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Vasiliev, S.V.

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ANOMALIES IN US EVIDENCE LAW

From Liberal Extremity to Safe Mainstream? The Comparative Controversies of Witness Preparation in the United States

Sergey V. Vasiliev, *University of Amsterdam*

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From Liberal Extremity to Safe Mainstream? The Comparative Controversies of Witness Preparation in the United States

Sergey V. Vasiliev

Abstract

This contribution examines the idea that partisan witness preparation in criminal trials in the United States amounts to a comparative anomaly in the common law context. In American procedure, parties are not constrained by straightforward rules and ethical canons in their choice and deployment of preparation techniques, save for a prohibition on subornation and use of perjury. The lax regulation of pre-trial witness interviews in the US contrasts with the stricter rules on professional conduct of barristers and prosecutors in England and Wales and the cautious attitude towards extensive witness preparation prevailing in Canada, Australia, and New Zealand. These divisions mark deep-seated differences between these countries in what fact-finding arrangements are deemed optimal in the criminal process and what importance is given to witness spontaneity as opposed to a leeway for parties to shape the evidence submitted for evaluation to the fact-finder. Although comparative divergence alone does not render the US approach ‘anomalous’, the difficulty of reconciling its liberal practice with the trial system’s quest for the truth in a sense justifies this label. Some of the excesses of the current practice could be remedied and the truth-finding objective given a more prominent place in the criminal process if a stricter approach were taken towards the regulation of witness preparation in the US and legal and ethical norms were aligned more closely to establishing the truth. In distinguishing between ethical and unethical conduct, the rules should consider not only the mental element of counsel but also the objective effects of preparation on the authenticity and accuracy of witness recollection. While more research into such effects is needed, the article argues tentatively that the most suggestive and therefore objectionable techniques used in the US should be abandoned or subjected to more rigorous regulation.

KEYWORDS: witness preparation, coaching, pre-trial interviews, common law, professional ethics, witness spontaneity, rehearsal, law lecture, suggestive questioning

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I. Ostensible anomaly and why care?

The unwritten rules of comparative law research caution against making swift judgments on the adequacy of foreign evidentiary rules and practices. It is as tempting as it is misguided to conceive of cross-jurisdictional differences in abstract and preconceived terms as ‘normalities’ and ‘anomalies’. A comparative inquiry culminating in an argument in favor of or against a particular element of procedure, be it for the purpose of transposition to a non-native context or otherwise, would be inherently suspect if it were to assert the superiority or inferiority of that element without proper regard to the goals and values pursued within a specific system of justice. Neglect of the legal-cultural setting in which a procedural arrangement has emerged and operates will often lead one to misinterpret its tailored rationale and systemic implications. For the same reason, it is precarious to summarily endorse a practice shared among multiple jurisdictions as by definition more authoritative and to denunciate another deviating from the mainstream, unless proper consideration is given to the contextual dimension.

The present article applies this line of argument to one essential but contentious aspect of the evidentiary process in the United States: the preparation of non-expert witnesses for giving trial testimony or depositions, elsewhere known as the ‘proofing’ of witnesses.¹ The abundance of alternative terms – some more euphemistic, others openly disparaging (‘coaching’, ‘wood-shedding’, ‘horse-shedding’ or ‘sandpapering’) – betrays the ethical controversy that enshrouds the practice.² Consistent with the theme of US ‘anomaly’ that is the subject of this symposium, the article engages with the thesis that the regulation of witness preparation in the United States is substantially more permissive than in most other common law jurisdictions and that the character of the comparative

¹ Witness preparation was defined as ‘any communication between a lawyer and a prospective witness—client or non-client, friendly or hostile—that is intended to improve the substance or presentation of testimony to be offered at a trial or other hearing’. John S. Applegate, ‘Witness Preparation’, (1989) 68(2) *Texas Law Review* 277, at 278. While the term ‘witness preparation’ or ‘prepping’ is mostly used in the US, the analogue notion of ‘proofing’ is characteristic of England and Wales and other Commonwealth countries: Cesare P.R. Romano, ‘Deciphering the Grammar of the International Jurisprudential Dialogue’, (2009) *New York University Journal of International Law and Politics* 755, at 767, note 38.

² Richard Alcorn, ‘Aren’t You Really Telling Me?... Ethics and Preparing Witness Testimony’, (March 2008) *Arizona Attorney* 14, at 14. Presumably, the term ‘horseshedding’ was coined by James Fenimore Cooper who thus referred to the lawyers’ practice of rehearsing their witnesses in carriage sheds near rural courthouses in the XIX century: Peter A. Joy and Kevin C. McMunigal, ‘Witness Preparation: When Does It Cross the Line?’, (2002) 17 *Criminal Justice* 48, at 48 and 49 (underlining the negative connotation of ‘clandestine activity not subject to review or enforcement of ethics rules’).

divergence is such as to earn the US practice a label of evidentiary anomaly. To deserve this label would require more than a simple departure from the 'mainstream' approach adopted elsewhere. It would require a deviation incongruent with the procedural values deemed vital for preserving the integrity of the adjudicatory system and its ability to advance the professed goals.

At the outset, a word of explanation is needed on the choice of the topic. To what extent is witness preparation aptly considered under the law of evidence, particularly in the US context, where, as will be seen, it is more traditionally dealt with under the rubric of legal ethics, by courts and scholars alike?³ I submit that approaching the issue as both ethical and evidentiary is fully justified and key to appreciating some of the controversies involved. Since witness preparation is meant to, and does in fact, affect the form and content of evidence heard at trial, viewing it as an evidentiary matter is hardly questionable. As it would seem to a non-US observer, the deficit of attention given to the evidentiary implications of witness preparation and the disjunction between the deontological and epistemic perspectives are the root causes for much of the discontent that there is with the regulation of witness preparation in that country.⁴ Approaching witness preparation as an issue of allocation of control over evidence between parties and fact-finders in the trial context is a refreshing vantage point, which also helps explain the starkly different attitudes to this practice that prevail in the Anglo-American and Romano-German legal traditions.

Another question is why one should engage in a painstaking comparison of essentially similar common law systems on this issue and care about the outcome. First, there would be no dialogue between national legal systems and no ulterior need to determine which approach to witness preparation is more advantageous, if it were not for comparatist curiosity which is driven by the urge to ameliorate criminal adjudication at home. As legislators, practitioners and scholars increasingly turned to foreign experiences in their quest for solutions to problems in their domestic legal systems, the fact that some common law jurisdictions adopt radically opposing approaches to witness preparation has not passed unnoticed.⁵ Second, the latest developments in the new realm of

³ E.g. Richard Wydick, 'The Ethics of Witness Coaching', (1995) 17 *Cardozo Law Review* 1-52; Fred C. Zacharias and Shaun Martin, 'Coaching Witnesses', (1998-1999) 87 *Kentucky Law Journal* 1001-1017; Joseph D. Piorkowski, Jr., 'Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching"', (1987-88) 1 *Georgetown Journal of Legal Ethics* 389-410; Joy and McMunigal, *supra* note 2, at 49; Liisa Renée Salmi, 'Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial', (1999) 18 *Review of Litigation* 135-179; Alcorn, *supra* note 2; Patricia J. Kerrigan, 'Witness Preparation', (1999) 30 *Texas Tech Law Review* 1367, at 1369-1371.

⁴ For example, see sources listed in *infra* notes 225-228 and 240.

⁵ For comparative discussion of witness preparation practices, see Marvin E. Frankel, *Partisan Justice: Too Much Fight? Too Little Truth? Equal Justice?* (New York: Hill and Wang,

international criminal procedure invigorate this interest and vest it with an even greater immediate practical relevance. International tribunals are environments in which lawyers educated and trained in different legal traditions closely collaborate to identify both agreeable and viable solutions giving effect to a culturally hybrid procedural regime, which provides insufficient direction on too many important details.⁶ In the International Criminal Tribunal for the Former Yugoslavia (ICTY), the question of how witness proofing is to be conducted, if at all, proved very controversial from the earliest days, given the absence of a common legal culture and shared expectations in relation to professional ethics.⁷

The lack of a uniform and principled approach inevitably boomeranged into a macro-dimensional rift in international criminal justice. Despite sharing an open-textured approach towards the law of evidence, the treatment of the issue of witness preparation in the UN *ad hoc* tribunals and in the International Criminal Court (ICC) is markedly different. The ICTY, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone are unanimous in embracing the need for prior preparation of witnesses by the parties.⁸ Yet the ICC

1978) 16; William T. Pizzi, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (New York and London: New York University Press, 1999) 124-126; A. Watson, 'Witness preparation in the United States and England & Wales', (2000) 164 *Justice of Peace* 816; R. Mahoney, 'Witness Conferences', (2000) 24 *Criminal Law Journal* 297-304; Patrick S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Clarendon Press, 1987) 163-164; Brad Rudin and Betsy Hutchings, 'England & the US: Contrasts in Witness Preparation Rules', *The New York Professional Responsibility Report*, March 2006 (on file with the author).

⁶ For a broader perspective, see Mary C. Daly, 'The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century', (1998) 21 *Fordham International Law Journal* 1239-1295.

⁷ Minna Shrag, 'Lessons Learned from ICTY Experience', (2004) 2 *Journal of International Criminal Justice* 427, at 432, note 9 (the differences within the ICTY Office of the Prosecutor on whether and how to prepare witnesses surfaced early in the first days and could not be reconciled through the adoption of a unified approach because trial attorneys preferred to emulate their domestic practices); Laurel Baig, 'International Criminal Law and Legal Ethics: The Need for Shared Expectations', (2010) 103 *American Society of International Law Proceedings* 256, at 257-258 (using the issue of witness proofing to demonstrate the lack of shared professional ethics in the tribunals).

⁸ Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, T. Ch. III, ICTY, 10 December 2004; Decision on Ojđanić Motion to Prohibit Witness Proofing, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch. III, 12 December 2006; Decision on Defence Motions to Prohibit Witness Proofing, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 15 December 2006 and, in the same case, Decision on Interlocutory Appeal Regarding Witness Proofing, A. Ch., 11 May 2007; Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, T. Ch. I, 26 October 2005 ('Sesay et al. Witness TF1-141 decision').

distinguished itself from the beginning by drawing a line between ‘proofing’ and ‘familiarization’, by prohibiting the former practice altogether, and by assigning the bulk of familiarization measures to the Registry’s Victims and Witnesses Unit rather than the parties.⁹ It is unnecessary to delve into the details of this jurisprudential split, on which extensive and specialized commentary exists.¹⁰ What is noteworthy is that in justification of different positions adopted, the international jurisprudence and the commentary thereon have relied upon national analogies, either as legal sources (qua general principles of law) or as sources of policy guidance.¹¹ In essence, the ICC was faced with a choice between a liberal approach, strongly resembling that of the United States, and a more restrictive approach, presumably inspired by the English and/or the Continental position.¹²

⁹ Decision on the Practices of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-679, PTC I, ICC, 8 November 2006 (‘Lubanga proofing pre-trial decision’); in the same case, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, T. Ch. I, 30 November 2007 (‘Lubanga proofing trial decision’); Decision on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, ICC-01/05-01/08-1016, T. Ch. III, ICC, 18 November 2010, para. 34. Cf., in the same case, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-1039, 24 November 2010, para. 7 (opining that the parties ‘should have been allowed, under specific conditions, to have a pre-trial meeting with witnesses to be called by them, in order to prepare their in-court testimony’).

¹⁰ Supportive of witness proofing: R. Karemaker *et al.*, ‘Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence’, (2008) 21(3) *Leiden Journal of International Law* 683-698; *id.*, ‘Witness Proofing in International Criminal Tribunals: Response to Ambos’, (2008) 21(4) *Leiden Journal of International Law* 917-923; ‘Witness Proofing at the International Criminal Court’, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, July 2009. Opposed to the practice: K. Ambos, ‘“Witness Proofing” before the ICC: Neither Legally Admissible nor Necessary’, in C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff/Brill, 2009) 599-614; *id.*, ‘Witness Proofing’ before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman, (2008) 21(4) *Leiden Journal of International Law* 911-916. In a similar vein, recognizing legal and policy reasons for the ICC’s departure, see S. Vasiliev, ‘Proofing the Ban on “Witness Proofing”: Did the ICC Get it Right?’, (2009) 20 *Criminal Law Forum* 193-261; W. Jordash, ‘The Practice of “Witness Proofing” in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice’, (2009) 22 *Leiden Journal of International Law* 501-523.

¹¹ *Lubanga* proofing pre-trial decision, *supra* note 9, para. 37; *Lubanga* proofing trial decision, *ibid.*, paras 40-42; Partly Dissenting Opinion of Judge Kuniko Ozaki, *ibid.*, para. 14.

¹² In clarifying for the Pre-Trial Chamber his proposal to proof a witness before the confirmation of charges hearing in *Lubanga*, the ICC Prosecutor expressly undertook to comply with article 705 of the Code of Conduct of the Bar Council of England and Wales (which prohibits coaching and rehearsing, see text accompanying *infra* note 132). However, specific measures proposed by the Prosecutor included among others ‘putting to the witness the very same questions

The debate has specifically centered on the implications of the fact that the practice of witness preparation at common law is not uniform.¹³ This has raised questions about the reasons for these differences and, taking the debate beyond national boundaries, which approach would serve international criminal procedure the best.

In the light of the cautionary note at the beginning, the discussion about witness preparation in international criminal proceedings reinforces the need to tread with particular care before approving certain domestic witness preparation practices or declaring them ‘anomalous’ as a result of a comparative exercise. The controversy outlined above is a point of departure for taking a closer look at how the bounds of permissible witness preparation are drawn in the United States and in other common law countries. Indeed, the focus on differences ensures a sharper contrast but ought not to obscure the fact that nuances coloring the approaches in individual common law jurisdictions pale against the differences between ‘common law’ and ‘civil law’. Thus, any discussions of forthcoming testimony between parties and witness are likely to be qualified as tampering in the Romano-Germanic tradition.¹⁴

The next two sections overview the standards relative to witness preparation in the US and in four other jurisdictions (England and Wales, Canada, Australia, New Zealand) on the basis of which some tentative explanations are proffered for the divergence in the common law camp. It is demonstrated that while the US approach certainly stands out as more lenient than in some other common law countries, regarding it as more anomalous than any other extreme position on the common law spectrum is inaccurate. However, as the argument continues in Section IV, the label of ‘anomaly’ is not completely misplaced, given the systemic tensions associated with the more liberal approach and, in particular, its possible incongruence with the values vital to the US system of criminal adjudication. The final section reflects upon the way in which the US approach might be aligned more with the practice elsewhere and some of its deleterious ‘extremities’ may be ironed out. Whilst at least some of these considerations may have relevance across a range of different legal contexts, including international tribunals, I refrain from exploring, let alone asserting, the universal validity of the conclusions. For above-mentioned reasons, this would require a separate and contextualized analysis in each case.¹⁵

and in the very same order as they will be asked during the testimony of the witness’, which went clearly beyond the English practice. *Lubanga* proofing pre-trial decision, *supra* note 9, para. 40.

¹³ Prosecution’s submissions regarding the subjects that require early determination..., *Prosecutor v. Lubanga, Situation in DRC*, ICC-01/04-01/06-952, OTP, ICC, 12 September 2007, para. 25. E.g. Ambos, “Witness Proofing” before the ICC’, *supra* note 10, at 606.

¹⁴ See *infra* III.1.

¹⁵ For an earlier analysis of some legal policy considerations in the ICC context, see Vasiliev, *supra* note 10, at 241 *et seq.*

II. Status of witness preparation in the US

1. Systemic acceptance

In the United States, witness preparation constitutes an integral part of an attorney's trial advocacy work in both criminal and civil litigation and is widely regarded as a core feature of the adversarial system as it is known and practiced in that country.¹⁶ The core of this preparatory work comprises among others: conferring with a prospective witness on the substance of proposed testimony, checking it for inconsistencies and overall coherence, allowing the witness an opportunity to review documents and previous statements so as to refresh memory, eliciting from her additional relevant information, briefing her on the relevant law, conducting mock direct- and cross-examinations that anticipate questions most likely to be asked during the trial, and advising the witness on the best way to present her evidence, including suggestions on the choice of language, demeanor and attire.¹⁷ It also encompasses support and familiarization measures to assist the witness in comprehending the trial process and the roles of participants therein so as to put her at ease and thereby enhance the effectiveness of her testimony.

There is a broad consensus that in the US trial system, lawyers are bound by ethical duties to both their client and the court (or the adversarial system) to prepare witnesses before submitting their testimony in evidence.¹⁸ For example,

¹⁶ Applegate, *supra* note 1, at 279 and 338-341; Kerrigan, *supra* note 3, at 1367 ('the most important task a lawyer will undertake in the development of a case for trial'). It may be debated though which one of the modern common law jurisdictions stands closer to adopting a pure adversarial system, given the uncertainty as to what are its core features. See Mirjan Damaška, 'Models of Criminal Procedure', (2001) 51 (3-4) *Zbornik PFZ* 477, at 481 ('The concepts of continental and Anglo-American legal traditions are too vague and open-ended to disclose what is, and in what sense, fundamental to the inquisitorial and the accusatorial type.'). John D. Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?', (2005) 68 *Modern Law Review* 737, at 741 (noting that 'certain American commentators have taken such a pure view of adversarial procedures that they have been unwilling to consider that even common law countries such as England truly belong within the adversarial camp').

¹⁷ Elaine Lewis, 'Witness Preparation: What is Ethical, and What is Not', (Winter 2010) 36(2) *Litigation* 41, at 43 (noting that 'witness preparation should include both a review of case facts and themes and instructions on how best to present the information. A focus on content without attention to presentation, or presentation training without review of content, will not produce a well-prepared witness').

¹⁸ Roberto Aron and Jonathan L. Rosner, *How to Prepare Witnesses for Trial* (Colorado Springs: Sheppard's/ McGraw-Hill, 1985) 11 ('preparation of each witness whose testimony may be offered or compelled in a litigated matter is a professional obligation that lies at the very essence of the adversary system of justice.'). Applegate, *supra* note 1, at 287; Salmi, *supra* note 3, at 136; Maj. Douglas E. Acklin, 'Witness Preparation: Beyond the Woodshed', (1987) 27 *Air Force Law Review* 21, at 21 ('Witness preparation is one of the most important ethical obligations

the ABA Model Code of Professional Responsibility speaks of the lawyer's duty, 'both to his client and to the legal system ... to represent his client zealously within the bounds of the law'.¹⁹ Similarly, the ABA Model Rules of Professional Conduct establish the duties of diligence and of competent and effective representation.²⁰ The Third Restatement of the Law Governing Lawyers states that '[a] lawyer may interview a witness for the purpose of preparing the witness to testify'.²¹ These texts do not explicitly require that preparation be conducted with respect to each witness in every case and do not provide for a positive obligation *stricto sensu*.²² But the most common interpretation given to these ethical standards by attorneys and commentators is that a lawyer would be derelict in her duty of zealous representation if she were to allow a 'cold' witness to take the witness stand.²³ The failure to adequately prepare a witness might

to the client.');

Joy and McMunigal, *supra* note 3, at 49 ('good advocacy under the adversary system compels the lawyer to present the facts as clearly and persuasively as possible').

¹⁹ ABA Model Code of Professional Responsibility (1983), Ethical Considerations, EC 7-1 and 7-19. *Ibid.*, DR 7-101(A)(1) ('A lawyer shall not intentionally ... [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules...')

²⁰ ABA Model Rules of Professional Conduct, Rule 1.1. ('Competence') ('A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.') and Rule 1.3. ('Diligence') ('A lawyer shall act with reasonable diligence and promptness in representing a client.')

²¹ Restatement (Third) of the Law Governing Lawyers (American Law Institute, 2000) ('Third Restatement'), section 116.

²² Piorkowski, *supra* note 3, at 392.

²³ Robert E. Keeton, *Trial Tactics and Methods*, 2nd ed. (Little Brown, 1973) 136 ('if you prepare your case properly you will not call a witness to the stand without having asked the witness what his testimony will be on all points as to which you can anticipate he may be questioned.');

Applegate, *supra* note 1, at 287-289 ('The obligation to prepare, in sum, is clear from the duties of competence and zealousness, however, the extent of that obligation is not clear.');

Paul C. Gianelli and Kevin C. McMunigal, 'Prosecutors, Ethics, and Expert Witnesses', (2007) 76 *Fordham Law Review* 1493, at 1521; Charles G. Monnett III and Randal J. Phillips, 'Direct Examination of Lay Witnesses', (2008) 44 *Trial* 34, at 36 (recommending not to call witness during trial 'without having adequately prepared him or her before entering the courtroom');

Peter J. Henning, 'The Pitfalls of Dealing with Witnesses in Public Corruption Prosecutions', (2010) 23 *Georgetown Journal of Legal Ethics* 351, at 357; David H. Berg, 'Preparing Witnesses', (1987) 13(2) *Litigation* 13, at 14 (it is 'probably unethical to fail to prepare a witness'; 'There are lawyers who refuse to woodshed witnesses at all... their clients most often are referred to as "appellants"');

Gerald L. Shargel, 'Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation', (2007-2008) 76 *Fordham Law Review* 1263, at 1268 ('Sending a client off to testify "raw" would be like tossing a child into a raging river to teach him to swim. The child might not drown but will suffer harm nonetheless.');

F. Lee Bailey and Henry Rothblatt, *Successful Techniques for Criminal Trials* (2nd ed., Rochester: Lawyers Co-operative Publishing 1985) 403 ('Any lawyer who fails to effectively prepare the defendant or his chief witness for cross-examination is derelict in his duty.');

Salmi, *supra* note 3, at 136.

qualify as malpractice, although it does not automatically lead to disciplinary action against the lawyer concerned.²⁴ Such an omission would possibly engage the protection under the Sixth Amendment's right to assistance of counsel, which entails the need to allow counsel to confer with a witness, thereby implicitly recognizing the necessity of such a consultation.²⁵

Consequently, the courts in the US have consistently treated witness preparation as a generally proper and commendable practice,²⁶ and even as an ethical duty.²⁷ The reason why the US courts have embraced witness preparation by the parties as a prominent aspect of the duty of 'zealous representation' is in the associated benefits of expedience and procedural efficiency in an adversarial context.²⁸ The expected outcome of prior discussions between counsel and witness on the subjects to be covered in the prospective testimony is that the latter becomes more complete, better structured, relevant to the issues *sub judice* and comprehensible, thereby enabling her evidence to be presented in the smoothest and most orderly fashion possible. As held by the North Carolina Supreme Court in *State v. McCormick*:

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.²⁹

²⁴ W. William Hodes, 'The Professional Duty to Horseshed Witnesses Zealously—Within the Bounds of Law', (1999) 30 *Texas Tech Law Review* 1343, at 1350 (describing such failure as 'unethical and unprofessional, bordering on legal malpractice to boot'); Applegate, *supra* note 1, at 287 (reporting the uniform view that the failure to conduct pre-trial interviews amounts to 'a combination of strategic lunacy and gross negligence'); Piorkowski, *supra* note 3, at 392 (not a basis for disciplinary action). See also District of Columbia Bar Ethics Commission, Ethics Opinion No. 79, 18 December 1979 ('a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly.')

²⁵ *Geders v. United States*, 455 U.S. 80, 88-91 (1976); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

²⁶ *Hamdi & Ibrahim Mango Co. v. Fire Association of Philadelphia*, 20 F.R.D 181, 182 (S.D.N.Y. 1957) ('it could be scarcely be suggested that it would be improper for counsel who called the witness to review with him prior to the deposition the testimony to be elicited. It is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given on deposition or at trial.')

²⁷ *State ex rel. Means v. King*, 520 S.E.2d 875, 881 (W.Va. 1999).

²⁸ Henning, *supra* note 23, at 357 ('Judges expect counsel for each side to have their witnesses ready to testify and to present the evidence in an orderly fashion.')

²⁹ *State v. McCormick*, 259 S.E.2d 880, 882 (NC 1979).

Insofar as the efficient presentation of testimony facilitates the jury's comprehension of the issues and evidence in the case and its reaching of a verdict, witness preparation is widely viewed as a practice conducive to truth-finding under the procedural arrangements hinging upon the parties' control and passivity on the part of fact-finders.³⁰ Thorough witness preparation benefits the establishment of the truth insofar as the attorney's questions may help a witness refresh her recollection of details and facts beyond those described in her previous statements to the police.³¹ It also contributes to truth-finding by enhancing the witness's ability to testify clearly, coherently and truthfully about the relevant matters in court. Witness preparation thereby assists the juries in the better comprehension of evidence, spares both counsel and court the need for direction and intervention, and saves valuable court time.³² Finally, the preparation helps a witness withstand the ordeal of cross-examination, often aimed at confusing and discrediting the witness, while the opportunity to reflect on the substantive areas of prospective testimony in advance enables more accurate and complete in-court recollection.³³

The need for, and acceptance of, witness preparation has permeated deeply into the US trial system. One illustration of this is the fact that it has come to be increasingly associated with professional trial consultants whose role is to prepare witnesses for testimony in addition to preparation by attorneys.³⁴ However, few attorneys are prepared to outsource this function and resort to consultants in this hitherto exclusive attorneys' domain remains controversial. Witness preparation is regarded as too important and ethically delicate an aspect of attorneys' work to be entrusted to staff not bound by the same deontological standards.³⁵ The following paragraph outlines the regulatory regime governing witness preparation in the US and points out why distinguishing thereunder between ethical and unethical conduct is an arduous task even for attorneys.

³⁰ Prof. Wigmore accepted 'the absolute necessity of such a [preparation] conference for legitimate purposes' and observed that witness preparation promotes the 'search for the truth, and it should, therefore be encouraged' (as cited in Mathew Rosengart, 'Preparing Witnesses for Trial: A Post-Moussaoui Primer for Federal Litigators', (2007) 54 *Federal Lawyer* 34, at 36). See further Applegate, *supra* note 1, at 334-341.

³¹ Joy and McMunigal, *supra* note 3, at 48; *Nix v. Whiteside*, 475 U.S. 157, at 190-191 (1986) ('after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked.' Per Stevens J.).

³² Piorkowski, *supra* note 3, at 391-392; Joy and McMunigal, *supra* note 3, at 48; Kerrigan, *supra* note 3, at 1367.

³³ Mahoney, *supra* note 5, at 301.

³⁴ Nicole LeGrande and Kathleen E. Mierau, 'Witness Preparation and the Trial Consulting Industry', (2003-2004) 17 *Georgia Journal of Legal Ethics* 947, at 947.

³⁵ Lewis, *supra* note 17, at 41-42; Alcorn, *supra* note 2, at 19; Kerrigan, *supra* note 3, at 1371 (arguing that 'it is not a good practice for nonattorney personnel to be utilized in witness preparation').

2. Regulatory uncertainties

It is striking that the essential character of witness preparation co-exists in the US with the absence of detailed and bright-line rules governing its proper scope and admissible techniques, resulting in a legal regime that is characterized as ‘technically complex and substantively ambivalent’.³⁶ Neither the federal rules of procedure nor codes governing professional conduct and responsibility contain specific provisions on witness preparation. However, what those codes do provide for is a strict and unambiguous prohibition on subornation of perjury and knowingly using false evidence as professional misconduct violating the duties of fairness to the opposing party and of candor to the court.³⁷

Thus, Rule 3.3 of the Model Rules of Professional Conduct stipulates that ‘[a] lawyer shall not knowingly: ... offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal’.³⁸ Rule 3.4 provides that ‘[a] lawyer shall not: ... (b) falsify evidence, counsel or assist a witness to testify falsely’.³⁹ Rule 8.4(a) qualifies as professional misconduct the violations or attempted violations of the Rules, including ‘through the acts of another’ (for example, a witness). The relevant Disciplinary Rules of the Model Code of Professional Responsibility reinforce these requirements by establishing that ‘[i]n his representation of a client, a lawyer shall not ... [k]nowingly use perjured testimony or false evidence’, ‘[k]nowingly make a false statement of law or fact’, ‘[p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false’, ‘[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent’.⁴⁰ The state Bar codes of professional conduct contain provisions to

³⁶ Applegate, *supra* note 1, at 279 and 324. See also Henning, *supra* note 23, at 356; Rosengart, *supra* note 30, at 35.

³⁷ In detail, see Piorkowski, *supra* note 3, at 395-398.

³⁸ ABA Model Rules of Professional Conduct, Rule 3.3.(a)(3).

³⁹ See also *ibid.*, Rule 1.2.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.’)

⁴⁰ Model Code of Professional Responsibility (1983), DR-7-102.

similar effect.⁴¹ The US courts have endorsed the content of these ethical canons in the strongest possible terms.⁴²

According to the codes, any attempts to cast evidence in a favorable light to the party's case in the course of preparation short of 'knowingly' eliciting false testimony, are in principle admissible and ethical.⁴³ Other than that, attorneys are left without concrete practical guidance as to which forms of preparation are proper and which are to be shunned as unethical.⁴⁴ Inasmuch as it remains unclear what exact objective conduct amounts to eliciting false testimony, the line between ethical and unethical preparation is evasive and extremely difficult if not impossible to draw definitely.⁴⁵ While for some, it comes down to the culpability and intent of the attorney (whether or not he has knowingly elicited false testimony),⁴⁶ for others the proper criterion is the attorney's motive and purpose (in particular, whether he seeks to provide a witness with content instead of merely improving the presentation aspects).⁴⁷

⁴¹ E.g. Texas Disciplinary Rules of Professional Conduct, Rules 3.03, 3.04, 8.04; New York Lawyer's Code of Professional Conduct, DR 7-102(A)(4) and (6); Arizona Rules of Professional Conduct, ER 1.2(d), 3.3(a)(3), 3.4(b). Most states have adopted either Model Rules or Model Code in their jurisdiction: Salmi, *supra* note 3, at 138.

⁴² E.g. *In re Peasley*, 90 P.3d 774, 778 (Ariz. S.C. 2004): ("There is no more egregious violation of a lawyer's duty as an officer of the court, and no clearer ethical breach" than deliberately eliciting false testimony from his client. ...[E]ven the most inexperienced lawyer knows that he or she should not elicit false testimony.' Per Ryan J.)

⁴³ Salmi, *supra* note 3, at 139 ('the only conduct in which the attorney cannot engage is subornation of perjury or creation of false evidence.') See e.g. D.C. Bar Ethical Opinion no. 79, *supra* note 24 ('a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may—indeed, should—do whatever is feasible to prepare his or her witness for examination.')

⁴⁴ Piorkowski, *supra* note 3, at 389 ('a vast realm of conduct that could potentially be characterized as improperly seeking to influence a witness' testimony. Within this area, there are very few guideposts to assist the attorney in maximizing his effectiveness as advocate while still remaining within the recognized limits of professional responsibility.') and 397; James A. Altman, 'Witness Preparation Conflicts', (1995-1996) 22(1) *Litigation* 38, at 38 ('neither [rule] gives any advice on how to apply these truisms in the horseshed.');

Applegate, *supra* note 1, at 279; Salmi, *supra* note 3, at 136 and 147; Zacharias and Martin, *supra* note 3, at 1006 ('The codes instead depend on lawyers to exercise discretion.')

⁴⁵ Shargel, *supra* note 23, at 1271; Alcorn, *supra* note 2, at 14.

⁴⁶ The persisting disagreement on the required quantum of knowledge can be noted: cf. Wydick, *supra* note 3, at 3 (arguing that the lawyer must be certain that the witness will perceive his instruction as inducement to testify falsely) with Piorkowski, *supra* note 3, at 404 ('should have known' standard should be sufficient) and Alcorn, *supra* note 2, at 16 (negligent misconduct amounts to a violation).

⁴⁷ Zacharias and Martin, *supra* note 3, at 1006 ('The correct resolution of ethical issues depends, at least in part, upon the reasons why a lawyer engages, or wishes to engage, in a particular type of coaching.');

Shargel, *supra* note 23, at 1271.

The deontological norms, inconclusive as they are, are given further teeth by the penalties that await both perjurious witnesses and attorneys who solicit false testimony.⁴⁸ Lawyers are in addition liable to disciplinary sanctions for assisting perjury and using its fruits, including disbarment and suspension from practice,⁴⁹ and risk ending their legal career ingloriously.⁵⁰ If revealed, improprieties with respect to witness preparation, even minor ones, would inevitably be exploited by the opposing counsel to the full and would possibly have most serious consequences for the respective party. Perjury will more likely than not divest the witness of credibility and result in the exclusion of the evidence or the rejection by the court of defences, elements of claims, and legal arguments.⁵¹

Be that as it may, the paucity and inconclusive character of the regulatory regime has meant that lawyers exercise a broad discretion in preparing witnesses for trial which is constrained by very little clear guidance on how this exercise should be conducted.⁵² The problem is that disciplinary rules are ill-served to prevent misconduct if they do not establish with sufficient clarity what such misconduct amounts to. The persisting uncertainty is not helped by the fact that witness preparation is normally conducted by parties in private and for the most

⁴⁸ 18 U.S.C. (2010) §§ 201 (Bribery of public officials and witnesses), 1001 (False statements), 1512 (Tampering with a witness, victim, or an informant), 1621 (Perjury), 1622 (Subornation of perjury).

⁴⁹ E.g. *In re Corizzi*, 803 A.2d 438, 440 (D.C. Ct. App. 2002) (disbarment for counseling of two witnesses to conceal facts at deposition); *In re Edson*, 530 A.2d 12465 (N.J. 1987) (disbarment for inducing client to commit perjury); *In re Peasley*, 90 P.3d 774 (Ariz. S.C. 2004) (disbarment for presenting misleading and false testimony in two trials); *Goodspell v. Mississippi Bar*, 667 So. 2d 7 (Miss. 1996) (6-month suspension for knowingly assisting false testimony); *In re Mitchell*, 262 S.E.2d 89 (Ga. 1979) (disbarment for suborning perjury); *In re Oberhellman*, 873 S.W.2d 851 (Mo. 1995) (disbarment for advice to testify falsely); *In re Allen*, 52 Cal. 2d 762 (1959) (disbarment for soliciting perjury); *In re Palmieri*, 162 N.Y.S. 799, 804, 807 (1916) (disbarment for aiding false testimony). See Alcorn, *supra* note 2, at 16; Joy and McMunigal, *supra* note 3, at 49; Salmi, *supra* note 3, at 148;-149 Piorkowski, *supra* note 3, at 393 notes 26 and 27 (citing extensively case law regarding disbarment for misconduct in connection with subornation of perjury).

⁵⁰ Stan Perry and Teshia N. Judkins, 'Ethical Witness Preparation: Stepping Back from the Line for the Lecture', *Houston Lawyer*, July/August 2010, at 34 ('a lawyer who fails to properly prepare a witness may lose her case and client, but a lawyer who fails to ethically prepare a witness may lose her reputation and career'); Rosengart, *supra* note 30, at 38.

⁵¹ Altman, *supra* note 44, at 39 ('false testimony dramatically undermines a witness's credibility and can destroy an entire case'); Alcorn, *supra* note 2, at 14 ('When the falsity of the client's testimony is revealed, the client's prospects for success in litigation will be virtually destroyed.');

Joy and McMunigal, *supra* note 3, at 54. See also *State v. Earp*, 571 A.2d 1227, 1234 (Md. 1990) (improper witness preparation may justify the exclusion of the evidence of that witness).

⁵² Rosengart, *supra* note 30, at 37 ('trial lawyers often operate in the zones of grey, rather than black and white').

part remains unexposed to judicial, partisan and public scrutiny.⁵³ In the absence of *prima facie* evidence of foul play by a party at preparation meetings, the disclosure of what was discussed by the attorney and the witness may not be compelled, except for the fact that a certain number of such meetings have been held. Cross-examination of the content of relevant discussions is prevented by the attorney-client privilege (for client-witnesses) and the work-product protection (for other witnesses).⁵⁴ Where there is reasonable suspicion of improper preparation, more extensive disclosure may be warranted. In *Geders v. US*, the Supreme Court held that ‘the extent of any “coaching” is properly within the scope of cross-examination’.⁵⁵ Nonetheless, the courts usually have little chance to confront the issue of admissible scope of witness preparation.⁵⁶ It is only in rare cases that instances of abuse by counsel can be brought to light.⁵⁷

Given these limitations the only signpost that American jurisprudence has given for distinguishing between improper coaching and ethical preparation is the subornation of perjury. As early as in 1880, Judge Finch of the New York Court of Appeal opined in *Re Eldridge* that when preparing a witness, a lawyer has no right to go further than extract information from him and may not ‘teach him what he ought to know’.⁵⁸ In *Hamdi & Ibrahim Mango Co. v. Fire Association of Philadelphia* it was held that ‘[t]here is no doubt that these practices are often abused. The line is not easily drawn between proper review of the facts and refreshment of the recollection of a witness and putting words in the mouth of the witness or ideas in his mind. ... [T]he line must depend in large measure, as do so

⁵³ Wydick, *supra* note 3, at 23; Salmi, *supra* note 3, at 139; Alcorn, *supra* note 2, at 14.

⁵⁴ Rules 501-502 of Federal Rules of Evidence; *Upjohn Co. v. US*, 449 U.S. 383, 394-95 (1981) (communications between an attorney and a client seeking a legal advice are confidential and not subject to disclosure); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) bringing under the privilege ‘interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible’ work products). See further Applegate, *supra* note 1, at 290-292.

⁵⁵ *Geders v. United States*, 455 U.S. 80, 89 (1976). See also *US v. Rhynes*, 218 F.3d 310, 320 (4th Cir. 2000); *State v. Blakeney*, 408 A.2d 636, 643-644 (Vt. 1979) and *State v. McCormick*, 259 S.E.2d 880, 883 (NC 1979); *Hamdi & Ibrahim Mango Co. v. Fire Association of Philadelphia*, 20 F.R.D 181, 182 (S.D.N.Y. 1957) (prior communication with counsel within the subject-matter of cross-examination).

⁵⁶ Altman, *supra* note 44, at 38 (noting the dearth of jurisprudence on the matter).

⁵⁷ Henning, *supra* note 23, at 357 (‘the secrecy of witness preparation means it will rarely become known that a lawyer violated the rule by suggesting how a witness should testify in a way that is untruthful’).

⁵⁸ *In re Eldridge*, 82 NY 161, 171 (NY 1880) (‘While a discrete and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide for his own examinations, he has no right, legal or moral, to go further. His 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.’)

many other matters of practice, on the ethics of counsel.⁵⁹ The Maryland Court of Appeal stated in *State v. Earp* that discriminating between ethical and unethical witness preparation is a daunting task whilst the ethics only mandates that counsel refrain from feeding a prospective witness with favorable ‘facts’ to help the client’s case:

Because the line that exists between perfectly acceptable witness preparation ... and impermissible influencing of the witness ... may sometimes be fine and difficult to discern, attorneys are well-advised to heed the sage advice ... [to] “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”.⁶⁰

Similarly, in *Geders v. US*, a leading US Supreme Court authority, Chief Justice Burger, held that ‘[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.’⁶¹

The failure to draw such an ‘important ethical distinction’ *in concreto* by defining what forms and methods of influence overstep propriety has meant that this jurisprudence has gone down the same road as the applicable ethical canons.⁶² It affords attorneys a broad leeway to decide which witness preparation methods to employ and how to use them, the only constraint being the prohibition on suggesting a witness what to say. As one author observed, ‘[t]he “rule of thumb” that an attorney may instruct a witness *how* to testify, but should refrain from telling a witness *what* to say, is an overgeneralized proposition providing unsatisfactory guidance to attorneys who wish to remain within the limits of acceptable conduct.’⁶³ Such a rule hinges upon the lawyer’s underlying motive or her knowledge as to whether her instruction would be interpreted by a witness as eliciting false testimony, rather than any objective parameter such as the recognition that some forms of preparation are inappropriate or the obligation to ensure that preparation does not result in the distortion of truth. As Henning put it, the problem is that ‘[t]here is no clear external or objective indicator about when a

⁵⁹ *Hamdi & Ibrahim Mango Co. v. Fire Association of Philadelphia*, 20 F.R.D 181, 183 (S.D.N.Y. 1957).

⁶⁰ *State v. Earp*, 571 A.2d 1227, 1234–35 (Md. 1990) (in addition permitting to ‘review statements, depositions, or prior testimony that a witness has given ... to test to refresh the recollection of the witness by reference to other facts of which the attorney has become aware during pretrial preparation, but in so doing the attorney should exercise great care to avoid suggesting to the witness what his or her testimony should be.’)

⁶¹ *Geders v. United States*, 455 U.S. 80, 90 (1976).

⁶² Piorkowski, *supra* note 3, at 401; Salmi, *supra* note 3, at 141; Altman, *supra* note 44, at 38; Rosengart, *supra* note 30, at 37.

⁶³ Piorkowski, *supra* note 3, at 390.

particular form of witness preparation is unethical and when it is perfectly consistent with the lawyer's responsibility to competently represent a client and seek a lawful objective.⁶⁴

3. Preparation methods and ethical dilemmas

The statutes and precedents do not provide a complete, let alone definitive, list of the permissible witness preparation methods in a lawyer's toolkit. Some indication of the broad discretion that is given to attorneys when it comes to witness preparation is provided by the impossibility of cataloguing the wide variety of different methods that attorneys employ, often sequentially and in combination, according to what fits their preferred style and the needs of each particular witness. For example, explaining to the witness what her role is in the courtroom and what the standard rules governing questioning are, which is normally done early on in the preparation session may be distinguished from rehearsing actual testimony with the witness which is more often done towards the end of the session but in practice these techniques may be effectively combined together.⁶⁵

The Third Restatement of the Law Governing Lawyers – a secondary but nevertheless authoritative source compiled by the American Law Institute – goes farthest in providing concrete examples of the preparatory techniques available to lawyers. Its section 116 authorizes a lawyer only 'to interview a witness for the purpose of preparing the witness to testify',⁶⁶ but the accompanying comment (b) permits far more than a one-way flow of information from witness to attorney typical for an interview.⁶⁷ It explicitly mentions the following practices:

- discussing the role of the witness and effective courtroom demeanor;
- discussing the witness's recollection and probable testimony;
- 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;
- discussing the applicability of law to the events in issue;

⁶⁴ Henning, *supra* note 23, at 359 (adding that 'lawyers are left on their own to determine whether their preparation of a witness is taking them close to the line of Model Rule 3.3's prohibition of false evidence.')

⁶⁵ See e.g. Altman, *supra* note 44, at 42-43 ('the rehearsal phase is the most effective time for imparting such instruction, because the rules can be pointed out and practiced while rehearsing the witness's testimony.');

Kerrigan, *supra* note 3, at 1378 (recommending to tailor preparation modalities to individual witnesses).

⁶⁶ Third Restatement, *supra* note 21, section 116.

⁶⁷ Henning, *supra* note 23, at 358.

reviewing the factual context into which the witness's observations or opinions will fit;
reviewing documents or other physical evidence that may be introduced;
and discussing probable lines of hostile cross-examination that the witness should be prepared to meet.⁶⁸

The comment (b) to section 116 furthermore states that 'a lawyer may invite the witness to provide truthful testimony favourable to the lawyer's client', which may legitimately include 'the rehearsal of testimony. A lawyer may suggest a choice of words that might be employed to make the witness's meaning clear.'⁶⁹ Finally, in emphasizing the right to elicit only *truthful* favorable testimony from the witness, the Third Restatement provides that 'a lawyer may not assist the witness to testify falsely as to a material fact'.⁷⁰ Although the Restatement thus qualifies what otherwise seems a *carte blanche* for a lawyer to shape the evidence for trial,⁷¹ it gives no clue as to how exactly each of the authorized practices is to be conducted without falling foul of this proscription.

All of the above-mentioned methods of preparing witnesses, including their numerous variations, are therefore permitted subject to the ethical obligation to refrain from assisting and using perjury in court. The underlying assumption is that each and every preparation technique may and should be employed ethically, although this *per se* does not exclude abuse by an inexperienced, incompetent or unscrupulous lawyer. Each of the ethical preparation methods can conceivably degrade into its respective unethical antipode. This is particularly so given that the line between proper and improper conduct is blurred and left to attorneys to draw according to their professional conscience in the light of the exigencies of the case and the predisposition of each individual witness. Commentators have inquired into the possibility of differentiating more sharply between ethical and unethical witness preparation in relation to the categories listed above. However, beyond the 'no-perjury' principle, the recommendations are too case-specific, conditional and often contradictory *inter se* to meet the recognized need for guidance. Without endeavoring to provide a solution to this problem, the remainder of this section discusses the ethical duplicity inherent in a few selected forms of preparation in order to point out where the potential difficulties lie in terms of differentiating lawful from unlawful conduct in this context.

⁶⁸ Third Restatement, *supra* note 21, section 116, comment b.

⁶⁹ *Ibid.* The lawyer's suggestion language to a witness was also authorized in Opinion No. 79 of the District of Columbia Bar, *supra* note 24. See Applegate, *supra* note 1, at 279.

⁷⁰ Third Restatement, sections 116, comment b, and 120(1)(a).

⁷¹ Henning, *supra* note 23, at 358 (commenting that '[u]nder the Restatement's analysis, almost anything short of showing the witness how to commit perjury appears to be acceptable. ... It would be hard to find any type of preparation short of the lawyer instructing the witness to fabricate a story that would not be defensible under the Comment to section 116.')

The first category of preparation measures is aimed at clarifying for a witness the structure of testimonial process so that she knows what to expect and what is expected of her as well as what are the roles of other participants at trial. This may commonly include steps as diverse as reminding a witness of the obligation to tell the truth, explaining the purpose of different phases of testimony (e.g. examination-in-chief and cross-examination) and advising her on the appropriate demeanor in the courtroom, body language and attire.⁷² A related technique is acquainting a witness with the courtroom in advance, which can be helpful in making her feel more comfortable and reducing her stress level during the actual testimony.⁷³ Insofar as this kind of assistance primarily aims at alleviating a witness's anxiety caused by unfamiliarity with the trial process and the formal setting in which testimony is to be given, rather than affecting its substance, it is deemed relatively uncontroversial.⁷⁴ Advising on demeanor and proper clothing in order to make the witness more believable and likeable when she appears before the jury is not deemed to be inappropriate as such.⁷⁵

However, even seemingly innocuous advice on demeanor by way of suggesting to an unsure witness that she should relax and speak with more confidence can lead a witness to be more certain about an alleged fact than she might otherwise be and result in her perjuring herself.⁷⁶ An instruction to display false emotion during testimony is more obviously problematic.⁷⁷ While deliberate advice to speak with more confidence about relevant facts than the witness would otherwise choose is fairly clearly caught by the prohibition on suborning perjury, it is less obvious that this is the case when such advice is given without any intention that it should have this effect. Applegate points out that the troubling aspect here is 'the thin line between adopting a new personality and adopting new

⁷² Applegate, *supra* note 1, at 298; Piorkowski, *supra* note 3, at 391; Bill Allison, 'Witness Preparation from the Criminal Defence Perspective', (1999) 30 *Texas Tech Law Review* 1333, at 1335-1336; Douglas, *supra* note 18, at 25-26; Kerrigan, *supra* note 3, at 1381.

⁷³ Thomas W. Wagstaff, 'Witness Preparation', (1989) 57(4) *UMKC Law Review* 762, at 767 (taking a witness to the courtroom and familiarizing her with surroundings may help decreasing stress).

⁷⁴ Applegate, *supra* note 1, at 298; Wagstaff, *supra* note 73, at 767.

⁷⁵ Piorkowski, *supra* note 3, at 408-409 (discussing the examples of proper modifications of demeanor in cases where an attorney means to prevent the jury from drawing erroneous and undue inferences from it).

⁷⁶ Applegate, *supra* note 1, at 299-300 ('Such preparation may unwittingly turn a skeptical witness into a true believer.');

Piorkowski, *supra* note 3, at 404-405; LeGrande and Mierau, *supra* note 34, at 955 ('relaxed witnesses tend to adopt an unwarranted level of confidence, possibly leading the witness to present what is actually a shaky recollection with a false air of substantial certainty, a subtle form of perjury.')

⁷⁷ Piorkowski, *supra* note 3, at 407 (advice to appear surprised in case the opposing counsel mentioned a particular event would be improper); Alcorn, *supra* note 2, at 16.

facts'.⁷⁸ Insofar as the credibility of the witness and her evidence is evaluated on the basis of her demeanor in court among other things,⁷⁹ a preparation technique aimed to alter demeanor surreptitiously reduces its actual probity and can thus contribute to obfuscation of the truth.

Informing a witness of the applicable law is another basic preparation method. This is aimed at assisting a witness (or client) to focus on facts that are relevant in the context of the legal claim. Not only does it have a partisan utility in that it makes the identification of relevant recollections easier, it also promotes the orderly and effective presentation of evidence to the court.⁸⁰ There is, however, a downside. Albeit that advising her client on the law is part of the attorney's natural duty,⁸¹ instruction on the law in certain circumstances risks prompting a prospective witness to amend her testimony in order to 'maximize its effect or minimize damage' to the party's case.⁸² Therefore, whilst providing a witness with the legal information relevant to the case is ethically unquestionable in many cases, there is a host of situations in which it could amount to suborning perjury or otherwise cross the line into the sphere of unethical conduct.⁸³ Such borderline cases include, for example, an attorney informing a witness of the hypothetical facts that could secure a particular outcome even before hearing what the witness has to say about the facts known to her.⁸⁴ Potentially problematic would be a

⁷⁸ Applegate, *supra* note 1, at 300 and 310 ('demeanour is even less probative when a lawyer has prepared the witness for testimony').

⁷⁹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) ('Most facts in any case depend on the determination of credibility of a witness as shown by their demeanor or conduct at hearings.') See also John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed. (Boston: Little Brown, 1940) §946 ('The demeanor of the witness on the stand may always be considered by the jury in their estimation of his credibility. ... So important has this form of evidence been deemed in our system of procedure that ... the witness is required to be present before the tribunal while delivering his testimony.'). Piorkowski, *supra* note 3, at 405; Salmi, *supra* note 3, at 163.

⁸⁰ Applegate, *supra* note 1, at 301.

⁸¹ Model Code of Professional Responsibility (1983), EC 7-8 ('A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. ... Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. ... He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.')

⁸² Applegate, *supra* note 1, at 301-302; Salmi, *supra* note 3, at 147; LeGrande and Mierau, *supra* note 34, at 955-956.

⁸³ Note the classical description of 'lecture' in the famous 1958 novel of Robert Traver, *Anatomy of a Murder* 44-49: 'the Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical and bad, very bad.'

⁸⁴ Frankel, *supra* note 5, at 15 ('short of criminality but still to be condemned, is the device of telling the client "the law" before eliciting the facts—i.e. telling the client what facts would

suggestion, guised as a lecture on the law, on what alternative or additional facts to those provided by the witness in her initial account would better promote the preferred legal outcome.⁸⁵ More likely than not, a dishonest witness would readily follow the cues to adjust the testimony in the way that could ‘help’ her side. Insofar as the lawyer provides a witness with the ‘means, motive and opportunity to lie’,⁸⁶ he suborns perjury or, at least, becomes an inadvertent accomplice in distorting the truth.

A third set of preparation measures, which arguably constitutes the core and most time-intensive part of the process, is the review of facts with a witness. In addition to inquiring into what the witness knows about the case, this includes explaining to the witness the facts in the case to which her testimony is to contribute and discussing with her the other available evidence and how her account would fit in that context. In accordance with the case strategy developed by the lawyer, each witness’s testimony fulfils the assigned function of proving or disproving particular factual allegations. The overall persuasiveness of the party’s case will rest upon the coherence of the factual mosaic put together by the lawyer based on the evidence presented in court through the direct examination of her witnesses and cross-examination of adverse witnesses. Therefore, the prior discussion of the factual context meant to refresh the witness’s recollections of relevant details, including review of documents, is a conventional preparation technique that is both judicially endorsed and recommended by practitioners.⁸⁷

constitute a successful claim or defense, and only then asking the client what the facts happen perchance to be.’); Salmi, *supra* note 3, at 154-155; Perry and Judkins, *supra* note 50, at 35-36 (‘Whenever possible, a lawyer should learn what the facts are before a lecture that may suggest what the facts should be.’); LeGrande and Mierau, *supra* note 34, at 956. Cf. Altman, *supra* note 44, at 39 (advice on applicable law possible as long as the attorney does not knowingly participate in falsification of evidence); Rosengart, *supra* note 30, at 37; Shargel, *supra* note 23, at 1275 (specifically arguing that ‘an attorney should tell the client about Rule 608(b) [providing that instances of the witness’s conduct, for the purpose of attacking or supporting her character for truthfulness, may not be proved by extrinsic evidence – SV] *before* asking the client about his past’).

⁸⁵ Applegate, *supra* note 1, at 301-302 (providing one example of the lawyer ‘describing an exculpatory scenario to the client before the client has a chance to tell an incriminating story’); Alcorn, *supra* note 2, at 18 (informing a witness on the applicable law and its relation to the facts should not pursue ‘the purpose of inducing a witness to misrepresent the facts’).

⁸⁶ Salmi, *supra* note 3, at 146.

⁸⁷ *Hamdi & Ibrahim Mango Co. v. Fire Association of Philadelphia*, 20 F.R.D 181, 182-183 (S.D.N.Y. 1957) (‘This sort of preparation is essential to the proper presentation of a case and to avoid surprise.’); Altman, *supra* note 44, at 39 (‘Most witnesses need to be oriented to the theory of the case and how their testimony fits into it.’ This includes describing ‘the dispute between the parties; each party’s primary legal contentions; the major factual issues in dispute; the material facts upon which each side will rely to make its case; the particular factual issues about which the witness probably will testify; and how the witness’s testimony fits into the big picture’).

When discussing facts and factual context, a lawyer seeks to identify and deal with possible inconsistencies between the accounts provided by different witnesses and to assist them in testifying more effectively. The witness's memory may need to be refreshed with respect to forgotten details, or the witness may need to be informed of other evidence in the case and confronted with facts that are reported differently or are missing in the original account.⁸⁸ At trial, apparent contradictions between witnesses in the areas of overlapping knowledge will not go unnoticed and are bound to be probed by the opposing counsel during cross-examination, whilst proper witness preparation may help avoid and appropriately resolve insignificant and illusory inconsistencies.⁸⁹ Moreover, witnesses can be assisted in testifying more meaningfully and comprehensively if they are made aware of the areas or details mentioned by other prospective witnesses, which are relevant but were not recalled by the witness immediately or were discarded as unimportant.⁹⁰ Discussing the factual background can also prove useful in testing the witness's confidence level as regards the contended details and can ultimately enhance the accuracy of testimony, inasmuch as the alternative information may induce the witness to critically assess the veracity of her account and perhaps come to the conclusion that she has erred previously.⁹¹ In the sense that factual discussions with witnesses serve to facilitate witness recollection, they are deemed to enhance truth-finding.⁹²

It is not difficult to see that some of the preparation techniques subsumed in this category can be turned by an unscrupulous lawyer into a tool for coaching witnesses. The discussion on relevant facts or the factual context could be used for overtly soliciting a witness, or covertly prodding her, to adopt a more convenient but false version of facts as well as for hinting to her concrete ways in which the testimony could be revised to dovetail it into what other witnesses may have said about the relevant matters.⁹³ For these reasons, the joint preparation of

⁸⁸ Altman, *supra* note 44, at 40; Applegate, *supra* note 1, at 304.

⁸⁹ Applegate, *supra* note 1, at 305 ('There is no good reason to allow a trial to get bogged down in apparent contradictions that, if considered carefully, are illusory or irrelevant.') and 310.

⁹⁰ Applegate, *supra* note 1, at 304; Altman, *supra* note 44, at 40 (the technique serves 'to push the witness beyond her initial recollection in the hope of making that recollection more complete, more accurate, and more favorable to the client').

⁹¹ Applegate, *supra* note 1, at 304-305; Altman, *supra* note 44, at 42 (recommending to challenge the witness with other contrary evidence in order 'to avert a disconcerting surprise while testifying').

⁹² Altman, *supra* note 44, at 40-41 ('No one disputes the propriety of genuinely filling in the gaps in a witness's recollection. ...Indeed, a more complete recollection actually promotes the truth-seeking function of trial.')

⁹³ Altman, *supra* note 44, at 39 (noting that orientation of friendly nonparty witnesses and client witnesses raises ethical questions insofar as 'those are the same witnesses who most likely will want to tailor their testimonies to make them as favourable as possible or the client').

several witnesses, although not banned by ethical rules,⁹⁴ is generally deemed particularly objectionable.⁹⁵ Many commentators have argued that it could easily turn into a collective coaching session giving witnesses ample opportunity to stimulate each other in aligning their divergent accounts with one another in order to produce one coherent and plausible yet not entirely truthful picture of facts.⁹⁶ More generally, it is believed that ‘educating’ a witness on the facts in the case and advising her on which ‘facts’ would help ‘win’ the case, are fraught with the risk of prodding her to deliberately adopt those facts in her testimony or to subconsciously amend her original recollection and change her level of confidence in it when testifying.⁹⁷ Put differently, the negative effect of this technique is that the witness testimony and possibly the court’s findings will be based on a lawyer’s script reproduced by the witness more than on her personal knowledge of the facts.⁹⁸

Another common method of witness preparation is one which enables the attorney to shape the answers given by a witness by way of suggesting the language to be used in response to an examiner’s questions. This can take the form of a recommendation to replace an unfortunate word or phrase with a synonym that would seem more adequate in light of the party’s legal claim.⁹⁹ As

⁹⁴ *US v. Sepulveda* (1993) 15 F (3d) 1161, at 1171 (US Supreme Court finding no impropriety in placing three prosecution witnesses in the same cell despite a general sequestration order) and *Solar Turbines Inc. v. US*, 14 Cl Ct 551 (1988) 62, reported in Mahoney, *supra* note 5, at 298 note 9 and 299 note 10.

⁹⁵ Cf. Mahoney, *supra* note 5, at 303 (who appears to equate the risk of abuse present in a joint preparation with that in the context of one-to-one discussion of other evidence with a witness). Arguably, this equation underestimates the former risk which is certainly higher, given that witness conferences provide incentives and ample opportunity for spotting and immediately addressing the areas of conflict in their testimonies without much preoccupation about the truth).

⁹⁶ Applegate, *supra* note 1, at 305-306 (noting that ‘the opportunity for concocting a story in this situation is enormous’); Rosengart, *supra* note 30, at 35 (reporting Judge Brinkema’s finding in *US v. Moussaoui* that “prepping” multiple witnesses simultaneously ...creat[ed] at least the appearance that they had improperly shaped (or might shape their testimony into a consistent story’) and 38 (recommending to not prepare several witnesses together); Alcorn, *supra* note 2, at 19 (‘a joint preparation session ineluctably will influence and reshape a witness’ independent recollection as the witness hears the statements of other witnesses. ... In the end, it may become difficult to disentangle a witness’s independent recollection from the information obtained during a joint preparation session.’)

⁹⁷ Piorkowski, *supra* note 3, at 409-410; Rosengart, *supra* note 30, at 38 (warning against telling the witness what should be said to win). Cf. Altman, *supra* note 44, at 40 (contradicting the ‘naive’ view that the witness’s initial recollection is the ‘sole criterion of the truth’ that is not to be ‘supplemented’ or ‘modified’ and arguing that it is rather a ‘starting point’ in witness preparation).

⁹⁸ Applegate, *supra* note 1, at 307; LeGrande and Mierau, *supra* note 34, at 956. See Rule 602 of Federal Rules of Evidence (‘A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.’)

⁹⁹ Altman, *supra* note 44, at 43 (providing as an example a suggestion to a criminal defendant relying on self-defense to replace the verb ‘cut’ for ‘stab’).

elsewhere, the ethical threshold is arguably not overstepped as long as such suggestions go to form rather than substance and do not knowingly elicit false testimony.¹⁰⁰ But obviously this type of recommendation can also go more directly to substance – one loose variation being the practice of advising a witness to not volunteer information or to not answer questions other than asked during cross-examination. Combined with other instructions, a seemingly innocent reminder by the lawyer that a failure to recall a relevant detail is ‘just fine’, can be interpreted by a witness as an invitation to conceal unfavourable facts or provide a misleading answer.¹⁰¹ Insofar as a failure to recall the fact that the witness actually does recall is false, it amounts to perjury and the respective advice by the lawyer to subornation of perjury.¹⁰² Between the two extremes represented by an innocent suggestion to fine-tune the language, on the one hand, and a recommendation to resort to an alternative wording that would amount to misrepresentation, on the other hand, there is a minefield of obscure and contentious practices that have the effect of rendering the courtroom testimony more evasive and less truthful without being readily caught by the prohibition of eliciting a false testimony.¹⁰³ For instance, while literally true but incomplete evidence falls short of perjury and is not in all circumstances unethical,¹⁰⁴ its

¹⁰⁰ Ibid.; Salmi, *supra* note 3, at 160-163, 176-177; Perry and Judkins, *supra* note 50, at 36 (language suggestions ‘only ethical if those words merely repackage previous testimony without affecting its substance’); Alcorn, *supra* note 2, at 16, 18 (language suggestions are ethical if meant to clarify and not substantively change the testimony or to help the witness eliminate ‘offensive mannerisms’ or ‘powerless speech’); Piorkowski, *supra* note 3, at 399-401 (elimination of prefatory phrases, offensive language and technical or formal speech are ‘clearly acceptable’, unlike the attempts to influence the ‘intended meaning’).

¹⁰¹ Salmi, *supra* note 3, at 145, 150-152, 162; Rosengart, *supra* note 30, at 38 (recommending to refrain from ‘even remotely suggest[ing] that the witness may be “forgetful” or evasive, much less misleading in response to questions posed by the hostile examiner’, while it would be ‘entirely appropriate to suggest that he or she respond by saying “I do not recall” in case of a true failure to remember’); Alcorn, *supra* note 2, at 16 (such instructions are ‘improper if made as part of an effort to encourage a failure of recollection by the witness. A lawyer should not ask questions or make statements that would subvert a witness’ actual recollection; the witness cannot be counseled to become “forgetful” or evasive.’)

¹⁰² *United States v. Barnes*, 889 F.2d 1374 (5th Cir. 1989); *Sheriff v. Hecht*, 101 Nev. 779, 710 P.2d; *US v. Barnhart*, 889 F.2d 1374, 1376-80 (5th Cir. 1989) (upholding perjury conviction for counseling to testify falsely to the failure to recall). See cites to cases in Altman, *supra* note 44, at 43; Rosengart, *supra* note 30, at 38; Alcorn, *supra* note 2, note 30.

¹⁰³ Piorkowski, *supra* note 3, at 402 (recommending attorneys to exercise the utmost caution that suggested word choice to a witness does not result in mischaracterization of facts prejudicial to administration of justice); Salmi, *supra* note 3, at 160-162.

¹⁰⁴ *Bronstein v. United States*, 409 U.S. 352, 358-359 (1973) (‘If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.’). See Altman, *supra* note 44, at 42 (concluding that ‘counseling a strategy of evasion will be unethical when it perpetrated a fraud on the court’).

capacity to mislead the court on details and eventually to sabotage the truth-finding exercise is quite significant, particularly if cross-examination cannot always be counted on as a waterproof guarantee for ascertaining the truth.

Last but not least, 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.¹⁰⁵ 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.¹⁰⁶ Rehearsal is to be distinguished from familiarization and training sessions which are meant to explain to witnesses the purpose underlying various forms of questioning used at trial so as to enable them to testify with a proper understanding of the procedural context. Although it contributes to the objective of familiarizing witnesses with their prospective role and advising them on the technical and presentational aspects of testimony,¹⁰⁷ this form of preparation clearly serves broader objectives. During these mock questioning sessions, which may be held repeatedly and attended by ‘jurors’ and ‘counsel’, the witness is asked specific questions the attorney intends to pose in the course of direct examination¹⁰⁸ and often in the same order.¹⁰⁹ Subsequently, the witness is ‘grilled’ in the course of a mock cross-examination by another attorney role-playing as adverse counsel, who asks her questions likely to be raised during

¹⁰⁵ *Supra* note 69. *State v. McCormick*, 259 S.E.2d 880, 882-883 (NC 1979); *United States v. Torres*, 809 F.2d 429, 439 (7th Cir. 1987); *Hamdi & Ibrahim Mango Co. v. Fire Association of Philadelphia*, 20 F.R.D 181, 182 (S.D.N.Y. 1957).

¹⁰⁶ Applegate, *supra* note 1, at 322-323. See e.g. Wagstaff, *supra* note 73, at 767; Altman, *supra* note 44, at 42; Rosengart, *supra* note 30, at 38; Lewis, *supra* note 17, at 42 (large law firms even maintain full-fledged mock courtrooms to give witnesses ‘practice in testifying under more realistic circumstances’).

¹⁰⁷ Applegate, *supra* note 1, at 322 (technical aspects include pausing before answers and refusing to give yes or no answers); Wagstaff, *supra* note 73, at 767; Altman, *supra* note 44, at 42 (‘increasing confidence in the accuracy of testimony and increasing familiarity with legal procedures quells some of the normal anxiety over testifying.’) This is corroborated by experimental psychology data: Marcus T. Boccaccini, Trina Gordon and Stanley L. Brodsky, ‘Effects of Witness Preparation on Witness Confidence and Nervousness’, (2003) 3(4) *Journal of Forensic Psychology Practice* 39, at 49-50 (testimony simulations increase the level of confidence and self-efficacy in witnesses, particularly for the purpose of cross-examination).

¹⁰⁸ E.g. Bennett L. Gershman, ‘Witness Coaching by Prosecutors’, (2002) 23 *Cardozo Law Review* 829, at 857 (recommending prosecution counsel to rehearse with a witness specific questions that will be asked during direct examination); Altman, *supra* note 44, at 42 (recommending to ‘question your witness just as if he was actually testifying at deposition or trial’ and for rehearsals to ‘continue until the witness feels confident in testifying’).

¹⁰⁹ Allison, *supra* note 72, at 1336-1337 (considering it ‘critically important’ to maintain, during direct and cross-examination, the sequence of questions agreed at rehearsal).

actual cross-examination in a manner that emulates it.¹¹⁰ This technique allows the witness to come better prepared for cross-examination, both in substance and psychologically, and to testify more confidently without being taken aback by a cross-examiner's hostile questions.¹¹¹ Finally, rehearsal may also be used to challenge the witness's initial recollection so as to test its veracity and her level of confidence about the alleged facts.¹¹²

A less attractive aspect of rehearsal, however, is that in addition to improving testimonial presentation, it provides the attorney with an ample opportunity to alter the content of the witness's original account through feedback on her performance.¹¹³ The witness can simply learn the details of the desirable testimony through repetition without appearing rehearsed, lest it affects her credibility.¹¹⁴ As the 'ultimate preparation technique', the rehearsal is deemed to be 'one of the most controversial' because the intensity and subtlety of the possible coaching which the witness may undergo during a mock examination goes far beyond that of other techniques.¹¹⁵ In seeking to maximize the effect of testimony on a jury by making its provider seem more credible, a dry run may combine the worst elements of techniques such as demeanor training, discussions on facts, and wording suggestions.¹¹⁶ Irrespective of the lawyer's motives and level of skill, it would seem almost impossible to draw a clear line in rehearsals

¹¹⁰ Wydick, *supra* note 3, at 16 ('Witness preparation sessions often end with role playing by the lawyer and witness. Typically, the lawyer questions the witness on several topics using the style she will use during direct examination. Then she, or one of her colleagues, cross-examines using the style the adversary lawyer is likely to use'); Wagstaff, *supra* note 73, at 767 (describing the practice and recommending it as 'helpful'); Altman, *supra* note 44, at 42.

¹¹¹ LeGrande and Mierau, *supra* note 34, at 953 ('practice sessions ... can serve the valuable purpose of educating a witness on what issues are important and get them to focus on those areas'); Allison, *supra* note 72, at 1341 (critical of the ability of 'practice examinations' to coach witnesses 'to become for a short period of time, someone they are not').

¹¹² Cf. Altman, *supra* note 44, at 40 (distinguishing between the 'quasi-cross' meant to probe the witness's recollection and the rehearsal).

¹¹³ Alcorn, *supra* note 2, at 16 (mock questioning 'should not be used to modify the substantive content of a witness's actual recollection.')

¹¹⁴ See e.g. Wagstaff, *supra* note 73, at 768 ('By the time the case reaches trial, the witness should know the case backwards and forwards. He should be able to discuss the substantive aspects of the case without referring to any notes and without acting like he has memorized the script. He needs to know the case so that he can present it to the jury in such a way that his statements and beliefs will be perceived as coming from the heart and not from a list of answers prepared ahead of time by his lawyer.'). See also Applegate, *supra* note 1, at 322 (noting the common concern among lawyers that witnesses do not appear rehearsed as this would harm credibility).

¹¹⁵ Applegate, *supra* note 1, at 322; LeGrande and Mierau, *supra* note 34, at 957.

¹¹⁶ Pizzi, *supra* note 5, at 125 (mock cross-examinations are used by lawyers to 'subtly, and sometimes not so subtly, shape the witness's proposed testimony for adversarial advantage at trial' through which witnesses learn 'how to qualify their answers and how best to explain apparent conflicts at trial').

between ethical conduct and that which verges on improper influence on the substance of testimony.¹¹⁷ ‘Practice examinations’ have an inherently suggestive nature, and this effect is reinforced through repetitiveness. This feature tends to turn in-court testimony into a performance orchestrated by the lawyer and based on his script. Rehearsals deprive the evidence of its actual – as opposed to its seeming – spontaneity and authenticity.¹¹⁸ The clear collision between the partisan interest to stick to the script and the duty to tell ‘the truth, the whole truth and nothing but the truth’ is embodied in the practice of advising witnesses not to volunteer information during cross-examination.¹¹⁹ As noted by Judge Frankel, ‘[t]he concern is not that the volunteered contribution may be false. The concern is to avoid an excess of truth where the spillover may prove hurtful to the case.’¹²⁰

This overview of preparation methods commonly used in the US suggests that the toolkit at attorneys’ disposal is extensive; the available techniques are geared to prepare witnesses in relation to every conceivable aspect of testifying in court. Constrained solely by the prohibition on eliciting false testimony, attorneys may advise witnesses on a wide range of legal and factual issues relevant to the case and to engage them in a diverse range of preparatory activities, including instructing on demeanor and attire, suggesting language to be used when testifying, acquainting them with the law and facts, confronting them with other, possibly contradictory, evidence and even rehearsing testimony. The ethical standards and jurisprudence are open-ended and provide no context-specific guidance that could conclusively resolve the ethical dilemmas that arise in the context of each of these techniques. Each technique that is used may, depending on the circumstances, qualify as ethical or unethical behavior. The prevailing trend is to treat each technique as neutral and to consider the attorney’s mental element (her motive, purpose, and her appreciation of the likely consequences) as determinative of the ethical or unethical nature of the conduct. This has the striking effect of focusing exclusively on the deontological side of the preparation process. There is no concern about what effect preparation techniques have on witness recollection and testimony, nor is there any endeavor to impose objective constraints on attorney’s conduct by regulating how those methods may or may not be practiced. Such a liberal approach to witness preparation is taken because

¹¹⁷ Applegate, *supra* note 1, at 323 (‘it comes uncomfortably close to the line between the lawyer’s knowing what would help the case and the lawyer’s advising the client how to help the case.’)

¹¹⁸ Cf. Pizzi, *supra* note 5, at 125 (‘The end result is testimony shaped by the lawyers. Witnesses are not just witnesses in our system: they are performers who need to be coached to give their best performance from the point of view of the lawyer calling the witness.’); Applegate, *supra* note 1, at 323 (rehearsal ‘treats the trial precisely as a play scripted by the lawyers’).

¹¹⁹ Pizzi, *supra* note 5, at 198 (condemning the practice).

¹²⁰ Frankel, *supra* note 5, at 16.

of the refusal even to acknowledge that any of these techniques may prod a witness to amend her account in the way that would not be truthful.

The problem of this visible tension, or rather disconnection, between the regime governing professional ethics in the US and the pursuit of truth through criminal process will be turned to in a due course. The next section places the issue of the admissible scope and forms of witness preparation in a comparative context, by examining the status in jurisdictions other than the US.

III. Witness preparation in a comparative context

1. *'Civil law v. common law'*

It was posited previously that a number of general witness preparation techniques are systemically accepted in the United States due to the adversarial nature of the American trial system. Since other adversarial systems of justice adhere to a more restrictive position, adversarialism cannot wholly explain this liberal approach. It is nevertheless worth beginning the survey of other representative examples of common law approaches to witness preparation by providing a schematic account of the basic contours of the adversary system which necessitate at least some measure of witness preparation to be conducted by the parties prior to trial. This will help to explain why the following overview is limited to the common law family and it will also serve to emphasize that adherence to the adversarial model does not prevent individual countries from drawing the line differently between appropriate and inappropriate conduct, depending on their preferred epistemic arrangements. This requires looking beyond vaguely defined comparative models which are only approximate and inaccurate descriptions of the legal realities in concrete national jurisdictions.

As noted previously, the notion of lawful and ethical witness preparation is unknown to the civil law jurisdictions of the Romano-Germanic legal tradition. Any party-driven measures aimed at preparing witnesses for testimony, substantively or demeanor-wise, will not only be looked at with great suspicion but will also most likely fall under penal provisions prohibiting interference with the administration of justice and tampering with evidence in particular.¹²¹ Consequently, witness preparation is not regarded as part of the regular function

¹²¹ 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. '); id., *Evidence Law Adrift* (New Haven/London: Yale University Press, 1997) 77.

of lawyers and has no place in the criminal process on the Continent.¹²² This restrictive approach is rooted in the arrangements for the production of evidence and, in particular, the roles of the fact-finder and parties in that process. In inquisitorial systems, the criminal process is structured as an official inquest by an impartial and pro-active authority which is responsible for investigating the relevant – both exculpatory and inculpatory – evidence as well as for the examination of the evidence amassed in the dossier during the trial. In the judge-driven rather than party-led process, the parties normally play a secondary role of assisting the court in ascertaining the truth at both the investigative and trial stages. Whilst the parties are not completely barred from conducting their investigations, such activities are normally limited to the identification of leads that could be used by the investigative authority and the nomination of potential witnesses. The parties are discouraged from contacting witnesses directly for such contacts are apt to diminish the witness's credibility.¹²³ There are no two distinct cases to be prepared and put forward by the parties but only one 'case of the truth' which encompasses the entirety of evidence collected as a result of the investigation and mustered in the case file. The veracity of this single case is probed at trial by a judge who conducts the inquiry by defining the relevant areas and extensively questioning witnesses before the parties have an opportunity to pose their questions. The inquisitorial process seeks to establish, to the extent possible, the material or objective truth rather than the truth emerging from the clash of different versions of events presented by opposing litigants. The court's 'ownership' of all the evidence in the case makes it inconceivable for the parties to try to discuss, let alone to influence, the proposed testimony, because this would be interpreted as an attempt at contaminating the court's evidentiary sources.¹²⁴ The allocation of responsibility for the proof-taking process to a professional or mixed bench entails that fact-finders come to trial equipped with solid knowledge of the evidence in the dossier, which enables them to meaningfully examine parties and witnesses. Under these arrangements, elements of trial advocacy calculated to secure the smooth presentation of testimony by the parties would be superfluous and suspect from the judicial perspective. A judge who is in full control of the evidentiary process may neither be deceived by nor tolerate any artificial adjustments to the package and content of the evidence. The testimonial process is incompatible with rigid forms of questioning and embodies

¹²² See among others, Mahoney, *supra* note 5, at 299.

