

Witness Interviews

Director of Military Prosecutions
Policy Directive

Directive #: 012/00
Original Date: 15 Mar 00
Subject: Witness Interviews

1. Any reference in this policy to "Prosecutor" or "Prosecutors" shall be deemed to refer to any officer or officers who are members of the Canadian Military Prosecution Service and have been authorized by the DMP to assist or represent the DMP pursuant to section 165.15 of the National Defence Act in preferring charges to court martial and in conducting prosecutions at courts martial.

Statement of Policy

2. Prosecutors should interview prospective witnesses in preparation for trial except where the investigation report is complete and a guilty plea is indicated. Effective interviews of witnesses by the Prosecutor are crucial for proper case preparation, and are not part of the investigation process. They shall be conducted in a manner that enhances the pursuit of truth, and shall provide to witnesses limited information about the proceedings. Interviews will trigger disclosure obligations where they bring to light new or inconsistent information about the case.

Application of Policy

General Principles

3. In criminal matters

a) investigators define "witness" as a person identified in an investigation as one who may know something about the matter in question (herein referred to as a "possible witness");

b) prosecutors define "witness" as a person who will be required to attend court martial proceedings because there is a likelihood that he or she will give evidence (herein referred to as a "prospective witness"); and

c) courts define "witness" as a person who has actually given evidence in a proceeding (herein referred to as an "actual witness").

The focus of this policy is the interviewing of prospective witnesses. Any reference to "witness" or "witnesses" should be read as a reference to "prospective witness" or "prospective witnesses".

4. The nature and scope of witness interviewing is crucial to proper case preparation. However, many variables will influence any interview including the skills of the interviewer; the nature of the case; the role of a given witness; and even the demeanour and personality of the witness. Generally, the following considerations apply:

a) The Prosecutor should interview all prospective witnesses prior to the date set for testimony in the proceedings. However, the Prosecutor may elect not to so interview witnesses if

i) the Prosecutor is satisfied that an interview would not advance the purpose and intent of this policy; or

ii) the investigation report is complete and the accused, having received disclosure and had opportunity to consult counsel, indicates that a plea of guilty will be tendered.

b) Prosecutor interviews should not be conducted before charges have been laid. Where an investigation continues after charges are laid, witnesses will be interviewed by the Prosecutor only when he or she is satisfied that the continuation of the investigation will not likely require a further interview of witnesses by the investigators.

c) The Prosecutor shall have the investigators re-interview a witness when

i) the Prosecutor determines that the initial interview of a witness was incomplete or unclear

ii) a witness indicates that his or her statement is inaccurate or incomplete

iii) a witness wishes to add to or change his or her statement

d) The comfort of the witness during interview is important. As circumstances permit, interviews should be in private. Prosecutors must maintain an attitude that is professional and respectful, while controlling the interview process. With these principles in mind, witness interviews should be conducted prior to the date upon which the witness is expected to testify, except where exigent circumstances prevail. A successful interview will permit the Prosecutor to build rapport with the witness, so as to facilitate the transmission of clear, frank and truthful testimony.

e) The need for privacy in the interview process must be balanced against the need to protect the integrity and safety of the interviewing Prosecutor. the Prosecutor may arrange for a third party to also attend the interview in any of the following circumstances:

i) where a particular witness asks to have a support person present.

ii) where a particular witness interview is expected to be volatile or emotionally charged.

iii) when the Prosecutor interviews key witnesses he or she should invite an investigator involved in the case to attend the interview and to take notes pertaining to the conduct of such interviews.

f) A Prosecutor must not give opportunity for one witness to influence the testimony of another witness in the same proceedings. Therefore, a third party, (other than an investigator) attending a witness interview, must not be a prospective witness (for the prosecution or the defence) in the same proceedings.

g) Unlike some other interactions with lawyers, there can arise an obligation upon the Prosecutor to disclose some or all of what transpires during a witness interview. The Prosecutor shall ensure that the lack of confidentiality is known to the witness.

