Attorney General's Guidance

Contact with prosecution witnesses before trial

Introduction

1) Training or coaching of witnesses is not permitted (see R v Momodou and Limani (2005) EWCA Crim 177).

2) This is not to say that all pre-trial contact between prosecutor and a witness is forbidden.

3) Such contact is permissible in certain circumscribed situations. They are these: special measures meetings; trial familiarisation meetings; meetings to explain a decision to discontinue a case or significantly to alter a charge; meetings to clarify or assess the reliability of the evidence the witness can give or to enable the prosecutor to reach a better informed decision about any aspect of the case.

4) The aim of these Guidelines is to set out the rôle played by Crown Advocates at or before Court in ensuring that witnesses give their best evidence. This is a core part of the Crown Advocate's job and will, if done properly, improve both the quality of the witness's evidence in Court and the perception of the service they receive from the Crown.

5) These Guidelines emphasise the need to ensure that witnesses are properly assisted and know more about what to expect before they give their evidence. Crown Advocates have an important rôle in reducing a witness's apprehension about going to Court, familiarising them with the processes and procedures – which may seem alien and intimidating – and managing their expectations as to what will happen whilst they are in Court. These Guidelines are designed to supplement the work done by other support agencies and it does not matter that there may be some overlap with that work.

6) Whatever the nature of the meeting which takes place, as a matter of good practice, it is helpful to notify the defence in writing before trial (and, if appropriate, before the meeting) that you have met identified prosecution witness(es), describing in high level terms the purpose of the meeting.

7) Some prosecutors may be uncertain about what they are allowed to say to witnesses. These Guidelines make it clear what is expected and permissible and explains the difference between assisting a witness to be better able to deal with the rigors of giving evidence (which is permitted) and witness coaching (which is not permitted).

8) These Guidelines apply to all witnesses including those who give evidence via a remote link as well as to witnesses who are present in Court.

Special measures meetings with witnesses

9) Providing assistance at Court is especially important where witnesses are vulnerable and/or intimidated. One measure which should be considered for such a witness is a pre-trial special measures meeting. This gives the Crown Advocate an opportunity to introduce him/herself and to help the witness to make a properly informed decision about which special measures will assist them to give best evidence in advance of the day in Court.

10) The purpose of such a meeting is not to discuss the evidence in the case, but to reassure witnesses that their needs will be taken into account and thereby help build up their trust and confidence.

11) It is preferable for the meeting with the witness to be held before an application for special measures is made to the court. This will allow the Crown Advocate to confirm the views of the witness as to which of the special measures should be applied for. The Advocate is then able to make a fully informed application to the Court.

12) The meeting provides an opportunity for the witness to explain their concerns about giving evidence and ask questions about special measures. The purpose of the meeting is to reassure the witness that their needs will be taken into account; this may reduce any reluctance to attend court/give evidence.

Trial familiarisation meetings

13) Even for those victims and witnesses who are not identified as vulnerable and do not need a special measures meeting, it is important that they are aware of what is likely to happen during their time at court, the nature of cross-examination and of any material that has been disclosed to the defence and which may form the basis of that cross-examination and which, in fairness, the witness should be told about. These things can be explained to a witness in a pre-trial meeting.

14) In many cases, giving evidence in court forces a witness to focus on a traumatic event that affected them personally or involved a family member of friend. Prosecutors should be aware of the potential for the witness to feel further victimised and/or traumatised and, to avoid this, should ensure that witnesses feel valued and involved in the Court process. Particular care and time needs to be taken to make sure they understand what will happen in Court. The Court room is an unfamiliar and unsettling place for victims and witnesses.

15) Most people feel better about being a witness if they know what to expect and have visited the court beforehand. Frequently asked questions are these, and of course it is quite proper to deal with them:

a) Who will be in the courtroom?
b) What is their function/job?
c) Where will people sit?
d) Where will I sit?
e) Will people be wearing wigs and gowns?
f) Where will I wait?
g) Who can come in with me?
h) How will I know when I am finished?
i) Who will question me?
j) How long will I wait?

