SPEAKING TO WITNESSES AT COURT: GOING TOO FAR?

25 BEDFORD ROW RESPONDS TO CPS CONSULTATION

In January 2015 the CPS published draft guidance on speaking to witnesses at court. The aim of the draft guidance is to set out the role played by prosecutors at or before court in ensuring that witnesses give their best evidence. It emphasises the need to ensure that witnesses are properly assisted and know more about what to expect before they give their evidence. The draft guidance attempts to make clear what is expected and permissible, and the difference between assisting a witness to be better able to deal with the rigors of giving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), but contains some worrying proposals on providing assistance for prosecution witnesses facing cross-examination.

A consultation on the draft guidance closed on 16 March 2015. Final guidance for prosecutors has not yet been published. This article sets out some of the issues.

Several aspects of the draft guidance are not controversial. Efforts to improve the court experience and offer support for witnesses are to be applauded. It is right that witnesses should be familiarised with court processes and procedures so that they understand how the system works and to help make the experience less daunting. Such measures may assist both in achieving best evidence, and to improve efficiency in the criminal justice system. To that extent, it is to the benefit of all parties in any trial for witnesses to be prepared for the rigours of giving evidence.

25 Bedford Row wholly supports (and many members are actively involved in) recent initiatives to improve the methods of adducing evidence from children and vulnerable witnesses and defendants. For example, by reforming the rules of examination in chief and cross-examination.

However, the CPS proposals for cross-examination have attracted widespread criticism. They go well beyond witness familiarisation or simple reassurance; they run the risk that witnesses’ evidence may be tainted or ‘coached’. If implemented, these proposals could undermine the fair administration of justice and the integrity of our adversarial system. In particular, measures on providing assistance for cross-examination represent an unacceptable encroachment on a fundamental principle of our adversarial system.

Among other things, the draft guidance proposes the following assistance for cross-examination:

*It is important that prosecutors 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. However, to enable witnesses to give their best evidence prosecutors 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 and disclosed, if appropriate.*
The best time to give this information is when the witness is being referred to his/her witness statement and being reminded that they should tell the truth. They should then additionally be informed that nothing they are told should affect what they say but that they are permitted to informed of the following information to assist them:

i. The general nature of the defence case where it is known (mistaken identification, consent, self-defence, lack of intent for example). The prosecutor must, however, avoid any discussion of the factual basis of the defence case.

ii. Where third party material about a particular witness has been disclosed to the defence as being capable of undermining the prosecution’s case or assisting the defence case (such as social services, medical or counselling records) then that particular witness should informed of the fact of such disclosure. The witness may, in any event, have already consented to the disclosure of some sensitive and/or confidential material that relates to them such as their medical records.

iii. Where leave has been given for a particular witness to be cross-examined about an aspect of their bad character under section 100 Criminal Justice Act 2003 or their sexual history under section 41 Youth Justice and Criminal Evidence Act 1999 then that particular witness should be informed that such leave has been given.

If it is possible to do so, witnesses should be provided with this information in advance of the trial date.

The degree of contact proposed between prosecutors and complainants and witnesses risks increasing the partiality of counsel and may give complainants a disproportionate influence over proceedings. Some prosecution witnesses might wrongly regard prosecutors as ‘their advocate’. Support for vulnerable or reluctant witnesses and complainants can be more appropriately delivered by properly trained police officers or other support workers, not by prosecuting advocates. The Witness Service already facilitate pre-trial court visits, support while in the witness box, and support after the trial. There are several other agencies working towards similar ends.

The goal of all parties in the criminal process must be the achievement of the best evidence. That has to be the achievement of the best ‘uncontaminated’ evidence, but the CPS proposals may run the very risks the Court of Appeal identified in R v Momodou & Limani [2005] EWCA Crim 177, a case on the issue of witness training:

“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. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved."

The Bar Council gave assistance in the light of Momodou in respect of witness familiarisation processes, when it set out the following:

“As part of the witness familiarisation process,...it is appropriate for barristers to advise witnesses as to the basic requirements for giving evidence e.g. the need to listen to and answer the question put, to speak clearly and slowly in order that the Court hears what the witness is saying, and to avoid irrelevant comments”

[see the Bar Standards Committee review on the guidance for Witness preparation 2008]

It is wholly unnecessary, for the purposes of supporting prosecution witnesses in advance of their appearance at court, to disclose to them the nature of the defence or any other material that may be used in cross-examination.

The proposed guidance conflates support for witnesses in unfamiliar surroundings with measures designed to give witnesses a substantial advantage in relation to the issues in the case. Prosecution witness evidence has nothing to do with the defence being advanced and should be given uninfluenced by what anyone else has said. It has never been the function of the prosecution to warn of the likely nature of the defence and it is inconceivable that a prosecution witness would not be influenced in some way by knowledge of the nature of the defence. Honest witnesses might be tempted to tailor their evidence according to what they have heard, even in respect of matters they perceive not to be crucial to the case, while untruthful witnesses will be equipped with the tools they need to prepare to adapt their evidence to meet the defence case.

A witness’s reaction in court when the specifics of a defence case are revealed is an important matter for a jury or bench to consider. If prosecution witnesses are forewarned of the nature of the defence, this element of the trial process will be lost. Defence counsel will in some cases begin cross-examining prosecution witnesses about the opportunity they have had to reconsider their evidence in the light of disclosure they have received, undermining the credibility of the same witnesses these proposals seek to protect.

In an article in Counsel Magazine in March 2015 the Director of Public Prosecutions argued that cross-examination is not about ambush, adding: “no one benefits – prosecution, defence or the public more generally – from a situation which is unfairly
stacked against the victim.” It is not necessarily the case that the system is unfairly stacked against complainants – there are a range of safeguards and statutory checks and balances against inappropriate cross-examination and in respect of issues such as non-defendant bad character and previous sexual history. Special measures are available in many cases and pre-recorded cross-examination of child witnesses is being piloted, with cross-examination subjected to judicial scrutiny in advance. All of these measures are designed to protect witnesses and to help them give their best evidence. Prior knowledge of the defence case – or warning of any other real issues of substance - may not increase witness confidence any further yet would significantly affect the fairness of proceedings for the defendant.

The draft guidance does not set out clearly what a prosecutor should do when meeting a witness at court, it fails to explain how meetings between prosecutors and witnesses would be recorded and what resources would be available to ensure that there are sufficient safeguards for prosecutors who could be criticised for seeing witnesses alone. If implemented, the guidance would need to provide for keeping accurate records of any significant comments made by witnesses in meetings with prosecutors and disclosure of the same. It is also unclear whether every prosecution witness of fact should be met and assisted with cross-examination, or only those perceived as vulnerable or requiring re-assurance. Furthermore, the draft guidance doesn’t explain the position in respect of multi-handed cases where the nature of each defence case might differ, or where defendants blame each other. It is unclear how technical defences might be explained to witnesses, if at all.

The proposals to not strike the right balance between supporting witnesses in advance of their appearance at court and ensuring that the trial is, and is seen to be, fair to the defendant. These proposals are impractical, they could give rise to real risks that prosecution witnesses will be coached and could undermine confidence in the integrity of the trial process and the independence of prosecution advocates.