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

#### **Abstract**

In Canada, lawyers are barred from using fraudulent means to mislead a court. Lawyers are also barred from permitting a witness to be presented in a false or misleading way. However, neither Canadian law nor Canadian professional codes clarify the permissibility of challenging a Crown witness with truthful evidence when defence counsel knows that the accused is guilty. This article explores the lack of guidance across the Canadian legal profession, and then uses Canadian and American legal scholarship to identify different approaches put forward on this topic. It concludes that there should not be an absolute ban on the practice of counsel for guilty accused used truthful evidence to challenge a Crown witness. Defence counsel must ensure convictions are only obtained by sufficient reliable evidence. Defense must also help clients obtain any remedy and defence not prohibited by law. However, a contextual approach should be taken in determining if the practice is appropriate and ethical in each case. This approach would consider, for example, the circumstances of the case, intended use of the evidence, legal merit to the claim it is used in support of, harm to the respective witness, and impact on justice norms such as equality, anti-discrimination and harm reduction.

#### Keywords

professional ethics, criminal advocacy, witness testimony, evidence, R v Li, R v Lyttle

### NAVIGATING THE FINE LINE OF CRIMINAL ADVOCACY: USING TRUTHFUL EVIDENCE TO DISCREDIT TRUTHFUL TESTIMONY

JEREMY TATUM\*

#### INTRODUCTION

The fine line of ethical criminal advocacy describes the struggle between defence counsel's duties to client, court, and profession. In recent years, it has received much attention.<sup>1</sup> Defence counsel is tasked with fearlessly advancing every argument she reasonably believes will help with a client's case without misleading the court,<sup>2</sup> relying on any evidence or defences known to be false or fraudulent,<sup>3</sup> or unduly harassing or intimidating witnesses.<sup>4</sup> These obligations are subservient only to the rules

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<sup>&</sup>lt;sup>1</sup> For example, see Austin Cooper, "The Good Barrister" (2004), *Second Colloquia on the Legal Profession*, online: <a href="http://www.lsuc.on.ca/with.aspx?id=1197">http://www.lsuc.on.ca/with.aspx?id=1197</a>> [unpublished]; Christine McGoey, "The 'Good' Criminal Law Barrister: A Crown Perspective" (2004), *Second Colloquia on the Legal Profession*, online: <a href="http://www.lsuc.on.ca/with.aspx?id=1197">http://www.lsuc.on.ca/with.aspx?id=1197</a>> [unpublished].

<sup>&</sup>lt;sup>2</sup> The decision in *Rondel v Worsley*, [1969] 1 AC 191 (UKHL) is still often cited for the proposition that every counsel has a duty to his or her client to fearlessly raise every issue, advance every argument, and ask every question which will help the client's case. But, as an officer of the court concerned in the administration of justice, counsel has an overriding duty to the court, to the standards of his profession, and to the public, which frequently leads to a conflict with what his or her client wishes or with what the client thinks are his personal interests.

<sup>&</sup>lt;sup>3</sup> R v Jenkins (2001), 44 CR (5th) 248 (Ont Sup Ct). See also Law Society of Upper Canada v Ross, 2010 ONLSHP 7.

<sup>&</sup>lt;sup>4</sup> The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: 2000, Rule 4.01(1) and Commentary [*LSUC Rules of Professional Conduct*].

of confidentiality and privilege.<sup>5</sup> It has been argued that lawyers are not even required to aid in the search for the truth.<sup>6</sup>

But very little written discussion has taken place in Canada concerning the ethics and propriety of using truthful evidence to challenge witness credibility when defence counsel knows that their client is guilty. A hypothetical twist on the American case of *The State v Casey Anthony* captures the essential complexity of this issue. Casey Anthony was indicted on October 14, 2008 for the first-degree murder of her toddler, who disappeared in June 2008. Suppose in that case Ms. Anthony confessed to her lawyer that she indeed murdered her daughter, and defence counsel also learned that Ms. Anthony's father had abused the accused when she was a child. Could defence counsel ethically cross-examine the father of the accused on the abuse inflicted upon the accused as a child, with the intention of leaving the jury with the impression that Ms. Anthony's father was the victim's killer? What legal authorities and normative legal theories could be relied on to support or belie this tactic?

In Canada there is no clear answer. Yet the ethical position taken by defence counsel might constrain the defence available to an accused who confides in his lawyer, whereas an accused who does not confide may not be so constrained. Accordingly, there are serious implications for the presumption of innocence, solicitor-client confidence,

<sup>&</sup>lt;sup>5</sup> *Ibid* at Rule 4.01(1). This rule states that, as advocates, lawyers must represent clients "resolutely and honourably within the limits of the law while treating the tribunal [or court] with candour, fairness, courtesy, and respect."

<sup>&</sup>lt;sup>6</sup> Professor Hodes has written that the role of lawyers often requires that they obscure inconvenient truths and prevent the truth from coming out. See William Hodes, "Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying and Lying with an Explanation" (2000) 44 S Tex L Rev 53.

<sup>&</sup>lt;sup>7</sup> Knowledge of guilt could follow where the client privately admits that she committed the offence or where no other reasonable alternative conclusion can be drawn as a result of overwhelming evidence. For instructive commentary on when a lawyer knows the client is guilty, see Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 41-47 and David Layton, "R v Jenkins: Client Perjury and Disclosure by Defence Counsel" (2001) 44 CR (5th) 259. For comparable American perspective, see Chris Selinger, "The 'Law' on Lawyer Efforts to Discredit Truthful Testimony" (1993) 46 Okla L Rev 99 at 101 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 [Subin, "Criminal Lawyer's Mission"]. See also *R v Moore*, 2002 SKCA 30, where the Court of Appeal confirmed the high level of certainty counsel must have of her or his client's guilt before the duties to the client and the court will conflict.

<sup>&</sup>lt;sup>8</sup> Florida v Casey Marie Anthony, 2011 Fla Tr 9 Dist.

<sup>&</sup>lt;sup>9</sup> During the trial of Casey Anthony, defence counsel claimed that the accused had been sexually abused by her father, George Anthony, as a child as part of an allegation that Mr. Anthony was responsible for the death, and that he had planted evidence to implicate the accused and cover-up the sexual abuse. Mr. Anthony flatly denied the accusation in his testimony. The accused never testified. See Jessica Hopper & Ashleigh Banfield, "Casey Anthony Trial: Defense Team Claims Caylee Anthony Drowned in Family Pool" *ABC News* (24 May 2011) online: ABC News <a href="http://www.abcnews.go.com/">http://www.abcnews.go.com/</a>>.

an accused's ability to make full answer and defence, and lawyers' balance of duties to client, court, and profession.

There is general consensus among legal scholars that counsel is legally and ethically prohibited from knowingly misleading the court or using false or fraudulent means to misrepresent a witness. However, the permissibility of using truthful evidence to discredit a truthful, but mistaken or susceptible witness on a material point has not been directly addressed by legislation, jurisprudence, or professional rules of conduct.

The prevailing view has been that defence counsel has a professional responsibility to raise every issue, argument, and defence in law that is neither illegal nor perjurious. This full support of zealous advocacy is based on the premise that defence counsel is often an accused's last line of defence and, as such, must not be constrained in performing client-based advocacy. But recently a more nuanced approach has been proposed, requiring more than mere zealous advocacy. This approach recognizes that lawyers' professional responsibilities to the administration of justice and the legal profession operate concurrently with, and are not superseded by, the duty to the client. This contextual model is referred to by Professors David Tanovich and William Simon in their general scholarship concerning normative or justice-based lawyering.

In this paper I argue that in some circumstances it will be ethical, appropriate, and in the interests of justice for counsel to use truthful evidence in defence of a guilty client. Until this issue is addressed by professional regulators or the court, examining such contextual factors will assist counsel and other bodies of review with navigating the fine line of ethical criminal advocacy. An all or nothing approach will not accomplish this. Trial judges will continue to monitor the probative value of the questioning and counsel's treatment of the witness, 12 but the proper functioning of the legal system must also depend on lawyers independently understanding and respecting legal and ethical limits. 13

<sup>&</sup>lt;sup>10</sup> Alice Woolley, *Understanding Lawyers' Ethics in Canada*, 2d ed (Toronto: LexisNexis, 2012) at 208.; Steven Skurka & James Stribopoulos, "Professional Responsibility in Criminal Practice" in Janet Leiper, ed, *Criminal Law Reference Materials, Ontario Bar Admission Course* (Toronto: Law Society of Upper Canada, 2005) ch 1 at10-11; 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.

