NAME OF STANDARD	REQUIREMENTS WHEN DEALING WITH WITNESSES

DESCRIPTION OF STANDARD

When dealing with witnesses or potential witnesses, Counsel must ensure that their communications and conduct are ethical, competent and that any potential or actual conflicts are fully disclosed.[1]

Committee completed its work	Final Committee review	Reviewed by Executive Committee
Introduced to Council	Approved by Council	Revised

Consultation process in developing the Standard (incl. who was involved internal/external):

STANDARD: (including commentary and resources)

COMMENTARY

[1] There are a number of aspects to this standard[2] and they are:

1. Preparation of Counsel's client[3]
2. Preparation of a potential witness of Counsel's client
3. Preparation of and interviewing expert witnesses
4. Witness age or capacity issues
5. Communicating with a witness identified as adverse
6. Communicating with a witness who has conflicting interests
7. Conduct of direct or cross examination

CLIENT AS WITNESS

[2] Counsel will often need to prepare their client to testify. If their client elects not to testify on their own behalf, Counsel must take special care to ensure that the client is aware that it is their right to testify; it is only they that can relinquish that right, and Counsel must ensure the client is not relinquishing their right because of some misunderstanding or mistake of law. Failure to do so will be regarded as ineffective assistance of Counsel resulting in a miscarriage of justice. In such cases, it is highly advisable to receive those instructions in writing.[4]

COMMUNICATING WITH WITNESSES GENERALLY

[3] When dealing with a potential witness that is not adverse, a lawyer's aim is to adequately prepare the witness to testify in direct and in cross examination. Counsel should ensure the witness has an adequate opportunity to prepare for the presentation of their testimony. When preparing a witness to testify, a lawyer must ensure they do not taint, coach or influence the witness's testimony.[5] Counsel must never encourage deception and take care so they do not become a witness themselves.[6]

[4] It is good practice to meet with a witness other than the client with a third-party present, in the absence of the client, to prepare a written, dated memorandum of the meeting and request that the witness sign or initial the memorandum.

[5] Preparation of witnesses is an integral, necessary and important aspect of overall trial preparation. Counsel has a duty to come to Court fully informed and well prepared.[7]

[6] Proper witness preparation will include:

1. Where applicable, providing the witness with previous statements or documents to assist the witness to refresh their memory.
2. Offering advice as to appropriate language or choice of words or otherwise to aid them in the presentation of their testimony.
3. Offering advice as to acceptable demeanor before the court and manner of dress.
4. Reviewing facts, issues and questions; Counsel should never call a witness to testify without previously ascertaining the witness' answers on important issues or identifying areas for potential cross examination.
5. Preparing a witness for areas of cross examination.

[7] Ethical witness preparation must not include[8]:

1. Directing or encouraging a witness to misstate or misrepresent facts, or to be intentionally evasive or vague.
2. Doing anything which might induce the witness to develop a false story.
3. Providing a witness with answers to possible questions.

[8] In essence, counsel is prohibited from coaching a witness.[9]

[9] Different witnesses will have different preparation needs. A vulnerable witness will require more preparation than a professional witness who is often well-versed in giving evidence and in courtroom procedures, such as a police officer or an expert witness. Counsel should have regard to a witness's gender, race, culture or language barriers which may also require more preparation.

[10] Counsel has a duty to advance the client's case and to ensure the evidence is properly presented which affords the court to arrive at a determination of the case.[10]

[11] Crown counsel's duty is not to secure a conviction, but to seek a just determination based upon the evidence.[11]

[12] Potential witnesses should not be interviewed together to avoid tainting their evidence and reducing its credibility. For similar reasons, Counsel should usually request that the Court order an exclusion of witnesses. In the face of such an order having been imposed, Counsel must not impart information from the evidence adduced by a witness already called, to any witness they have pending, who has been excluded.

[13] Once a witness is sworn, in the absence of judicial permission otherwise, Counsel must not communicate with that witness regarding the case until they have been discharged. Also, Counsel must pay special attention to the possibility that a witness may be recalled to the stand for some reason, including rebuttal evidence.[12].

[14] It is advisable to have a third-party present for witness interviews, particularly for a witness adverse in interest or a vulnerable witness. The presence of a third party diminishes the risk that Counsel may become a witness in the event that the witness says something

different in court than they did in an interview, or if the witness alleges any impropriety by Counsel during the interview.

