

England & the US: Contrasts In Witness Preparation Rules

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In contrast to American principles allowing counsel to confer with a witness about the substance of proposed testimony and the best way to present the evidence, professional responsibility standards in England and Wales impose severe restrictions on how a lawyer may prepare a witness to testify at trial. English trial advocates are confined to a set of practices known as “witness familiarization.” This includes familiarizing the witness with courtroom procedures, informing the witness about the need to testify clearly, and instructing the witness how to withstand the rigors of cross-examination.

Describing the English practice, England’s leading witness- preparation consulting firm, Bond Solon, states in its advertising: “Mock questioning is expressly permitted to give a witness greater familiarity and confidence in the process of giving oral evidence, provided the exercise is not based on facts which are the same as or similar to those of any current or impending trial (emphasis added).” See, <http://www.bondsolon.com> (visited 1/29/06).

Contrasts in Approach

The admonition offered by two prominent officials of The General Council of the Bar (known as the “Bar Council”, the Council represents and regulates English barristers) establishes the limits of witness preparation in England and Wales. “Suggesting an answer to a witness (‘I suppose you are trying to say ...’) or conveying that an answer is wrong or implausible would and plainly ought to breach any professional code.” L. Dobbs & D. Etherington, “Witness Coaching in Criminal Cases,” *The Barrister*, January 12, 2004.

Contrast this advice with the American approach to witness preparation: “. . . [A] lawyer may invite the witness to provide truthful testimony favorable to the lawyer’s client.” *Restatement (Third) of the Law Governing Lawyers*, §116, Comment b, American Law Institute, 2001 at 206. The Restatement continues: “[w]itness preparation may include the rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness’s meaning clear.” *Id.*

Because witness preparation in England is tightly regulated, lawyers worry about the disciplinary consequences of mismanaging the process. As a London barrister and academic specializing in witness preparation notes: “Witness preparation – mention it to barristers and the response is sometimes a cautious ‘Is this permitted by the Bar Council?’ or even a dismissive ‘I’d never do that, it’s coaching isn’t it?’ The short answer to both is that the *Bar Code of Conduct* permits witness preparation when it is done properly and, done properly, it is not coaching.” P. Cooper, “A Stitch In Time Saves Nine,” *Counsel*, July 2003.

English Professional Responsibility Codes

Under the *Code of Conduct* promulgated by the Bar Council, “[a] barrister must not rehearse, practice or coach a witness in relation to his evidence.” *Code of Conduct*, §705[a]. Virtually the same rule applies to solicitors (“solicitor advocates”) who qualify to appear as advocates in court. See, *The Law Society’s Code for Advocacy*, §6.5[b] (The Law Society of England and Wales is the organization that represents and regulates solicitors).

The decision by England’s Court of Appeals in a recent criminal case, *R. v. Momodou*, EWCA 177 (2005), reinforces and reflects (but strangely, does not mention) code-based restrictions on witness preparation. While the *Momodou* court affirmed convictions obtained in a trial in which improperly prepared witnesses testified for the prosecution, the opinion clearly defines the boundaries of ethical witness preparation in England and Wales. The basic teaching of *Momodou* is that “[t]he witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said . . .” *Id.*, at para. 61. See, *Ultraframe v. Fielding*, EWHC 1638 (2005) (applying *Momodou* in the civil context).

Momodou approves “pre-trial arrangements to familiarize the witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants.” *Id.* at para. 62. Pointedly, the Court goes on to say, “[n]one of this however involves discussions about proposed or intended evidence (emphasis added).” *Id.*

Bar Council Guidance

Bar Council comment on *Momodou*, filling a gap in the decision, states, “it is also appropriate, as part of the witness familiarization process, for barristers to advise witnesses as to the basic requirements for giving evidence, e.g., the need to listen to and answer the question put, to speak clearly and slowly...and to avoid irrelevant comments.” *Guidance on Witness Preparation*, §5.

Following *Momodou*, the Bar Council – commenting specifically on “witness familiarization” in civil matters – warned: “[i]n any discussions with witnesses regarding the process of giving evidence, great care must be taken not to do or say anything which could be interpreted as suggesting what the witness should say, or how he or she should express himself or herself in the witness box – that would be coaching.” *Guidance on Witness Preparation*, §12[2].

The restrictive witness preparation rule set forth in §705[a] of the *Code of Conduct* is reinforced by Bar Council comment in *Written Standards for the Conduct of Professional Work*, §6.2.4. This section reminds the profession that discussion with a witness about his evidence “may place the barrister in a position of professional embarrassment”

Witness Preparation in New York

In New York, witness preparation is regulated by DR 7-102[A][6], which states that a lawyer must not “[p]articipate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.” The rule prohibits counsel from preparing a witness for trial by knowingly urging the presentation of false evidence.

This narrowly drawn prohibition, however, simply restates the obvious. It does not help resolve ethical issues arising from counsel’s zealous (or overly zealous) efforts to urge a witness to recall “true” facts.

But the rule is a good place to start when defining the boundaries of ethical witness preparation. Hal Lieberman, former chief counsel for the First Department's Disciplinary Committee, has observed that the difference between ethical and unethical witness preparation lies in the distinction "between aiding a witness to make a point clearly (to bring out the 'truth')" and "changing (i.e. facilitating or orchestrating) a witness's presentation so that the testimony is either false or creates a false impression." H. Lieberman, "Be Aware Of Ethical Witness Preparation Rules," *NYLJ*, May 25, 2000.

If the English *Code of Conduct* regulates witness preparation too strictly, the *New York Code of Professional Responsibility* regulates it too loosely. Referring to standards of conduct prohibiting the encouragement of false testimony, one commentator notes that these precepts "frequently offer insufficient specific guidance on how to stay on the right side of the line that separates zealous client representation . . . from improperly influencing a witness' testimony." H. Gordon, "Crossing The Line On Witness Coaching," *NYLJ*, July 8, 2005.

Indeed, the truth or falsity of a witness' testimony was found to be an inadequate measure of the integrity of a lawyer's witness preparation in a nineteenth century New York disciplinary case decided almost 30 years before the 1908 ABA Canon of Ethics. The decision affirmed the suspension of a lawyer who had written out the testimony of witnesses in a probate matter. *Matter of Eldridge*, 82 N.Y. 161, 1880 WL 12546 (1880). "Grant that the answers are not shown to be false and that [lawyer] Eldridge believed them to be true; yet he corrupts justice at the fountain by dictating the evidence of the witness." *Id.*, at *6.

The Need for a New Approach

More recently, the need for a new approach to the regulation of witness preparation was demonstrated in a Texas case not unlike *Eldridge*. The firm of Baron & Budd, acting as plaintiffs' counsel in asbestos litigation, distributed a memo to plaintiffs, who claimed they had suffered medical problems as a result of working with asbestos. See, J. Rogers, "Ethics of Witness Preparation," *ABA/BNA Lawyer's Manual On Professional Conduct*, Vol. 14, No. 2, February 18, 1998 (providing a useful summary of the facts and resulting controversy).

Here is a sample from the Baron & Budd witness preparation memo: "It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it. . . . It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER. . . . (emphasis as in the original)."

Considering the Baron & Budd memo under ABA Model Rule 3.3[a][3] (prohibiting evidence the lawyer knows to be false) and Model Rule 3.4[b] (warning that counsel must not "falsify evidence, counsel or assist a witness to testify falsely. . ."), Cornell Law Professor W. Bradley Wendel concludes – without resolving the issue of whether the testimony suggested by the memo would distort the truth – "as a matter of black letter law, it is not entirely clear what prohibits the lawyer from preparing a witness in this manner." W. Wendel, *Professional Responsibility*, Aspen, 2004 at 221.

Nor does the official Comment to the ABA version of Model Rule 3.4 resolve the ambiguity highlighted by Professor Wendel. Comment 1 states, in part, "Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, *improperly influencing witnesses*, obstructive

tactics in discovery procedure, and the like (emphasis added).” But the Comment – leaving a huge void – does not explain what kind of conduct constitutes improper influence of a witness.

COSAC’s *Proposed New York Rules of Professional Conduct*, NYS- BA, September 30, 2005, [NYPRR, December 2005, page 1; January 2006, page 8] offer a version of 3.4[b] that is similar to its ABA Model Rules counterpart, except that the proposed New York rule emphasizes the mens rea element. “A lawyer shall not . . . falsify evidence, create or use evidence the lawyer *knows* to be false or counsel or assist a witness to testify falsely (emphasis added).” Official Comment 1 in COSAC’s proposed New York rules mirrors the ABA Comment about “improperly influencing witnesses.”

Neither the proposed New York witness preparation rule, 3.4[b], nor the current New York rule prohibiting the creation of false evidence, DR 7-102[A][6], encompasses the kind of conduct involved in *Eldridge* or in the Baron & Budd memo. The problem with rules framed as a prohibition against encouraging false testimony is that they require a showing that the evidence was *actually* false. This narrow standard provides a very limited basis for defining the ethical boundaries of witness preparation because, as a practical matter, the truth or falsity of a piece of evidence often remains in doubt even after the case is over. And that narrow basis for applying discipline shrinks even further when it must be shown that the lawyer knew that the evidence was false.

While the true-or-false standard must be retained to preserve the integrity of our adversary system, it should be supplemented with specific guidelines defining those elements of witness preparation that create an unreasonable risk that the witness will interpret counsel’s advice as an invitation to present false testimony. An unreasonable risk may occur, for example, when counsel lectures the witness on the elements of a claim or defense before eliciting any facts from the witness. It may also occur if counsel delivers her lecture *after* she receives a statement from the witness that is inconsistent with the claim or defense she suggests in her lecture.

Of course, all witness preparation creates a risk of corruption. As the *Momodou* Court correctly notes, “the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant.” *Momodou* at para. 61.

But the English solution – *i.e.*, to prohibit a trial advocate from preparing a witness on his evidence – goes too far in its zeal to reduce the risk that trial counsel will corrupt the witness. We think the better approach for New York would be to formulate a list of witness preparation guidelines that would discourage witness manipulation and reduce the risk of tainted testimony.

Amend Comment To Proposed Rule 3.4

To clarify what elements of witness preparation are prohibited (or at least disfavored), COSAC and the NYSBA should consider incorporating risk-based guidelines to supplement the true-or-false standard set forth in proposed Rule 3.4[b]. To that end, Comment 1 to Rule 3.4(b) could be expanded as follows:

The term “improperly influencing witnesses” means more than encouraging or assisting a witness to testify falsely. It includes witness preparation that creates an unreasonably high risk that the witness will disregard his or her obligation to refrain from giving false testimony. For example, an unreasonable risk of eliciting false testimony is created when a lawyer suggests to the witness

that a particular line of proof is essential to his case, or when counsel tells a witness that the adversary, or the trier of fact, will probably be unable to detect false testimony.”

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