

Prepping, Not Coaching: The Ethics of Witness Preparation in Civil Litigation

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“The lawyer’s duty is to extract facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.”¹

Some years ago, as part of litigation in England, the author was helping prepare a key American witness for upcoming testimony at trial. The witness and the lawyers were no strangers to each other: proceedings had been underway for many years, during which time various witness statements had been taken; documents had been reviewed; and countless meetings had taken place, often long into the night. But with trial approaching, the witness wanted as specific guidance as possible about how to put his best foot forward. To his irritation, the English lawyers informed him that no, they could not just give him a list of questions and suggested answers: although “witness familiarization” was allowed – showing witnesses the courtroom, explaining the procedure and who sits where, how to dress, how to address the judge, and so on – “coaching” witnesses is not permissible in England. The witness thought about this for a moment, then lit up with a suggestion: perhaps we could all fly somewhere *outside* the jurisdiction, coach him up there, and then return to England in time for him to testify! Problem solved, or so he thought. It was therefore to his great annoyance when the lawyers explained that this wouldn’t work either: the ethical requirements which made coaching off limits in England applied out of jurisdiction too.

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The episode highlighted that major differences exist between the type of witness preparation that is considered acceptable in different common law jurisdictions. In the United States, England & Wales, and Canada, the underlying principles regulating the practise are substantially similar: candour, honesty, integrity, diligent advocacy, and so on. However, these have a diverse range of application in the context of witness preparation. While everyone agrees that it is not proper for counsel to lie, or knowingly to permit a witness to give false testimony, beyond that, the jurisdictions have vastly differing approaches, with the United States quite permissive, and England & Wales quite restrictive. Canada – as in so many other respects a halfway house between the two – falls somewhere in between, but also has the least official guidance, case law or commentary on the subject, particularly in the civil context.

This article summarises key cases and commentary from each of the jurisdictions mentioned above, considers the relevant ethical and professional responsibility obligations in the Canadian context, and – while acknowledging that there will always be grey area and room for counsel’s interpretation, suggests a few guiding rules. Above all, this review advocates for authoritative guidance: this is an area that would benefit from clarification by Canadian Law Societies.

Overview

Witness preparation – sometimes called “witness proofing” – is unique to adversarial (typically common-law) legal systems, with England & Wales, the United States, Canada, Australia, and New Zealand being the five leading jurisdictions.² Within such a jurisprudential framework, a witness may give evidence “for” a party: that is, counsel for one side is recognised as having an

¹ *In re. Eldridge* 37 N.Y. 161, 171 (1880).

interest, and indeed a duty, to elicit that witness's evidence in the service of proving her client's case. That is not possible in a civil law or "inquisitorial" system. There, a witness belongs to the court, with a corresponding duty to give evidence in the interests of establishing the truth. Correspondingly there is no room, conceptually, for "coaching" by one side or the other:³ one side trying to coach a witness in the adversarial model might well be considered to be engaging in an obstruction of justice.⁴

There is thus an important distinction, adverted to above, to be drawn between "familiarization", which aims to make a witness comfortable with the courtroom and associated process, and "coaching", which seeks to enhance a witness's testimony through preparation and rehearsal.

There is also an important distinction between criminal and civil matters. Clearly, there is some overlap in practice, as certain ethical duties (candour toward the tribunal and fairness to opposing counsel, to name two) apply in both contexts. However, there are also a number of key differences which set the criminal context apart, including the different duties of prosecutors as opposed to plaintiff's counsel (to the court in the service of the administration of justice, rather than to the client). One crown prosecutor has claimed that civil litigators are at a "distinct advantage" over crown prosecutors in relation to witness preparation: the plaintiff is paying to take his case to court and is personally invested in the outcome, with witnesses likely to be allied

² Sergey V. Vasiliev, 'From liberal extremity to safe mainstream? The comparative controversies of witness preparation in the United States' (2011) *International Commentary on Evidence*, 9(2).

³ Although "familiarization" of the sort described above is possible, and probably useful.

⁴ Mirjan Damaška, 'Presentation of Evidence and Factfinding Precision', (1975) 123 *University of Pennsylvania Law Review* 1083, at 1088-1089 ("Coaching" witnesses comes dangerously close to various criminal offenses of interfering with the administration of justice. '); see also *id.*, *Evidence Law Adrift* (New Haven/London: Yale University Press, 1997) 77.

with the client.⁵ The difference in subject matter between civil and criminal cases may also have implications for what constitutes best practice in terms of how witnesses are handled or “prepared”: for example, in the case of rape victims, it has been argued that greater preparation for both victim witnesses *and* police and prosecutors in terms of how to support them can produce higher-quality evidence at trial.⁶

A number of cases and official guidance (directions to prosecutors, for example) address the proper approach in criminal matters, but there is a relative paucity of equivalent material examining civil litigation. Much of the commentary that does exist (judicial, regulatory, or academic) relates to examinations for discovery, depositions, or other pre-trial interviews. There may be a practical explanation for this: there is a greater opportunity to challenge the conduct of counsel in these settings; a classic example is counsel using objections to suggest an answer to a witness, or talking to a witness during breaks in testimony. In a trial setting, it may be difficult to challenge adverse witnesses on whether preparation has been proper or not due to privilege or otherwise. However, whether before or at trial, the purposes of examining a witness are similar, and include to discover facts about the case; commit a witness’s account to the record; assess credibility and character; support or undermine other evidence; and enhance or neutralize other witness testimony. Therefore, many if not all of the same cautions and wisdom expressed in relation to the pre-trial context may apply to preparation / coaching for trial as well.