¹²³ Damaška, *Evidence Law Adrift*, *supra* note 121, at 77-78 (observing also (n. 8) that the ban on witness contacts has lately been relativized in a few Continental jurisdictions).

¹²⁴ Damaška, 'Presentation of Evidence and Factfinding Precision', *supra* note 121, at 1088 ('All witnesses are evidentiary sources of the bench, and it is the judge, not the parties, who has the primary duty to obtain information from them. The parties are not supposed to try to affect, let alone to prepare, the witnesses' testimony at trial.')

a preference for free and spontaneous development of evidence in the way deemed most suitable for testing the veracity of the proof in the case file.

By contrast, adversarial systems of the common law world employ a party-led process before a passive fact-finder (normally a lay jury) blessed with ignorance about the facts and evidence that is to be presented during trial.¹²⁵ The parties conduct their parallel and unavoidably partial investigations to collect proof in support of their respective claims and are the ones primarily responsible for presenting their cases. The bipolar structure, consisting of two opposing cases for each party, reflects the dialectic vision of ‘truth’ as the result of the clash between two one-sided accounts (*‘du choc des opinions jaillit la lumière’*).¹²⁶ Because the truth tends to be seen as a by-product of fair proceedings rather than its direct objective, the emphasis is slanted considerably towards the need to ensure due process and equality of arms between the parties to the adversarial combat. The lay juries’ lack of prior knowledge of the case is one factor that renders preparation of evidence by the parties not only vital to securing a successful outcome but also an objective necessity of the adjudicative system.¹²⁷ Most of the evidence is collected, reviewed and chosen for presentation by each party and only the parties are aware of how they intend to use their evidence to buttress their claims. Therefore, it is only natural for them to be the real ‘owners’ of the evidence and ‘masters’ of their cases. This comes with a significant autonomy in deciding which witnesses to present, how best to sequence testimonies and organize them internally as well as the responsibility to ensure that the evidentiary material is sifted and polished prior to submitting it to a naïve fact-finder.¹²⁸ Hence, prior witness preparation by the parties becomes an indispensable tool for ensuring coherent and convincing case presentation.¹²⁹

¹²⁵ Applegate, *supra* note 1, at 335.

¹²⁶ Damaška, *Evidence Law Adrift*, *supra* note 121, at 100.

¹²⁷ *Ibid.*, at 97 (‘Where the development of evidence is in the hands of lawyers for the parties, their effectiveness in making their client’s case makes interviews with potential witnesses imperative: direct examiners must know what testimony they are likely to get if they call a person to the stand.’); Applegate, *supra* note 1, at 342 (‘the structure of the adversary system requires partisan presentation of a case, some preparatory activities are essential to coherent and persuasive presentation.’)

¹²⁸ Applegate, *supra* note 1, at 335; Marvin E. Frankel, ‘The Search for Truth: An Umpireal View’, (1975) *University of Pennsylvania Law Review* 1031, at 1041-1045, 1054; Damaška, ‘Presentation of Evidence and Factfinding Precision’, *supra* note 121, at 1090; Applegate, *supra* note 1, at 335-337; Wydick, *supra* note 3, at 12-13.

¹²⁹ Partly Dissenting Opinion of Judge Kuniko Ozaki, *supra* note 9, para. 14 (‘In a considerable number of jurisdictions with adversarial systems of law and where in-court oral testimony of witnesses plays a central role in the evaluation of the evidence, some form of pre-trial discussion on the substance of the testimony to be given by a witness is either allowed or encouraged between the witness and the party calling the witness.’)

Yet, a distinguished comparatist has observed that ‘it is uncertain how widespread the coaching of witnesses is across common law systems’.¹³⁰ Despite sharing a similar structure of state authority and an adversarial style of procedure, the attitudinal and regulatory differences between individual countries as to the permissible scope of witness preparation are more than cosmetic. Arguably, the differences flow among others from diverging conceptions of the values which criminal processes should aim to promote as well as from culturally and historically predetermined views on how best to honor those values. As will be shown, one relevant and important variable is the degree of witness spontaneity which is deemed desirable. Jurisdictions differ in the degree of control over the evidence which fact-finders are willing or in a position to yield to parties before it is presented. The courts may be more or less tolerant to the possibility of a party molding or repackaging that evidence to fit its case. In light of the question of whether and to what extent the regulation of witness preparation in the United States is more liberal than elsewhere in the common law world, the following overview provides a sample of alternative approaches drawn from the practice in England and Wales, Canada, Australia and New Zealand.

2. England and Wales

The English system takes a markedly more restrictive approach towards ‘witness proofing’ than the United States.¹³¹ In both civil and criminal proceedings, witness proofing falls under paragraph 705(a) of the Code of Conduct of the Bar Council: ‘A Barrister must not rehearse, practise or coach a witness in relation to his evidence’.¹³² Initially, this provision operated to forbid barristers from having any contact with prospective witnesses other than lay clients and expert witnesses.¹³³ It was gradually relaxed to permit barrister—witness contact to enable the barrister to introduce himself to the witness and to familiarize her with

¹³⁰ Damaška, *Evidence Law Adrift*, *supra* note 121, at 98 note 48.

¹³¹ Atiyah and Summers, *supra* note 5, at 163 (observing that ‘the rules are very different in the two countries, and ... that the American rules, lax as they are by comparison to the English rules, are also less stringently enforced.’); Rudin and Hutchings, *supra* note 5, at 1.

¹³² Code of Conduct of the Bar of England and Wales and Written Standards for the Conduct of Professional Work, 8th ed., adopted by the Bar Council on 18th September, effective from 31st October 2004 (‘Code of Conduct’). Paragraph 705(b) further prohibits a barrister to ‘encourage a witness to give evidence which is untruthful or which is not the whole truth’.

¹³³ Paul Roberts and Candida Saunders, ‘Piloting PTWI – A Socio-Legal Window on Prosecutors’ Assessments of Evidence and Witness Credibility’, (2010) 30 *Oxford Journal of Legal Studies* 101, at 102 and 138; Atiyah and Summers, *supra* note 5, at 163. See also *R. v. Richardson*, CA (Crim. Div.), 16 February 1971; *Lau Pak Ngam v. Queen, CA* (Hong Kong), 11 March 1966; *R. v. Da Silva*, CA (Crim. Div.) 20 July 1989, (1990) Cr. App. R. 233; *Worley v. Bentley* (1976) 62 Cr App R 239; *R. v Westwell* (1976) 62 Cr App R 251, reported in *Lubanga* proofing trial decision, *supra* note 9, para. 42 note 62.

the process and, ultimately, to review the evidence with a witness in a limited number of cases.¹³⁴ Thus, the discussion of the proposed testimony with the witness has until most recently been strictly forbidden.¹³⁵ The relevant Written Standards of Professional Work (Section 3 of the Code) provide that in principle and with exception of lay clients and character and expert witnesses, ‘it is wholly inappropriate for a barrister in ... a [criminal] case to interview any potential witness. Interviewing includes discussing with any such witness the substance of his evidence or the evidence of other such witnesses.’¹³⁶ This provision is less absolute than it seems because in exceptional circumstances it may still be considered ethical for a barrister to discuss the evidence with a witness, limited as such discussions may be and at all times subject to an unqualified proscription of ‘coaching’.¹³⁷ Furthermore, a specific exception has been made for counsel of the Crown Prosecution Service, who ‘may, if instructed to do so, interview potential witnesses for the purposes of, and in accordance with, the practice set out in the Code for Pre-Trial Witness Interviews’.¹³⁸

It is uncontroversial enough that barristers may and arguably are duty-bound to conduct familiarization of witnesses with the proceedings and courtroom setting in order to help them handle the stress of giving testimony in court.¹³⁹ This may include: reminding the witness of the duty to testify truthfully; giving basic advice on how to testify (listening to the questions carefully and answering the questions asked; speaking slowly and clearly); acquainting her with the structure of the trial process, the goals of the distinct questioning phases, and the respective role of participants at trial; introducing her to the layout of the court, possibly

¹³⁴ In 1995, the Code of Conduct was amended to allow barristers to introduce themselves to the witnesses prior to the trial: Jonathan Doak, ‘Victims’ Rights in Criminal Trials: Prospects for Participation’, (2005) 32(2) *Journal of Law and Society* 294, at 304; Wydick, *supra* note 3, at 8. See ‘Section 3. Written Standards for the Conduct of Professional Work’, Bar Standards Board, Code of Conduct of the Bar of England and Wales’, paras 6.1.2. and 6.1.3. (‘There is no longer any rule which prevents a barrister from having contact with any witness. ... In particular, there is no longer any rule in any case (including contested cases in the Crown Court) which prevents a barrister from having contact with a witness whom he may expect to call and examine in chief, with a view to introducing himself to the witness, explaining the court’s procedure (and in particular the procedure for giving evidence), and answering any questions on procedure which the witness may have.’) See also *ibid.*, paras 6.2.1. and 6.2.2.

¹³⁵ Alcorn, *supra* note 2, at 19; Gordon Van Kessel, ‘Adversary Excesses in the American Criminal Trial’, (1992) 67 *Notre Dame Law Review* 403, at 435 (‘Ethical rules prevent the barrister from interviewing witnesses, thereby guarding against the danger of counsel drilling or coaching his witnesses.’)

¹³⁶ Written Standards for the Conduct of Professional Work’, para. 6.3.1.

¹³⁷ *Ibid.*, para. 6.3.3. See text accompanying *infra* notes 152-153.

¹³⁸ *Ibid.*, para. 6.3.2.

¹³⁹ *Ibid.*, para. 6.1.4. (‘It is a responsibility of a barrister, especially when the witness is nervous, vulnerable or apparently the victim of criminal or similar conduct, to ensure that those facing unfamiliar court procedures are put as much at ease as possible.’)

combined with a walk-through in the courtroom.¹⁴⁰ In *R. v. Momodou*, the recent and leading authority on the issue from the Court of Appeal of England and Wales, the rationale for distinguishing between familiarization and illicit forms of proofing ('coaching') is explained as follows:

There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. ... This principle does not preclude pre-trial arrangements to familiarise 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. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence.¹⁴¹

The Guidance on Witness Preparation, subsequently issued by the Bar Council, supplemented the *Momodou* decision in the matter of familiarization. It pointed out that, in addition to the measures mentioned by the Court of Appeal, it is appropriate for a barrister '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.'¹⁴²

The fact that English barristers have long been precluded from substantively preparing witnesses for testimony and remain so to a large extent does not mean that no 'proofing' is conducted at all.¹⁴³ The actual status of witness proofing in England and Wales is defined by the split of the legal profession into two branches: barristers who present the case in court and solicitors who prepare the case by collecting evidence, compiling a file ('Proof of

¹⁴⁰ Alcorn, *supra* note 2, at 19.

¹⁴¹ *R. v. Momodou and R. v. Limani*, [2005] 2 All ER 571, EWCA Crim 177, paras 61 and 62 (continuing thus: '[s]ensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. ... The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated 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.') See also *Ultraframe v. Fielding*, EWCA 1638 (2005) (on 'proofing' in the civil litigation context).

¹⁴² Guidance on Witness Preparation – *Momodou and Limani*, Bar Council of England and Wales, para. 5 (observing that these steps would be 'consistent with a barrister's duty to the Court to ensure that the client's case is presented clearly and without undue waste of the Court's time').

¹⁴³ This tends to be misunderstood at times: e.g. *Lubanga* proofing pre-trial decision, *supra* note 9, para. 37, cf. clarification in *Lubanga* proofing trial decision, *ibid.*, para. 42.

Evidence'), meeting clients and prospective witnesses and by hiring a barrister to perform as counsel in court.¹⁴⁴ In contrast to barristers, solicitor advocates who are also qualified to conduct cases in the higher courts do regularly conduct pre-trial interviews of witnesses in order to prepare them for trial, although the ethical prohibition of coaching and rehearsal applies to them as well.¹⁴⁵

This stark difference in approach towards pre-trial interviews by barristers and solicitors and the fairly strict ban on pre-trial discussion of evidence by trial advocates, is underlain by institutional and legal policy considerations relatively specific to England and Wales. In the criminal procedure context, it flows from the aspiration to uphold a strict separation between the investigation and prosecutorial function. Lawyers who present the case in court should not be the same ones collecting evidence and preparing it for trial. This separation calls for caution on the part of barristers whenever they engage in pre-trial contacts with the witnesses, insofar as investigation is not deemed their proper job.¹⁴⁶ Counsel for both the prosecution and defence would normally only see the written statements documenting interviews held by the police or solicitor. Where a review of the case-file reveals a need to re-interview a potential witness, the police or solicitor would be requested by the Crown Prosecutor (or barrister) to take an additional statement.¹⁴⁷

The English approach of disfavoring discussions on the substance of the case between barristers and witnesses is brought about by increased sensitivity to the risk that, first, such discussions might slide into unlawful and unethical coaching and, second, that they might lead to unfounded accusations of abuse.¹⁴⁸ As stated in the Written Standards, discussions on substance may 'diminish the value of the witness's evidence in the eyes of the court, or may place the barrister

¹⁴⁴ For an overview, see Wydick, *supra* note 3, at 5-8.

¹⁴⁵ The Law Society's Code for Advocacy, Professional Ethics (last amended 13 January 2003) para. 6.5 ('Advocates must not when interviewing a witness out of court: '(a) place witnesses who are being interviewed under any pressure to provide other than a truthful account of their evidence; (b) rehearse, practise or coach witnesses in relation to their evidence or the way in which they should give it.'). See also Anthony Thornton, 'The Professional Responsibility and Ethics of the English Bar', in Ross Cranston (ed.), *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995) 85 (solicitors may "interview all witnesses subject to rules prohibiting coaching"); Wydick, *supra* note 3, at 8 (role-playing is viewed by some solicitors as 'ethically suspect').

¹⁴⁶ Roberts and Saunders, *supra* note 133, at 102. Written Standards for the Conduct of Professional Work, para. 6.2.2. ('Although there is no longer any rule which prevents a barrister from having contact with witnesses for such purposes a barrister should exercise his discretion and consider very carefully whether and to what extent such contact is appropriate, bearing in mind in particular that it is not the barrister's function (but that of his professional client) to investigate and collect evidence.')

¹⁴⁷ Roberts and Saunders, *supra* note 133, at 102.

