1. THE OBLIGATION TO INTERVIEW ALL WITNESSES [§9.8]

Interviewing potential witnesses is often necessary to fulfill counsel's duties to one's client. Rule 2.1-3 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*") requires lawyers to "obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client". Ascertaining the relevant facts will often require interviewing potential witnesses; the failure to do so may in some circumstances amount to professional negligence (see *Fawell v. Atkins*, 1981 CanLII 654 (BC SC), where counsel was found to be negligent for recommending settlement of a motor vehicle action without first interviewing a valuable independent witness who could have corroborated their client's account).

Spending hours with a key witness is not only ethical but essential. A witness, particularly one who is not a party, will normally have forgotten a great deal of what is important to the case. Counsel's task is to work with that witness and permit them to become re-acquainted with the context of the case, the documentary evidence, and what other prospective witnesses have recalled before their minutes of evidence are concluded.

2. APPROACHING A PROSPECTIVE WITNESS [§9.9]

When a potential witness has been identified through pre-trial preparation, contact should be made as soon as possible, and a preliminary interview should be arranged. The best method of approach will vary and could be by letter, email, contact through an intermediary, or over the telephone. An email can set out a brief explanation about the interest in them as a witness and ask that they contact counsel at their convenience. This may put the witness more at ease than an unexpected phone call. No single approach is inherently preferable to another, although a gently persuasive call placed directly by the lawyer to the witness at the outset will often assist in overcoming the reluctance a witness may feel in connection with involvement in a trial. It will also assist in the early development of rapport.

If the client is acquainted with the potential witness, they may wish to make the first approach. This is fine and is often the most natural means by which contact is made. It is, however, essential in these circumstances for the lawyer to advise the client *not* to discuss the details of the case with the witness, as doing so may compromise the value of the witness's later testimony at trial.

A lawyer must not approach a prospective witness who is represented by counsel without first obtaining that lawyer's permission to speak with their client (rule 7.2-6). In the case of an organization represented by counsel, a lawyer must not approach an officer or employee of that organization unless the organization's lawyer consents or contact is "otherwise authorized or required by law" (rule 7.2-8).

When contacting a prospective witness, rule 5.3 of the *BC Code* requires lawyers to disclose their interest in the matter and to avoid suppressing evidence:

> **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.

There is no property in a witness, and counsel should not allow the opposition to appropriate someone they want to speak with (*Stainer v. Insurance Corp. of British Columbia*, 2001 BCCA 133 at para. 12). Counsel should normally endeavour to make contact before trial even with those witnesses whose sympathies are thought to rest with the other side. At worst, the inquiring phone call will end quickly when the person hangs up. (Even then, Supreme Court Civil Rule 7-5(1) to (10), which provides for pre-trial examination of witnesses, presents a viable alternative in many cases.)

3. COMMUNICATING WITH PROSPECTIVE WITNESSES [§9.10]

There are professional obligations that apply to the way counsel communicate with prospective witnesses and how counsel may permissibly prepare witnesses to give evidence.

Pursuant to the *BC Code*, counsel must be courteous and civil and act in good faith with all potential witnesses (rule 7.2-1). Counsel must not communicate with prospective witnesses in a manner that is "abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer" (rule 7.2-4).

It is not advisable to interview multiple witnesses together because group preparation of witnesses may "give rise to an inference that a witness was influenced, whether innocently or not, by what others in the room said" (*Gemmell v. Reddicopp*, 2005 BCCA 628 at para. 47).

Further ethical considerations apply at the stage where counsel prepare a witness to testify. While thorough preparation of a witness is important, counsel must take care to respect the boundary between

proper preparation and improper coaching. In respect of clients, lawyers have a duty to "endeavor by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law" (*BC Code*, rule 2.1-3(e)). In addition, lawyers must balance their obligations to the court and to the administration of justice, which include obligations not to:

- "attempt to deceive a court or tribunal by offering false evidence or by misstating facts" (rule 2.1-2(c));
- "engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud" (rule 3.2-7);
- "knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable" (rule 5.1-2(b));
- "knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct" (rule 5.1-2(e));
- "make suggestions to a witness recklessly or knowing them to be false" (rule 5.1-2(h));
- "improperly dissuade a witness from giving evidence or advise a witness to be absent" (rule 5.1-2(j)); or
- "knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another" (rule 5.1-2(k)).

The boundary between proper preparation and impermissible coaching must be assessed with regard to these various professional obligations. As stated by Cromwell J., "The conventional wisdom places the line between making the evidence relevant and effective, which is permissible, and tampering with the evidence, which is not" (Cromwell J., B. Finlay, KC, and N. Iatrou, *Witness Preparation: A Practical Guide*, 3rd ed. (Carswell, 2010) at p. 107).

"Scripting" a witness, in the sense of suggesting what their evidence should be, is wrong. As explained in *Halsbury's Laws of Canada*:

> It is not appropriate for a lawyer to instruct a witness as to what they should say, or how to express particular ideas, or to take other steps that might affect the accuracy of the evidence given by the witness, or cause the witness to alter the emphasis of their evidence. Any pressure on a witness, with a view towards encouraging that witness to bring their testimony into line with the evidence provided by others (or with a particular version of events), is prohibited, as is the use of other methods

> to attempt to influence or contaminate a witness's evidence. (See Associate Judge Linda S. Abrams, Kevin P. McGuinness, Heather MacIvor, Jay Brecher *Halsbury's Laws of Canada - Civil Procedure* (2021 Reissue) online at HCV-238).

In addition to running afoul of one's ethical obligations, scripting testimony also generally produces weaker evidence. "Scripting" a witness, in the sense of giving "lines" that stray beyond what that witness knows or believes, represents artificially induced evidence that tends to ring hollow and collapse in cross-examination. It is wrong to put words in a witness's mouth to suggest what they should say to suit counsel's case. A witness's evidence needs to be authentic, and for this, they need to speak in their own voice.

For a further discussion of the ethical obligations that apply to witness preparation, see J. Francis and S. Herra, "Preparing Lay Witnesses for Direct Examination" in *Direct Examination 2023* (CLEBC 2023), available through CLEBC's Courses on Demand; and chapter 9 (Witness Preparation and Professional Responsibility) of *Witness Preparation: A Practical Guide*.

4. SPECIAL WITNESS CONSIDERATIONS [§9.11]

There is no "one size fits all" approach to interviewing prospective witnesses, and counsel in all cases should adapt their strategy to the potential witness in question. In particular, some special considerations apply in respect of vulnerable witnesses and uncooperative witnesses, described beginning at "Overcoming Witness Reluctance to Testify" in this chapter.

a. Overcoming Witness Reluctance to Testify [§9.12]

Some witnesses will be unwilling to testify or even to speak openly when they are first approached. This is understandable. The trial process is foreign to most non-lawyers, time is precious, and the prospect of public speaking may hold little appeal. It is, therefore, sometimes necessary for a trial lawyer to persuade an unwilling witness to divulge what they know about a case, and then to agree to do so again in court.

There are no hard and fast rules for how to persuade reluctant witnesses to come forward. Experience suggests that some approaches tend to succeed where others might fail. For example, it is often helpful for a lawyer to employ the following techniques during an initial telephone contact, or if the witness prefers, initial video contact through Zoom or Microsoft Teams: