



Memo

To: Members of the Profession and others interested in BC Code changes
From: The Ethics Committee
Date: October 6, 2017
Subject: Consultation on proposed *Code of Professional Conduct* Rules 5.3 & 5.4:
Interviewing and Communicating with Witnesses

This memorandum presents for review and comment draft amendments involving rules 5.3 and 5.4, and associated Commentary, of the *Code of Professional Conduct for British Columbia* (the “BC Code”). The Ethics Committee is now seeking feedback from members of the profession and other interested persons prior to finalizing its recommendation to the Benchers on any potential amendments. Individuals interested in providing comments for the Committee to consider may do so by email to the attention of Lance Cooke at lcooke@lsbc.org. Please be sure to identify in the subject line of such emails that the message is a response to the Ethics Committee’s consultation on BC Code rules 5.3 and 5.4.

Introduction

With amendments adopted in late 2016, the Federation of Law Societies of Canada (“FLSC”) substantially changed the language, organization, and overall approach of the *Model Code of Professional Conduct* rules addressing lawyers’ communications with witnesses. When such changes are made, the new rules are circulated to all Canadian law societies to determine the extent of similar changes, if any, that should be made to the codes of conduct that guide lawyers’ activities in each provincial or territorial jurisdiction. The Ethics Committee has reviewed and considered the changes to the Model Code, in conjunction with reviewing the corresponding provisions in the BC Code, in order to provide the draft amendments presented below.

In conducting its review of the Model Code changes, the Ethics Committee is guided by the principle that where it is reasonable to do so, the BC Code, like other codes of conduct across the country, should follow the lead of the Model Code, in order that Canadian law societies can adopt and promote relatively consistent professional standards for lawyers’ conduct across Canada. While progressively developing consistent national standards is a valued goal, the process is not one of simply adopting the Model Code’s provisions without critical reflection. The Ethics Committee attempts to take into account the context of the practice of law in British Columbia and that means that in some instances Model Code amendments may not be adopted

into the BC Code or may be modified somewhat before being recommended for adoption by the Benchers.

The Model Code provisions addressing lawyers' communications with witnesses have provided a challenging task because the overall organization and approach of those rules is quite different than the organization and approach of the existing BC Code provisions. It is not always possible to identify each point addressed by the BC Code and locate the corresponding point in the Model Code provisions. The approach of the Model Code's rules has been described as more general and an attempt to stay closer to basic principles. Some of the more specific considerations have been shifted into the Commentary portion of the Model Code. In order to give appropriate weight to the value of relatively consistent national standards and to keep open the potential for developing further consistency across jurisdictions in the future, the Committee determined to attempt to follow the basic structure of the Model Code's new provisions. However, for present purposes in British Columbia, the Committee was also concerned that the resulting provisions should not represent a loss of significant guidance relative to the provisions they would replace. Accordingly, a careful comparison will reveal some differences, not only between the draft rules provided for consultation and the BC Code rules they would replace, but also between the draft rules and the Model Code's rules. In crafting these draft rules, the Ethics Committee has attempted to preserve the best guidance of the existing BC Code rules, while adopting the basic format and approach of the Model Code provisions.

The following four sets of the relevant code provisions are attached below for the purpose of review and comparison:

- Clean draft prospective amended BC Code provisions
- Draft prospective amended BC Code provisions red-lined to the existing Model Code provisions
- Clean copy of existing Model Code provisions
- Clean copy of existing BC Code provisions

To follow references to any related BC Code provisions, the entire current BC Code is available online here: <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/>

To follow references to any related Model Code provisions, the entire current Model Code is available here: <http://flsc.ca/wp-content/uploads/2017/08/Model-Code-as-amended-March-2017-Final.pdf>

1. Clean draft prospective amended BC Code provisions

5.3 [deleted]

5.4 COMMUNICATING WITH WITNESSES

5.4-1 A lawyer may seek information from any potential witness, provided that:

(a) before doing so, the lawyer discloses the lawyer's role in the matter and general purpose in contacting the witness;

(b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and

(c) the lawyer observes Rules 7.2-6 to 7.2-8 on communicating with represented parties.

Commentary

[1] There is generally no property in a witness. 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 except as permitted in this rule.

Expert witnesses

[2] 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 or solicitor-client privilege. A lawyer must notify an opposing party's counsel when the lawyer is proposing to contact the opposing party's expert witness.

Conduct during Witness Preparation and Testimony

5.4-2 A lawyer must not influence a witness or potential witness to give evidence that is false, misleading or evasive.

5.4-3 A lawyer involved in a proceeding must not obstruct an examination or cross-examination in any manner.

Commentary

General Principles

[1] The ethical duty against improperly influencing a witness or a potential witness applies at all stages of a proceeding, including while preparing a witness to give evidence or to make a statement, and during testimony under oath or affirmation. The role of an advocate is to assist the

witness in bringing forth the evidence in a manner that ensures fair and accurate comprehension by the tribunal and opposing parties.

[2] A lawyer may prepare a witness, for discovery and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

Communicating with Witnesses Under Oath or Affirmation

[3] During any witness testimony under oath or affirmation, a lawyer should not engage in conduct designed to improperly influence the witness' evidence.

[4] 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.

[5] A lawyer, including the examining lawyer, may communicate with a witness on any matter during examination-in-chief, subject to the direction of the tribunal.

[6] 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.

[6.1] This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has recently been retained by a witness under cross-examination, from consulting with the lawyer's new client.

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

Discoveries and Other Examinations

[8] Rule 5.4 also applies to examinations under oath or affirmation that are not before a tribunal including examinations for discovery, examinations on affidavits and examinations in aid of

execution. Lawyers should scrupulously avoid any attempts to influence witness testimony, particularly as the tribunal is unable to directly monitor compliance. This rule is not intended to prevent discussions or consultations that are necessary to fulfil undertakings given during such examinations.

