

Witness Interviews: 21 Best and Worst Practices

Alexander DC Kask
Guild Yule LLP

14 Best Practices (1 to 5)

1. Avoid Delay
2. Know the file
3. Do your due diligence
4. Be professional
5. Identify yourself

14 Best Practices (6 to 10)

6. Determine witness legal knowledge and approach accordingly
7. Interview to avoid suggestion and ensure accuracy
8. Obtain data and BF your system
9. Record and Confirm
10. Identify future activities

14 Best Practices (11 to 14)

11. Subpoena
12. Protocol for uncooperative witnesses
13. Protocol for treating physicians
14. Protocol for opposing experts

7 Practices To Avoid (I to IV)

- I. Telling the witness with whom they should not speak
- II. Advocacy
- III. Assuming anything
- IV. Interviewing more than one witness at a time

7 Practices To Avoid (V to VII)

- V. Interviewing witnesses who you know have counsel
- VI. Audio or video recording the interview
- VII. Obtaining affidavits

Best Practices

Best Practices

1. **Avoid Delay**

Start process as early as possible:

- memories fade
- documents get lost/destroyed
- people move/decease

Best Practices

2. Know the file

Before you contact anyone review pleadings, documents and statements in detail

Best Practices

3. Do your due diligence

- Check online for data on witnesses,
- conduct social media searches (but no trolling), check for media references,
- do a site visit (or a GoogleMap walk-through), etc.

Best Practices

4. Be professional

- Communicate clearly, be polite, pleasant, conversation, candid, and empathetic (try to put the witness at ease)
- Remember that what you do reflects on your firm and the client

Best Practices

5. Identify yourself

At the outset, leave no doubt as to

- who you are,
- your role in the case, and
- why you are contacting the witness

Best Practices

6. **Determine witness legal knowledge and approach accordingly**
 - Does s/he have experience testifying or observing litigation
 - Reassure him or her
 - Explain process and their role in it
 - Confirm your client's interest in learning the unvarnished truth

Best Practices

7. Interview to avoid suggestion and ensure accuracy

Recommendations from the British Psychological Society *Guidelines on Memory and the Law* 2008

<http://www.forcescience.org/articles/Memory&TheLaw.pdf>

- a. Develop rapport
- b. Encourage Witness participation
- c. Reinstate Context
- d. Encourage reporting of everything
- e. Use Varied recall
- f. Avoid contamination

Best Practices

7. Interview to avoid suggestion and ensure accuracy

a. Developing rapport

Encourage witness to ask questions for clarification, not to guess, tell you if you have misunderstood their answer

Best Practices

7. **Interview to avoid suggestion and ensure accuracy**
 - b. *Witness participation*

Be a good conversationalist – a good listener
who invites discussion

Techniques to encourage the witness to volunteer information:

- ask open-ended questions only
- do not interrupt the witness
- encourage the witness to take a dominant role in the interview conversation
- do not rush the witness

Best Practices

7. Interview to avoid suggestion and ensure accuracy

c. *Context reinstatement*

For eyewitnesses see if you can get the witness to mentally reinstate their thoughts, feelings and physical experiences at time of the witnessed event

Best Practices

7. Interview to avoid suggestion and ensure accuracy

d. *Reporting everything*

Invite the witness to report everything including those things they consider trivial

Best Practices

7. Interview to avoid suggestion and ensure accuracy

e. Varied recall

Ask eyewitnesses to recall in different temporal orders, for example, starting at the end and recalling backwards from there

Best Practices

7. Interview to avoid suggestion and ensure accuracy

f. Avoiding contamination

- Do not provide the witness with sources of external data
- Avoid reference to what other witnesses have to say
- Determine if they have spoken previously to other witnesses/interviewers who may have influenced their current recollections

Best Practices

8. Obtain data and BF your system

Confirm full legal name, occupation, and contact information (address, email, landline phone number, and mobile number)

Record witness account in detail

Determine who else has interviewed the witness and what was asked (to determine risk of contamination)

BF your system to check up periodically on changes to witness contact information

Best Practices

9. Record and Confirm

Convert your notes into a typed statement and ask witness to sign

If you can't get a signed statement, email/courier/fax the witness a summary of what you understand their evidence to be and ask them to advise if anything is incorrect or unclear to them (emphasize importance that you not be mistaken regarding their account)

