

YOUR BACKUP MEMORY

The importance of making accurate notes

~ Part 1 ~

Salhany's Police Manual of Arrest, Seizure and Interrogation

by Ian D. Scott and Joseph Martino

One of the core difficulties that can contribute to an unsuccessful prosecution is the failure by police officers to prepare proper notes of an investigation. The preparation of notes should never be approached as if it was a burdensome task that police officers must reluctantly undertake because they were taught to do so at their police college. It is an integral part of a successful investigation and prosecution of an accused, as important as obtaining an incriminating statement, discovering incriminating exhibits or locating helpful witnesses.

The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator. The judicial system expects that officers, as a condition of their role as professional witnesses, are required to keep notes: Ontario (*Police Complaints Commissioner v. Kerr* (1997), 96 O.A.C. 284 (Ont. C.A.), leave to appeal refused (1997), 107 O.A.C. 398 (note) (S.C.C.)).

How should the notes be taken? Some officers prefer to do it by narrative; others in point form. It does not really matter so long as the notes are comprehensive. A good ballpoint pen that does not smudge

should be used. The lead of a pencil fades over time and leaves the officer open to the suggestion that something important was erased or changed.

Electronic notes present their own challenges due to their potential malleability; it can be difficult to determine whether an electronic note has been altered after the fact. It is our suggestion that notes taken by means of a computer be printed, and then manually dated and signed after review by the writer of the note. By this process, the information contained in the note is frozen in time and can be differentiated from any subsequent versions.

It is an unfortunate fact that the administration of criminal justice in Canada does not move quickly, although section 11(b) of the *Canadian Charter of Rights and Freedoms* purports to guarantee any person charged with an offence "the right to be tried within a reasonable time." The delay in prosecuting crimes is a situation common to all provinces of Canada. Delays are much longer in the superior courts involving indictable offences because of the requirement that there be a preliminary inquiry where an accused requests it. This means that police officers, who are usually the main witnesses in the criminal courts, are expected to recall events of an investigation long after

their memory of they have faded. In the meantime, a police officer will usually have been involved in new investigations that will only add to the concern of the court about reliability of the officer's evidence.

The importance of preparing complete, detailed and comprehensive notes will rarely be appreciated by the officer until he or she is called upon weeks, months or even years later to testify as to his recollection of the events of his investigation. When the case comes up for trial, the Crown attorney will ask the officer to review his or her notes to prepare for testifying when called at trial. The officer may have some recollection of the facts or may have none at all. In either case, the officer will soon discover how invaluable full and detailed notes of his or her investigation will be to the presentation of the evidence.



It is important that the notes be prepared as soon as possible after the event which the officer is investigating. If the officer at the time that he or she is called upon to testify has little independent recollection of an earlier investigation, the officer will be allowed to refer to his or her notes to assist in giving evidence. Since the court will be placing reliance upon the notes, and not the officer's limited recollection, it is important that the notes be recorded very soon after the event.

Judges recognize that memory becomes notoriously unreliable as time passes and other investigations and events take place. Judges also recognize that police officers must refer to their notes when testifying if the officer's testimony is going to be reliable. It is because an officer needs to refer to notes while testifying to assist in recalling events that occurred long in the past, that accurate, detailed and comprehensive notes are essential if the officer expects to be relied upon by the court.

Any witness, whether a police officer or an ordinary witness, who refreshes his or her memory from notes or any statement prepared prior to trial must produce them to the cross-examiner: *Morgan* (1993), 80 C.C.C. (3d) 16 (Ont. C.A.), leave to appeal refused (1994), 87 C.C.C. (3d) vi (note) (S.C.C.). A cross-examiner is entitled to examine the notes to consider whether they are consistent with the officer's oral testimony, to attack the accuracy of the notes by questioning the timeliness of the record, or to raise the possibility of invention. Moreover, a police officer is required to produce those notes to the defence as part of the disclosure process: *Stinchcombe* (1995), 96 C.C.C. (3d) 318 (S.C.C.).

It is also too often forgotten that detailed and comprehensive notes serve

another purpose. The notes themselves may be admitted into evidence in certain circumstances where an officer has absolutely no memory of an event.

This is recognized in law and called "past recollection recorded". To be admissible, the past recollection must have been recorded in some reliable way; it must have been sufficiently fresh and vivid to be proba-

bly accurate at the time; the witness must be able now to assert that the record accurately represented his or her knowledge and recollection at the time (the witness must be able to affirm that "he knew it to be true at the time."); and the original record itself must be used, if procurable: *Meddoui* (1990), 61 C.C.C. (3d) 345 (Alta. C.A.), leave to appeal refused (1991), 114 A.R. 80 (note) (S.C.C.);

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B. (A.J.) (1994), 90 C.C.C. (3d) 210 (Nfld. C.A.), leave to appeal allowed (October 6, 1994), Doc. 24182 (S.C.C.), reversed [1995] 2 S.C.R. 413 (S.C.C.) and *F. (C.)* (1997), 11 C.R. (5th) 209 (S.C.C.).

The notes should be made as close as possible in time to the event witnessed. The courts do not require that the note be made by the witness shortly after the event, simply that the note be made by the witness when the event was fresh in the witness's mind: *Coffin* (1956), 114 C.C.C. 1 (S.C.C.); *Shergill* (1997), 13 C.R. (5th) 160 (Ont. Gen. Div.); *B. (K.G.)* (1998), 125 C.C.C. (3d) 61 (Ont. C.A.).

Common sense tells us that unless the note was made when the event was fresh in the witness's mind, there is a serious risk that the note will contain errors that the witness will probably rely upon when giving testimony.

This does not mean that officers are entitled to delay preparation of their notes. They should prepare their notes as soon as possible after an incident. An officer who is unable to complete his or her notes before the shift has ended, should not delay completing the notes until their next shift.

A police officer who is questioning a witness or photographing a crime scene does not stop in the middle of taking a statement or photographing the scene because his or her shift has ended. The preparation of notes, where possible, should be completed



before the officer leaves one's shift.

If an officer does not have his or her notebook or duty book during the investigation, notes should be jotted down on any piece of paper that is available. Later those notes can be transferred to the notebook or duty book.

As a precaution, the officer should keep the original notes in a safe place or attached to the notebook or duty book, and brought to court in case counsel for the defence tries to suggest that there was an error made when the notes were transcribed to the notebook.

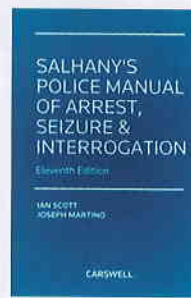
Copies of those original notes should also be made part of the disclosure material.

Although notes should be prepared as soon as possible after the event, there is no arbitrary time limit for making them. The general rule is that the notes should be made immediately after the event recorded or so soon thereafter that the facts are fresh in the recorder's memory: *Gwozdowski* (1972), 10 C.C.C. (2d) 434 (Ont. C.A.).

However, that rule is subject to the recognition that freshness of recollection will often depend on the circumstances. For example, an unusual, unique or isolated event will probably be remembered long after a routine one or one of a continuous series.

NEXT MONTH - Changing notes

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