16) The Crown Advocate conducting the case must meet all lay witnesses before they give evidence and inform them of the matters set out below. The meeting should ideally take place at the office of the Crown Advocate, at Police Headquarters or the Royal

Court, within the seven days before the trial in the presence of the officer in the case and a representative of the Witness Care Unit. The contact e-mail address for the Witness Care Unit is witnesscareunit@jersey.pnn.police.uk

Introductory matters

17) Introduce yourself by explaining who you are, giving your name and rôle.

18) Be aware of the particular needs and requirements of vulnerable witnesses and those with learning difficulties or mental health issues. If the witness has an intermediary or other supporter, then they should be present when you speak to the witness in order to assist the witness. The Witness Care Unit will arrange the attendance of the intermediary so there is a need to liaise with the Unit. In relation to various vulnerable witnesses, a pre-trial visit by the intermediary will be arranged by the Witness Care Unit, particularly if the witness has complex needs. It might be that a better location for this meeting is not the advocate's office but elsewhere - as recommended by the Witness Care Unit.

19) Invite questions from the witness. Do not positively restrict the ambit of the questions but rather explain why you cannot answer a question if one is asked which you are unable to answer.

Providing assistance about procedure

20) Confirm any special measures arrangements and make sure the witness understands and is content with them and, where applicable, that arrangements are in place for the supporter of their choice to accompany them when giving their evidence. The supporter will usually be identified early on and will be a person such as an appropriate adult or an intermediary. However, in addition to the presence of such a person (particularly if the evidence is being given from a video suite) an officer from the Viscount's Department will also be present. In order to ensure that the witness is aware of the identity of that person, it would be helpful for the advocate to contact the Deputy Viscount in order to identify the representative of the Viscount's Department.

21) Explain the Court's procedure, Oath taking and the order in which questions are asked by the advocates.

22) Explain the rôle of the defence advocate – that it is their job to put their client's case and challenge the prosecution's version of events. The witness should be informed that they should listen carefully to questions and (if necessary) clearly say whether they agree or disagree with them.

23) Witnesses should be told that they should not be afraid to ask the Judge for a break if they genuinely need one, such as when they feel tired, are losing concentration or if they want to compose themselves.

Providing assistance about giving evidence

24) Explain to the witness the importance of listening to all questions carefully and making sure they understand each one before answering it. Witnesses should be encouraged not to be afraid to ask the advocate asking the question or the Judge to repeat or rephrase any question which they do not understand.

25) Witnesses must be told to answer all questions truthfully, however difficult they may be.

26) If the witness has provided a witness statement, explain the importance of the witness refreshing their memory from such a statement before going into Court. Encourage them to do so. However, in appropriate circumstances, the witness should also be reassured that giving evidence is not a test and that in certain circumstances (such as a contemporaneous statement) they may be able to refresh their memory from their witness statement whilst giving evidence. In such circumstances, a witness should be told that they should not hesitate to ask to see their statement when giving evidence if they think their memory would be assisted by it. Usually the witness will be provided with a copy of his or her witness statement by the Witness Care Unit approximately one week before trial. In the event of the witness giving evidence by ABE video in chief then it is important that the witness be given an opportunity to refresh their memory by seeing the video interview again. Again ideally this should happen not just before trial but a few days, but no more than one week, before trial.

27) If there is inadmissible evidence in the statement given by the witness then the witness should be given a redacted copy of their statement (if possible, one already agreed with the defence) and told that the text that has been deleted should not be referred to by the witness when giving evidence. This should prevent the witness from

referring to matters that may be irrelevant and/or prejudicial when giving evidence. The Crown Advocate should also send a copy of the redacted statement to the Witness Care Unit for the purpose of it being transmitted to the witness.

Providing assistance for cross-examination

28) It is important that Crown Advocates should not provide the detail of, discuss or speculate upon the specific questions a witness is likely to face or discuss with them how to answer the questions.

29) However, in order to enable witnesses to give their best evidence Crown Advocates should ensure that they are informed of the matters set out below. The witness must be told that the purpose of doing so is to provide information to assist them and not to elicit information from them. They should be discouraged from giving a response. Should the witness make any comment which is relevant to the issues in the case, then it should be recorded by the officer in the case and disclosed, if appropriate.

30) The best time to give this information is when the witness is being reminded of the need to read his/her witness statement and being reminded that they should tell the truth. They should then additionally be informed that nothing that they are told should affect what they say but they are permitted to be informed of the following information to assist them;

a) The general nature of the defence case where it is known (mistaken identification, consent, self-defence, lack of intent, for example). The Crown Advocate must, however, avoid any discussion of the factual basis of the defence case. It is important to take care. So, for example, in a rape case, a victim might be told if the likely defence was to be on the issue of consent – but would not be told of the evidence itself, or any further detail. They may also be told that the court has permitted details of their sexual history be examined by the defence – but not why or what. In an assault case, the advocate would tell the victim if the likely defence case was to be self-defence, or perhaps an identity dispute – but not any details.

b) Where third party material about a particular witness has been disclosed to the defence as being capable of undermining the Crown's case or assisting the defence case (such as Social Services, medical or counselling records) then that particular witness (only) should be informed of the fact of such disclosure. The witness may have already consented to the disclosure of some sensitive and/or confidential material that relates to them, such as their medical records, but they may not have done so or may not realise what the defence have been given. In fairness to the witness, they should be told of this disclosure. Further, consideration should be given to providing copies of the medical information that has been disclosed in relation to a witness to the witness so that they can consider it before they give evidence.

c) Where leave has been given for a particular witness to be cross-examined about an aspect of their bad character or their sexual history, then that particular witness should be informed that such leave has been given. Similarly, they should be told that any previous convictions have been disclosed and offered a copy of the same. But in neither case should the consequence of such disclosure be explored with the witness.

d) Witnesses should be reassured that the Crown Advocate can object to intrusive/irrelevant cross-examination and, if this is done, the Judge will decide whether the questions need to be answered. The witness should be told that the Judge's decision must be followed.

Updating witnesses on progress

31) Ensure witnesses at Court are kept informed about progress and any delays with regular updates so that they feel engaged rather than left wondering what is happening. The witness order, drafted by the Crown Advocate, which provides the order in which prosecution witnesses are to give evidence and the likely duration of their evidence, should be sent to the Witness Care Unit when it is sent to the defence and the Court. In respect of any routine pre-trial meetings with the officer in the case, consideration should always be given to inviting a representative from the Witness

Care Unit in order to provide an update in relation to the status of victims and any other witnesses.

32) Manage expectations and be realistic. Never give information that is likely to be inaccurate, for example, by providing unrealistic estimates of how long witnesses will need to wait, even with the best intentions.

33) Make sure witnesses are released at the earliest opportunity and, if they are present to be sworn at the beginning of the trial, that they are then released until a realistic point later in the trial (subject to the caveat that, if they have one, they provide their mobile telephone number to the officer in the case or relevant witness liaison officer).

34) Consult with victims when considering changing a charge, accepting a plea to lesser charges, or dropping a case.

35) When certain special measures are adopted it is usual that the timing of breaks will be agreed in advance. A witness in such circumstances should be informed that these break times are not inflexible and that if a break is required sooner or if the witness feels that he/she can carry on without a break, this can be accommodated and that he/she should not be afraid to ask.

36) In relation to a witness who requires the services of an interpreter, it should be explained at the outset that they should wait for the interpreter to finish translating the question asked, even if the witness believes that he/she understood what was being asked. Also, any reply should not be given in English. This avoids any concerns about the understanding of the witness and quality of the evidence given.

37) When the witness has completed their evidence, speak to the witness or arrange for someone else to do so on your behalf in order to thank them and answer any questions they may have. As to witnesses who are warned but not called to give evidence, it is courteous to explain to them why they were not called.