<sup>&</sup>lt;sup>11</sup> See e.g. Edward Greenspan & George Jonas, *Greenspan: The Case for the Defence* (Toronto: Macmillan of Canada, 1987) at 260-65.

<sup>&</sup>lt;sup>12</sup> R v Lyttle, 2004 SCC 5 at paras 44-45, 50-52 [Lyttle].

<sup>&</sup>lt;sup>13</sup> Woolley, *supra* note 10 at 208.

Part I of this paper discusses the two leading authorities in Canadian jurisprudence:  $R \ v \ Li^{14}$  and  $R \ v \ Lyttle^{15}$ . In 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 in instances when counsel knew that the client was guilty. In Lyttle, the Supreme Court of Canada's reasoning indirectly implied that it is neither proper nor appropriate to utilize this approach. Part II considers the  $Rules \ of \ Professional \ Conduct$  and Commentary. Part III identifies primary conclusions in Canadian and American legal scholarship. Finally, in Part IV, three case studies are used to further develop and consider the consequences of a contextual approach.

#### PART I: THE JURISPRUDENCE

#### R v Li

In *Li*, the accused was convicted at trial of burglarizing a jewelry store. On appeal to the British Columbia Court of Appeal, the accused argued that his lawyer had not properly represented him by failing to challenge police testimony regarding the stolen jewelry found in the accused's possession.<sup>18</sup>

The Crown's evidence at trial consisted of two witness accounts and the stolen jewelry, which the police found in the accused's room at his parents' residence. The two store clerks positively identified the defendant. However, the second identification, by a photo lineup, was done with something less than 100 percent certainty and there were discrepancies with the first identification, particularly "with regard to the accused's hairstyle and manner of speaking." 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. 22

<sup>&</sup>lt;sup>14</sup> [1993] BCJ No 2312 (CA) [*Li*].

<sup>15</sup> Lyttle, supra note 12.

<sup>&</sup>lt;sup>16</sup> *Ibid*; *Li*, *supra* note 14.

<sup>&</sup>lt;sup>17</sup> Only four Canadian contributions appear to have considered the legal ethics of using truthful evidence to impeach: Woolley, *supra* note 10; Skurka & Stribopoulos *supra* note 10; Tanovich, *supra* note 10; Layton, *supra* note 10.

<sup>&</sup>lt;sup>18</sup> *Li*, *supra* note 14 at paras 19, 47, 55-57.

<sup>&</sup>lt;sup>19</sup> The frailties with eyewitness evidence are well documented and argued by many as a leading cause of wrongful convictions. See the decisions in *R v Hanemaayer*, 2008 ONCA 580; *R v Hibbert*, 2002 SCC 39; and *R v Bullock*, [1999] OJ No 3106, per Hill J for summaries of cases and Commissions that have recognized the dangers associated with eyewitness identification.

<sup>&</sup>lt;sup>20</sup> Li, supra note 14 at paras 4-5.

<sup>&</sup>lt;sup>21</sup> *Ibid* at para 57.

<sup>&</sup>lt;sup>22</sup> *Ibid* at para 66.

In the view of the Court of Appeal, having received an admission of guilt from the accused, the defence was required to "refrain from setting up an inconsistent defence." The defence was not permitted to lie about the accused's innocence. However, the accused was entitled, and counsel was under a duty, to test the Crown's case in every proper way. McEachern C.J., 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 [as part of an effort to raise] a doubt about the reliability of the identification evidence given by the jewelry store clerks." 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, counsel defending an accused who has privately admitted guilt, could properly call evidence to prove the real height of the accused was less or more than that." 25

The Court concluded that defense counsel had not breached any legal or ethical rules by challenging the discrepancies in the Crown's identification evidence. Nor were any rules breached by defense counsel in introducing truthful evidence about the accused's actual height and fluency in English. The Court noted that this line of questioning "was the only hope the accused had" of having an active defence, or to avoid a conviction.<sup>26</sup>

#### R v Lyttle

In 2004 the Supreme Court weighed in on a different debate, over whether disputed and unproven facts may be used in cross-examination to create an impression, in good-faith, that a witness is either untruthful or mistaken.<sup>27</sup>

In *Lyttle*, the accused was charged with robbery, assault causing bodily harm, kidnapping, and possession of a dangerous weapon. A Crown witness selected the accused out of a photo lineup as one of the four masked assailants who had attacked him. The defence's 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 either his associates or himself.<sup>28</sup> The record indicated that the Crown had been aware of the defence's theory since pre-trial discussions. However at trial, the Crown and the trial judge agreed that the defence was prohibited from cross-examining on this theory

<sup>&</sup>lt;sup>23</sup> Ibid.

<sup>&</sup>lt;sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at para 67.

<sup>&</sup>lt;sup>26</sup> *Ibid* at para 68.

<sup>&</sup>lt;sup>27</sup> Nothing in the record suggested that defence counsel knew that her client was guilty.

<sup>&</sup>lt;sup>28</sup> Lyttle, supra note 12 at para 20.

unless it could provide an evidentiary foundation.<sup>29</sup> The Ontario Court of Appeal upheld the decision using the curative proviso under s 686(1)(b)(iii) of the *Criminal Code*. In a unanimous judgment reversing both of the lower courts, the Supreme Court concluded that the trial judge's unwarranted restriction of a legitimate line of questioning had caused a fatal impact on the defence and rendered the trial unfair.<sup>30</sup>

Although the Supreme Court did not directly address the impeachment of witnesses when the client's guilt is known to counsel, the reasoning in *Lyttle* implies that it is improper.<sup>31</sup> The Court confirmed that the broad right of an accused to cross-examine witnesses is limited by considerations of fairness and the ethical and legal duties of counsel.<sup>32</sup> Cross-examination is further subject to the requirements of good faith, professional integrity, and not needlessly harassing or unfairly taking advantage of a vulnerable witness.<sup>33</sup>

The Court ultimately decided that a witness can be cross-examined on matters that need not, or cannot, be proved independently, provided the cross-examiner has a good faith basis for doing so.<sup>34</sup> The Court's reasoning and illustration of good faith scenarios all center on the cross-examiner's genuine belief in (or ignorance of) the truth of the theory behind her line of questioning.<sup>35</sup> In explaining the notion of a good-faith basis, Justices Major and Fish, held that its presence or absence at the time of cross-examination would depend on the information available to the cross-examiner, her belief in that information's likely accuracy, and the purpose for which that information were used.<sup>36</sup> Essentially, the permissibility of the line of questioning will be constrained according to whether it can be "honestly advanced on the strength of reasonable inference, experience, or intuition."<sup>37</sup>

The range of permissible cross-examination after *Lyttle* may nonetheless be broad. To be clear, asserting or implying scenarios in a manner that is calculated to mislead is improper and prohibited, however, where particular evidence or a suggestion is not itself false the Court did not address how far the defence could go in inviting a

<sup>&</sup>lt;sup>29</sup> *Ibid* at para 21.

<sup>&</sup>lt;sup>30</sup> *Ibid* at paras 3, 6-11, 71-75.

<sup>&</sup>lt;sup>31</sup> *Ibid* at paras 44-45.

<sup>&</sup>lt;sup>32</sup> *Ibid* at paras 41, 45-46, 50-51. At paras 51-52, the Court discussed the trial judge's common law power to require a *voir dire* to confirm the existence of a good faith basis or prevent questioning that is unduly prejudicial or otherwise prohibited. The common law power to exclude evidence whose prejudicial value exceeds its probative value can be traced back to *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577.

<sup>&</sup>lt;sup>33</sup> *Lyttle*, *supra* note 12 at paras 44, 45, 50.

<sup>&</sup>lt;sup>34</sup> *Ibid* at paras 47, 66. This general principle applies to both expert and lay witnesses.

<sup>&</sup>lt;sup>35</sup> *Ibid* at paras 47-48.

<sup>&</sup>lt;sup>36</sup> Ibid.

<sup>&</sup>lt;sup>37</sup> *Ibid*.

trier of fact to form inferences from truthful evidence that nonetheless support a false proposition.<sup>38</sup>

Unfortunately, no other Supreme Court decision, or other case apart from Li, addresses this issue. Consequently, it is appropriate to examine what guidance can be gleaned from the relevant professional rules and legal scholarship.

#### PART II: THE RULES

The *Rules of Professional Conduct* and other professional codes<sup>39</sup> set minimum criteria for how lawyers practice. However, like the decision in *Lyttle*, the *Rules* 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 argued that the *Rules* preclude this method. Counsel may test the evidence of every Crown witness and argue that, as a whole, it is insufficient to convict, <sup>40</sup> but he cannot suggest that some other person committed the offence or set up an affirmative case inconsistent with the admission. <sup>41</sup> Counsel is also expressly prohibited from knowingly attempting to deceive a court or tribunal. <sup>42</sup> With the use of truthful evidence to present a witness or party in a false or misleading way, counsel is, at the very least, introducing evidence to raise doubt about the accused's guilt. This arguably amounts to misstating evidence, <sup>43</sup> an action which might harm the integrity of the profession <sup>44</sup> or respect for the administration of justice. <sup>45</sup>

<sup>&</sup>lt;sup>38</sup> For an interesting perspective on discrediting truthful testimony through false suggestion and submission, see 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 [Subin, "Necessary Lie?"].

<sup>&</sup>lt;sup>39</sup> LSUC Rules of Professional Conduct, supra note 4. See also Canadian Bar Association, Code of Professional Conduct (Ottawa: CBA, 2009).

<sup>&</sup>lt;sup>40</sup> LSUC Rules of Professional Conduct, supra note 4 at Rule 4.01(1), Commentary. See also Federation of Law Societies of Canada, Federation Model Code of Professional Conduct, Rule 4.01(1) Commentary; The Law Society of New Brunswick, Code of Professional Conduct, c 8, Rule 14(d). The old Alberta Code of Professional Conduct, c 10, Rule 14.2, replaced as of November 1, 2011, went further in providing that counsel "may otherwise attack the case of opposing parties, including the credibility of witnesses through cross-examination," provided that "it does not set up an affirmative case that is contrary to [admissions made by the client]. Counsel would be similarly be prohibited from calling evidence in support of an alibit to show that the client could not have or did not commit the crime.

<sup>41</sup> LSUC Rules of Professional Conduct, supra note 4 at Rule 4.01(1), Commentary. See also CBA Code,

c 9, Commentary 11; British Columbia, *Code of Professional Conduct*, c 8, Rule 1(e.1). Of note, the *BC Professional Conduct Handbook* will be replaced January 1, 2013 with the new *Code of Professional Conduct for BC*.

<sup>&</sup>lt;sup>42</sup> LSUC Rules of Professional Conduct, supra note 4 at Rule 4.02(e).

<sup>&</sup>lt;sup>43</sup> LSUC Rules of Professional Conduct, supra note 4 at Rule 4.02(f). Also, CBA Code, c 9, Commentary 2(f).

<sup>&</sup>lt;sup>44</sup> *Ibid* at Rules 6.01(1), 6.03(1). The Nova Scotia Barristers' Society, *Code of Professional Conduct*, Rule 3.01(2) and Commentary, effective January 1, 2012, goes further in stating that a lawyer must not

On the other hand, it could be argued 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 to the best of their ability, except against sufficient reliable evidence to support a conviction for the offence charged. Counsel is authorized to use any evidence, defences, or technicalities "not known to be false or fraudulent." Demonstrating or suggesting that a witness is mistaken through truthful evidence is not misleading in that sense. Unless defence counsel goes further to set up an affirmative case or advance a defence inconsistent with the admission, then he is not relying on any evidence or defence known to be false or fraudulent.

Furthermore, the Commentary for Rule 4.06(1) directs counsel to speak out against injustice and maintain constant efforts to improve the administration of justice and public respect for it. There may be instances when these principles will encourage the use of truthful evidence to challenge the credibility of a truthful witness, in the course of promoting respect for the administration of justice, and speaking out against injustices such as systemic discrimination or abuse of state power. This perspective will be explored in Part IV of the paper.

#### 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 or views in legal scholarship: (1) 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");<sup>48</sup> (2) 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");<sup>49</sup> and (3) 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 legally

use false, misleading or "other means" that bring the profession or the administration of justice into disrepute.

<sup>&</sup>lt;sup>45</sup> LSUC Rules of Professional Conduct, supra note 4 at Rule 4.06(1).

<sup>&</sup>lt;sup>46</sup> LSUC Rules of Professional Conduct, supra note 4 at Rule 4.01(1), Commentary. See also CBA Code, c 9, Commentary 10.

<sup>&</sup>lt;sup>47</sup> LSUC Rules of Professional Conduct, supra note 4 at Rule 4.01(1), Commentary. See also FLS Model Code, Rule 4.01(1), Commentary; NB Code of Professional Conduct, c 8, Rule 14(c); and NS Code of Professional Conduct, c 4, Rule 4.01, Commentary.

<sup>&</sup>lt;sup>48</sup> Monroe Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Ouestions" (1966) 64 Mich L Rev 1469 at 1471,1474-5.

<sup>&</sup>lt;sup>49</sup> Layton, *supra* note 10 at 386-390. See also Eleanor Myers & Edward Ohlbaum, "Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy" (2002) 69 Fordham L Rev 1055.

correct result ("The Tanovich Approach").<sup>50</sup> Each viewpoint will be introduced in turn to provide additional considerations for the contextual study in Part IV, and support for the overall conclusion in this paper.

#### The Freedman Approach: zealous client-centered advocacy

Professor Monroe Freedman is the most well known advocate of zealous advocacy of the client's interests. In his commentary *Professional Responsibility of the Criminal Defense Lawyer*,<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> Defence counsel is obligated to attack the reliability and credibility of witnesses' evidence, whether or not the client is known to be factually guilty.<sup>54</sup> Failure to do so because counsel knows the client is guilty is wrong, a violation of the client's confidence, and contrary to the essential administration of justice.<sup>55</sup>

Proponents of this view often cite the judicial comment of former United States Supreme Court Justice Byron White in *United States v Wade*:

[D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. [He must] defend his client whether he is innocent or guilty. Defense counsel need present nothing, even if he knows what the truth is. [...] If he can confuse a witness, even a truthful one, or make

<sup>&</sup>lt;sup>50</sup> Tanovich, *supra* note 10 at 284-289.

<sup>&</sup>lt;sup>51</sup> Freedman, *supra* note 48. See also Abe Smith, "Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things" (2000) 28 Hofstra L Rev 925.

<sup>&</sup>lt;sup>52</sup> Freedman, *supra* note 48 at 1471, 1474-5. The issue of under-zealous representation was explored in Abe Smith, "Burdening the Least of Us: 'Race-Conscious' Ethics in Criminal Defense" (1999) 77 Tex L Rev 1585.

<sup>&</sup>lt;sup>53</sup> *Ibid.* See 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 [Mitchell, "Response to Different Mission"]; Hodes, *supra* note 6; Barbara Babcock, "Defending the Guilty" (1983) Clev St L Rev 175; John Mitchell, "The Ethics of the Criminal Defense Attorney–New Answers to Old Questions" (1980) 32 Stanford L Rev 293 [Mitchell, "New Answers"]; and Mark Orkin, "Defense of One Known to be Guilty" (1958) 1 Crim LQ 170.

<sup>&</sup>lt;sup>54</sup> Freedman, *supra* note 48 at 1475.

<sup>&</sup>lt;sup>55</sup> *Ibid* at 1474-5. The American Bar Association's *Standards for Criminal Justice*, Standard 4-7.6 (2d ed 1980 & Supp 1986) instructed the criminal defence lawyer to destroy a truthful government witness when it is essential to provide the accused with a defence. Failure to do so would violate the lawyer's duty under the *Model Code of Professional Responsibility* DR 7-101(A)(1) to zealously represent the client.

him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth.<sup>56</sup>

Further, Freedman and others opine that the legal system cannot tolerate a result where the client is effectively prejudiced because of special knowledge that was gained as part of the sacred solicitor-client relationship.<sup>57</sup> A client should not be worse off for confiding in counsel than a client who does not make full disclosure or when counsel is "selectively ignorant."<sup>58</sup>

Further, advocates of zealous client-centered advocacy 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.<sup>59</sup> Mitchell argues that the legal system is concerned with the level of certainty and doubt required for a conviction, not the question of truth or falseness.<sup>60</sup>

Policy concerning discrediting a truthful witness has been the subject of extensive commentary in American legal scholarship, most notably the Subin-Mitchell<sup>61</sup> and Luban-Ellmann<sup>62</sup> exchanges.<sup>63</sup> Not surprisingly, the view that defence counsel must provide client-centered<sup>64</sup> advocacy to protect against overreaching by the state<sup>65</sup> and advance the individual dignity of the accused<sup>66</sup> is not universally held. Professor

<sup>&</sup>lt;sup>56</sup> (1967) 388 US 218 at paras 256-258.

<sup>&</sup>lt;sup>57</sup> Freedman, *supra* note 48 at 1475. See also Mitchell, "Response to Different Mission", *supra* note 53; Charles Fried, *Right and Wrong* (Harvard University Press: Maryland, 1978) at 191-2; and Richard Wasserstrom, "Lawyers as Professionals, Some Moral Issues" (1975) 5 Hum Rts 1.