⁵ Geordie Proulx, QC, ‘Witness Preparation – A Prosecutor’s Perspective’ (April, 2016) *Continuing Legal Education Society of British Columbia*, p. 2.

⁶ Louise Ellison, ‘Witness preparation and the prosecution of rape’ (June, 2007) *Legal Studies*, 27(2).

United States

*American litigators regularly use witness preparation, and virtually all would, upon reflection, consider it a fundamental duty of representation and a basic element of effective advocacy*⁷.

A seminal article⁸ summarises the “standard wisdom” about the ethics of witness coaching as follows:

1. First, a lawyer may discuss the case with the witnesses before they testify. A lawyer in our common law adversary system has an ethical and legal duty to investigate the facts of the case, and the investigation typically requires the lawyer to talk with witnesses – the people who know what happened on the occasion in question. Moreover, the adversary system benefits by allowing lawyers to prepare witnesses so that they can deliver their testimony efficiently, persuasively, comfortably, and in conformity with the rules of evidence.
2. Second, when a lawyer discusses the case with a witness, the lawyer must not try to bend the witness’s story or put words in the witness’s mouth. As an old New York disciplinary case puts it: ‘[The lawyer’s] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.’
3. Third, a lawyer can be disciplined by the bar for counselling or assisting a witness to testify falsely or for knowingly offering testimony that the lawyer knows is false.

⁷ John S. Applegate, ‘Witness Preparation’ (December, 1989) *Texas Law Review*, 68(2), 278-279.

⁸ Richard C. Wydick, ‘The Ethics of Witness Coaching’ (September, 1995) *Cardozo Law Review*, at 1.

That “standard wisdom” is grounded in a number of rules of professional conduct and civil procedure. The following examples are taken from the American Bar Association’s *Model Rules of Professional Conduct*,⁹ which most states have adopted verbatim or in nearly-identical form:

1.1 Competence

1.2 Scope of Representation and allocation of authority between client and lawyer

... (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

1.3 Diligence

3.3 Candor Toward the Tribunal

3.4 Fairness to Opposing Party and Counsel

8.4 Misconduct

Attorneys have a legal duty to investigate the facts of a case. Rule 11 of the Federal Rules of Civil Procedure requires attorneys to make a reasonable investigation of the facts alleged in their pleadings:

By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances... (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.¹⁰

This task normally includes reviewing with the client the matters to be covered, anticipating specific questions that may be asked on direct or cross-examination, and reviewing important

⁹ *Model Rules of Professional Conduct*, online: American Bar Association (2017) <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>.

documents to familiarize or refamiliarize the client with them.¹¹ Indeed, the practical literature uniformly views the failure to interview available witnesses prior to testimony as a combination of strategic lunacy and gross negligence.¹² Berg – using the common American vernacular “woodshedding” for preparing a witness¹³ – states this even more strongly: “the first rule, then, is to woodshed in every instance, rehearsing both direct and cross-examination,” going on to remark that “it is probably unethical to fail to prepare a witness.”¹⁴ Similarly, other authors have declared that a lawyer who does not prepare all witnesses is “derelict in his professional duties.”¹⁵

It is clear from the above that witness preparation is considered important, and even essential. But beyond “don’t lie”, there is little guidance about what is and is not acceptable. Courts have confirmed that the acceptable ambit is very wide: “an attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the

¹⁰ Fed. Rule Civ. Proc. 11(b), (3).

¹¹ Applegate, *supra* note 5 at 287.

¹² *ibid.*

¹³ See, for example, Erin Asborn, ‘Ethical Preparation for Witnesses for Deposition and Trial’, American Bar Association, December 13, 2011 <<http://apps.americanbar.org/litigation/committees/trialpractice/articles/121311-ethics-preparation-witnesses-deposition-trial.html>>: “James Fenimore Cooper originated the phrase “horse-shedding the witness,” referring to attorneys who lingered in carriage sheds near the old courthouse in White Plains, New York, to rehearse their witnesses” (citing James W. McElhaney, *McElhaney’s Trial Notebook* at 99 (4th Ed. 2005)); see also Robert D. Gifford, ‘A Primer for Ye Ol’ Woodshed: Witness Preparation’ (November, 2016) *The Oklahoma Bar Journal*, “By its very nature, witness preparation is performed mostly behind closed doors that is often referred to as “woodshedding” a witness. The origins of the term “woodshedding” actually came from the writings of James Fenimore Cooper that referenced “horseshedding” as the attempt to gain influence over jurors of a case while in the horseshed. Over time, the “horseshed” became the “woodshed”.”

¹⁴ David Berg, ‘Preparing Witnesses’ (Winter, 1987) *Litigation Journal*, online: <<https://www.bafirm.com/publication/preparing-witnesses/>>.

¹⁵ Leo A. Levin, and Harold Cramer, *Problems and materials on trial advocacy*, (Mineola, N.Y.: Foundation Press, 1968) at 29.

witness to alter testimony in a false or misleading way.¹⁶ Instead, the focus seems to be on why witnesses *ought* to be prepared: common themes include that doing so is one of the indicative behaviours of competent counsel, and that it assists in the administration of justice. One court held that “...when a witness is designated by a corporate party to speak on its behalf... producing an unprepared witness is tantamount to a failure to appear that is sanctionable.”¹⁷ Similarly, in the North Carolina case of *State v. McCormick*:¹⁸

*It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney’s questions and the witness’ answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer... and is to be commended because it promotes a more efficient administration of justice and saves court time*¹⁹

But where are the boundaries, if there are any, when one is “going over... the witness’ answers”? Judges and commentators alike frequently quote the famous dictum of Judge Francis Finch: “*The lawyer’s duty is to extract facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.*”²⁰ However, there is minimal commentary on the grey area where the lawyer helps sculpt testimony which is not false, and which is consistent with what the witness knows or believes... but which is also not entirely the witness’s: that is, where the lawyer goes over not only what questions might be asked, but also how the witness ought to answer.

¹⁶ *Ibarra v. Baker* 338 Fed. Appx. 457 (2009) at 465.

¹⁷ *Black Horse Lane Assoc. L.P. v. Dow Chemical Corp.* 228 F. 3d 275 (2000) at 287.

¹⁸ *State v. McCormick* 259 S.E. 2d 880 (1979).

¹⁹ *Ibid* at 882.

²⁰ *In re Eldridge. supra* note 1.

Judge Finch was clear that this was improper: “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 witnesses.”²¹ There is more recent case authority to support restraint:

Because the line that exists between perfectly acceptable witness preparation on the one hand, and impermissible influencing of the witness on the other hand, may sometimes be fine and difficult to discern, attorneys are well advised to heed the sage advice of the Supreme Court of Rhode Island:

In the interviews with and examination of witnesses, out of court and before trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses. State v. Papa, 32 R.I. 453, 80 A. 12, 15 (1911)²²

Similarly, continuing the excerpt from *State v. McCormick*, above,

Even though a witness has been prepared in this manner, his testimony at trial is still his voluntary testimony. Nothing improper has occurred so long as the attorney is preparing the witness to give the witness’s testimony at trial and not the testimony that the attorney has placed in the witness’s mouth and not false or perjured testimony.

When a witness’ testimony appears to have been memorized or rehearsed or it appears that the witness has testified using the attorney’s words rather than his own or has been improperly coached, then these are matters to be explored on cross-examination, and the weight to be given the witness’s testimony is for the jury.

The sanctions of the Code of Professional Responsibility are there for the attorney who goes beyond preparing a witness to testify to that about which the witness has knowledge and instead procures false or perjured testimony. (DR7-102, Code of Professional Responsibility.²³ (emphasis added)

The suggestions here are that (i) rehearsal with a witness is fine; (ii) encouraging false or perjured testimony is sanctionable; and (iii) “testimony that the attorney has placed in the

²¹ *Ibid* at 6.

²² *State v. Earp*, 571 A 2d 1227 (MD 1990) at para 33.

witness's mouth" is to be explored on cross-examination – however, note that there is no echo of Justice Finch's suggestion that this is *improper* or contrary to high principles, but simply that it might hurt an attorney's case by damaging her witness's credibility.

Even this may be shifting further to a more permissive position, whereby suggested responses may be acceptable so long as they are not *actually false*: the Hawaii appellate court in *In re Hawaii v. Damien Chong*²⁴ held that,

[I]n this case, the circuit court concluded that the State had crossed the ethical boundary line that separates permissible preparation from impermissible coaching. Although the court acknowledged that providing grand jury witnesses with the questions they would be asked was proper, the court concluded that providing the answers to the questions was not. ...[W]e disagree. There is no evidence in the record to indicate that the predicate answers provided by the prosecution to the witnesses and the testimonies of the witnesses before the grand jury were a fabrication of the facts. Although the use of predicate questions and answers by the State may be risky, ethically, we cannot conclude that the State overstepped the ethical boundary line in this case²⁵.

That more permissive approach has been reflected in the American Law Institute's *Restatement of the Law Governing Lawyers*. §116 (1) states, "A lawyer may interview a witness for the purpose of preparing the witness to testify." However, Comment (b) elaborates as follows:

Under litigation practice uniformly followed in the United States, a lawyer may interview prospective witnesses prior to their testifying... As a practical matter, rules requiring inquiry to support factual allegations in a complaint or other document... may require a lawyer to interview witnesses to gain the necessary factual foundation... [The] general negligence standard might also require pre-testimonial interviews with witnesses...

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favourable to the lawyer's client. Preparation consistent with the rule of this Section may include the following:

²³ *State v. McCormick*, *supra* note 17 at 883.

²⁴ *In re Hawaii v. Damien Chong*, 949 P 2d 130 (1997).

²⁵ *Ibid* at 141.

[1] discussing the role of the witness and effective courtroom demeanor;

[2] discussing the witness's recollection and probable testimony;

[3] revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light;

[4] discussing the applicability of law to the events in issue;

[5] reviewing the factual context into which the witness's observations or opinions will fit;

[6] reviewing documents or other physical evidence that may be introduced;

[7] discussing probable lines of hostile cross-examination that the witness should be prepared to meet;

[8] witness preparation may include rehearsal of testimony. A lawyer may suggest choice words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact...²⁶ (emphasis added)

The notion that a lawyer might "suggest choice words" seems remarkable, and dangerously close to "putting words into the mouth" of the witness.²⁷ Nevertheless, that approach has also been endorsed by the Washington D.C. Bar in its Legal Ethics Opinion No. 79: "*A lawyer may not prepare, or assist in preparing, testimony the lawyer knows is false or misleading. However, so long as a lawyer does not violate this prohibition, a lawyer may suggest language and even the substance of a witness' testimony in preparing the witness.*"²⁸

In practice, there are few limits on what witness preparation might entail beyond the prohibition

²⁶ The American Law Institute, *Restatement of the Law Governing Lawyers*, (2000) at §116.

²⁷ Also remarkable is the implication that a lawyer *might* assist the witness to testify falsely as to a "non-material fact": if this is *not* what is being suggested here, it begs the question of why the "as to a material fact" wording is included at all.

²⁸ District of Columbia Legal Ethics, *D.C. Ethical Opinion No. 79*, (1979).

on encouraging false testimony.²⁹ Mock trials, scripted questions and answers, and “dress rehearsal” cross-examinations based on the actual facts of the case are all common place in large civil litigations.³⁰

Other cases have dealt with concerns around coaching in the context of depositions. However, the concern of the courts seems in general to be around whether attorneys are using objections improperly, for example, to hint at an answer,³¹ or whether an attorney is using breaks in testimony improperly, including attorneys requesting breaks *between* a question being asked and answered, in order to allow the witness to consult with counsel before responding. There is some indirect suggestion that such breaks should not be used for coaching: *Hall v. Clifton Precision*³² suggested that “*private conferences between deponents and their attorneys during the taking of a deposition are improper unless the conferences are for the purpose of determining whether a privilege should be asserted.*”³³ However, see also the Nevada case of *In re Stratosphere Corporation Securities Litigation*,³⁴ in which the court stated,

²⁹ See Elkan Abramowitz and Barry Bohrer, “Handling Witnesses: The Boundaries of Proper Witness Preparation” (2006) 235:84 NYLJ: “*Other than these admonishments related to perjurious testimony, however, there are no guidelines for attorneys to reference regarding witness coaching.*”

³⁰ See, for example, Sergey V. Vasiliev, “From Liberal Extremity to Safe Mainstream? Comparative Controversies of Witness Preparation in the United States (2011) 9:2 Intl. Commentary on Evidence 5, p.23: “*...an essential witness preparation method is the ‘dry run’, or rehearsal of direct and cross-examination with a witness in a form of abbreviated mock trial. This is not only explicitly mentioned by the Third Restatement of Law Governing Lawyers and endorsed by courts. It also comes recommended by practitioners as a technique which enables witnesses to testify more clearly and effectively, thus saving the court’s time and effort at trial.*”

³¹ Cf. Rule 30(c) of the Federal Rules of Civil Procedure – Examination and Cross-Examination; Record of the Examination; Objections; Written Questions, which states that objections “*should be in a non-argumentative and non-suggestive manner.*”

³² *Hall v. Clifton Precision* 150 F.R.D. 525 (1993).

³³ *Ibid* at 527.

³⁴ *In re Stratosphere Corporation Securities Litigation*, 182 F.R.D. 614 (1988).

While this Court agrees with the *Hall* court's goals, it declines to adopt its strict requirements. This Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness. So long as attorneys do not demand a break in the questions, or demand a conference between questions and answers, the Court is confident that the search for truth will adequately prevail.³⁵ (emphasis added)

Note the reference to “*attempt to rehabilitate a client by fulfilling an attorney's ethical duty to prepare a witness*”: “rehabilitate” suggests that the witness has answered a question in a way which damages his/her case or otherwise requires remediation; if a solution is to be found in the “duty to prepare a witness”, this seems to imply that counsel can offer the witness a way out. But if that is the case, then to the extent it includes any circumstance outside the narrow ambit of re-examination at trial – and the excerpt above seems to make clear that it refers to breaks in pre-trial questioning – it is difficult to escape the conclusion that this may be done through coaching.

England & Wales

If the American approach smacks of “Anything Goes”, the attitude of their transatlantic cousins may be described as “mum's the word”. There are arguably two main explanations for this cultural divide: first, the British distinction between barristers and solicitors, and second, the presence in England of far more specific regulation on the subject, for both types of lawyers.

As will be familiar to most, English litigation is comprised of two elements. On one hand are solicitors, who will receive instructions from a client and do more of the “preliminary” work on a file, including “proofing” sessions, reviewing documents, conducting interviews, drafting witness statements, and arranging “witness familiarization” (see further below). On the other hand are barristers, the specialist advocates who will actually argue the case in court.

³⁵ *Ibid* at 621.

Historically, barristers have no contact with the public, and are only instructed by solicitors. It has been suggested that this divide has encouraged a reticence among lawyers, but barristers in particular, to engage in any substantive preparation or coaching with witnesses.³⁶ It remains very rare for barristers in civil cases to have face-to-face contact with witnesses prior to meeting them in the courtroom. Although that is no longer required *de jure*, as is explained further below, new ethics rules mean that it is highly unlikely that this practice will change.

In addition, the preparation of witnesses is governed by more specific regulation in England than in America. The American authorities set out a number of duties of counsel (both in the form of ethical mandates and requirements of civil procedure), but do not explain what implications these have for witness preparation in practice. By contrast, the governing authorities for both barristers and solicitors in England and Wales also include similar overriding duties of competence, diligence, and so on – but have included specific provisions on witness preparation.

Solicitors

Since 2011, solicitors have been governed by the Solicitors Regulation Authority *Code of Conduct*, which sets out various outcomes (O) and indicative behaviours (IB)³⁷:

You must achieve these outcomes:

O(5.1): you do not attempt to deceive or knowingly or recklessly mislead the court;

O(5.2): you are not complicit in another person deceiving or misleading the court;

[...]

³⁶ Wydick, *supra* note 8 at 3.

³⁷ Solicitors Regulation Authority, *Code of Conduct*, October 2017.

Acting in the following way(s) may tend to show that you have not achieved these outcomes and therefore not complied with the Principles:

IB(5.9): calling a witness whose evidence you know is untrue;

IB(5.10): attempting to influence a witness, when taking a statement from that witness, with regard to the contents of their statement;

IB(5.11): tampering with evidence or seeking to persuade a witness to change their evidence.

Barristers

The conduct of barristers or solicitor-advocates is regulated by the Bar Standards Board Handbook, which requires as follows³⁸:

rC9: Your duty to act with honesty and integrity under CD3 includes the following requirements:

[...]

.3 you must not encourage a witness to give evidence which is misleading or untruthful;

*.4 you must not rehearse, practise with or coach a witness in respect of their evidence;*³⁹

.5 unless you have the permission of the representative for the opposing side or of the court, you must not communicate with any witness (including your client) about the case while the witness is giving evidence. (emphasis added)

While the requirements above are more permissive for solicitors (“may” versus “must”), both are fairly strict compared to the American alternative.

A nuance to English practice is that, in almost all cases, a witness’s evidence in chief is tendered by written witness statement, with the witness taking the stand only for cross-examination and re-examination. The Chancery Guide contains further guidance in relation to expected practice around witness statements which, while less of an imperative than the ethical requirements

³⁸ Bar Standards Board Handbook, *Code of Conduct* (9th edition, updated: November 2017).

above, still acknowledges (i) that lawyers will be drafting witness statements in the first instance; and (ii) that there is a need to be careful about staying on the right side of ethical boundaries⁴⁰:

19.2 - the function of a witness statement is to set out in writing the evidence in chief of the maker of the statement. Accordingly, witness statements should, so far as possible, be expressed in the witness's own words.

19.6 – witness statements must contain the truth, the whole truth and nothing but the truth on the issues covered. Great care must be taken in the preparation of witness statements. No pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence.

As a result of the prescriptions above, lawyers in England and Wales have deep hesitation around any suggestion of witness coaching. Instead, a sophisticated process of “witness familiarization” has developed. Specialised third-party providers can be engaged to prepare prospective witnesses to give evidence, training them to pause before responding, seek clarification, avoid hearsay, and so on by using fictional fact patterns with no connection to the actual case.

The leading English case on witness coaching / familiarization is *R v. Momodou*⁴¹, a criminal case. No civil case to date has discussed the issue in equivalent detail, although civil cases have referred to *Momodou* principles.⁴² In *Momodou*, the court approved “*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*

³⁹ In particular, compare this to the edict in the Nevada case of *In re Stratosphere Corp. Securities Litigation* 182 FRD 614 (D.Nev. 1998): “*a lawyer has an ethical duty to prepare a witness.*”

⁴⁰ Her Majesty’s Courts and Tribunals Service, *Chancery Guide 2016* (Amended: November, 2017), at 81-83.

⁴¹ *R v. Momodou* [2005] EWCA Crim. 177.

⁴² See, for example, *Ultraframe v Fielding* [2005] EWHC 405, at para 25.

participants.”⁴³ Pointedly, the court went on to state, “[n]one of this however involves discussions about proposed or intended evidence... The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it.” Following *Momodou*, the Bar Council issued a comment affirming that it was appropriate, “as part of a witness familiarisation process, for counsel 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 in order to ensure that the Court hears what the witness is saying, and to avoid irrelevant comments,” but that witness coaching was prohibited, and as a result, “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.”⁴⁴

A main concern of the English courts appears to be “contaminated evidence”, with decisions identifying a “difference of substance” between familiarizing a witness with the task of giving good comprehensive evidence, and having prepared contaminated evidence.⁴⁵ “*The [witness familiarization] course was delivered by a member of the Bar I judge to have been well aware of the implications. She took pains to ensure that any witnesses who attended her courses knew of the possible consequences of collusion and she forbade it. No attempt was made to indulge in application of the facts of this case, or anything remotely resembling them.*”⁴⁶

⁴³ *Momodou*, *supra* note 38 at para 62.

⁴⁴ The General Council of the Bar Ethics Committee, “Witness Preparation”, October 2005 (revised August 2017), <http://www.barcouncil.org.uk/media/438420/witness_preparation.pdf> at paras 5 and 20.2.

⁴⁵ *Ibid* at para 61.

⁴⁶ *R v. Salisbury* [2005] EWCA Crim. 3107, at para 60.

A secondary concern echoes the Chancery Guide warning about over-lawyered witness statements. The court in the civil case of *Djibouti v. Boreh*⁴⁷ observed how witnesses who have obviously been coached may be viewed as having less credibility:

*Whilst I am not suggesting that witness training in itself is improper (provided that it does not amount to coaching of a witness as to what to say, which would be improper) it is to be discouraged, since, as this case demonstrates, it tends to reflect badly on the witness who, perhaps through no fault of his or her own, may appear evasive because he or she has been “trained” to give evidence in a particular way.*⁴⁸

Other judgments have expressed similar sentiments.⁴⁹

In summary, it is acknowledged that lawyers in England and Wales inevitably have a role in early-stage witness proofing, obtaining evidence and drafting statements; however, the potential ethical pitfalls around this have been conspicuously flagged in official guidance, and firm prohibitions are in place designed to prevent courtroom advocates from discussing evidence or potential testimony with witnesses in advance so as to keep it “uncontaminated”. Instead, witness familiarization training is designed to prepare witnesses to give evidence – without going to the substance of that witness’s evidence itself. Although it is done at arm’s length, such training still carries the risk of backfiring if it makes witnesses appear too polished or their testimony contrived, and as a result less credible.

⁴⁷ *Djibouti v. Boreh*, [2016] EWHC 405.

⁴⁸ *Ibid*, at para 67.

⁴⁹ See, for example, *Globe Motors Inc. & Ors. v. TRW Lucas Variety Electric Steering Ltd.* [2014] EWHC 3718, in which the judge was skeptical about certain witnesses clarifying questions because they had gone through “witness preparation”: “*All of the witnesses of fact were clear, honest, and straightforward. Some of Globe’s witnesses were hampered by the effects of some external ‘witness preparation training’ which their integrity and common sense fortunately allowed them to shake off as their cross-examination continued. Thus at first Mr. McHenry and Mr. Keegan appeared reluctant to answer questions clearly and were prone to ask for these to be repeated when witnesses of their caliber should not have had difficulty in understanding what was being asked. Apart from that I was impressed by how readily all the witnesses generally put candour and integrity before the interests of the party for whom they were giving evidence.*” (at para 22)

Canada

Lawyers in each Canadian jurisdiction are subject to a version of all of the same professional obligations and duties discussed above, including candour, honesty, and zealous representation of the client's interests⁵⁰. Professional Codes in certain provinces contain provisions relating specifically to advocates – but (at least compared to the English equivalents), these are remarkable more for their permissiveness than their restrictiveness. Consider for example the Law Society of Upper Canada's Rules of Professional Conduct:

5.1-1 – When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

5.1-2 – When acting as an advocate, a lawyer shall not [...] (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable [...] (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct [...] (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority.

Insofar as there are provisions relating to witness / lawyer communications, these are directed at communications *while the witness is giving evidence*, i.e. under oath. The concern is much more along the lines of the rules above re. breaks during depositions or communications while the witness is on the stand.⁵¹ To the extent that these can be said to deal with preparation or coaching, it is generally by implication, if at all: for example, see the Law Society of British Columbia *Code of Professional Conduct* Rule 5.4 Commentary [1]: “*In civil proceedings, a*

⁵⁰ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, (Amended: March, 2017), at 3.2.

⁵¹ Law Society of Upper Canada, *Rules of Professional Conduct*, (Amended: September, 2017), at Rule 5.4, See also Law Society of Prince Edward Island, *Code of Professional Conduct*, at 5.4 and Law Society of

lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process.

The Law Society of Alberta rules are unusual in that they do discuss preparation – but only in the commentary to the rules, not the rules themselves... and even then, the commentary appears contradictory:

Rule 5.4-1 – A lawyer must not influence a witness or potential witness to give evidence that is false, misleading, or evasive.

Rule 5.4-2 – A lawyer involved in a proceeding must not obstruct an examination or cross-examination in any manner.

Commentary – General Principles:

[1] The ethical duty against improperly influencing a witness or a potential witness applies at all stages of a proceeding, including while preparing a witness to give evidence or to make a statement, and during testimony under oath or affirmation. It also applies to the preparation of sworn written evidence and “will say” statements for use in any proceeding. The role of an advocate is to assist the witness in bringing forth evidence in a manner that ensures fair and accurate comprehension by the tribunal and opposing parties.

[2] A lawyer may prepare a witness, for questioning and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words, and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

[...]

[9] Rule 5.4 also applies to questioning, including all examinations under oath or affirmation that are not before a tribunal. Lawyers should scrupulously avoid any attempts to influence witness testimony, particularly as the tribunal is unable to directly monitor compliance. (emphasis added)

However, these principles appear to be contradictory. The reference in the commentary to “any attempts to influence witness testimony” is wider than the actual wording of the Rule (“influence

Newfoundland, *Code of Professional Conduct*, at Rule 5.4, which address the situation of a witness actually in

a witness to give evidence that is false, misleading, or evasive.”) More notably, the apparent prohibition in Commentary [9] against “any attempts to influence” must surely contradict the apparent permission in [2] to “discuss... choice of words” – which itself goes well beyond the stated role of the advocate in [1], namely to “bring forth the evidence in a manner that ensures fair and accurate comprehension...” To add to the confusion, many Canadian jurisdictions have identical provisions to the Alberta Rule 5.4 (Manitoba, Saskatchewan, and New Brunswick, and Nova Scotia uses Rule 5.4-2); however, it is unclear if the same commentary applies.