¹⁴⁸ *Ibid.*

in a position of professional embarrassment', particularly if the barrister would have to become a witness in the case.¹⁴⁹ Furthermore, the same Standards point to the need for the barrister to 'be alert to the fact that, even in the absence of any wish or intention to do so, authority figures do subconsciously influence lay witnesses. Discussion of the substance of the case may unwittingly contaminate the witness's evidence.'¹⁵⁰ The recognition of inadvertent and subconscious impact of a lawyer's questioning on witness recollections echoes the extensive *obiter* on this matter in *Momodou*, where the Court of Appeal held that the impermissibility of coaching is the logical consequence of the:

... well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. ... The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. ... Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.¹⁵¹

The nearly absolute ban on pre-trial interviews of witnesses by barristers in criminal cases is justified in the Written Standards by the nature of those cases being distinct from the civil litigation context and, in particular, by the 'special pressures' on both barristers and witnesses.¹⁵² Such interviews are only permitted in in extraordinary circumstances where they may be able to address serious gaps

¹⁴⁹ Written Standards for the Conduct of Professional Work, para. 6.2.4. (providing examples of discussions on substance that takes place '... before the barrister has been supplied with a proof of the witness's evidence; or ... in the absence of the barrister's professional client or his representative.')

¹⁵⁰ *Ibid.*

¹⁵¹ *R v. Momodou* [2005] EWCA Crim 177, 2 February 2005, para. 61.

¹⁵² Written Standards for the Conduct of Professional Work, para. 6.3.1 ('Contested criminal cases in the Crown Court present particular difficulties and may expose both barristers and witnesses to special pressures.

in investigation in cases of flagrant incompetency.¹⁵³ Any such instance must be documented, i.e. a written record is to be made of the substance of and the reason for the interview; the fact of holding an interview must be disclosed to all other parties in the case before the witness is called to testify.¹⁵⁴

The ethical rules governing barristers' professional conduct and the case law are strict about the methods that can legitimately be used in pre-trial interviews. Group preparation, or joint training, of witnesses is generally inadmissible. This mode of proofing was flagged by the *Momodou* court as posing inordinate risks of collusion between witnesses and/or inadvertent alignment of their accounts with one another, thereby increasing the chance that they would not testify from their personal knowledge.¹⁵⁵ In addition, the Written Standards disfavor disclosing to one witness the facts or factual evidence provided by another witness for the reason that this practice is 'strongly deprecated by the courts as tending inevitably to encourage the rehearsal or coaching of witnesses and to increase the risk of fabrication or contamination of evidence'.¹⁵⁶ While it may in some circumstances be appropriate to disclose to a witness the evidence of another (in particular so as to discuss discrepancies between statements), barristers are expected to approach these situations with discretion.¹⁵⁷ The deontological standards are averse to any form of suggestive or leading questioning: '[s]uggesting 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.'¹⁵⁸

Mock examinations are not prohibited as long as they are solely aimed at enhancing a witness's familiarity with, and confidence in, the process of giving testimony, i.e. do not go to the facts in the case at hand or in any comparable cases and do not practice any proposed or likely lines of questioning. Although there is no specific prohibition on rehearsals based on actual facts in criminal

¹⁵³ *Ibid.*, para. 6.3.3. referring to the circumstances in *R. v. Fergus* (1994) 98 Cr. App. R. 313. See Peter W. Tague, 'Faulty Adversarial Performance by Criminal Defenders in the Crown Court', (2001) 12 *King's College Law Journal* 137, at 159-160.

¹⁵⁴ Written Standards for the Conduct of Professional Work, para. 6.3.4.

¹⁵⁵ *R v. Momodou* [2005] EWCA Crim 177, 2 February 2005, para. 61 ('Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own.')

¹⁵⁶ Written Standards for the Conduct of Professional Work, para. 6.2.5, with references to *R. v. Arif* (1993) May 26; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1992] BCLC 1104, [1994] 1 WLR 1271.

¹⁵⁷ Written Standards for the Conduct of Professional Work, para. 6.2.5.

¹⁵⁸ L. Dobbs and D. Etherington, 'Witness Coaching in Criminal Cases', *The Barrister*, 12 January 2004, reported in Rudin and Hutchings, *supra* note 5, at 1.

litigation unlike in civil litigation,¹⁵⁹ it is reasonable to assume that such a prohibition applies *a fortiori* in the context of criminal procedure. Thus, familiarization might properly encompass an explanation about the process provided in abstract terms or through role-playing which *does not* touch upon substantive matters of the testimony, difficult as this may be to achieve. But rehearsals of in-court testimony are strongly discouraged as attested by the unequivocal language of the Bar Council's Code of Conduct to the effect that barristers may not 'rehearse' witnesses.¹⁶⁰ As will be discussed presently, the Guidance for Prosecutors which painstakingly regulates witness interviews by Crown Prosecutors leaves little room for exercises such as mock examinations in the criminal trial context, even if they are not based on the facts in the case. By and large, the Bar's Code is very apprehensive about substantive discussions of testimony between a witness and barrister as it views such contacts as highly undesirable and tolerable only in exceptional cases where these are unavoidable. If barristers were to engage so extensively in the ways in which American attorneys prepare witnesses, this would certainly amount to professional misconduct in England.¹⁶¹

As mentioned earlier, an exception to the prohibition of pre-trial witness interviews by trial advocates is made for Crown Prosecutors.¹⁶² The fact that specific guidelines have emerged in that context merits consideration as an example of a somewhat more liberal approach towards witness contacts by the staff of the Crown Prosecution Service (CPS) than was formerly tolerated. It constitutes what has been regarded as a 'minor revolution' in the English legal system.¹⁶³ One of the goals of establishing the CPS in 1985 was to enforce the distinction between the investigative and prosecutorial phases of proceedings and to address the common perception that prosecuting barristers perform as hired guns of the police.¹⁶⁴ Being 'sandwiched' between the police and the Bar, the CPS

¹⁵⁹ Guidance on Preparation of Witness Statements—Preparing Witness Statements for Use in Civil Proceedings—Dealings with Witnesses, October 2005, Bar Council of England and Wales ('Mock cross-examinations or rehearsals of particular lines of questioning that counsel proposes to follow are not permitted. ... [A Barrister's] duty is to extract the facts from the witness, not to pour into them; to learn what the witness does know, not to teach him what he ought to know.')

¹⁶⁰ Mahoney, 'Witness Conferences', *supra* note 5, at 299 ('it is at least clear that on its face the English rule precludes any pre-trial mock cross-examination of a witness by the lawyer calling him or her at trial.') See also *Lubanga* proofing trial decision, *supra* note 9, para. 42 (concluding that 'the accepted practice in England and Wales ... permits neither substantive conversations between the prosecution or the defence and a witness *nor any type of question and answer session to take place prior to the witness giving evidence*'. Emphasis added.)

¹⁶¹ Atiyah and Summers, *supra* note 5, at 163.

¹⁶² Written Standards for the Conduct of Professional Work, para. 6.3.2.

¹⁶³ Doak, *supra* note 134, at 304; Roberts and Saunders, *supra* note 133, at 102 and 138.

¹⁶⁴ Prosecution of Offences Act 1985. See John D. Jackson, 'The Ethical Implications of the Enhanced Role of the Public Prosecutor', (2006) 9(1) *Legal Ethics* 35, at 36 and 38.

lawyers initially had no right of audience in the Crown Courts and the CPS normally had to seek assistance of barristers in private practice for conducting prosecutions in court.¹⁶⁵ For these reasons, the prohibition on witness contact for barristers was presumed to apply to CPS lawyers as well.¹⁶⁶ However, this position came under attack because the impossibility of the CPS verifying its evidence through pre-trial interviews was seen to impair the prosecutorial effort.¹⁶⁷ This triggered an inquiry into the matter and two policy documents were issued by the CPS (2003) and the then Attorney-General Lord Goldsmith QC (2004).¹⁶⁸ The recommendations contained in the latter report led to the lifting of the strict ban on witness interviews by the CPS and the adoption of the specialized Pre-Trial Witness Interviews (PTWI) Code of Practice on pre-trial witness interviews, the subordinate Guidance for Prosecutors, and the respective Protocol.¹⁶⁹ This framework regulates in a comprehensive and highly detailed manner all aspects of arranging, preparing and conducting pre-trial interviews and covers among others the questions of who may conduct them and be present from the CPS side and the witness's side, and what the concrete steps must be followed by the Crown Prosecutor, with practice tips relating to each step.¹⁷⁰

In contrast to the traditional rule, the PTWI Code authorizes the CPS prosecutors to conduct, in addition to court familiarization and other meetings, pre-trial interviews with witnesses as far as necessary 'to assess the reliability of a witness's evidence or to understand complex evidence' and generally 'when they consider that it will enable them to reach a better informed decision about any

¹⁶⁵ The right of audience was eventually extended to CPS by virtue of the Access to Justice Act 1999 and the Criminal Justice Act 2003 implementing recommendations of Auld's 'Review of Criminal Courts of England and Wales' (2001).

¹⁶⁶ Roberts and Saunders, *supra* note 133, at 102 (positing the 'orthodoxy insisting on a strict separation between investigative and prosecutorial phases' as the rationale of the prohibition of pre-trial witness interviews by prosecutors).

¹⁶⁷ Michael Zander, 'The English Prosecution System', a paper prepared for the Conference on the Prosecution System, Rome, 29-30 September 2008 (on file with the author), at 14; Jackson, *supra* note 164, at 40. Admittedly, the collapse of the first *Damilola Taylor* trial, in which the testimony of the prosecution 12-year-old witness 'Bromley' was discredited in view of her suspect motives for testimony, provided the impetus for reconsideration of the restrictive approach: see Doak, *supra* note 134, at 304 n. 52 (noting that the inquiry by the Director of Public Prosecutions pointed to the limited ability of CPS to further investigate the witness evidence prior to trial); Roberts and Saunders, *supra* note 133, at 103.

¹⁶⁸ CPS, Pre-Trial Witness Interviews by Prosecutors: A Consultation Paper (CPS, London, 2003); Office of the Attorney-General, Pre-Trial Witness Interviews by Prosecutors: Report (London, 2004).

¹⁶⁹ CPS, 'Pre-Trial Witness Interviews. Code of Practice', December 2005, Director of Public Prosecutions ('PTWI Code'); CPS, 'Pre-Trial Witness Interviews – Guidance for Prosecutors' ('PTWI Guidance'), para. 1.2. and 'Annex D. Protocol Pre-Trial Witness Interview' ('PTWI Protocol'), all available at <http://www.cps.gov.uk>.

¹⁷⁰ See, in particular, PTWI Guidance, paras 7.1.-7.37.

aspect of the case'.¹⁷¹ Thus, PTWI are not envisaged as a *sine qua non* element in the preparation of each and every case but are to be conducted only when justified by a legitimate objective, more likely occurring in serious indictable-only cases.¹⁷² The Code explicitly prohibits such interviews being pursued for the purpose of 'improving a witness evidence or performance' other than by answering her questions about court procedure. According to the PTWI Code, in order to assess the reliability of a witness's evidence at a pre-trial interview, a prosecutor may question the witness on the content of her statement and other relevant issues, including 'taking the witness through their statement, asking questions to clarify and expand evidence, asking questions relating to character, exploring new evidence or probing the witness's account'.¹⁷³ In reinforcing the ban on 'training' or 'coaching' under the Bar Council Code of Conduct and the *Momodou* decision, both the PTWI Code and Guidance also prohibit 'questions that may taint the witness's evidence' and provide that leading questions are to be avoided.¹⁷⁴

The Code does not forbid acquainting the witness with alternative versions of the facts, but it limits cases in which a Crown Prosecutor may do so to situations of 'significant conflict between witnesses that cannot be resolved by careful questioning' and proscribes attributing the conflicting account to any particular source let alone any suggestion that the witness should adopt it.¹⁷⁵ In order to avoid indicating to a witness that there is a conflict between her account and other evidence, the PTWI Guidance recommends that instead of pointing to conflicting evidence the interviewer uses formulae such as 'what would you say if

¹⁷¹ PTWI Code, section 'Interviews to which this Code of Practice applies'; PTWI Protocol, para. 4.1. (providing for the three distinct purposes of PTWI: to assess the reliability of the witness's evidence; to assist the prosecutor in understanding complex evidence; to explain the process and procedures to the witness).

¹⁷² PTWI Guidance, paras 4.4. and 4.5. (regarding selection of cases for PTWI). See also Doak, *supra* note 134, at 305 (predicting that PTWI 'will be the exception, rather than the norm').

¹⁷³ See also PTWI Guidance, paras 7.22.-7.25 (emphasizing the need to question witness closely, to ask probing questions, to discern signs of exaggeration or overconfidence and to pay attention to whether the evidence is admissible)

¹⁷⁴ PTWI Code, section 'Questioning'; PTWI Guidance, paras 7.26. ('You must be very careful during the interview and in all dealings with witnesses that you do not taint a witness's evidence. Do not ask leading questions. You should not tell the witness what other witnesses have said. This may cause them to change their evidence. Similarly, your questions should not be suggestive that another witness has given different evidence. It is the independent recollection of the witness that is important.') and 7.27. ('Under no circumstance should you ever suggest to a witness that he/she might be wrong (they may be right and other witnesses may be wrong) or indicate approval or disapproval in any way to any answer given by the witness. Never suggest the answer to a question. To do so goes beyond coaching into the territory of fabricating evidence.')

¹⁷⁵ PTWI Code, section 'Questioning'; PTWI Guidance, para. 7.29 (prescribing the prosecutors to be 'even more careful in dealing with evidence that conflicts with the evidence of other witnesses').

someone was to suggest that...?’ or ‘can I explore a different version of events with you and seek your view. I am not suggesting that this is what happened but I need to explore all possibilities?’¹⁷⁶ In a similar vein, where the witness’s proposed evidence is inconsistent with her previous statements, the PTWI Guidance mandates Crown Prosecutors to listen carefully first of all to the answer ‘to ensure that it really is inconsistent’ and to refer the witness to the previous statement and ask her to explain the inconsistencies only ‘[a]s a last resort’.¹⁷⁷ Given the need to counteract the ‘risk of allegations that the witness has been led or coached’, the Code of Practice imposes on Crown Prosecutors a duty to remain dispassionate in reaction to responses given by a witness and never to suggest that she might be wrong, to express approval or disapproval.¹⁷⁸

3. Canada

The Canadian approach essentially views witness preparation as indispensable for effective preparation for trial by both Crown counsel and the defence.¹⁷⁹ While pre-trial interviews of witnesses are a standard practice, the provincial codes of ethics and practice manuals restrain counsel in how far they are allowed to go in preparing witnesses for giving testimony.

In Ontario, the issue of witness interviews is addressed in the Crown Policy Manual—Witnesses.¹⁸⁰ Although the Manual recognizes the impossibility of interviewing all witnesses in all cases, it recognizes the need for Crown Counsel to conduct such interviews in particularly serious or sensitive cases, as ‘properly conducted witness interviews can contribute significantly to th[e] goal’ of ‘ensuring that witnesses provide complete, honest and independent evidence’. To that end, Crown counsel are reminded of the ‘need to preserve the integrity of the evidence and to safeguard against suggestive techniques that can improperly influence a witness’s testimony.’¹⁸¹

¹⁷⁶ PTWI Guidance, para. 7.30. The Guidance also cautions the prosecutors to mind their tone when asking such questions so that they did not draw the witness’s attention to a possible error and to not insist with questioning in case of a clear and unequivocal response because the witness might conclude that there is a conflicting evidence: *ibid.*, para. 7.31.

