

What Ought Crown Counsel to do in Prosecuting Sexual Assault Charges? Some Post-Ghomeshi Reflections

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Case Commented On: *R v Ghomeshi*, [2016 ONCJ 155](#)

The *Ghomeshi* trial made me think about the ethical duties of prosecutors in sexual assault cases. *Not* because I have any basis for saying that the prosecutors violated their ethical duties. I have no personal knowledge of what the prosecutors did or did not do in their preparation and presentation of the *Ghomeshi* case. I also do not know either the pressures they faced or the policies that governed their decisions.

Rather, I have thought about the ethical duties of prosecutors because of claims made by people in response to criticisms of the *Ghomeshi* prosecutors. Specifically, I have heard the following:

- The prosecutor simply takes the case the police provide: “You do the best you can with the evidence you’re given” (Laura Fraser, “Jian Ghomeshi trial questions answered by criminal lawyers” CBC February 12, 2016, [here](#)).
- The prosecutor should not prepare witnesses. Otherwise, the prosecutor risks becoming a witness due to his disclosure obligations pursuant to *R v Stinchcombe*, [\[1991\] 3 SCR 326](#): “Crown interference, even through so-called preparation, can result in a Crown Attorney becoming a witness to the own proceeding or worse still a stay of proceeding for an abuse of process” (Sean Robichaud, “In Defence of the Crown in Ghomeshi”, [here](#)).
- The prosecutor represents the public, not the complainants, and owes the complainants no obligation in his role as prosecutor.

(See also [here](#) and [here](#))

In my view, each of these propositions is at best incomplete, and at worst wrong. The exercise of a prosecutor’s discretion requires her to examine, assess and even investigate a case. She cannot properly exercise that discretion without interviewing and assessing complainants and other witnesses. In addition, as the Supreme Court has made clear, a prosecutor at trial is an advocate in an adversarial system (*R v Cook*, [\[1997\] 1 SCR 1113](#)). No competent advocate presents a case at trial with witnesses unprepared for the rigours of cross-examination. No ethical advocate coaches witnesses, but no competent advocate fails to prepare them. The *Stinchcombe* risk is overstated and can almost always be addressed without requiring the prosecutor to be a witness at trial. And while the prosecutor does represent the public (technically, the Crown), that does not excuse the prosecutor from the ordinary moral obligation not to unnecessarily inflict injury on others, and it certainly does not excuse the lawyer from the obligation not to inflict an injury through dereliction of her professional obligations. That a

complainant is not the prosecutor's client – i.e., that the prosecutor's primary professional obligation is to someone else – does not prove that the prosecutor owes a complainant no duty.

Each of these propositions would be wrong in any case – not adequately preparing the victim of an alleged robbery for cross-examination would be incompetent too – but adherence to them in a sexual assault case is more troubling. An accused suffers a worse reputational injury by going through an unnecessary trial than in other areas; given the credibility-based nature of most sexual assault trials, a case cannot be competently presented without adequate witness preparation; and the troubling reality of how sexual assault cases are sometimes defended makes sexual assault witnesses far more vulnerable than ordinary witnesses, and in need of better preparation before trial and better protection at trial than an average witness (see [Craig](#) and [Tanovich](#)). Competent and effective advocacy by a prosecutor matter in all cases, but they matter more in sexual assault cases.

I recognize that fulfilling these duties in practice can be very difficult. Prosecutors operate with extremely limited resources. Judges may not appreciate the difference between preparing a witness and coaching, and lawyers themselves may reasonably find maintaining that balance tricky – it *is* tricky. Any mistake by a prosecutor is likely to be seized upon by a zealous defence counsel, undermining the prosecutor's reputation and her likelihood of success at trial. Prosecutors have disparate duties and obligations that can be hard to reconcile. But the practical difficulties must be resolved in light of the underlying norms that govern prosecutorial conduct. The worry that has motivated this blog post is that those underlying norms appear to be misunderstood or misrepresented, even by people participating in the criminal justice system.

Proposition One: The prosecutor takes the case he is given by the police; “You do the best you can with the evidence you’re given”

In our legal system prosecutors have two distinct functions. First, they exercise prosecutorial discretion about whether to proceed with a charge (and in some provinces about whether a charge should be brought, see Gary [McCuaig](#), “British Columbia Charge Assessment Review”). Prosecutors exercise their discretion to determine whether there is a reasonable probability of conviction on a charge, and whether pursuing it is in the public interest, given factors such as the age and circumstances of the accused. Second, they prosecute cases at trial, “vigorously pursu[ing] a legitimate result to the best of its ability” and acting as a “strong advocate” (*Cook* at para 21).