<sup>&</sup>lt;sup>58</sup> *Ibid* at 1472. See *R v IBB*, [2009] SKPC 76, 339 Sask R 7 at paras 14-17.

<sup>&</sup>lt;sup>59</sup> David Luban, *Lawyers and Justice: An Ethical Study* (New Jersey: Princeton University Press, 1988 at 1760. Mitchell asserts that trying to make the trier of fact "appreciate the possibilities other than guilt" falls within the legitimate boundaries of defence counsel's function to test the Crown's case with all available facts. See Mitchell, "Response to Different Mission", *supra* note 53 at 345. <sup>60</sup> *Ibid* at 343.

<sup>&</sup>lt;sup>61</sup> Subin, "Criminal Lawyer's Mission", *supra* note 7; Mitchell, "Response to Different Mission", *supra* note 53; and Subin, "Necessary Lie?", *supra* note 38.

<sup>&</sup>lt;sup>62</sup> Luban, *supra* note 59; 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.

Excerpts of those exchanges can be found in prominent American legal ethics casebooks such as Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics*, 5th ed (New York: Aspen Law & Business, 1998) at 419-24 and Richard Zitrin, Carol Langford & Nina Tarr, *Legal Ethics in the Practice of Law*, 3rd ed (New Jersey: LexisNexis, 2007).
 Charles Ogletree, "Beyond Justifications: Seeking Motivations to Sustain Public Defenders" (1993)

Charles Ogletree, "Beyond Justifications: Seeking Motivations to Sustain Public Defenders" (1993) 106 Harv L Rev 1239 at 1250.

<sup>&</sup>lt;sup>65</sup> David Luban, "Are Criminal Defenders Different?" (1993) 91 Mich L Rev 1729 at 1730-52,1755. See also Mitchell, "Response to Different Mission", *supra* note 53 at 345-49.

<sup>&</sup>lt;sup>66</sup> Monroe Freedman, *Understanding Lawyers' Ethics* (New Jersey: LexisNexis, 1990) at 65-66.

William Simon, for instance, has challenged each of the justifications of the Freedman Approach as implausible and self-serving.<sup>67</sup>

However, the dominant critique of zealous client-centered advocacy concerns the impact that discrediting truthful witnesses might have 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 other detractors argue that defence lawyers as officers of the court have a paramount duty to advance the truth. They argue there is no right to put forward a false defence or "truth-defeating devices" such as evidence or suggestions designed to have the trier of fact knowingly draw false inferences. Untrue or mistaken testimony should not be exploited for its probative value and should instead only be used to show that the Crown failed to discharge its burden.

Moreover, Subin, Simon, and Schwartz seem to have taken the position that counsel should not cross-examine prosecution witnesses in a way that knowingly supports a false theory of the facts, that harms the reputations of the truthful witnesses, or that attempts to cast blame on innocent persons. Once counsel knows of a client's guilt, Subin suggests that she is ethically limited to a monitoring role, in which she may only ensure that a conviction is based on an adequate amount of competent and admissible evidence. In reply to Mitchell, Subin has accepted that defence counsel may still suggest alternative explanations of the facts to the trier of fact for the purpose of assisting the trier in measuring the weight of the evidence, provided the trier of fact receives proper instruction on the limited purpose for which these alternative explanations, even those made without a good faith basis, are being offered.

<sup>&</sup>lt;sup>67</sup> William Simon, "The Ethics of Criminal Defense" (1993) 91 Mich L Rev 1703 at 1726-28. For example, Simon disputes the notion that aggressive cross-examination of truthful witnesses will result in more thorough police investigation at 1711-12.

<sup>&</sup>lt;sup>68</sup> Subin, "Criminal Lawyer's Mission", *supra* note 7 at 149-152. On the purpose of truth ascertainment, see generally Marvin Frankel, "The Search for Truth: An Umpireal View" (1975) 123 U Pa L Rev 1031. <sup>69</sup> Subin, "Criminal Lawyer's Mission", *supra* note 7 at 126.

<sup>&</sup>lt;sup>70</sup> Subin, "Necessary Lie?", *supra* note 38 at 697.

<sup>&</sup>lt;sup>71</sup> Murray Schwartz, "Making the True Look False and the False Look True" (1988) 41 SW LJ 1135 at 1146.

<sup>&</sup>lt;sup>72</sup> Michael Asimow & Richard Weisberg, "When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature" (2009) 18 S Cal Interdisciplinary LJ 229 at 245-46.

<sup>&</sup>lt;sup>73</sup> Subin, "Criminal Lawyer's Mission", *supra* note 7 at 146-47.

<sup>&</sup>lt;sup>74</sup> Subin, "Necessary Lie?", *supra* note 38 at 690. Mitchell characterizes Subin's interpretation of a false defence as an attempt to deny any effort to "convince the judge or jury that facts established by the state and known to the attorney to be true are not true, or that facts known to the attorney to be false are true." See Mitchell, "Response to Different Mission", *supra* note 53 at 340.

<sup>&</sup>lt;sup>75</sup> Subin, "Necessary Lie?", *supra* note 38 at 690.

Professor Luban agrees that defense lawyers should not engage in forms of deception, including impeaching a witness known to be testifying truthfully, how, in particular, Luban argues that zealous advocacy softens in the context of sexual assault cases, where the "moral limits to the advocate's role [...] must be designed to maximize the protection of jeopardized individuals" against both the state and network of practices that "encourages male sexual violence." Luban further contends that there are powerful policy reasons to render the all-out assault of truthful sexual assault victims off limits. Refusing to engage in aggressive cross-examination on the issue of the complainant's consent, without good faith, is not a violation of the advocate's duty to the client. Counsel avoids pressing a false case and still retains discretion over other tactics and truthful witnesses to call. To

#### Proulx and Layton: a modified Freedman approach

In *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," that the accused is guilty or there is a risk of undue prejudice to the witness. Eaving aside the continuing duties of confidentiality and loyalty to the client, are gardless of whether the accused is guilty or not, they argue that the law allows the defence to "insist that the Crown prove

<sup>&</sup>lt;sup>76</sup> Luban, *supra* note 59 at 1760.

<sup>&</sup>lt;sup>77</sup> Luban, *supra* note 59 at 1028-30.

<sup>&</sup>lt;sup>78</sup> *Ibid* at 1030.

<sup>&</sup>lt;sup>79</sup> *Ibid* at 1031.

<sup>&</sup>lt;sup>80</sup> See also Layton, *supra* note 10 at 386-88. The 1986 version of the American Bar Association Criminal Justice Standards, Standard 4-7.6, originally stated that defence counsel should "take into consideration" knowledge that the witness is telling the truth when conducting cross-examination. However, since 1993, that wording has been omitted. Now defence counsel's belief or knowledge "does not preclude cross-examination," but the examination "should be conducted fairly, objectively and with due regard for the dignity and legitimate privacy of the witness." Professor Lawry proffers that the amendment came about because unless the defence could challenge the Crown's truthful witnesses, in some cases the accused will be denied an effective defence and any opportunity to oppose the prosecution's case in Robert Lawry, "Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering" (1996) 100 Dick L Rev 563 at 566-7.

<sup>&</sup>lt;sup>81</sup> Proulx & Layton, *supra* note 7 at 40-47, 370. Of course, the prevailing view amongst defence counsel is that nothing short of an outright admission constitutes knowledge of guilt triggering counsel's additional ethical responsibilities and limiting the available defences. See also Alan Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999) at 157.

<sup>82</sup> Layton, *supra* note 10 at 387.

<sup>&</sup>lt;sup>83</sup> Proulx & Layton, *supra* note 7 at 55-56. See also generally Monroe Freedman and Abe Smith, eds, *Understanding Lawyers' Ethics*, 2nd ed (New Jersey: LexisNexis, 2002).

its case according to the justice system's applicable standards and rules, and to [...] test the Crown case within an adversarial setting."<sup>84</sup> Defence counsel can properly take objection to jurisdiction, the form of the indictment, or to the admissibility or sufficiency of the evidence, <sup>85</sup> but should not go further so as to conduct a false defence or knowingly mislead by relying on evidence or assertions to the contrary of what he knows to be true. <sup>86</sup>

In his article *The Criminal Defence Lawyer's Role*, Layton distinguishes between presenting false evidence or suggestions intended to mislead the witness or court from using evidence that counsel knows or suspects is true to ensure that no conviction necessarily follows unless the criminal standard is met.<sup>87</sup> 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 a person of bad character.<sup>88</sup> It must never be suggested that the witness is deliberately being untruthful.<sup>89</sup> Unintentional mistake causes substantially less harm to the witness' reputation and disincentive for other victims, particularly with sexual assault, to come forward.<sup>90</sup> Layton justifies this restricted use of truthful evidence by reference to the Crown's burden of proving all essential elements of the offence, state propensity to abuse its power, absolute confidence of clients in the lawyer-client relationship, and the need to combat injustice and discrimination.<sup>91</sup> In recognizing that juries may have difficulty distinguishing between testing and impugning the evidence of a mistaken witness, Layton recommends that the ethical line might be where counsel knowingly

<sup>&</sup>lt;sup>84</sup> Proulx & Layton, *supra* note 7 at 36.