The case law in Canada offers little clarification. Some support exists for techniques such as witness conferences or providing witnesses with copies of the evidence of other witnesses – unless this would amount to “coaching: “[i]n so far as reading their own evidence there can be no objection, nor can there be any objection to their reading of the evidence of other witnesses, unless such was done for the purpose of “coaching” various witnesses. If it was done for this latter purpose it would be grounds for judicial censure and would seriously affect the weight of such evidence...”⁵²

Many cases deal with, as above, rules about counsel communicating with witnesses while under oath: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*⁵³; *Villeneuve v. Refill Pros Inc et al.*⁵⁴ Some of these include commentary which may be seen to apply to preparation: for

the process of giving evidence.

⁵² *R v. Muise (No. 1)* (1974) 11 NSR 2d 104, 115-116, at para 38 – though again, note that this arose in the criminal context.

⁵³ *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*, [1992] BCJ No. 2114.

⁵⁴ *Villeneuve v. Refill Pros Inc et al*, 2015 ONSC 7815.

example, *Canalta Concrete Contractors v. Camrose*⁵⁵ states that counsel should never, in whatever manner, attempt to feed an answer to a witness. However, this was in the context of a witness under oath, on the stand - it does not speak to the issue of witness preparation. Similarly, *Polish Alliance of Canada v. Polish Association of Toronto Ltd* held that “it is... improper for counsel to instruct the witness on what to say or to coach the witness during cross-examination.”⁵⁶

At most, the failure of judges to condemn certain tactics might be taken as a form of tacit endorsement. In *Morrison Voss v. Smith*⁵⁷, the British Columbia Court of Appeal quoted from reasons given by the Registrar for a decision about solicitors’ fees. The Registrar wrote that “From June through October 2003, the solicitors diligently prepared for the trial. They met with witnesses and with the client to take minutes of evidence and to prepare for trial. They conducted a ‘mock’ trial with the client as a witness.” The Registrar evidently took no issue with this (or at very least, no issue about the propriety of such an exercise was raised), and the Court of Appeal did not challenge it either.

In the criminal context, there is some limited suggestion that there are boundaries on how witnesses may be “influenced.” In *R. v. Singh*⁵⁸, the court considered the propriety of Crown counsel apparently choosing a location for an interview of a minor which was designed to persuade her to change her previously sworn testimony:

⁵⁵ *Canalta Concrete Contractors v. Camrose*, 1985 CanLII 1169 (ABQB).

⁵⁶ *Polish Alliance of Canada v. Polish Association of Toronto Ltd.*, 2011 ONSC 1851, at para 57.

⁵⁷ *Morrison Voss v. Smith*, 2007 BCCA 296.

⁵⁸ *R v. Singh*, 1979 CanLII 2631 (MBCA).

*There was some suggestion that the course of action was proper having regard to the fact that the witness was being persuaded to tell the truth, rather than to give false evidence. In my opinion, improper interference with a witness is wrong whether the motive or result of that interference is to produce true testimony or false testimony.*⁵⁹

However, whether or to what extent this does or should apply in a civil context is unclear.

In light of the above, the principled basis for witness preparation in Canada is therefore uncertain: there is no firm grounding in the rules, but no explicit prohibitions either, and there have been no authoritative judicial statements. The trend in practice seems to be moving towards an American approach, with only practitioners' personal notions of propriety acting as a brake: as an April 2016 paper published by the Continuing Legal Education Society of BC put it, there is "*nothing wrong with a lawyer reviewing proposed questions with a witness so they will be prepared for trial,*" and that there is "*nothing improper about conducting a mock direct examination to draw attention to relevant issues and probe the witness's memory by referring to other known evidence or facts.*" A May 2013 CLE paper⁶⁰ expressed a similar message, arguing that "you should conduct a thorough interview with your witness and cover the key issues and documents. Also your witness may benefit from a dry run or a series of some questions, after which you may reinforce the basic rules." However, the author of the 2016 paper suggested that there is a fine and important "distinction between eliciting evidence the known to the witness and suggesting answers in a manner that amounts to coaching."⁶¹

⁵⁹ *Ibid*, at para 16.

⁶⁰ Martha A. Sandor, 'Preparing Your Witness for Discovery' (May, 2013) *Continuing Legal Education of British Columbia*, at 6.

⁶¹ Jennifer L. Francis, 'Preparing a Witness for Direct Examination' (April, 2016) *Continuing Legal Education of British Columbia*, at 5.

One criminal prosecutor has implied that scripting questions with a witness in advance is acceptable. Although he cautions that this runs the risk of the witness sounding mechanical, nevertheless, his view is that in some circumstances, the benefits outweigh the risks:

If the natural response to a naturally phrased question runs the risk of adducing an answer which counsel knows will be partly inadmissible or prejudicial, I believe it is much preferable to ask a scripted question and receive a scripted, admissible response that has been explained and covered with the witness in the interview. An example would be if the witness's answer would naturally contain hearsay, or reference to a prior consistent statement, or contain evidence of the accused's bad character etc. This is an example where, in my view, "coaching" a witness is much preferable to a witness unknowingly relating inadmissible evidence and risking a mistrial.⁶²

As one author has put in, summarizing the Canadian approach,

... [it] essentially views witness preparation as indispensable for effective preparation for trial... What seems to distinguish the Canadian from US approach is the difference in professional attitudes towards more suggestive forms of witness proofing, which cannot but affect the actual extent of witness preparation....