[15] Where *alibi* is asserted, Counsel must advise the client that notice of *alibi* is required in order to afford weight to that defence. Failure to provide sufficient or any notice of *alibi* does not prohibit the assertion of the defence but it has an adverse effect on the weight to be attributed to the alibi.[13]

[16] Additionally, Counsel is permitted to point out inconsistencies or flaws in the client's recollection but should never offer more plausible alternatives. Such conduct is not only unethical, but also tactically unsound.

[17] The lawyer must ensure witnesses' attendance.[14] If a witness requires that they be served with a subpoena to compel their attendance, witness fees are required unless the witness expressly waives this requirement. A witness ought to be paid for any expenses associated with their attendance at court. Service of a subpoena ought to be timely to avoid scheduling difficulties.

[18] A lawyer must not needlessly inconvenience a witness. Counsel has an obligation to avoid conduct that might needlessly inconvenience a witness and are not permitted to accede to a client's request to engage in such activity. As indicated, defence counsel has significant latitude and discretion as to the manner in which the case will be conducted, to refuse instructions from the client to the contrary, and should always exercise that discretion in a fashion consistent with the ethical obligations towards witnesses. [15]

[19] Avoiding inconvenience to the witness may involve notifying the witness of the date of the hearing and/or serving the subpoena as soon as the hearing date is known, providing the witness with some indication when they will testify if a matter is set for multiple days, reminding the witness of the court date/time, and calling of the witness if the matter will not be proceeding as scheduled.[16]

[20] While a witness may be cooperative and agree to come to court without service of a subpoena, the ability to invoke s.705 of the *Criminal Code* to obtain a witness warrant is dependent upon such service.[17] Similarly, if a witness does not appear as expected, an adjournment to secure their attendance will be more difficult or may not be granted if the court concludes Counsel is guilty of laches or neglect.[18] A decision to proceed in this manner should be confirmed by written instructions by the client.

[21] A subpoena must be in proper form and issued correctly and served by a peace officer or qualified process server.[19]

[22] The *Cost and Fees Act (NS)* governs the payment of witness fees by the Crown. While there is no rule requiring payment of expenses incurred by a witness for the defence in coming to court, as a matter of common courtesy and professional deportment, this should be negotiated with the witness in advance. A witness who has incurred costs that he/she is not properly reimbursed for is not likely to be the most forthcoming witness. While a subpoena is an Order of the court, the subpoena is issued on the application of counsel.

[23] Counsel may wish to consider requesting that a witness not discuss their possible testimony with other witnesses.

DEALING WITH AN ADVERSE WITNESS

[24] There is generally no property in a witness. Any party to an action may take a statement from a witness or call a witness to give evidence in court. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding should be free to impart it voluntarily and in the absence of improper influence. A lawyer should not advise a potential witness to refrain from speaking to other parties. It is ethically proper, however for Counsel to advise a witness that they are not obliged to do so. Subject to the rules on communication with a represented party set out in rules Code of professional Conduct 7.2-4 to 7.2-8, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence.[20]

[25] A lawyer must not improperly dissuade a witness from giving evidence or advise a witness to be absent. [21]

[26] A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, when the complainant or potential complainant is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. If the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused.[22] When communicating with an unrepresented complainant or potential complainant, it may be prudent to have a third-party present depending on the circumstances of the communication [See para 14].

[27] Also, Counsel is prohibited from offering or suggesting to a witness possible resolution of a Criminal proceeding in any manner in respect of other proceedings or as a term of an agreement. Similarly, Counsel must not threaten a witness with criminal proceedings. It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit.[23]

[28] Special considerations may apply when communicating with expert witnesses. Depending on the area of practice and the jurisdiction, there may be legal or procedural limitations on the permissible scope of a lawyer's contact with an expert witness, including the application of litigation privilege or solicitor-client privilege. This may include notifying an opposing party's counsel prior to communicating with that party's expert witness. [24]

PREPARATION FOR AND DELIVERY OF TESTIMONY

[29] A lawyer who has called a witness has a duty not to communicate with that witness about the witness's evidence in the matter, without leave of the court or tribunal, from the time when the witness is called until the witness concludes his or her testimony under examination, cross-examination or re-examination and is dismissed.[25]

[30] A lawyer must not knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another.[26] Once a witness has been sworn, if that witness provides testimony that Counsel believes or suspects is untrue, Counsel is obliged to avoid any further questioning on that topic which would confirm or support the untruthfulness of the assertion. Counsel must bear in mind the duty of Solicitor-Client confidentiality. The

testimony may require Counsel to advise the Court of the inconsistency, if Counsel can do so ethically and without breaching their ethical duty of confidentiality to the client.[27]

