



# Speaking to Witnesses at Court Draft CPS guidance for consultation

January 2015

## 1. Introduction

The aim of this guidance is to set out the role played by prosecutors at or before court in ensuring that witnesses give their best evidence. This is a core part of the prosecutor's job and will, if done properly, impact positively on both the quality of the witness's evidence in court and the perception of the service they receive from the CPS.

The guidance emphasises the need to ensure that witnesses are properly assisted and know more about what to expect before they give their evidence. Prosecutors have an important role 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 on what will happen whilst they are at court.

Some prosecutors may be uncertain about what they are allowed to say to witnesses. This guidance makes 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).

Prosecutors must apply the principles set out in this guidance irrespective of whether they are from the CPS or from the self-employed Bar. The guidance applies to witnesses who give evidence via a remote link as well as to witnesses who are present at court.

## 2. Purpose of Assisting the Witness at Court

Pre-trial court familiarisation; meeting the prosecutor in advance; and having their questions answered, can help a witness to feel prepared for their court experience and able to give their best evidence. We should seek to help all witnesses who are called to court in this way, taking into account their needs and the amount of interaction they wish to have.

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 prosecutor 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 at court. It can also be used to inform the witness about the matters covered in this guidance.

Even for those victims and witnesses who are not identified as vulnerable and do not have 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 the defence has that may form the basis of that cross-examination.

### **3. Meeting a witness at court**

In many cases giving evidence at court forces a witness to focus on a traumatic event that affected them personally or involved a family member or 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.

Whilst we appreciate that the court room is the place of work for advocates, we would urge them to remember that it is also an unfamiliar and unsettling place for victims and witnesses. Prosecutors should therefore exercise discretion when communicating with other professionals in the presence of a witness and be aware of the impact of thoughtless interaction in and around the courtroom on witnesses and victims.

[CPS Guidance - Care and treatment of victims and witnesses](#) sets out the CPS commitment to Victim and Witnesses at Court as follows:

The CPS is committed to treating witnesses at court with respect and sensitivity. Whenever possible we should introduce ourselves and try to put nervous or vulnerable witnesses at ease and explain court procedures. We should keep all victims and witnesses informed about delays and ask for them to be released as soon as possible after giving evidence.

The following guidance will assist prosecutors to deliver this commitment.

The prosecutor conducting the case should meet all witnesses before they give evidence and inform them of the matters set out below:

#### **(a) Introductory Matters**

- Introduce yourself by explain who you are, giving your name and role.
- Treat witnesses with respect and dignity.
- 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 involved when you speak to the witness in order to assist the witness.

- 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.

#### (b) Providing Assistance about Procedure

- 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.
- Explain the court's procedure, oath taking and the order in which questions are asked by the advocates.
- Explain the role of the defence advocate – that it is their job to put their client's case and challenge the prosecution's version of events, including by suggesting the witness is mistaken or lying. The witness should be informed that they should listen carefully to any such suggestion and clearly say whether they agree or disagree with it. Inform the witness that this is how the jury / Magistrates decide the issues in the case – by seeing and hearing the reaction of the witness when the case for the “other side” is put to them.
- Witnesses should be told that they should not be afraid to ask for a break if they genuinely need one such as when they feel tired, are losing concentration or if they want to compose themselves emotionally.

#### (c) Providing Assistance about Giving Evidence

- 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.
- Witnesses must be told to answer all questions truthfully, however difficult they may be. They should be informed that it is not a sign of weakness if they do not know or do not recall the answer to a particular question and, if this is genuinely the case, they should not be afraid to say so.
- 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, the witness should also be reassured that giving evidence is not a “memory game” and that in certain circumstances they may be able to refresh their memory from their witness statement whilst giving evidence. 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.

#### (d) Providing Assistance for Cross-Examination

Cross examination within the adversarial system is designed to cast doubt on the prosecution's version of events. This can put pressure on individual witnesses, especially where their character is attacked in order to reduce their credibility. Questioning may also address deeply personal aspects of the witness's life especially in sexual offence cases involving young, vulnerable victims who have been subject to sexual exploitation.

Although some witnesses will have no problem anticipating the type of cross-examination they will face, others, and particularly those who are vulnerable due to lack of maturity, mental health issues or learning disability, may have little or no idea what to expect. Relying on witnesses to 'work it out for themselves' is clearly unfair and unrealistic. To justify this on the basis that giving such information is 'coaching' is unhelpful and inaccurate.

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 be 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 be 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. This could ideally be done at the same time as a special measures meeting.

Witnesses should be reassured that you can object to intrusive/irrelevant cross-examination and, if you do so, the judge will decide whether the questions need be answered. The witness should be advised that the judge's decision must be followed.

#### (e) Updating Witnesses on Progress

- Ensure witnesses at court are kept informed about progress and delays with regular updates so that they feel engaged rather than left wondering what is happening.
- Manage expectations and be realistic (never give information that is likely to be inaccurate for example by providing unrealistic estimates of how long they will need to wait, even with the best of intentions).
- Make sure witnesses are released at the earliest opportunity.
- Consult with victims when considering changing a charge or dropping a case and similarly, inform them of any changes at the end of a hearing.

#### (f) When the Witness had Completed their Evidence

- Speak to the witness after they have given evidence if this is possible to thank them and answer any questions they may have.

### **Coaching – Case Law**

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.”

Prosecutors 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.

#### 4. Court supporters

The Witness Service is represented in magistrates’ and Crown Courts in England and Wales providing pre-trial visits for witnesses, so that they are familiar with the court room and the roles of the people in court, as well as providing practical support and information to both prosecution and defence witnesses and their families and friends on the day of trial. Where the magistrate or judge agrees, the Witness Service volunteer or another person may accompany the witness into the court room or live link room to give their evidence, if the witness wants them to. They will also assist and encourage the witness to make contact with the prosecutor whilst they wait to give their evidence at court. Prosecutors should ensure that they build effective relationships with the Witness Service representatives at the court centres where they appear.

Independent Sexual Violence Advisors (ISVA) and Independent Domestic Violence Advisors (IDVA) provide invaluable support to victims and may influence a victim’s decision whether to support a prosecution. Prosecutors should be familiar with the supporters’ role and should actively engage with them.

IDVAs/ISVAs provide an effective channel of communication through which information can both be supplied to, and obtained from, a witness. In addition the prosecutor can ask the IDVA/ISVA for their views about how the witness is coping and other relevant issues.

Because the ISVA role is not always understood the type of support ISVAs are permitted to offer their clients at court can vary considerably. If a victim expects the ISVA to accompany them in the live link or behind a screen and this does not happen, their experience of court will undoubtedly be affected. To avoid this situation prosecutors should always explain the ISVA’s role to the defence advocate and the court where necessary.

The role includes:

- Understanding the views, wishes and concerns of the victim

- Providing support and information through interviews and court hearings, familiarisation with the court and its procedures and guidance on Special Measures
- Accompanying the victim on a pre-trial visit to court and while they give evidence in court or the live link room (where the court approves this)
- Acting as a main liaison point with family members, friends
- Liaising with legal, health, education and social work professionals and those offering therapy and counselling prior to a criminal trial
- Arranging links with experts if there are specific vulnerabilities

When speaking to the witness it is always useful to have the ISVA/IDVA present.

## 5. Further Information

For more information see [Achieving Best Evidence in Criminal Proceedings](#) Guidance on interviewing victims and witnesses, and guidance on using special measures.

### Useful Links:

[The Code of Practice for Victims of Crime](#)

[The Advocate's Gateway](#)