TAB 6

Evidentiary Ethical Issues

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Evidentiary Challenges for Criminal Lawyers

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING PROFESSIONAL DEVELOPMENT

Evidentiary Ethical Issues

1. Perjured testimony

- what if client insists you call witness you "know" will give false evidence?
    - basic rule, cannot lead evidence you "know" to be false: Rule 2.02(5) and Rule 4.01
    - Rule 4.01 of RPC

> 4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.
>
> (2) When acting as an advocate, a lawyer shall not (a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party, (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,
>
> Commentary: The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the 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 where justice can be done.
>
> Duty as Defence Counsel - When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences including so-called technicalities not known to be false or fraudulent.

- issue of "knowing" something to be false
- Plan A: dissuade client

- Plan B: withdraw from case if it not prejudice client

- Plan C: do not call the witness [memo to file]

- approach any different if the client says that he is going to take the stand and falsely claim to have been some where else?

- same Plan A and B

- Plan C is different: client has right to testify – if not A or B, then must allow client to provide perjured testimony BUT cannot support or rely

- *contra* Monroe Freedman

2. Cross-examination

- what if instead of telling you that they have false evidence for you to present, the client insists on you cross-examining a Crown witness about something you know to be false?

- Rule 4.01 of RPC - BUT careful not to over-extend the prohibition

  - 4.01(g) knowingly assert as true a fact when its truth ***cannot reasonably be supported by the evidence*** or as a matter of which notice may be taken by the tribunal,

- Rule in *R. v. Lyttle*, [2004] 1 S.C.R. 193

  - As a matter of law, an advocate is entitled to use his or her discretion as to whether to put questions in the course of cross-examination which are based on material which he or she is not in a position to prove directly: see also *R. v. D.(C.)* (2000), 145 C.C.C.(3d) 290 at 317 (Ont.C.A.)

  - could not ask something you know to be false

  - BUT do not need to "know" it to be true – only good faith basis – "might reasonably be true"

- according to RPC, however, counsel may not assert as true a fact if counsel knows that the truth of the fact cannot reasonably be supported by the evidence

- counsel's professional and legal obligations may conflict: *D.(C.), supra*.

- in *D.C.,* the Ontario Court of Appeal suggested that because of this potential for conflict the *Bencardino* rule (*i.e.*, the *Lyttle* Rule) may have to be reconsidered and modified

- wrong rule to change

- even OCA noted that in *The Trial of an Action, 2ed.* (1998) Sopinka J. stated that the governing ethical rule should merely prohibit questions for which there is no foundation in the information available to counsel

3. Potential use of inadvertently disclosed confidential information

- what if the client hands you a putatively "confidential" document which ***he claims*** contains the information necessary for you to have a "good faith" basis for asking questions?

- no more jurisprudential doubt that inadvertent disclosure does not somehow "out" a confidential informer

- Crown is entitled to apply to court to have the horses put back in the barn: *R. v. Mohamed*, [2008] O.J. No. 5162; *R. v. Akleh*, [2008] O.J. No. 5577 (S.C.); *R. v. Lucas*, [2009] O.J. No. 2251 (S.C.)

- AND, if you viewed the info, Crown may also be able to have court disqualify

- duty to advise client of all that ***before examining contents of document***

- what if the inadvertently disclosed document is entitled a solicitor-client communication and is sought to be used by the Crown as a basis to cross-examine an accused?

- shouldn't be and probably isn't any different than above

- *Dunbar and Logan*, [1982] O.J. No. 581 (C.A.), held that the evidentiary privilege was erased by the inadvertent disclosure of the confidential

- notwithstanding that it was Martin J.A., that 1982 approach to sol-client privilege as a rule of evidence was overtaken by a series of SCC decisions which recognized sol-client confidentiality as a substantive right, starting with *Descoteaux* and more recently with *Lavalee, Rackel and Heintz,* [2002] S.C.J. No. 61 at para. 49

- as a substantive right, could only be waived if voluntary and unequivocal

- lots of cases in the civil sphere to support contention that inadvertent disclosure is not waiver of sol-client privilege [also Mosley J. in F.C.T.D. decision in *Khawaja*]
- Crown who tried to take advantage of inadvertently disclosed sol-client information could and should suffer same fate as defence counsel who tried to do likewise with confidential informer info

4. Calling evidence which is technically admissible on one issue but which is obviously prejudicial on another material issue

- what happens when one counsel is proffering evidence which is technically admissible on a relatively non-contentious issue but which is obviously prejudicial on a more important issue?
- unless opposing party can make out oblique motive (*i.e.*, abuse of process), analysis must turn on probative vs. prejudice
- expect proffering counsel to be able to recognize and articulate the prejudice as much as they recognize the probative value