Every technique which does not amount to subornation of perjury in principle enjoys judicial and doctrinal endorsement or is condoned in the US, whilst practitioners in New Zealand, Australia and Canada appear to have reservations about some of the practices despite their not being declared blatantly unethical. Presumably more open to the English influence, the tide of opinion tends to view the most intrusive forms of preparation as a controversial and counterproductive trial strategy given the high risk of suspicion of "coaching" and imminent consequences for witness credibility.⁶³

Recommendations

The line between preparing and prompting (or "coaching", the usual term of opprobrium) is rarely clear even for the most scrupulous. Even though witness preparation occurs in practically every lawsuit, it is almost never taught in law school, not directly regulated, seldom discussed in scholarly literature, and rarely litigated. Witness preparation is treated as one of the dark secrets of the legal profession. The resulting lack of rules, guidelines, and scholarship has created significant uncertainty about the permissible types and methods of witness preparation.⁶⁴

⁶² Proulx, *supra* note 5 at 9. However, note that Proulx immediately caveats this in a way which suggests either (a) it only applies in the criminal context, or (b) it only extends to "familiarization" techniques, as opposed to case-specific preparation.

⁶³ Vasiliev, *supra* note 1 at 38-39 and 45

⁶⁴ Applegate, *supra* note 5 at 279

It is clear that there will always be a grey area in relation to what constitutes acceptable witness preparation, and room for counsel's interpretation. However, in light of the current ambiguity, a positive step would be for the relevant Canadian authorities to (a) acknowledge that preparing witnesses, although required to some extent, is fraught with ethical risks; and (b) delineate certain formal parameters, leaving room for counsel intuition and discretion.

A few "obvious" situations are already covered by existing Canadian rules:

1. If the lawyer knows the witness's testimony is false – whether intentionally or unwittingly – that is unethical.
2. If the lawyer intentionally attempts to cause the witness to (knowingly or unwittingly) mislead the tribunal – that is unethical.
3. If the lawyer knows, or is aware of a substantial risk, that the witness will view the lawyer's conduct as an invitation to testify falsely – that is unethical.

Other uncontroversial techniques could be explicitly condoned, including as a method of distinguishing them from more controversial practices. These might include the "familiarization" type exercises including discussing what to wear, how to address the judge, the courtroom set-up and process, how to avoid hearsay, the need to tell the truth / avoid perjury, or generic advice on cross-examination and how to answer questions. There is merit, however, in specifically requiring that any preparation under this heading should not be based on the facts of the case.

Such guidance might refer (perhaps in commentaries) to trickier situations. For example, consider the scenario where the lawyer is indifferent to whether the prompted testimony of a witness is true or false. It would be entirely appropriate to admonish a witness to tell the truth –

but is that, alone, sufficient to be confident that a lawyer had abided by the relevant ethical requirements?

Similarly, it would be appropriate for a lawyer to use documents or other evidence to persuade a witness that his recollection may be incorrect; this is in aid of the requirement that a witness tell the truth. However, what if a lawyer feels that a witness's intended testimony is not "incorrect", but:

- (a) Incomplete? In this case, it would probably be acceptable to review relevant documents or additional evidence and explain why a fuller picture is a more honest account, as doing so would be compatible with the requirement to tell "the truth, the whole truth...";
- (b) Not as "polished" as a lawyer might like? That is arguably much riskier. While it is probably permissible to attempt to enhance the "completeness" of a witness's testimony, trying to affect the "gloss" or "spin", or telling a witness what words or phrases they should emphasise, comes much closer to the subsequent account being the lawyer's evidence, or the lawyer's *version* of the witness's evidence, than the witness's own.

There is also an important distinction to be drawn between preparation for direct and cross-examination. The reality of modern litigation is that counsel will draft affidavits and witness statements. There are serious downsides to having these appear over-lawyered, including credibility issues; however, given the role of the lawyer (particularly in jurisdictions such as Canada and the US where there is no barrister-solicitor divide), it is inevitable that counsel will discuss a witness's evidence, and the evidence of other witnesses, with that witness prior to him or her testifying.

However, it is very much in the interests of justice to have an opportunity for parties to try to get behind the “lawyer’s shield” of counsel-drafted evidence and obtain the witness’s own account, unpolished. Doing so helps reconcile the lawyer’s duties to the client and to the court. Lawyers should help clients put their own best foot forward: not give the clients a “better” foot to put forward.

It is therefore suggested that there is room for relevant authorities to clarify the position and confirm that:

- while scripted questions may be justifiable in the context of direct examination, scripted answers are not, although reference to affidavits and witness statements will inevitably give a witness some direction;
- in the context of cross-examination, while it is permissible for counsel to discuss possible themes of inquiry with their witnesses, it is safer to avoid scripting questions or answers; and
- consistent with the above, best practice should be to avoid conducting rehearsal examinations or mock trials based on the actual facts of the case at hand.