. In such a case, the lawyer would have an obligation to withdraw on the ground that to stay on the case would impact adversely on the client’s best interests. This decision is in theory different from one where the lawyer refuses to cross-examine because he or she thinks that it is wrong to do so, but the line between the two situations is thin indeed.
I want to make clear, however, that if I decided against conducting an aggressive cross-examination I would have a duty to tell my client immediately. In other words, I could not simply proceed with the case, including a tepid cross-examination, without informing him of the decision. A fair forewarning would give my client time to react. He could choose to fire me, or force me to withdraw by insisting on an aggressive cross-examination, and thereupon obtain a new lawyer. Or, perhaps less likely, he might be persuaded by my position and decide to plead guilty. What is important is that he not be saddled with a lawyer who conducts the case in a manner fundamentally inconsistent with his wishes.

In different circumstances, I might have less compunction about attacking the character of a truthful witness. Suppose my client is an Aboriginal woman with a long criminal record who shoplifts to help feed a heroin addiction, and the truthful witness is a store security guard who utters a racist comment while making the arrest. Our courts have recognized that special measures are needed to combat racism against Aboriginal people in the justice system and have held that the adverse impact of discrimination is something that can be taken into account in passing sentence. Am I barred from looking to similar values in applying my discretion in favour of conducting the cross-examination? I don’t think so. Even more importantly to me, the aggressive cross-examination of the security guard would not promote inequality. If anything, it would have the opposite effect. Harm caused by the cross-examination would thus be considerably less than in the case of the truthful sexual assault complainant. Consequently, I would be prepared to attack the witness’s character in order to raise a reasonable doubt. Once again, in doing so I would merely be taking action that is within the range of proper ethical behaviour, motivated by my view that in the circumstances an aggressive cross-examination best reconciles my duties to my client and the administration of justice.

Conclusion

As a defence lawyer, it is tempting for me to accept the view that my only allegiances are to my client and the limits of the law. This keeps things simple. It provides a positivist shield that absolves me of personal respon-

73. See e.g. R. v Williams (1998), 124 C.C.C. (3d) 481 (S.C.C.).
sibility for the things that I do in the course of my work. The view that I have argued for here is messier. If a criminal defence lawyer necessarily applies a personal conception of shared professional values, if he or she makes normative decisions that impact on the course of justice, the security offered by a strong version of role morality begins to erode. Charges of moral relativism must be addressed. The comfort of categorical responses is lost.

I am the first to admit that sometimes I'm slightly nervous with the notion that my own moral compass — and not just the limits of the law — might restrict what I can do for a client. But surely this notion does no more than depict the reality of my work. It does not mean that I betray my clients or take on the role of judge or prosecutor. What it means is that I necessarily make contextual, value-based choices when conducting a criminal defence. Usually, the result is that I resolutely represent my client, and force the Crown to prove guilt beyond a reasonable doubt. Sometimes, however, resolute representation is not the only acceptable course of action. Dilemmas may arise like the case of the truthful sexual assault complainant, dilemmas that yield to no easy answer and perhaps more than one right response. The trick is always to be morally engaged and to assume responsibility for my actions. That is what defence lawyering means to me. And that, to answer the question posed at the beginning of this paper, is how I live with myself.