Best Practices

10. Identify future activities

Remind witness of trial dates and need to testify

Ask them to advise you if they have plans to move or engage in lengthy travel

Ask them if they have any health issues that could affect ability to testify

Best Practices

11. Subpoena

Draft Subpoena and have a plan for service of same

Best Practices

12. Protocol for uncooperative witnesses

Rule 7-5 — Pre-trial Examination of Witness

Order for examination

- (1) *If a person who is not a party of record to an action may have material evidence relating to a matter in question in the action, the court may*
- (a) *order that the person be examined on oath on the matters in question in the action, and*
 - (b) *either before or after the examination, order that the examining party pay reasonable lawyer's costs of the person relating to the application and the examination.*

Best Practices

12. Protocol for uncooperative witnesses

When drafting letter to non-cooperating witness, consider the following:

Affidavit in support of application

(3) An application for an order under subrule (1) must be supported by affidavit setting out

(a) the matter in question in the action to which the applicant believes that the evidence of the proposed witness may be material,

(b) if the proposed witness is an expert retained or specially employed by another party in anticipation of litigation or preparation for trial, that the applicant is unable to obtain facts and opinions on the same subject by other means, and

(c) that the proposed witness

(i) has refused or neglected on request by the applicant to give a responsive statement, either orally or in writing, relating to the witness' knowledge of the matters in question, or

(ii) has given conflicting statements.

Send letters on a fixed schedule asking for their cooperation and advising in last couple of letters of Rule 7-5 option that will need to be utilized

Best Practices

13. Protocol for treating physicians

Swirsky v. Hachey [1996] 5 WWR 214; 16 BCLR (3d) 281 at para 42

<http://canlii.ca/en/bc/bcsc/doc/1995/1995canlii617/1995canlii617.html>

If you are on for the defendant and the witness is a physician who has treated the plaintiff, advise the plaintiff's counsel that in advance that you intend to proceed with a *Swirsky* interview and that you are giving them the opportunity to attend

Best Practices

14. Protocol for opposing experts

Spring 2013 *Practice Watch* article on contacting opposing counsel's expert and the BC Code

<http://www.lawsociety.bc.ca/page.cfm?cid=2711&t=Practice-Watch-The-BC-Code:-questions-and-answers>

Although the *Code of Professional Conduct for BC* no longer includes the old *Handbook* Chapter 8 Rule 15 requirement that you contact opposing counsel prior to attempting to interview experts they have retained, the Law Society recommends doing so.

Practices to Avoid

Practices to Avoid

I. Never suggest they should not speak with opposing counsel about the matter

*Code of Professional Conduct for BC
Delegation*

6.1-3 A lawyer must not permit a non-lawyer to:

(n) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do

5.3 Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

*It is not improper for a lawyer to request a witness to decline to talk to the other side unless he is present. [PCH]
[EC May 1997, item 8](#)*

Practices to Avoid

II. Do not engage in advocacy

Do not try to convince the witness of anything

Do not share your theory of the case to the witness

Avoid saying disparaging things about other litigants

Practices to Avoid

III. Never assume anything

Do not allow yourself to think you know everything

Do not assume that information provided to you prior to the interview is accurate

At end of interview ask witness if they have anything else to add

Practices to Avoid

IV. Never interview more than one witness at once

Risk of contamination

Practices to Avoid

V. Never interview witnesses who have counsel

Not without advising the counsel

Practices to Avoid

VI. Do not audio or video recording the interview

Not without advising the witness in advance

CBA Code of Professional Conduct

CHAPTER XVI

RESPONSIBILITY TO LAWYERS AND OTHERS

5. The lawyer should not use a tape-recorder or other device to record a conversation, whether with a client, another lawyer or anyone else, even if lawful, without first informing the other person of the intention to do so.

Practices to Avoid

VII. Do not obtain an affidavit

Other than for a summary trial motion or narrow issues relating to an interlocutory application

Pierre v. Mount Currie Indian Band [1999] 10 WWR 174; 61 BCLR (3d) 381 <http://canlii.ca/t/1d135> at para 28

Golden Capital Securities v. Holmes, 2001 BCSC 1487
<http://canlii.ca/t/4wq8> at para 21

Birch v. Brenner, 2013 BCSC 1862
<http://canlii.ca/en/bc/bcsc/doc/2013/2013bcsc1862/2013bcsc1862.html>
at para 11

Conclusion