Meetings to explain a decision to discontinue a case or significantly alter a charge

38) It is important for witnesses who are victims of a violent or sexual offence to be informed of the decision to discontinue a case and the reasons for such

discontinuance. A meeting with the Crown Advocate may not be necessary in all cases but should take place in all serious cases. This also applies to a decision to significantly alter a charge, e.g. to discontinue a rape charge in favour of accepting a guilty plea to indecent assault. In the case of a child victim it may suffice to meet the parents of the child only. A careful note of the meeting should be taken and communicated to the officer in the case if he or she is not present during the meeting and, in any event, provided to the police for their files. In any event, in every case the Police should consult victims in respect of any such decisions – if the Crown Advocate is unable to do so.

Meetings to clarify or assess the reliability of the evidence a witness can give

39) These meetings are separate to special measures meetings and court familiarisation meetings or meetings to explain a decision to discontinue a case or alter a charge. They will not be necessary in most cases.

40) The purpose of such a pre-trial interview is to assess the reliability of a witness' evidence. A pre-trial interview may take place at any stage of the proceedings, including pre-charge. Before a pre-trial interview takes place, you will need to ensure that the senior investigating officer has been consulted by you.

41) Interviews must not be held for the purpose of improving a witness's evidence or performance but reliability can be tested. This may include taking the witness through their statement, asking questions to clarify and expand evidence, asking questions relating to character, exploring new evidence or probing the witness's account.

42) No interview should be conducted until the witness has provided to the police a signed witness statement or has taken part in a video recorded evidential interview.

43) If there is any possibility that the witness may come under suspicion as a suspect, the interview must not take place until that possibility ceases to exist.

44) The presence of a police officer may not normally be necessary but can be requested.

45) An interview may be conducted by more than one prosecutor or by a prosecutor and an independent advocate. However, where this is done, the interview process should be led by one person.

46) The witness may be accompanied by a supporter.

47) Prosecutors must not, under any circumstances, train, practise or coach the witness or ask questions that may taint the witness's evidence. Leading questions should be avoided.

48) Where there is significant conflict between witnesses that cannot be resolved by careful questioning, alternative accounts may be put to the witness for comment so long as any source of the alternative account is not attributed. If this is done, it should never be suggested to the witness that they adopt the alternative account.

49) Prosecutors should remain dispassionate about the responses that a witness gives. In particular, they must never suggest to the witness that he/she might be wrong, indicate approval or disapproval in any way to any answer given by the witness. To depart from this standard carries with it the risk of allegations that the witness has been led or coached in their evidence.

50) An audio recording of the interview should be made. If a witness has previously given a visually recorded evidential interview the pre-trial interview may also be video recorded.

51) Where, in the course of an interview, the witness provides further evidence which is material to the case, a further witness statement should be taken (or visual interview conducted) by a police officer and served upon the defence.

Appeals

52) In the event of an appeal, it is important to notify the Witness Care Unit so that the witnesses can be made aware, if appropriate, of an appeal. Police involvement in an appeal, whether against conviction or sentence, may be slight. Accordingly, it is important to keep the Witness Care Unit abreast of the listing and outcome of an

appeal against conviction or sentence. As far as the Crown Advocate is concerned, witness care is not complete until the case has come to an end.

Coaching – Case Law

53) The rule against coaching a witness was explained by the Court of Appeal in R v Momodou & Limani [2005] EWCA Crim 177; [2005] 2 ALL ER 571; [2005] 2 Cr App R 6, when the Court considered the impact of training delivered to witnesses that included a case study which strongly resembled the circumstances of the case in which the witnesses were to give evidence. At paragraph 61, the Court concluded:

> *"Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness … The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training."*

54) Crown Advocates can have confidence that providing their discussion with a witness is aimed at assisting the witness to give their best evidence and avoids rehearsing them as to the evidence they should give, then there should be no risk that coaching has occurred.

Court supporters

55) Crown Advocates should ensure that they build effective relationships with the Witness Service representatives and relevant police support services.

Further information

56) As indicated, as a matter of good practice, it is important to notify the defence in writing before trial that you have met any prosecution witness(es) in order to explain the trial process to them and to put them at their ease, or have met a witness or witnesses for any other purposes set out in this Guidance.

57) If you need clarification of any aspects of this policy, which will be reviewed after one year, please do not hesitate to contact me.

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Attorney General

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