h) The Prosecutor cannot require a civilian witness to take part in the interview process. The Prosecutor shall not attempt to influence any witness with respect to the witness's decision to speak or not speak with defence counsel about the case.

i) In any interview, the Prosecutor shall reinforce the obligation of a witness to answer all

questions truthfully. While it is appropriate to prepare a witness by canvassing the sorts of questions that might be expected, the Prosecutor shall not coach or steer the witness as to what the witness should or should not say in testimony. However, a witness ought to be advised about the application of rules of evidence which might preclude reference to certain matters: for example, it is appropriate to tell a witness that certain components of expected evidence should not be included in testimony where those components are inadmissible as hearsay, evidence of the accused's bad character, or irrelevant to issues in the case at bar.

j) During an interview of a witness unfamiliar with court martial proceedings, the Prosecutor shall explain generally

i) the role of a court martial, Prosecutor, and defence counsel

ii) the court martial process including such fundamentals as

A. the nature and scope of examination, cross examination and re-examination

B. the order in which witnesses are called and examined by counsel or the court

C. the duty of counsel to object where appropriate and of the witness to answer unless an objection is raised by counsel

iii) the role of a witness including

A. the obligation to honour a subpoena or order to attend;

B. the duty to speak the truth, based only on personal observation;

C. the lack of a witness's capacity to offer an opinion unless qualified as an expert witness;

D. the freedom of the witness to speak or not speak with defence counsel as the witness wishes;

E. the right to be free from intimidation by the accused or others;

iv) any outstanding conditions placed upon the accused for the security and protection of this particular witness, and the manner in which the witness can report to appropriate authorities any real or perceived breach of those conditions; and

v) the physical setting of the courtroom and basic hearing procedures

k) The Prosecutor may discuss in a witness interview the sort of questions that the witness might be asked during the hearing process, either as part of the examination in chief or cross-examination.

l) At times, the Prosecutor may conclude that a prospective witness intends to defeat or subvert the course of justice by a means such as failing to honour a subpoena or lying under oath or solemn affirmation. The Prosecutor might also perceive that a witness's testimony will be altered because of harassment, intimidation or some other improper influence; or that a witness is not competent to testify under oath¹. In any of these circumstances, the Prosecutor shall

- i) consider where necessary a postponement of the witness's testimony;
- ii) report the circumstances immediately to the DMP or the D/DMP;
- iii) Reconsider whether the witness ought to be called by the prosecution;
- iv) Reconsider whether the prosecution ought to proceed; and
- v) Reconsider disclosure obligations

Limits on Information Exchange

5. In its simplest form, the prehearing interview of a Prosecution witness is an exchange of information directed by the Prosecutor in relation to the anticipated testimony of the witness. It also provides an opportunity for the witness to gather information about the contemplated proceedings and the witness's role with respect thereto. While a Prosecutor must know as much as possible about every aspect of the case, the scope of information required by a witness is much more restricted. Further, the Prosecutor must bear in mind that information gathered by investigating officers and shared with the Prosecutor is encumbered with a variety of mechanisms which restrict the liberty of the Prosecutor to share any or all of that information with others. For example

- a) Some information exchange may be in the nature of legal advice and, as such, is protected by a solicitor-client privilege². Where the privilege exists, it cannot be waived by the Prosecutor unilaterally but must be waived by the client³.
- b) The Prosecutor must not release any information that
 - i) would tend to identify a police informer;
 - ii) out of court, would tend to identify a complainant or a victim;
 - iii) out of court would tend to identify an accused who was under the age of eighteen years at the time of the offence alleged;
 - iv) would tend to violate a court order sealing up any part of a court proceeding or file.
- c) The Prosecutor must not share with a witness information about the investigation to the degree that it influences or "taints" evidence the witness has to offer⁴. Similarly, care must be taken not to share with a witness details about proceedings underway, from which the witness has been excluded by court order.
- d) The Prosecutor must bear in mind that there is no property in a witness. Therefore, any details shared with a witness about the Prosecutor's thoughts and opinions, tactical or strategic considerations in a case (or other matters not within the scope of disclosure) can be repeated by the witness to defence counsel or anyone else.