In exercising those functions prosecutors enjoy independence. They are independent from the police, whose charging decisions they effectively review and have the power to overturn. And they are independent from the courts, who will not review prosecutorial discretion absent an abuse of process, and who will not hold prosecutors civilly liable for how they exercise that discretion absent malice. Prosecutors are not liable even if they prosecute “absent reasonable and probable grounds, by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence” (*Miazga v Kvello Estate* [2009 SCC 51](#) at para 81).

In exercising those functions prosecutors also have obligations. They have an obligation to pursue justice and not simply conviction (*Boucher v. The Queen*, [1955] SCR 16, at p 23-24 (although see my critique of the ethical effectiveness of that obligation, [here](#)). They also have an obligation to disclose all relevant evidence to the defence, whether tending to show innocence or guilt (*Stinchcombe*).

The prosecutor thus has functions and obligations central to the operation of the criminal justice system, functions that she exercises independently. That means that her role in the prosecution is active not passive. She must independently determine whether a charge has a reasonable prospect of conviction. She must independently determine whether prosecuting the charge is in the public interest. She must determine what is necessary to vigorously pursue a legitimate result. She must ensure that proper disclosure has been provided. In some cases she may have to consider the propriety of police conduct in investigating a case. In other cases she may have to assess whether a witness on whose story a case depends has the credibility and testimony to create a reasonable prospect of conviction. She has to determine effective trial strategy – which witnesses to present (she has no duty to present every witness – *Cook* at para 39), which legal arguments to rely on and the narrative of the case that will discharge the Crown’s evidentiary burden.

A prosecutor obviously relies upon the police. Prosecutors do not investigate. But the prosecutor’s role in assessing, shaping and presenting a prosecution requires prosecutors to engage actively, both with assessing the merits of a case, and in presenting those merits effectively and vigorously. This *could* be described as doing the best you can with the evidence you are given, but that description makes the prosecutor seem like a mere functionary. It seriously underplays the prosecutor’s power and his responsibility in determining whether to proceed, and in how best to do so.

Proposition Two: The prosecution should not prepare witnesses

In a civil trial, preparing a witness requires talking to the witness about the evidence he is able to give on the matters at issue. It means telling the witness about the areas that you will be exploring in a direct examination, so that he can think about how to answer those questions, and provide you with some information about how he will. And it means telling the witness about what will be explored on cross-examination, areas in which the witness may be questioned in order to make that witness appear unworthy of belief. It may involve far more than this as well, depending on the approach of the individual lawyer, and the resources available.

A criminal trial is different. The police talk to witnesses and obtain statements that set out the evidence the witness will be able to give on the matter; those statements are given to the prosecutor (and the defence). The police interviews with a witness may be videotaped, allowing the prosecutor to examine the witness’s demeanor and assess how the witness will be perceived at trial. The police will investigate the existence of other evidence that corroborates or contradicts the witness’s statements, giving the prosecutor the most valuable sort of information about the credibility of the witness’s testimony.

That means that a prosecutor who presented a witness in a criminal trial without talking to that witness first would not be blind in the way that a civil litigator would. But preparation is still essential for the prosecution of a criminal trial. Witness preparation does more than tell the lawyer about the nature of the evidence. It allows the lawyer to assess the witness’s ability to present the evidence, to determine whether the witness will advance the lawyer’s trial strategy and, ultimately, to determine if that trial strategy has a viable chance of succeeding given the nature of this witness’s evidence and capacity to testify. Further, it allows the lawyer to help ensure that the witness gets to provide her testimony, and that she will not end up looking like a liar when she is telling the truth.

Because let's be absolutely clear: it is the ethical duty of a defence lawyer to make prosecution witnesses look like liars, *even if those witnesses are telling the truth*. That duty is constrained; a defence lawyer must not harass a witness, and must remain within the boundaries of the legal restrictions on cross-examination (in a sexual assault case, e.g., not asking improper questions about the complainant's sexual history). But within those constraints a defence lawyer will do his best to exploit any inconsistency or weakness in the witness's evidence to make that witness appear to be non-credible. Whether or not the witness is in fact telling the truth is not only irrelevant, it may make discrediting that witness essential to the defence lawyer's ability to obtain an acquittal for his client (Abbe Smith has a terrific paper on the ethical implications of this role for the defence lawyer "Representing Rapists: The Cruelty of Cross-Examination and Other Challenges for a Female Criminal Defense Lawyer" (2016) 53 *American Criminal Law Review* (forthcoming) – summarized [here](#)).

A lawyer who prepares a witness will tell the witness about what cross-examination looks like. She will tell the witness the type of questions that are likely to be asked. She may ask some questions as "mock cross" in order to give the witness a chance to experience what cross-examination feels like.