[31] During any witness testimony under oath or affirmation, a lawyer should not engage in any conduct designed to improperly influence the witness' evidence. The ability of a lawyer to communicate with a witness at a specific stage of a proceeding will be influenced by the practice, procedures or directions of the relevant tribunal, and may be modified by agreement of counsel with the approval of the tribunal. Lawyers should become familiar with the rules and practices of the relevant tribunal governing communication with witnesses during examination-in-chief and cross-examination, and prior to or during re-examination. In Nova Scotia, a lawyer may not communicate with a witness during examination in chief except with leave of the tribunal. [28]

[32] It is generally accepted that a lawyer is not permitted to communicate with the witness during cross-examination except with leave of the tribunal or with the agreement of counsel. The opportunity to conduct a full-ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objections to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing. [29]

[33] A lawyer should seek approval from the tribunal before speaking with a witness after cross-examination and before re-examination.[30]

[34] A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings. [31] A lawyer must not needlessly abuse, hector or harass a witness. [32] This direction relates to conduct both outside and inside the courtroom. Section 139(3) of the *Criminal Code* provides that a person commits the offence of obstruction of justice where they, in a judicial proceeding existing or proposed, "dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence". Within the courtroom, it has long been recognized that there are limits on cross-examination.

[35] In adversarial proceedings, Counsel has a duty to their client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help their client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.[33]

[36] When questioning a witness, Counsel must not make suggestions to a witness recklessly or knowing them to be false and must not knowingly misstate the witness' testimony. When cross examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

[37] Counsel ought not pursue questions in cross-examination that they, acting reasonably and competently, would know are neither relevant nor admissible. Section 276 of the *Criminal*

Code sets out various offences for which counsel are presumptively prohibited from adducing any evidence of prior sexual activity involving the complainant that does not form the subject matter of the charge. Similarly, section 278 of the *Criminal Code* presumptively prohibits the use of any record for which the complainant would have a reasonable expectation of privacy. Counsel must make an application in advance of trial should they wish to introduce such evidence. Defence counsel are ethically precluded from using strategies and advancing arguments that rely for their probative value on social assumptions about sexual violence that have been legally rejected as baseless and irrelevant.

[38] Counsel involved in a proceeding, during an examination and a cross-examination by opposing Counsel, must not obstruct the examination and cross-examination in any manner.[35]

[39] The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counter-balanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing and direct examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

[40] In the criminal law context, consideration of witness competence and capacity requires[36]:

(a) an understanding of witness competency –

> Counsel should be familiar with the provisions of sections 4, 6, 16 and 16.1 of the *Canada Evidence Act (Canada)* relating to competence, capacity and compellability and a witness whose capacity is in issue

(b) an understanding of how to procure the appearance of a witness –

> Counsel should be familiar with the provisions of s. 698 to s. 703.2 of the *Criminal Code* regarding the issuance and execution of process

(c) an understanding of the law and procedural requirements related to expert witnesses

> Counsel should be familiar with the rules related to expert testimony in s. 657.3 of the *Criminal Code* and s. 7 of the *Canada Evidence Act*. Counsel should be familiar with the common law rules relating to the calling and qualifying of witnesses to give expert opinion evidence (*R. v. Mohan, [1994] S.C.J. No. 36*)

(d) an understanding of procedures related to refreshing memory and adverse witnesses

> Counsel should be familiar with the process to refresh a witness's memory (*Reference re R. v. Coffin, [1956] S.C.R.191*)
> Counsel should be familiar with s. 9 of the *Canada Evidence Act* and the procedure to apply for leave to cross-examine one's own witness regarding a prior inconsistent statement (*R. v. Milgaard (1971), 2 C.C.C. (2d) 206 (Sask. C.A.)*)

(e) an understanding of the principles of direct, cross, re-examination and rebuttal

(f) an understanding of impermissible lines of cross-examination as developed from the common law as well as statutory prohibitions such as s. 276 of the *Criminal Code*

(g) an understanding of *Criminal Code* provisions related to the protection of witnesses, such as bans on publication of identity, testimonial aids and other supports

[41] Counsel should ensure that they are acquainted with the Rule in *Browne and Dunn*.

[42] Counsel must also understand the process for dealing with adverse witnesses or confronting witnesses with prior inconsistent statements [39].