<sup>&</sup>lt;sup>85</sup> CBA Code, c 9, Commentary 11. See also NS Code of Professional Conduct, Rule 4.01 and Commentary.

<sup>&</sup>lt;sup>86</sup> LSUC Rules of Professional Conduct, supra note 4 at Commentary and Rule 4.01(1); CBA Code, c 9, Commentary 10. See also Proulx & Layton, supra note 7 at 37 and Layton, supra note 10 at 386.

<sup>&</sup>lt;sup>87</sup> Layton, *supra* note 10 at 386. See also Subin, "Criminal Lawyer's Mission", *supra* note 7 at 148-49. <sup>88</sup> *Ibid* at 389. See also Luban, *supra* note 65 at 1760.

<sup>&</sup>lt;sup>89</sup> Suban, *supra* note 7 at 387. Professor Schwartz suggests that the rationale for differential treatment in this respect between Crown and defence counsel has more to do with the obligation of the Crown to make timely disclosure of evidence that tends to negate the guilt of the accused and the basis of that knowledge. See Shwartz, *supra* note 71.

<sup>&</sup>lt;sup>90</sup> Layton, *supra* note 10. Layton uses the example of a sexual assault complainant and the chilling effect this will have on victims. He also cites the Supreme Court of Canada decision in *R v Mills*, [1999] 3 SCR 668 for the proposition that the right to full answer and defence does not necessarily trump the interests of a sexual assault complainant. A somewhat analogous approach is taken with racial stereotypes by Professor Anthony Alfieri in "Defending Racial Violence" (1995) Colum L Rev 1301. For a more recent decision on that point, see *R v NS*, 2010 ONCA 670, leave to appeal to SCC granted, [2010] SCCA No 494.

<sup>191</sup> *Ibid* at 386. However, Layton's argument that the risk of wrongful convictions will be reduced because the police and Crown will be more diligent at the investigative and prosecution stages is significantly weakened by the fact that the accused in question are guilty.

risks misleading the trier of fact or causes a disproportionate amount of direct prejudice to the truthful witness.<sup>92</sup>

Equally, 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. There is nothing wrong with presenting all available truthful evidence to the court and inviting the trier of fact to draw exculpatory inferences from that evidence. That is the general function of defence counsel. Otherwise, an accused is deprived of a defence and/or the skillful assistance of defence representation. Additionally, in certain circumstances, Layton suggests that defence counsel's duties to the client may warrant aggressively attacking a witness' character to combat greater harms such as inequality and discrimination in the criminal justice system while also raising reasonable doubt in the Crown's case.

#### The Tanovich Approach: justice focused discretionary decision-making

In his article *Law's Ambition and the Reconstruction of Role Morality in Canada*, Professor Tanovich suggests that the pursuit of justice "demands that lawyers engage in a behaviour that will enhance a fair, 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." Accordingly, 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. 97 Contextual or discretionary decision-making should generally be employed in this analysis.

Some of the 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 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

<sup>&</sup>lt;sup>92</sup> *Ibid* at 387.

<sup>&</sup>lt;sup>93</sup> Proulx & Layton, *supra* note 7 at 72.

<sup>&</sup>lt;sup>94</sup> Woolley, *supra* note 10 at 308.

<sup>&</sup>lt;sup>95</sup> Layton, *supra* note 10 at 390. Layton uses the case of an Aboriginal woman subject to a racial slur by the arresting officer when being apprehended for shoplifting to argue that the need to combat racism in the justice system and promote equality outweighs any harm caused by cross-examination of the officer to raise reasonable doubt.

<sup>&</sup>lt;sup>96</sup> Tanovich, *supra* note 10 at 289.

<sup>&</sup>lt;sup>97</sup> Subin, "Criminal Lawyer's Mission", *supra* note 7 at 146.

there are any other factors that will impact on the ability of the process or procedure to produce the legally correct result.<sup>98</sup>

Tanovich provides a more concrete approach than Layton to the question of what ethical lawyering requires in a particular situation. He also draws a brighter line in cases involving sexual assault complainants and racialized accused. In cases where there is no air of reality to a defence of consent, Tanovich argues that defence counsel are legally prohibited under *Lyttle* and ethically barred under the non-discrimination rule from suggesting there was consent, or proceeding with that avenue of questioning.

Generally, cross-examination with the intent to reinforce historical stereotypes in order to prejudice a witness serves to further the historical discrimination, stereotypical assumptions, and disadvantage faced by stereotyped groups, <sup>99</sup> activities prohibited by lawyers special obligations to protect the dignity of individuals. <sup>100</sup>

On the other hand, Tanovich posits that defence counsel "have a substantial license to engage in zealous advocacy when representing accused from racialized or other marginalized communities" because it is well documented that the criminal justice system is inherently biased towards racialized groups. Thus, even where a goodfaith basis does not exist, the relevant social context could permit suggestions that are not in good faith, or proceeding with that avenue of questioning. <sup>102</sup>

While cross-examination in both situations arguably departs from counsel's role as a truthful advocate and from the good-faith requirement in *Lyttle*, <sup>103</sup> these examples lay important groundwork for the contextual analysis in the final part of this paper. After all, the adoption of a procedural, professional, or evidentiary rule that permits obscuring, distorting, or preventing truthful evidence requires powerful justification. <sup>104</sup>

#### PART IV: CASE STUDIES AND ANALYSIS

The need for a contextual approach in determining the permissibility of using truthful evidence to challenge credibility in a particular case does not erode the need for clear rules and boundaries governing lawyers' practice. The profession and

<sup>&</sup>lt;sup>98</sup> William Simon, "'Thinking Like A lawyer' About Ethical Questions" (1998) 27 Hofstra L Rev 1 at 4. See Tanovich, *supra* note 10 at 286. For a contrary view, see David Yellin, "Thinking Like a Lawyer or Acting Like a Judge?: A Response to Professor Simon" (1998) 27 Hofstra L Rev 13.

<sup>&</sup>lt;sup>99</sup> Tanovich, *supra*, note 10 at 282-3. Similarly, in the American context, David Luban first argued in favour of barring cross-examination of sexual assault complainants, and subsequently where the client admits guilt or where on an objective view of all the facts consent did not exist. See Luban, *supra*, note 59 at 1035-43.

<sup>&</sup>lt;sup>100</sup> LSUC Rules of Professional Conduct, supra note 4 at Rule 1.03(1)(b).

Tanovich, *supra* note 10 at 288.

<sup>102</sup> *Ibid*.

<sup>&</sup>lt;sup>103</sup> Subin, "Necessary Lie?", *supra* note 38 at 696.

<sup>&</sup>lt;sup>104</sup> Schwartz, *supra* note 71 at 1140.

administration of justice invariably require clear rules for handling matters of substance and procedure.

The Supreme Court decision in *Lyttle* and the *Rules of Professional Conduct* provide a starting point and outer ethical limits. I argue that no hard rule can take into account all competing interests and contextual subtleties when it comes to challenging witness testimony. The criminal justice system is an adjudication model that encompasses different actors playing varied roles for competing causes, which in turn gives rise to multiple considerations and interests in deciding if a particular witness can ethically be discredited in a particular fashion or on a specific point. Three case studies illustrate this point and the need for a contextual approach to deciding application.

### Case Study One: The Truthful Sexual Assault Complainant with A Conviction For Fraud 105

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. Consequently, 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. <sup>106</sup>

The *Rules of Professional Conduct* and the decision in *Lyttle* prohibit counsel from arguing that the complainant consented or lied to implicate the accused. But, as noted by Layton, neither the *Rules of Professional Conduct* nor the decision in *Lyttle* clearly prevents counsel from putting questions to her that highlight elements of her story that could be consistent with consent, that are mistaken about identification, or are internally inconsistent. The final submissions could focus on the reasonable doubt that exists about whether the complainant is telling the truth.<sup>107</sup>

The Freedman approach would advocate that defence counsel is obligated to attack the credibility of the complainant using the conviction for fraud, any possible motivation to lie, and any other legal avenues of inquiry to obtain an acquittal. The

others have too used this figure to discuss the power imbalance facing victimized women and children, and the need to avoid cross-examination promoting stereotypes and discouraging victims from coming forward. See Layton, *supra*, note 10; Tanovich, *supra*, note 10; and Luban, *supra* note 59. In *R v Titus*, [1983] 1 SCR 259 at paras 263-64, the Supreme Court recognized the importance of

cross-examination in exploring the motive of a witness to fabricate evidence or testify to gain favour with the Crown.

<sup>&</sup>lt;sup>107</sup> Layton, *supra*, note 10 at 387.

Crown bears the burden of disproving inferences favouring the defence beyond a reasonable doubt. 108

Layton's approach to cross-examining and challenging the credibility of the complainant could be considered 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 the complainant. Layton would advise the accused to plead guilty if the Crown's case was strong enough to render an aggressive cross-examination futile; if the accused rejected this advice, defence counsel would likely be required to withdraw herself. However, if the Crown's case was not insurmountable and aggressive cross-examination of the complainant might lead to an acquittal, Layton would permit the suggestion that the complainant was mistaken, rather than portray her as a liar and creating a disincentive for other victims of sexual assault to come forward. In these facts, Layton would not cross-examine on the issue of consent; there would be no good-faith basis to do so here, and counsel is ethically barred under the *Rules* from putting forward an affirmative defence or presenting the complainant in a false or misleading manner. Neither would Layton cross-examine the complainant on her conviction for fraud or possible motive to lie, since the use of either would portray the complainant as a person of bad character.

Layton's approach in this scenario is therefore inconclusive because it revolves around a subjective assessment of the strength of the case and then, to a lesser extent, depends on how the evidence is being used to portray the complainant. Although the strength of the prosecution is obviously pivotal to the tactical decision to resolve or force the Crown to prove its case, I would argue this is less helpful in providing objective basis to decide whether counsel can ethically use truthful evidence to cross-examine a particular witness.

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 accused, his counsel, and the complainant. The discrimination norm would be perpetuated by allowing such a cross-examination. Challenging the complainant on her record would not contribute

<sup>&</sup>lt;sup>108</sup> Woolley, *supra*, note 10 at 307. The Crown's putative burden of disproving other inferences is commonly seen, for example, in *R v Charemski*, [1998] 1 SCR 679 on directed verdicts and *R v Griffin*, 2009 SCC 28, [2009] 2 SCR 42 on final disposition. See also Benjamin Berger, "The Rule in Hodge's Case: Rumours of Its Death Are Greatly Exaggerated" (2005) 84 Can Bar Rev 47. <sup>109</sup> Layton, *supra* note 10 at 389.

The Supreme Court recognized the direct relationship between sexual violence against women and gender inequality in *R. v. Osolin*, [1993] 4 SCR 595 at 669 and *Seaboyer*, *supra* note 32 at 648.

The correlation between vulnerability to sexual assault and social, political and legal disadvantage was

<sup>&</sup>lt;sup>111</sup> The correlation between vulnerability to sexual assault and social, political and legal disadvantage was recognized by Justice L'Heureux-Dube in *Seaboyer*, *supra* note 32 at 665-674 and studied in Elizabeth Shilton and Ann Derrick, "Sex, Equality and Sexual Assault: In the Aftermath of *Seaboyer*" (1991) Windsor YB Access Just 107. Also, the inequality of children and adult exercise of dominance was

to or vitiate a legally correct result, and a disproportionate amount of harm would be caused to the dignity of the complainant and other victims of sexual assault if she were portrayed as a person of bad character who intended to be dishonest. 112

As Selinger notes, part of the "truth-seeking" purpose of the law is to encourage witnesses to come forward and give evidence. If victims are subjected to unnecessary humiliation throughout the legal process, "the existing human tendency to avoid becoming involved will be increased." Especially with crimes of sexual assault and exploitation, there is an acute need to prevent victims from being discouraged to come forward and report these crimes. There is also an acute need to dispel the myth that women frequently invite sexual advances and lie about them occurring. The Supreme Court has acknowledged that of all the most serious crimes, sexual assault appears to be one of the most unreported because of the fear of trial procedures, publicity and embarrassment, trepidation of treatment by police and prosecutors, and defence counsel. In the court of the sexual action of treatment by police and prosecutors, and defence counsel.

Additionally, in this scenario, arguably the only interest being served by defence counsel's exploration of the fraud conviction is that of the accused. No other positive contribution would be made to relevant legal values.<sup>117</sup>

In this case, counsel would have no good-faith basis for impeaching the complainant's character and testimony through the fraud conviction, since she knows that the complainant provided an accurate account of what occurred. While the zealous

recognized by the Supreme Court in R v L(DO), [1993] 4 SCR 419, Lamer J at paras 428-29 and L'Heureux-Dube J at paras 439-41.

Arguably, the same could be said where the defence obtains and then wants to cross-examine the complainant on her medical records.

<sup>&</sup>lt;sup>113</sup> Selinger, *supra* note 7 at 101. In *Seaboyer*, *supra* note 32 at 604-6 and 626, the Supreme Court characterized the "avoidance of unprobative and misleading evidence, the encouraging of reporting sexual offences and the protection of the privacy of witnesses" as fundamental conceptions of the criminal justice system.

<sup>&</sup>lt;sup>114</sup> *Ibid.* In *R. v. Moore* (1986), 26 CCC (3d) 474 and *R v McGinty* (1986), 27 CCC (3d) (36) (YCTA), the courts chronicled difficulties faced by victims of assault that after being called to testify suddenly become silent and unable to recall how her injuries occurred. Justice Bourassa described in *Moore* how in these circumstances the courts operate as an institution to avoid, subvert and denigrate.

<sup>115</sup> Canadian Newspapers Co v Canada (Attorney General), [1988] 2 SCR 122. Studies demonstrate that upwards of 80 percent of sexual assaults are not reported to the police. See Christopher Manfredi, Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Action Fund (British Columbia: UBC Press, 2005) at 113; Final Report of the Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence—Achieving Equality (Ottawa: Minister of Supply and Services Canada, 1993); and Morrison Torrey, "When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions" (1991) 24 U Calif Davis L Rev 1013.

<sup>&</sup>lt;sup>116</sup> In *Mills*, *supra* note *90* at paras 90-93, the Supreme Court recognizes the problems with a "whack the complainant" strategy of defending sexual assault cases.

<sup>&</sup>lt;sup>117</sup> See William Simon, *Practice of Justice: A Theory of Lawyers' Ethics* (Massachusetts: Harvard University Press, 1998) at 191 [*Practice of Justice*] and Layton, *supra*, note 10 at 388.

advocate might argue that this conclusion would unduly constrain the accused from testing the reliability of the prosecution's case in every legal manner, the right to make full answer and defence does not imply an entitlement to rules and procedures most likely to result in a finding of innocence. The right entitles accused persons to rules and procedures that are fair in the manner in which they enable them to defend against and answer to the Crown's case. Here, defence counsel is still entitled to force the Crown to carry its burden and maintain the client's confidence in the administration of justice by testing the reliability and credibility of the complainant's evidence through all other legal and ethical avenues.

## Case Study Two: The Truthful Witness Who Is In Error About Time or An Aspect of Identification<sup>119</sup>

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 independent of the mistaken witness testimony. The accused wants to call the alibi witness.

The Michigan State Bar on Professional and Judicial Ethics Committee concluded that it is entirely appropriate for a defence lawyer to present any evidence that is truthful in defending the client. Defence counsel's role is to zealously defend the client within the boundaries of all legal and ethical rules. It is not counsel's responsibility to "correct inaccurate evidence introduced by the prosecution or to ignore truthful evidence that could exculpate his [or her] client." 120

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

<sup>&</sup>lt;sup>118</sup> *R v Rose*, [1998] 3 SCR 262 at para 99.

<sup>&</sup>lt;sup>119</sup> The second scenario is based on a case reviewed by the Michigan State Bar Committee on Professional and Judicial Ethics. State Bar of Michigan, *Michigan Bar Committee of Professional and Judicial Ethics*, Op. CI-1164 1987, online:

<sup>&</sup>lt;a href="http://www.michbar.org/opinions/ethics/numbered\_opinions/ci-1164.html">http://www.michbar.org/opinions/ethics/numbered\_opinions/ci-1164.html</a>. In *R v B (G)*, [1990] 2 SCR 30 at paras 38, 43, the Supreme Court confirmed that where there is conflicting evidence regarding the time or date of the offence, the Information does not have to be quashed and a conviction could still follow as long as the time was not an essential element of the offence or crucial to the defence. 