Doing so allows her, if she is a prosecutor, to exercise her prosecutorial discretion about whether to proceed. Specifically, it allows her to assess whether, given the ability of this witness to testify effectively, there is a reasonable prospect of conviction. It will also, if the witness is a victim, allow her to consider public interest factors such as "Whether a prosecution is likely to have an adverse effect on the victim's physical or mental health" (Public Prosecution Service of Canada [Desk Book](#), Section 3.2(3)).

It also allows her to vigorously pursue her case to its legitimate end. A prosecutor cannot prevent a witness from being discredited – and nor should he. But he can reduce the likelihood that the witness will be discredited improperly, because she was confused or overwhelmed, or simply had not had the opportunity to think about the truthful answer to a question away from the pressure, stress, aggression and even hostility of cross-examination in a court room.

What about the three risks though – that a prosecutor will coach the witness; that a prosecutor will be accused of coaching a witness, and put the trial and her reputation in jeopardy; that a prosecutor may become a witness because of a coaching accusation or because she discovers new evidence?

A lawyer coaches a witness when the lawyer does not simply prepare a witness to testify, but rather plays a part in creating the testimony that the witness provides. Coaching witnesses is unethical and problematic – unethical because it disrupts the already fragile ability of a trial to produce truthful outcomes; problematic because lawyers who are not careful can unwittingly cross the line from preparation to coaching.

Human memory does not work like a video recorder. We do not remember facts; we remember facts mediated by our emotional experiences, subsequent events and our conversations about what happened – our memories are narratives that are rarely literally accurate. Our memories are also suggestible – a witness asked to estimate what speed a car *smashed* into another will "remember" a higher speed than a witness asked what speed a car *hit* another. Lawyers must be constantly alert to the possibility that what started as preparation becomes improper influence of a witness's testimony (See in general, Alice Woolley *Understanding Lawyers' Ethics in Canada* (Toronto: LexisNexis Canada, 2011), Chapter 7).

The fallibility of our memories is also, though, why witness preparation is so important – the fallibility of memory is part of what allows truthful witnesses to appear untruthful under cross-examination. Careful and well-prepared defence lawyers will be able to unpack inaccuracies and inconsistencies in a witness’s testimony. They will highlight in particular any differences between a statement to the police, statements to the media, evidence in a preliminary inquiry and the testimony given at trial. They will use any external evidence they have in their possession to identify errors or inconsistencies in the witness’s memory. A prosecutor cannot tell a witness how to answer those questions. A prosecutor cannot protect a witness from having to answer them (unless they are otherwise improper). But a prosecutor can give a witness a good idea of what to expect, and some (really) basic tactics for effective testimony: keep answers brief; answer only the question you were asked; be careful of over-confident assertions; take time to think if you need it; don’t lose your temper; and if you don’t remember something it’s better to say so than to guess. The prosecutor can also familiarize the witness with the basics of how a court works – what it will look like and how people will act. As Elaine Craig has noted, courtrooms are [inhospitable places](#), and can be intimidating and unsettling, even without the stress of cross-examination. Telling the witness to tell the truth is critical; but a truthful witness told nothing else risks slaughter on the stand.

Coaching is thus a risk, but not in my view one significant enough to outweigh the benefits of preparation, especially bearing in mind that they actually are not at all the same thing. Ethical preparation of a witness is not coaching.

What about the other risks, of the accusation of coaching, and that the prosecutor may become a witness? Again, this is a possibility. Courts have allowed counsel to cross-examine a witness to determine if coaching occurred (*R v Weibe*, [2006] OJ No 544 (CA)). They have been clear that coaching is inappropriate (see, e.g., *R v Muise*, [1974] NSJ No 298 (NSSCAD) at para 38 – *obiter* re coaching by police; *General Motors of Canada Ltd. v Canada*, 2008 TCC 117 – coaching by a lawyer in examination for discovery). Courts have noted that counsel may end up being a witness if coaching is alleged (*R v Polani*, [2006] BCJ No 915 at para 13).

But this is a risk that can be managed. Three obvious routes come to mind. First, the lawyer may prepare the witness with someone else present – a police officer or social worker. That ensures that the lawyer has both the appearance and reality of care in how she approached the witness. It also provides a person who can testify in the event that the lawyer’s preparation of the witness becomes an issue in the trial, or new evidence is disclosed. That person can also take “notes” to disclose to the defence. Second, if the lawyer prepares the witness alone, and new evidence arises, the lawyer can have that witness repeat that information to a police officer who discloses it to the defence. This approach is obviously less thorough than the first, but it would be appropriate for some witnesses. Third, the Crown’s office may develop standard materials and practices for the purpose of preparing a witness – preparation checklists – which they can use to ensure that they stay on the right line between preparation and coaching, and which they can use to support the claim that they have done so. Routinization both improves practices and educates people about the nature of the practices being engaged in.

