

**Ontario Ministry of the Attorney General  
Criminal Law Division**



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PM [2006] No. 5

**PRACTICE MEMORANDUM  
To Counsel, Criminal Law Division**

**Date:** March 31, 2006

**Subject:** CONDUCT OF WITNESS INTERVIEWS

**Synopsis:** This memo reminds Crown counsel of the need to preserve the integrity of evidence when interviewing witnesses. It sets out techniques that Crown counsel can use to effectively interview witnesses while safeguarding against suggestive techniques which can improperly influence a witness's testimony. **This Memorandum replaces PM[2002] No. 11 – Conduct of Witness Interviews.**

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**1. Pre-Trial Witness Interviews**

The administration of justice is best served by a trial process that strives to ensure that witnesses provide complete, honest and independent evidence. Properly conducted witness interviews can contribute significantly to that goal. While it may be impossible to interview all witnesses in all cases, the effective prosecution of serious or sensitive cases often requires Crown counsel to interview witnesses. See PM [2005] No. 11 - *Victims of Crime: Communication and Assignment of Sensitive Cases* for a list of cases in which victims should be interviewed. Because of the distinct legal considerations that govern their evidence, this policy does not apply to the preparation of expert witnesses.

*a. Witness Interview Guidelines*

While it is understood that no Crown counsel would ever deliberately do anything to influence a witness to change his or her evidence to accommodate the prosecution theory,

counsel should be wary of interview techniques that might unintentionally produce the same result. Accordingly, when interviewing witnesses, Crown counsel should observe the guidelines set out below.

- i. Wherever practical, the interview should be conducted in the presence of a police officer or other appropriate third person. That person can assist in making a record of the meeting. This practice will be critical in documenting the process, preserving the integrity of the interview, and preserving the role of Crown counsel by minimizing the possibility that counsel will be called as a witness.
- ii. Crown counsel should rely on the witness's own memory as refreshed by his or her prior statements. The witness should be advised that it is his or her own honest recollection of events that is important.
- iii. Witnesses should be interviewed separately.
- iv. Questioning should not suggest that Crown counsel desires a particular answer.
- v. Where Crown counsel believes that a witness may be honestly mistaken, counsel may appropriately inquire into the circumstances surrounding the witness's present recollection. Crown counsel should not tell a witness that he or she is wrong.
- vi. Crown counsel may properly confront a witness with respect to aspects of his or her statement where the witness is apparently being deliberately untruthful.
- vii. Where a witness provides information which apparently conflicts with or is not contained in his or her prior statements, that information, along with the general circumstances in which it came to light, must be recorded in writing and disclosed in accordance with the Policy and Practice Memoranda regarding disclosure.**
- viii. Crown counsel should not conduct investigative interviews. If a new issue arises during the preparatory interview that requires investigation, Crown counsel should request that the police investigate the matter. See the Policy/Practice Memoranda regarding the Crown's relationship with the Police and the Recanting Witness Practice Memorandum for a discussion on how to deal with a recantation.
- ix. Crown counsel may occasionally conclude that it is necessary to discuss evidence with a witness which conflicts with the witness's own anticipated evidence. Counsel should be mindful of the potential dangers associated with this practice. In particular, counsel should make every effort to avoid

inadvertently influencing the witness to change his or her evidence in order to conform to the prosecution theory. To this end, counsel should, at a minimum, advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to the witness's own honest and independent recollection and that he or she is free to reject the other evidence. Counsel may be well advised not to put conflicting evidence to a witness who is patently impressionable or highly suggestible.

## **2. Pre-Charge Witness Interviews**

Pre-charge interviews are usually conducted by police as part of their investigative function. The Supreme Court of Canada in *R. v. Regan*<sup>1</sup> acknowledged that pre-charge interviews by the Crown may, in some very limited circumstances, serve the interests of justice by:

- screening out fruitless complaints
- encouraging proper charges to go forward
- signalling to the larger society that complainants can bring sexual assault allegations to the courts without further undue trauma, and where charges are properly laid, they will be prosecuted.

Accordingly, in Ontario, while the practice is rare and should continue to be rare, there are still limited occasions when pre-charge interviews may be conducted to fulfill the interests of justice outlined above. Crown counsel should not engage in pre-charge evidence gathering. It is essential that the Crown maintains his or her role as an independent prosecutor.

**Attachment:** None

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**Signed by:**  
Paul Lindsay  
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**Practice Memoranda are not considered to be confidential and may be given to defence counsel or other interested persons, upon request.**

## **MANDATORY LANGUAGE**

**Where a witness provides information which apparently conflicts with or is not contained in his or her prior statements, that information, along with the general circumstances in which it came to light, must be recorded in writing and disclosed in accordance with the Policy and Practice Memoranda regarding disclosure.**

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<sup>1</sup> (2002), 161 CCC (3d) 97