120 Ibid.

caused the trier of fact to disbelieve the alibi witness. The victim might also realize his mistake and change his evidence, thereby rendering the alibi irrelevant.

The British Columbia Court of Appeal reached a similar conclusion in Li. 121 The Court held that it would be entirely proper for defence counsel to cross-examine Crown witnesses and lead uncontroversial independent evidence on identification where the Crown's evidence is inconsistent with the identification of the accused. 122 Counsel would continue to be prohibited from presenting any perjured evidence or putting up an inconsistent defence at common law, 123 and according to Canadian and American professional codes. 124

Most, if not all, of the American legal scholarship supports the argument that it is entirely proper for the defence to attempt to procure an acquittal of the factually guilty accused by demonstrating that the Crown's evidence is inadequate or erroneous in any essential respect. 125 Professor Alice Woolley has argued that forbidding the defence from presenting the truthful alibi evidence subverts 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 in the first place. 126

In accordance with Rule 4.01 of the Rules, 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. Defence counsel could also introduce expert evidence to show the hazards of eyewitness identification. 127 This is entirely consistent with counsel's responsibility to test the evidence of every witness and ultimately argue that the evidence as a whole is insufficient to support a conviction. 128 The Rules and Lyttle only prohibit the defence

<sup>&</sup>lt;sup>121</sup> Li, supra note 14. Although it has been suggested that Li could be distinguished from the Michigan State Bar case because counsel in Li only challenged the Crown's identification evidence and did not set up an affirmative defence. See Woolley, *supra* note 10 at 305.

Li, supra note 14 at paras 66-68.

<sup>&</sup>lt;sup>123</sup> Also, *Lyttle supra* note 12 at paras 44, 48, 52 and *Nix v Whiteside* (1986), 475 US 157.

<sup>124</sup> LSUC, Rules of Professional Conduct, supra note 4 at Rule 4.01(1), 4.02 and American Bar Association's Standards for Criminal Justice, supra note 124 at Standards 4-1.2, 4-3.7, 4-4.3, 4-7.5.

<sup>&</sup>lt;sup>125</sup> Subin, "Criminal Lawyer's Mission", *supra* note 7 at 146-7. Layton's comments can also be taken to infer that he would support cross-examination in a manner that suggests unintentional mistake and the presentation of independent truthful evidence that exploits the mistake.

 $<sup>\</sup>overline{126}$  Woolley, *supra* note 10 at 305.

<sup>&</sup>lt;sup>127</sup> Subin, "Criminal Lawyer's Mission", *supra* note 7 at 134. On the dangers of misidentification, see Thomas Sophonow & Peter de C Cory, The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (Winnipeg, Manitoba Justice, 2001); R v Hanemaayer, 2008 ONCA 580, 234 CCC (3d) 3; and United States v Wade (1967), 388 US 218. 128 LSUC Rules of Professional Conduct, supra note 4 at Rule 4.01(1), Commentary. See Layton, supra note 10 at 385 and Freedman, supra note 48 at 1471, 1474-5. Subin refers to this as a pure "reasonable doubt defense" in supra note 38 at 696.

from offering false evidence to show and argue that the crime occurred when the mistaken witness stated, or support the accused testifying as to his innocence. 129

While it is possible that the trier of fact could reject the defence alibi or identification evidence, a judge or jury could also accept the evidence and go on to conclude that there is reasonable doubt as to guilt. In that instance, the truth would arguably have been obscured and a factually guilty person declared legally innocent. Although it is quite correct to say there is always the possibility in a criminal trial that the Crown will fail to discharge its onus, here the presentation of truthful evidence would facilitate such a false defence and result.

In approaching the situation contextually, the considerations and broader interests that were present with the sexual assault complainant do not exist here. No stated 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 or harmed if counsel suggests the witness is unintentionally mistaken rather than knowingly being untruthful. Attacking the credibility and reliability of the witness' evidence may be the only viable defence, and the accused will likely receive a custodial sentence if convicted. Unlike the previous scenario, the decision in *Li* may provide authority to permit this line of questioning, provided that the defence does not unnecessarily harass or inconvenience the witness, present evidence that is believed or known to be false, or set up an affirmative case that is inconsistent with an accused's guilt.

While the three approaches reach the same result favouring permissibility in this instance, the underlying reasoning and considerations are very different. The zealous advocate justifies proceeding on the basis that it is in the client's best interest, and the evidence is neither illegal nor perjurious. Unless the Crown's case was perceived to be air-tight, modified-Freedman proponents would likely cross-examine on and introduce the truthful independent witness to demonstrate the victim's material mistakes. The contextual approach provides a more coherent result by taking into account all proper considerations, interests, and duties to the client, profession, and the administration of justice.

# Case Study Three: The Truthful Police Officer Who Has a Disciplinary Record with Race-Based Complaints

The accused is a racialized, Black youth charged with possession under the Controlled Drugs and Substances Act. On the evening in question, he was walking with

<sup>&</sup>lt;sup>129</sup> Subin, "Criminal Lawyer's Mission", *supra* note 7 at 150.

a Caucasian friend in what police identify as a high crime area. A patrolling officer was drawn to the pair because of their youth, activity, and location. The officer called them over to find out what they were up to. The two youth ran. The officer will testify that he saw the accused throw a baggie that was found to have three grams of cocaine in it. The officer pursued the pair of youths and stayed with the accused when the boys went in different directions. The accused was eventually apprehended and searched. The accused admitted to counsel that he was in possession of the cocaine but also that he felt he was stopped, pursued and searched because he is Black. The disclosure revealed that the officer has a disciplinary record as a result of an unrelated race-related complaint. Defence counsel believed there was a good faith basis to bring a Charter application. The application was dismissed. No plea offer was made. The matter proceeded to trial. The defence wants to cross-examine the officer on the race-related complaint in his record to raise reasonable doubt on possession, suggest that the arrest and charge was race motivated and it was, instead, the White youth who had possessed the drugs.

On the facts of this scenario, proponents of the Freedman approach would argue that counsel must attack the officer's credibility and introduce the disciplinary record in order to maintain the adversarial system, the presumption of innocence, and confidentiality between the lawyer and client. The decision not to cross-examine solely because the client has confessed guilt to his lawyer unjustifiably prejudices the client's best interest and collapses the integrity of the justice system. There is nothing illegal or untruthful about the record, and the officer's credibility concerning what he believes he saw is directly at issue.

Layton's comments imply that the correct approach in these circumstances is to consider counsel's duties to the client and administration of justice, which in turn

<sup>&</sup>lt;sup>130</sup> In February 2010, the Toronto Star reported about the Toronto Anti-Violence Intervention Strategy called "targeted policing". The practice involves randomly stopping and searching typically racialized persons in select high crime neighbourhoods. The officers will complete "Field Information Reports" of names, acquaintances, addresses and skin colour that form part of a police database of personal information. According to police statistics, the police carded 24,540 individuals in 2008 and 105,800 in 2009. See Moira Welsh, "Elite Toronto Police Squad Goes Looking for Trouble" *Toronto Star* (8 February 2010) online: Toronto Star <a href="http://www.thestar.com">http://www.thestar.com</a>. E.g. *R v Humphrey*, 2011 ONSC 3024, and *Kampe v Toronto Police Services Board*, [2008] HRTO 128.

<sup>&</sup>lt;sup>131</sup> The Supreme Court confirmed in *R v McNeil*, 2009 SCC 3 that Crown counsel must include in first party disclosure any police disciplinary records and criminal investigation files that are likely relevant to the investigation of the accused and could reasonably impact on the case against him or her. The principles in *McNeil* have been imported into proceedings before the Human Rights Tribunal of Ontario: see e.g. *Washington v Toronto Police Services Board*, [2009] HRTO 217.

<sup>&</sup>lt;sup>132</sup> Freedman, *supra* note 48 at 1471, 1482.

<sup>133</sup> *Ibid* at 1474-5.

encourages attacking the officer's character to raise reasonable doubt on the charge, <sup>134</sup> drawing out the use of possible profiling evidence, and combating both the perception and existence of discrimination in the justice system. <sup>135</sup>

Canadian courts have accepted that racialized and marginalized persons are disproportionately arrested and searched. <sup>136</sup> Further, lawyers' special relationship to the administration of justice requires that they encourage public respect for and try to improve the administration of justice by committing to the concept of equal justice for all within an open, ordered, and impartial system; speaking out against injustice, and; taking care not to destroy public confidence in legal institutions. <sup>137</sup> Public confidence in the criminal justice system would presumably worsen if a police officer were repeatedly found to have engaged in racial profiling. <sup>138</sup>

However, it is unclear on these facts whether Layton would recommend that the client plead guilty based on the strength of the Crown's case, or whether he would cross-examine the officer to combat discrimination. Layton only speaks to the situation where there is direct evidence of racism through a police officer's comments or conduct.