2. Draft prospective amended BC Code provisions red-lined to the existing Model Code provisions

5.3 *[deleted]*

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5.4-1 A lawyer may seek information from any potential witness, provided that:

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(b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and

(c) the lawyer observes Rules 7.2-6 to 7.2-8 on communicating with represented parties.

Commentary

[1] There is generally no property in a witness. 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 except as provided-permitted in this rule.

Expert witnesses

[2] 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 or solicitor-client privilege. This may include notifying A lawyer must notify an opposing party's counsel prior to communicating with that when the lawyer is proposing to contact the opposing party's expert witness.

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[2] A lawyer may prepare a witness, for discovery and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

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[5] A lawyer, [including the examining lawyer](#), may communicate with a witness [on any matter](#) during examination-in-chief, [subject to the direction of the tribunal](#). ~~However, there may be local exceptions to this practice.~~

[6] ~~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.

[\[6.1\] This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has recently been retained by a witness under cross-examination, from consulting with the lawyer's new client.](#)

[7] A lawyer should seek approval from the tribunal before speaking with a witness after cross-examination and before [or during](#) re-examination.

Discoveries and Other Examinations

[8] Rule 5.4 also applies to examinations under oath or affirmation that are not before a tribunal including examinations for discovery, examinations on affidavits and examinations in aid of execution. Lawyers should scrupulously avoid any attempts to influence witness testimony, particularly as the tribunal is unable to directly monitor compliance. This rule is not intended to prevent discussions or consultations that are necessary to fulfil undertakings given during such examinations.

3. Clean copy of existing Model Code provisions

5.3 *[deleted]*

5.4 COMMUNICATING WITH WITNESSES

5.4-1 A lawyer may seek information from any potential witness, provided that:

- (a) before doing so, the lawyer discloses the lawyer's interest in the matter;
- (b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and
- (c) the lawyer observes Rules 7.2-6 to 7.2-8 on communicating with represented parties.

Commentary

[1] There is generally no property in a witness. 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 except as provided in this rule.

Expert witnesses

[2] 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 or solicitor-client privilege. This may include notifying an opposing party's counsel prior to communicating with that party's expert witness.

Conduct during Witness Preparation and Testimony

5.4-2 A lawyer must not influence a witness or potential witness to give evidence that is false, misleading or evasive.

5.4-3 A lawyer involved in a proceeding must not obstruct an examination or cross-examination in any manner.

Commentary

General Principles

[1] The ethical duty against improperly influencing a witness or a potential witness applies at all stages of a proceeding, including while preparing a witness to give evidence or to make a statement, and during testimony under oath or affirmation. The role of an advocate is to assist the witness in bringing forth the evidence in a manner that ensures fair and accurate comprehension by the tribunal and opposing parties.

[2] A lawyer may prepare a witness, for discovery and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

Communicating with Witnesses Under Oath or Affirmation

[3] During any witness testimony under oath or affirmation, a lawyer should not engage in conduct designed to improperly influence the witness' evidence.

[4] 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.

[5] A lawyer may communicate with a witness during examination-in-chief. However, there may be local exceptions to this practice.

[6] 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.

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

Discoveries and Other Examinations

[8] Rule 5.4 also applies to examinations under oath or affirmation that are not before a tribunal including examinations for discovery, examinations on affidavits and examinations in aid of execution. Lawyers should scrupulously avoid any attempts to influence witness testimony, particularly as the tribunal is unable to directly monitor compliance. This rule is not intended to prevent discussions or consultations that are necessary to fulfil undertakings given during such examinations.

4. Clean copy of existing BC Code provisions

5.3 Interviewing witnesses

5.3 Subject to the rules on communication with a represented party set out in rules 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 or procure the witness to stay out of the way.

Annotations

5.4 Communication with witnesses giving evidence

5.4-1 A lawyer involved in a proceeding must not, during an examination and a cross-examination, obstruct the examination and the cross-examination in any manner.

5.4-2 Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence:

- (a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;
- (b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;
- (c) upon the conclusion of cross-examination and during any re-examination, with the leave of the court, the lawyer may discuss with the witness any matter;
- (d) during examination for discovery, the lawyer may discuss the evidence given or to be given by the witness on the following basis:
 - (i) where a discovery is to last no longer than a day, counsel for the witness should refrain from having any discussion with the witness during this time.
 - (ii) where a discovery is scheduled for longer than one day, counsel is permitted to discuss with his or her witness all issues relating to the case, including evidence that is given or to be given, at the conclusion of the discovery each day. However, prior to any such discussion taking place, counsel should advise the other side of his or her intention to do so.

(iii) counsel for the witness should not seek an adjournment during the examination to specifically discuss the evidence that was given by the witness. Such discussion should either wait until the end of the day adjournment or until just before re-examination at the conclusion of the cross-examination.

Commentary

[1] The application of these rules may be determined by the practice and procedures of the tribunal and may be modified by agreement of counsel.

[2] The term “cross-examination” means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. The rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.

[3] The opportunity to conduct a fully 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 objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

[6] This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer’s new client.

[8] For a discussion of issues relating to counsel speaking to the witness during examination for discovery see *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* (1992), 72 B.C.L.R. (2nd) 240 (B.C.S.C) and *Iroquois Falls Power Corp. v. Jacobs Canada Inc.* [2006] O.J. No. 4222 (Ont.Sup.Ct.). See also Shields and Shapray, “Woodshedding, Interruptions and Objections: How to Properly Conduct and Defend an Examination for Discovery”, *the Advocate*, Vol. 68, Part 5, Sept. 2010.