

CPS GUIDANCE

“SPEAKING TO WITNESSES AT COURT”

INTRODUCTION

Defence practitioners should be aware of guidance issued by the Crown Prosecution Service on the topic of speaking to witnesses at court.

Following a year-long public consultation, the CPS has made adjustments to the draft guidance, which is now operational in most CPS areas and due to be in force nationwide by the end of July.

This CPS document sets new, and some would say bold parameters, for out of court discussions between prosecutors and witnesses: with the stated aim being to “clarify the role played by prosecutors in ensuring that witnesses give their best evidence”.

GUIDANCE – KEY ASPECTS

Prosecutors will be expected to meet a witness and assist with the following:

- Their understanding of **procedure**, including oath-taking and a defence advocate’s obligation to put the defendants’ case.

- Their understanding of **giving evidence** including the importance of answering questions truthfully and being clear if they are unable to recall certain detail.
- Providing them with **assistance for cross-examination** which will include the following:
 - Outlining the *general nature* of the defence case (e.g. self-defence).
 - Informing the witness about the fact of third party disclosure to the defence (e.g. their medical records).
 - Informing the witness that s/he may be cross-examined about an aspect of their *bad character* OR their *sexual history*.

In terms of when such information should be imparted to witnesses, the guidance suggest **before** the trial date (ideally at the time of any special measures meeting).

PUBLIC CONSULTATION – RESPONSES & CONCERNS

The extent to which this information will help put witnesses at ease remains itself a matter of debate. Reactions to such disclosures could result in a witness being defensive at the expense of focusing on the questions and appearing credible.

Of greater concern though is the effect of such disclosures on the fairness of the adversarial process. Even if one accepts that general notice of the defence case is not akin to “coaching”, legitimate concerns remain that such information could lead a witness, consciously or subconsciously, to tailor their evidence in light of what they have been told.

The consultation response of **25 Bedford Row**, whilst endorsing efforts to improve support for witnesses, observed that such a course may “...increase

the partiality of counsel and give complainants a disproportionate influence over proceedings”.

There is a further and inevitable concern as to whether all prosecutors will observe the boundaries set in terms of the limits of disclosure. The CPS has stated with confidence that prosecution advocates “know where the line should be drawn”. Notwithstanding this optimism, it seeks to address such concerns by way of **compulsory training** for all prosecutors before the guidance is implemented in full.

Consultation feedback also touched on the need for clear arrangements for the **recording** of such conversations. To this end the CPS states that for any conversations that happen on the day at court, there is to be sufficient paralegal cover to allow for effective recording of such discussions. Worryingly, there are no plans to change current levels of paralegal support in the magistrates’ court but it is said that the training offered will include “very clear guidance on how such conversations should be recorded”.

THE PARAMETERS

The CPS guidance makes it clear that “coaching” of witnesses is strictly prohibited and the following rules apply to such discussions:

- i. Prosecutors must **not** provide the detail of or speculate upon the *specific questions* a witness is likely to face **OR** discuss with them *how* to answer the questions.
- ii. Prosecutors must explain to the witness that the purpose of the information is to assist them (as opposed to elicit information from them).
- iii. Prosecutors should discourage witnesses from giving a response.
- iv. If the witness does make a comment which is relevant to the case issues then it “should be *recorded and disclosed, if appropriate*”.

- v. Witnesses should be told that information regarding the defence case should not affect what they say in evidence.

CONCLUSION

However laudable the overall aim, there is clearly the potential for error or abuse in the procedures contemplated.

Defence practitioners should familiarise themselves with the guidance and do what they can to ensure compliance with the same.

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