Rather than beginning from a default position like the zealous advocate, a contextual approach would begin with the purpose of the evidence, the legal and societal merit of the conduct, and any power imbalance and/or evidence of discrimination. Three factors considered by the contextual approach suggest that counsel should be able to use the disciplinary record in these circumstances to attack the officer's character and the veracity of the charge. <sup>139</sup>

First, racial profiling can result from overt, subconscious, or institutional racial bias. An officer could very well be unaware that he is engaging in this type of profiling. In any case, it is unlikely that a police officer will admit that she was influenced by racial stereotypes, so that racial profiling is rarely proven by direct

<sup>&</sup>lt;sup>134</sup> Layton, *supra* note 10 at 390.

<sup>&</sup>lt;sup>135</sup> Government of Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995).

<sup>&</sup>lt;sup>136</sup> See *R v Golden*, 2001 SCC 83 at para 83; *R v Brown* (2003), 64 OR (3d) 161 at para 9; *Peart v Peel Regional Police*, [2006] OJ No 4457 at para 94.

<sup>&</sup>lt;sup>137</sup> LSUC Rules of Professional Conduct, supra note 4 at Rule 4.06(1).

Officer S. Ceballo was alleged to have engaged in conduct that was consistent with racial profiling in both *Peart v. Peel Police*, *supra* note 136 and *R v Singh*, [2003] OJ No 3794.

<sup>&</sup>lt;sup>139</sup> In *R v Brown*, the Ontario Court of Appeal recognized that racial profiling can occur when race is used in conjunction with other factors such as youth, gender, location and dress: *supra* note 136 at para 9. <sup>140</sup> *Peart v Peel Police*, *supra* note 136 at paras 93-94.

<sup>&</sup>lt;sup>141</sup> *Ibid* at para 93.

evidence. 142 Therefore, circumstantial inference will often be a critical evidentiary tool with which to examine police actions. 143

Second, the imbalance of power inherent in police-citizen interactions is exacerbated in this case by the accused's ethnicity, youth, inexperience, and the adversarial relationship between the accused and the police officer. The exercise of state authority to stop the accused to investigate his behaviour injected an additional element of coercive power. Defence counsel would also want to explore whether the initial attempt to stop the youth was done to embarrass, intimidate, or discriminate against the youth. The initial accused to investigate his behaviour injected an additional element of coercive power.

Third, the demonstrated bias in the criminal justice system towards racialized persons <sup>146</sup> supports greater license to engage in zealous advocacy and ensure that the result obtained was not done in a discriminatory or improper fashion. <sup>147</sup> Any harm to caused by aggressive cross-examination and leading truthful evidence to suggest racial motivation in the police officer's actions, would be considerably less than aggressive questioning of a victim of sexual assault, which would perpetuate stereotypes and power imbalance. <sup>148</sup>

Finally, a number of recent cases involving police brutality, <sup>149</sup> untruthful testimony, <sup>150</sup> and obstruction of justice, <sup>151</sup> together with the difficulty Crown counsel

<sup>&</sup>lt;sup>142</sup> R v Brown, supra note 136 at paras 8, 44; Peart v Peel Police, supra note 136 at para 95.

<sup>&</sup>lt;sup>143</sup> Peart v Peel Police, supra note 136 at paras 91, 94.

<sup>144</sup> E.g. *R v Grant*, 2009 SCC 32 at paras 22, 32, 50, 178; *R v Wills* (1992), 7 OR (3d) 337 (CA) at para 45.

<sup>&</sup>lt;sup>145</sup> The Supreme Court cautioned against the use of police powers to intimidate, ridicule or pressure citizens to obtain admissions or unlawfully investigate criminal activity in *Cloutier v Langlois*, [1990] 1 SCR 158 at para 61. For cases where the police have been found to have used their powers to humiliate, demean and intimidate, see *R v Agostinelli*, [2002] OJ No 5008; *R v Golden*, *supra* note 136; and *Brown v Durham Police* (1998), 43 OR (3d) 223 (CA).

<sup>&</sup>lt;sup>146</sup> See Tanovich, *supra* note 10. Two comprehensive and compelling contributions on the prevalence of racial profiling in Canada and the United States are David Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall Law Journal 152; and Kenneth Meeks, *Driving While Black: Highways, Shopping Malls, Taxicabs, Sidewalks: Fight Back if You are a Victim of Racial Profiling* (New York: Broadway Books, 2000).

<sup>&</sup>lt;sup>147</sup> Tanovich, *supra* note 10 at 288. The Toronto Star has created a section on its online publication with studies showing how "race matters" when it comes to police patrol and searches, See "Police Patrol Zones" *Toronto Star* online: The Toronto Star <a href="http://www.thestar.com">http://www.thestar.com</a>>.

<sup>&</sup>lt;sup>148</sup> *Ibid*. See also Layton, *supra* note 10 at 390.

<sup>&</sup>lt;sup>149</sup> E.g. *R v Tran*, 2010 ONCA 471; *R v Bonds*, 2010 ONCJ 561.

<sup>&</sup>lt;sup>150</sup> Li, supra note 14; R v Salmon, 2011 ONSC 3654; R v McPhail, 2011 ONCJ 315; and R v Cook, 2010 ONSC 1188.

<sup>&</sup>lt;sup>151</sup> It was found in *Schaeffer v Wood*, 2011 ONCA 716 that two officers involved in the shooting death of a mentally disabled individual had vetted and prepared their notes of the incident with the assistance of counsel.

sometimes has in adopting a non-adversarial role pursuing justice, <sup>152</sup> suggest vigorous cross-examination of the truthful police officer is the only way in this case to expose falsehood, rectify error, correct distortion, or to elicit vital information that would otherwise remain forever concealed. <sup>153</sup>

This type of scenario is why the right of an accused to cross-examine truthful witnesses for the prosecution without significant and unwarranted constraint is an essential component of the right to make full answer and defence. However, as opposed to relying upon a steadfast position or subjective test, ethical limits are best identified and respected through contextual analysis of immediate and broader interests, impact, and the professional duties of counsel.

#### **CONCLUSION**

In a justice system that seeks to punish the guilty and spare the innocent through the pursuit of truth, discrediting a truthful witness appears to be counter-productive. Yet, while no legitimate interest will be served by using fraudulent means to precipitate a false legal conclusion, the use of truthful evidence to test the credibility and reliability of truthful testimony is more controversial. Until the Supreme Court weighs in on this issue, the law in this area will remain unsettled.

The main contribution of this paper has been to identify the current gap that exists in Canadian jurisprudence and the various codes regulating the profession, and to bring together and build on the discourse that exists in American and Canadian legal scholarship. Using this legal-ethical framework and theories of ethical lawyering, this paper's case studies examined the interplay between competing values and interests, and demonstrated that a contextual approach should be taken in deciding whether and to what extent the use of truthful evidence to test the credibility and reliability of truthful testimony can be used in any specific instance.

As much as rules are essential to how both Crown and defence counsel are expected to reconcile their duties to the client and the administration of justice, different individual and public interests in each case require measured legal and ethical responses

<sup>&</sup>lt;sup>152</sup> The Supreme Court confirmed in *R v Boucher*, [1955] SCR 16 and *R v Cook*, [1997] 1 SCR 1113 that the Crown performs a special function ensuring justice is served, but also acting as a strong advocate in the pursuit of a legitimate result. For examples where Crown counsel has struggled to remain at armslength with the police and operate in a non-adversarial fashion, see *Li*, *supra* note 14; *R v Emms*, 2010 ONCA 817; *Tran*, *supra* note 149; and *Bonds*, *supra* note 149.

<sup>&</sup>lt;sup>153</sup> Lyttle, supra note 12 at paras 1-2. For important discussion about the "code of silence" that exists amongst police officers, see Jerome Skolnick, "Corruption and the Blue Code of Silence" (2002) 3(1) IPES at 7-19 and Neal Trautman, "The Code of Silence Antidote" (2002) *The Law Enforcement Trainer* at 18-21.

<sup>&</sup>lt;sup>154</sup> Lyttle, supra note 12 at para 2.

to achieve justice. Adopting a contextual approach using the factors outlined in this paper will assist with navigating the fine line of ethical criminal advocacy. In circumstances where counsel must advance substantive legal norms such as equality, anti-discrimination, and fairness, the contextual approach will give defence counsel a license to use truthful evidence to discredit truthful testimony. In other situations, it will not.