I have been told by some prosecutors that judges do not always appreciate the difference between preparation and coaching, and can be alert to any allegation that a prosecutor has coached a witness. That is unfortunate. Coaching *is* bad. It would not just undermine trial fairness but would also be deeply unfair to the accused. But judges should be as aware of the importance of witness preparation to the discharge of the prosecutor’s duties as they are to the

dangers of witness coaching. Judges do not need to take prosecutors at their word, or to be naïve about the risks of prosecutorial misconduct, but they do need to let prosecutors fulfill their function within the legal system.

Proposition Three: The prosecutor represents the public, not the complainants, and owes the complainants no obligation in his role as prosecutor

This proposition troubles me the most of the three. It is of course true that the prosecutor's client is the Crown not the complainant. But there is a world of difference between saying that someone is not your client, and saying that you owe them no duty. Being a lawyer creates moral challenges. Sometimes the lawyer's professional obligations require him to violate ordinary moral obligations. As Abbe Smith has carefully and bravely explored in the paper noted earlier, a defence lawyer has a professional obligation to challenge the credibility even of truthful complainants in a sexual assault case. Doing so puts that lawyer in the crosshairs of the moral demands of protecting the dignity and humanity of her client and the moral demands of respect for the dignity and humanity of the complainant. There is no answer to that dilemma which does not require some sort of moral sacrifice.

But the point of that observation is not that that lawyer has no moral obligation to the complainant. The point of that observation is that the defence lawyer has conflicting moral obligations, which she cannot simultaneously fulfill. That's what makes being a lawyer morally difficult, some of the time.

The prosecutor has a legal duty to the state in conducting a prosecution. But that does not excuse or eliminate his moral, legal and ethical duties with respect to others in the court room. He has the same obligations he would have elsewhere not to participate in the wrongful infliction of harm on others. And where preventing the wrongful infliction of harm is not only not inconsistent with his professional duties, *but is in fact required to fulfill those duties*, it makes no sense at all to say that the lawyer has no duty to prevent such harm.

As I have been endeavoring to demonstrate, both the exercise of prosecutorial discretion and trial advocacy require the prosecutor to prepare witnesses. And it is through preparation of a witness – and in particular a sexual assault complainant – that the prosecutor can help to protect the witness from the *wrongful* infliction of harm. The prosecutor cannot prevent the witness from experiencing harm. Being cross-examined is inevitably awful, especially for a person testifying to a traumatic and personal experience, with respect to which she may feel shame, embarrassment or guilt. But that inevitable harm must not be confused with preventable wrongful harm. And it is the preventable wrongful harm with respect to which a prosecutor does have moral responsibility. A witness needs to know what is going to happen to her. She needs to have the chance to think about how she will respond to the questions she is going to be asked. She needs not to be intimidated by the ordinary processes of a criminal trial. She needs to be given basic strategies to avoid getting confused, distressed or angry on the stand. She does not need to be – and must not be – told what to say. But she does need general advice on how to say it, and on how to withstand being asked questions designed to confuse or unsettle her. The prosecutor cannot prevent her from being cross-examined, but through effective preparation he may well prevent her from being unduly harmed.

Some will respond to this point by noting that some complainants have counsel, as they did in *Ghomeshi*. But that point does not speak to the duties of the prosecutors. First, relatively few complainants will have counsel. Second, having a lawyer is not the same as having the resources to pay a lawyer to work for hours on your case. Third, the complainant's lawyer does not know the prosecutor's trial strategy, and has no access to the evidence and materials that have been provided to the prosecutor by the police – she may not even have the witness's police statement. It may even be improper for the complainant's lawyer to prepare her client in a way that undermines the prosecutor's ability to prosecute the case ethically and effectively. Fourth, the complainant's lawyer has the same duties not to coach a witness as the prosecutor, but is subject to far less scrutiny. If our concern is about preventing witness coaching, then it is prosecutors we should want to prepare witnesses, not a lawyer for the complainant. Finally, and most importantly, the existence of another lawyer does not change the duties of the prosecutor. The prosecutor has the duty to prepare, and the prosecutor has the moral obligation to ensure that people she can protect from wrongful infliction of harm are protected.

Conclusion

I understand that prosecuting cases ethically and effectively is difficult. We ask our prosecutors to occupy multiple roles. They have “clients” who are notional – the lawyer both identifies the interests of the Crown/client and pursues those interests. Prosecutors litigate against zealous opponents, who do not have duties reciprocal to theirs. Some cases – like *Ghomeshi* – are subject to overwhelming amounts of public scrutiny, much of it neither fair nor accurate. But none of that changes the importance of understanding accurately the role that prosecutors play. They occupy a central and powerful place within our criminal justice system, which places on them duties that they have to discharge ethically and effectively. Those duties include ethical preparation of witnesses, and the protection of those witnesses from the wrongful infliction of harm by others.

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