6. The scope of information a Prosecutor may disclose to a witness is somewhat wider where the witness is also the victim of the alleged offence: see **Interviewing the Victim**, below. Generally, however, the Prosecutor should not divulge details of the case to any witness, except as might be necessary to properly prepare the witness for participation in the hearing process. In particular, the following principles apply:

a) The Prosecutor shall not provide to a witness access to information, documents or copies of documents not otherwise available to the public which are contained within the prosecution brief except as required for reasonable and proper preparation for the hearing (such as documents in relation to the testimony of an expert witness, or a copy or transcript of the witness's statement or prior testimony). The Prosecutor shall take reasonable steps to ensure that any document provided to a witness, and any copies made thereof by or for the witness, are surrendered to the Prosecutor upon the completion of the witness's involvement in the hearing.

b) Care must be taken once a witness has begun to give evidence at a court martial. The Prosecutor shall always adhere to any relevant Rules of Professional Conduct⁵. Where an examination in chief of a prosecution witness is interrupted by a court adjournment, the Prosecutor may only discuss with the witness any matter not covered in the examination up to that point. Once the examination in chief is complete and until any and all cross-examination and re-examination of the witness is complete, the Prosecutor shall not have any discussion with the witness respecting the witness's testimony or relative to any issue in the proceeding without leave of the court.

c) Generally, witnesses are excluded from court martial proceedings⁶. The Prosecutor shall ensure that any subsequent witness interviews respect the spirit and intent of the exclusion. Generally, exclusion is required so that each witness will testify without knowledge of questions or answers involved in the testimony of other witnesses, so as to maximize the opportunity of the court to measure the reliability and credibility of each witness.

Interviewing the Victim

7. Additional considerations apply in relation to the interview of a victim who requires more than the information required by all witnesses in court martial proceedings. With respect to a victim, the following principles apply:

a) A Prosecutor shall treat all witnesses and victims in particular with courtesy, sensitivity and respect, bearing in mind the emotional interest one might reasonably expect the victim to have in the proceedings.

b) The Prosecutor shall make all reasonable efforts to answer any questions posed by the victim in respect of the proceedings.

c) A Prosecutor shall take all reasonable steps to ensure that the victim understands the nature of the proceedings.

d) A Prosecutor shall, in appropriate cases, inform the victim of available support and counseling resources of which the Prosecutor is aware.

e) A Prosecutor shall make all reasonable efforts to keep the victim informed with respect to the proceedings including plea and sentence discussions undertaken; any verdict, sentence or other final decision in the case.

f) A Prosecutor shall always consider the propriety of special accommodations⁷, and shall discuss the availability of such matters with the victim in appropriate cases.

Disclosure of Witness Interviews

8. Interviews of witnesses by the Prosecutor are *not* undertaken to gather new information about

the case at hand: see **General Principles**, above. Where the Prosecutor determines that the investigation is incomplete, he or she shall invite the investigating officers to re-interview the appropriate witnesses.

9. The Prosecutors' interview of a witness is an opportunity to build rapport, to answer questions posed by the witness, and to provide generic information about the proceedings and how they are normally conducted. Sometimes, however, the interview may involve a discussion of specific areas in the anticipated evidence of the witness. For example, a witness may raise points of his or her testimony during the interview, or the Prosecutor may be interested in the witness's reaction to a question of minor significance which had not been asked in previous interviews conducted by the investigators. While the proper preparation and conduct of a prosecution may require this sort of discussion (especially in respect of witnesses who are frail, reluctant or nervous) it should be avoided, especially near or during the calling of evidence, for practical reasons:

a) the discovery of new testimony on the eve of the proceedings may leave the prosecution with insufficient time to properly prepare the case;

b) a properly investigated case should have revealed the substantive aspects of the case prior to witness interviews by the Prosecutor;

c) disclosure of new and relevant information by a witness to the Prosecutor on the eve of trial may also trigger a delay in the proceedings with consequent cost and inconvenience; and

d) if the new disclosure is inconsistent with prior statements of the witness, the fact of this new disclosure will likely be relevant to the defence, thereby placing the Prosecutor in the position of a possible witness for the defence.