1. See generally, Code of Professional Conduct, Rule 5 but in particular Rule 5.4
2. Ibid
3. Code of Professional Conduct, Commentary following Rule 5.1-1
4. R. v. Charter 2022 NSCA 18; R. v. AWH 2019 NSCA 40
5. Code of Professional Conduct, Rules 5.1-2; 5.4-1(b) & 5.4-2 with Commentary
6. Code of Professional Conduct, Rule 5.2 and Commentary
7. Code of Professional Conduct, Rule 5.1 and Commentary
8. See Note 5 above
9. Ibid. See also Code of Professional Conduct, Rule 5.1-2A
10. See generally Code of Professional Conduct, Rule 5.1-1 & 5.1-2
11. Code of Professional Conduct, Rule 51-3 and Commentary [1]
12. Code of Professional Conduct, Rule 5.4-3 Commentary [3] to [6]
13. R. v. Cleghorn [1995] 3 SCR 175; R. v. W(N) 2017 NSPC 38; R. v. Lewis 2020 NSSC 210
14. R. v. Darville (1956) 116 CCC (SCC)
15. See Code of Professional Conduct, Rule 5.1-2(m)-(0).
16. See Skurka LSUC lectures, Guide to Best Practices Barreau du Quebec
17. *Criminal Code* Section 705(1)
18. See Note 13
19. *Criminal Code* sections 699 to 701

20. Code of Professional Conduct Rule 5.4-1 and Commentary

21. Code of Professional Conduct Rule 5.1-2(j))

22. See Note 20

23. Code of Professional Conduct Rules 3.2-5 and 3.2-6 and Commentary. Also see *Criminal Code* section 346.

24. See Nova Scotia Code of Professional Conduct. See also Section 657.3 *Criminal Code*

25. Code of Professional Conduct Rule 5.2-1

26. Code of Professional Conduct Rule 5.1-2(k)

27. See law Society of BC v. AG Can 2001 BCSC 1593

28. Code of Professional Conduct Rule 5.3-1). Also see note 12

29. Ibid

30. Ibid

31. Code of Professional Conduct Rule (Rule 5.1-5).

32. Code of Professional Conduct (Rule 5.1-2(m)) and Commentary 5.4 [3] to [7].

See also In *R. v. Varga*, 1994 canLii 8727 (ONCA, [1994] O.J. No. 1111, 18 O.R. (3d) 784 (C.A.), speaking for the court, at paras. 48 and 49, Doherty J.A. stated:

> A trial judge has a responsibility to ensure that no witness is harassed or otherwise mistreated when giving evidence. At the same time, a trial judge must be sensitive to an accused's right to make full answer and defence through effective cross-examination of the witnesses called by the Crown... (Emphasis added.)
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> In deciding whether a trial judge should have prohibited cross-examination as abusive, an appellate court must also recognize the advantaged position of the trial judge. He or she is able to watch the witness and the questioner as the cross-examination proceeds, to observe the effect of the cross-examination, and to hear the tone of voice in which questions are asked and answered. The trial judge is able to use these oral and visual aids in distinguishing between cross-examination which is persistent and exhaustive, and that which is abusive. The trial judge is also able to assess the extent to which the attitude and answers of the witness contribute to the nature and tone of the cross-examination.
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> Abuse, hectoring and harassment may occur because of the questions asked or the manner in which they've been asked

33. Counsel should be familiar with s. 486 to s. 486.5 of the *Criminal Code*

s. 486 - Exclusion of the public
s. 486.1 - Support person
s. 486.2 - Testimony outside of the courtroom or behind a screen
s. 486.3 - Accused not to cross-examine witness under 18
s. 486.31 - Non-disclosure of witness' identity
s. 486.4 - Order restricting publication – sexual offences
s. 486.5 - Order restricting publication – victims and witnesses

33. See Code of Professional Conduct, Rule 5.1-3

34. Counsel should see R. v. Lyttle, 2004 SCC 5, [2004] 1 S.C.R. 193 regarding the permissible bounds of cross examination (at para 47 and 48):

> 47 Unlike the trial judge, and with respect, we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true, without being able to prove it otherwise than by cross-examination; nor is it uncommon for reticent witnesses to concede suggested facts – in the mistaken belief that they are already known to the cross-examiner and will therefore, in any event, emerge.
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> 48 In this context, 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.

35. Counsel should understand the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) which has been stated as follows:

> This well-known rule stands for the proposition that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while he or she is in the witness box. (R. v. Henderson [1999] O.J. No. 1216 (Ont. C.A.) Sources: Code of Conduct, Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases Osgoode Hall Law Journal 51:2, Forthcoming Osgoode Legal Studies Research Paper No. 2/2014

36. See section s 9, 10 and 11 of the Canada Evidence Act, Also see R. v. Milgaard (1971), 14 CRNS 34and R. v. FJU (1994) 32 CR (4th) 378.