e) therefore, Prosecutors should not conduct a witness interview as a fact-finding mission. Where a Prosecutor has concerns with the expected testimony of the witness, the preferred course is to invite investigators to fully explore such matters and to reinterview the witness.

10. If the witness's interview comments are completely encompassed by and consistent with prior statements of the witness of which the Regional Military Prosecutor is aware, the Regional Military Prosecutor need not disclose the nature or substance of the interview to defence. The onus is upon the Regional Military Prosecutor, however, to determine if the interview reveals anything new or inconsistent and to be governed accordingly. If the witness's interview comments afford new information or details wholly or partly inconsistent with prior statements of the witness of which the Regional Military Prosecutor is aware, a disclosure obligation is triggered. As soon thereafter as is reasonably possible, the Regional Military Prosecutor shall:

a) prepare a file memo outlining the details of the interview, including the date, place and duration of the interview, the identity of persons present, and the nature and substance of all discussion during the interview;

b) place a copy of the file memo and any other notes made by the Regional Military Prosecutor during the interview on the Regional Military Prosecutor's file;

c) provide as soon as practicable to the investigating police officers any original notes made by the Regional Military Prosecutor or any third party present in the interview along with any other recording of the interview which is in the possession or control of the Prosecution, and the details of all persons present during the interview;

d) provide as soon as practicable to defence a summary of the interview events including: where and when the interview took place; who was present; and what the witness said during the interview which was new or inconsistent with prior statements of the witness.

11. Where the Prosecutor is served with a subpoena by defence in respect of a witness interview, the Prosecutor shall inform the DMP or D/DMP immediately so that efforts can be undertaken to address the evidentiary issues without the necessity of the Prosecutor giving evidence in the proceedings or, alternately, to appoint a different Prosecutor to conduct the balance of the case.

Availability of this Policy Statement

12. This policy statement is a public document. It is to be made available on request to defending officers/defence counsel, accused persons or members of the Canadian Forces and the public.

Footnotes

¹ See sections 79 and 86 of the Military Rules of Evidence.

² The privileged nature of investigator-to-prosecutor communications is limited by other considerations: it is subject, for example, to the overriding disclosure obligations imposed upon the Prosecutor to allow the accused to know the case to be met and to prepare a full answer and defence.

³ In the context of prosecutor and investigator, care must be taken in analyzing whether the solicitor-client privilege, where it exists, has been waived implicitly: see, for example, *R. c. Shirose and Campbell*.

⁴ See in this regard *R. v. Buric* (1997), (S.C.C.).

⁵ For example, the Canadian Bar Association Code of Professional Conduct which provides (Rule IX, Commentary 16):

When in court the lawyer should observe local rules and practices concerning communication with a witness about the witness's evidence or any issue in the proceeding. Generally, it is considered improper for counsel who called a witness to communicate with that witness without leave of the court while such witness is under cross-examination.

In Nova Scotia the rule has long existed that it is improper for counsel to communicate with a witness called in chief during a break or adjournment until the witness's cross-examination has concluded. The Rules of Professional Conduct of the Law Society of Upper Canada provide several guidelines respecting communication with witnesses giving evidence: see Commentary 15 to Rule 10.

⁶ See subsection 180(3) of the *National Defence Act*, and QR&O 112.10.

⁷ See, for example, section 180 of the *National Defence Act*, and Q.R.&O. art. 112.10 and 112.33.