¹⁷⁷ PTWI Guidance, para. 7.28.

¹⁷⁸ PTWI Code, section ‘Questioning’.

¹⁷⁹ *R. v. Sungalia et al.*, [1992] O.J. No. 3718 (‘If Crown counsel or Defence counsel could be routinely called as a witness simply because she had previously interviewed one of her own witnesses then no lawyer, Crown or Defence, could ever properly prepare for trial.’ Per Campbell J); *R. v. D’Orazio Excavating Contractors Inc.* (1998), 75 O.T.C. 124 (Gen. Div.), para. 16; *R. v. Elliot* (2003), Court of Appeal of Ontario, 4 December 2003, para. 114.

¹⁸⁰ Crown Policy Manual—Witnesses, Province of Ontario Ministry of Attorney General, 21 March 2005, available at <http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/Witnesses.pdf>.

¹⁸¹ Crown Policy Manual—Witnesses, at 1.

The Rules of Professional Conduct of the Law Society of Upper Canada obligate a lawyer, when acting as an advocate, to represent the client ‘resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect’.¹⁸² In particular, a lawyer must not ‘knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable’, ‘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’ and must not ‘dissuade a witness from giving evidence or advise a witness to be absent’.¹⁸³ At least, this entails that a lawyer may not knowingly elicit false testimony from a witness and/or use perjured evidence at trial. The specific rule on witness interviews authorizes a lawyer to ‘seek information from any potential witness, whether under subpoena or not’, provided that ‘the lawyer shall 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.’¹⁸⁴

If it were not for these general standards that are clearly aimed at ensuring the integrity of evidence and disfavor intrusive preparation techniques which tend to compromise it, the Canadian position would appear to be nearly as liberal as the US approach, as it does not bar any specific preparation methods. The provincial ethical codes and case law do not expressly prohibit techniques such as witness conferences or providing a witness with information obtained from another witness unless these amount to coaching.¹⁸⁵ Similarly, question and answer sessions held shortly before witnesses give evidence in court are not prohibited unless they are designed to facilitate false testimony.¹⁸⁶ However, 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.

¹⁸² Rule 4.01 (1) of the Rules of Professional Conduct, Law Society of Upper Canada, 1 November 2000 (amendments current to 25 November 2010), available at: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=10272>

¹⁸³ Rule 4.01 (2) (b), (e) and (i) of the Rules of Professional Conduct, Law Society of Upper Canada.

¹⁸⁴ *Ibid.*, Rule 4.03.

¹⁸⁵ Mahoney, *supra* note 5, at 298, referring to the opinion of MacDonald JA in *R. v. Muise (No. 1)* (1974) 11 NSR (2d) 104, at 115-116 (‘In 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.’)

¹⁸⁶ Reaching the same conclusion based on Ontario’s Crown Policy Manual, see *Lubanga* proofing trial decision, *supra* note 9, para. 40.

4. Australia

Interviewing witnesses in advance of trial is a standard practice in Australia, although it is subject to a strict prohibition on ‘coaching’.¹⁸⁷ In some Australian states the professional ethics codes for lawyers pass over the duties in the context of pre-trial witness interviews,¹⁸⁸ while in others the issue is covered in some detail. For instance, in New South Wales, barristers are precluded under Rule 43 of their professional code from engaging in any sort of suggestion of what evidence a prospective witness may give at any stage in the proceedings.¹⁸⁹ In a similar vein, the Australian Model Rules of Professional Conduct and Responsibility prohibit practitioners from advising or suggesting to a witness that false evidence should be given or from condoning the practice of a third person suggesting to a witness the contents of her prospective evidence.¹⁹⁰ At the same time, the rules expressly exclude from the scope of prohibition under Rule 43 the issue of an admonition to tell the truth, the questioning and testing in conference the version of evidence to be given by a prospective witness, including pointing to ‘inconsistencies or other difficulties with the evidence’ of the witness.¹⁹¹ However, this exemption does not permit coaching witnesses or encouraging them to give evidence other than what they believe to be true.¹⁹²

Notably, certain preparation techniques are identified as inherently suspect and undesirable, even if not unethical *per se*. The joint preparation of several lay witnesses features prominently among them. In particular, the NSW Rules provide that normally ‘[a] barrister must not confer with, or condone another legal practitioner conferring with, more than one lay witness (including a party or client) at the same time’ on any issue that the barrister reasonably believes may prove contentious during trial or that could affect, or be affected by, the evidence of

¹⁸⁷ Mahoney, *supra* note 5, at 303; Ysaiah Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia*, 4th ed. (Sydney: Butterworths, 2005) 559-560. Note an inaccuracy in *Lubanga* proofing pre-trial decision, *supra* note 9, para. 37 (noting that all proofing measures ‘would be either unlawful or unethical’ in Australia among others).

¹⁸⁸ E.g. Professional Conduct Rules, The Law Society of Western Australia, July 2008. There exists, however, a guide for the preparation of statements in civil cases: Western Australian Bar Association, Best Practice Guide 01/2009: Preparing Witness Statements for Use in Civil Cases, as at 25 March 2009.

¹⁸⁹ Rule 43 of the New South Wales Barristers’ Rules, April 2001, NSW Government Gazette No. 67, 12 April 2001, p.1880, available at http://www.nswbar.asn.au/docs/professional/legislation/Rules_april2001.pdf.

¹⁹⁰ Model Rules of Professional Conduct and Responsibility, Law Council of Australia, March 2002, paras 17.1 and 17.2.

¹⁹¹ Rule 44 of the New South Wales Barristers’ Rules; Model Rules of Professional Conduct and Responsibility, para. 17.3.

¹⁹² *Ibid.*

other witnesses.¹⁹³ There is no absolute ban on witness conferences: these may be held if there are reasonable grounds to believe that ‘special circumstances’ require them.¹⁹⁴ But it has been reported to be ‘the universally held view in Australia’ that practitioners ought not to hold or participate in witness conferences involving more than one witness at one time.¹⁹⁵ By contrast, a lawyer is not precluded from disclosing to one witness the evidence of another if the disclosure is undertaken to point out inconsistencies rather than to prompt a witness to testify falsely. According to one commentator, the Australian practice is not averse to the ‘hub and spoke’ arrangement under which it is common for a lawyer ‘to alert a prospective witness to the anticipated testimony of others and to employ contradictory versions in a mock cross-examination’.¹⁹⁶

5. New Zealand

As in other common law jurisdictions, witness preparation in pre-trial interviews in New Zealand is not only admissible but is also considered a good practice and an integral part of trial preparation, as opposed to witness coaching which is illegal.¹⁹⁷

As elsewhere, counsel are expected to operate with the requisite zeal in the effective representation of their clients. Yet the applicable Rules of Conduct provide for lawyers’ ‘absolute duty of honesty to the court’ and prohibit them from misleading and deceiving the court.¹⁹⁸ Counsel are prevented from adducing evidence known to be false and, if the witness nonetheless testifies falsely, are obliged, in the absence of retraction, to refuse to further examine the witness on that matter or, where the witness is a client, to cease to act for him.¹⁹⁹ More

¹⁹³ Rule 46 of the New South Wales Barristers’ Rules. See also Model Rules of Professional Conduct and Responsibility, para. 17.4.

¹⁹⁴ Rule 46 of the New South Wales Barristers’ Rules. Rule 47 allows conferring with more than one client ‘about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise’. See also Model Rules of Professional Conduct and Responsibility, paras 17.6. and 17.7.

¹⁹⁵ Mahoney, *supra* note 5, at 297-298 (reporting also that in state jurisdictions with no respective ethical rule, e.g. Western Australia, joint preparation would still lead to forensic sanctions due to the risk of contamination of evidence).

¹⁹⁶ Mahoney, *supra* note 5, at 303. See also *Lubanga* proofing trial decision, *supra* note 9, para. 40 (concluding that the NSW Barrister’s Rules ‘do seem to provide support for the practice of engaging in some kind of question and answer session with the witness directly prior to their evidence in court’).

¹⁹⁷ Mahoney, *supra* note 5, at 303.

¹⁹⁸ Schedule, Rules of Conduct and Client Care for Lawyers, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (SR 2008/214), para. 13.1, available at <http://www.legislation.govt.nz/regulation/public/2008/0214/latest/DLM1437811.html#DLM1437951>.

¹⁹⁹ *Ibid.*, para. 13.10. and 13.10.1.

relevant to witness interviews, '[a] lawyer must not suggest to a witness or potential witness, whether expressly or impliedly, that false or misleading evidence ought to be given or that evidence should be suppressed.'²⁰⁰ The legitimate techniques for assisting a witness in preparing to give evidence, expressly sanctioned by the Rules of Conduct, include 'assisting in the preparation of a brief of evidence, and by pointing out gaps, inconsistencies in the evidence (with that witness's evidence or the evidence of other witnesses), the inadmissible nature of proposed evidence, or irrelevancies in evidence that the witness is proposing to give'.²⁰¹

Court practice generally disapproves of some preparation techniques more than others. The High Court of New Zealand held in one case that the common law prohibits joint discussions of evidence between witnesses and that the credibility of witnesses involved had been weakened as result of the conference.²⁰² By contrast, techniques such as reviewing with the witness material that could be used to challenge his evidence, going over other evidence so as to identify inconsistencies and to discuss the way to deal with them, reviewing possible areas for cross-examination and giving general advice on proper demeanor are regarded as proper.²⁰³ As in Australia, informing a witness of the contradictory evidence in the case with a view to providing her with an opportunity to explain the conflict and probing the witness's evidence in a mock examination are not improper *per se*, unless the objective is to alter the witness's evidence.²⁰⁴

6. *Contours of divergence*

The foregoing overview allows an assessment to be made on the extent to which the US approach to witness preparation diverges from that of other common law jurisdictions. The rules governing professional conduct of lawyers in this area of practice are considerably less detailed than in England and Wales and in at least some of the Australian states. However, the regime barely amounts to a regulatory 'anomaly' and is not incomparable to ethical codes across much of the rest of the common law world where there is often also a dearth of detailed rules on the conduct of pre-trial interviews. Apart from the legal framework, the question is

²⁰⁰ Ibid., para. 13.10.08.

²⁰¹ Ibid., para. 13.10.08, note 24.

²⁰² *R. v. Dacombe*, High Court, Whangerei T990189, 1 April 1999 (per Fisher J.), reported in Mahoney, *supra* note 5, at 297 (the author maintains the view that witness conferences are not unethical and must not be prohibited on this ground: *ibid.*, at 304).

²⁰³ Thomas A. Mauet, *Fundamentals of Trial Techniques*, New Zealand ed. (Auckland: Oxford University Press, 1989) 10-14.

²⁰⁴ Mahoney, *supra* note 5, at 303.

whether the boundaries between what are ethical and unethical preparation practices are in fact more permissive in the US than in other jurisdictions.

The comparative data tend to confirm that the scope of ethical witness preparation is subject to significant cross-jurisdictional variation, in the sense that ‘the various jurisdictions ... have chosen to adopt differing points on the continuum of witness preparation as marking the stage where the epithet of “coaching” takes on its pejorative connotation.’²⁰⁵ Whether a certain domestic approach is anomalous in comparative terms depends on what position on that continuum is considered to be mainstream. The claim that the overly liberal US approach is more irregular than the restrictive British approach rings hollow unless it is based on a broader statistical analysis of what the position is in other comparator jurisdictions and what might point to a representative middle-ground position. Indeed, even after significant reforms aimed at liberalizing witness contacts, the status of interviews of prospective witnesses by English barristers and the CPS is immeasurably more rigid than in other jurisdictions in issue and could itself be regarded as a common-law anomaly.²⁰⁶ It is a matter of debate whether the ban on witness interviews in England was softened because it was deemed generally irreconcilable with the elements of party control and zealous representation intrinsic to any adversarial system or because it was failing to satisfy the needs of the newly established Crown Prosecution Service. The very fact that the previous approach was abandoned, however, suggests that it can hardly be represented as occupying some middle ground. Arguably, the position in other Commonwealth countries, in particular Australia and New Zealand, is more aptly described as representing ‘some mid-way point’: their acceptance of potentially far reaching witness preparation as good practice is combined with rejection of some ‘more extreme practices of American lawyers, where the line blurs between assisting a witness to recollect, and making thinly veiled suggestions for what amounts to a reconstruction’.²⁰⁷

The picture that emerges is one of fine yet sufficiently discernible contours of divergence between the common law jurisdictions. These are best depicted by examining of the prevailing attitudes towards the permissibility of individual preparation techniques. It is a common view that the United States exemplifies the least restrictive system.²⁰⁸ It provides counsel with a rich choice of methods which, in accordance with the Third Restatement,²⁰⁹ include among others the contentious ‘rehearsal of testimony’. In England and Wales, by contrast, a mock

²⁰⁵ *Ibid.*, at 299.

²⁰⁶ E.g. *ibid.* (criticizing the ‘most stringent’ English standard as ‘unrealistic’).

²⁰⁷ *Ibid.*

²⁰⁸ E.g. Partly Dissenting Opinion of Judge Kuniko Ozaki, *supra* note 9, para. 14 note 21 (characterizing the US system of preparation under Third Restatement as ‘the less restrictive system in comparison with other jurisdictions’).

²⁰⁹ See text accompanying *supra* notes 68-65.

examination by barristers and Crown Prosecutors which is intended to practice a witness on the same facts of the case would squarely fall under the ban.²¹⁰ The same exercise is not prohibited as inadmissible and unethical *per se* in provinces or states throughout Canada, Australia and in New Zealand – although there it is not expressly sanctioned either.²¹¹ The other preparation methods which appear in the US Third Restatement are either expressly authorized or tacitly accepted in those Commonwealth countries. This includes discussing the witness's recollections and projected testimony, revealing to the witness other (conflicting) evidence, reviewing documents and conferring on the factual context of the case and the probable lines of cross-examination.

By contrast, the English stance in relation to these preparation methods is atypically cautious and the resulting practice notably more restrictive. Even where barristers and Crown Prosecutors are not precluded by ethical rules from conducting pre-trial interviews, they operate in a straightjacket of standard procedures such as those set out in PTWI Code and Guidance for CPS prosecutors. The interviewers are seriously constrained as regards the timing and applicable protocol, the kind of questions that may be asked, and the ways of putting to witnesses any inconsistencies with previous statements and other conflicting evidence. Crown Prosecutors may mention to the witness possible contradictory versions of facts only as *extrema ratio*, namely where close questioning proved to be of no avail and even then only through hypothetical questions that do not divulge any concrete conflicting evidence or forensic theories.²¹² Although there is a chance that aspects of the restrictive approach will be introduced in other Commonwealth jurisdictions as a result of the *Momodou* decision, it would appear that at present the English view represents a peculiarity that is not necessarily reflective of the position adopted in other common law countries. In accordance with the practice in the US, litigants in Australia and New Zealand are not precluded from openly discussing with a witness any inconsistencies between her proposed testimony and the other evidence (including in a mock cross-examination), insofar as this is necessary to prepare the witness effectively.²¹³ Finally, in Canada and in the United States, it is not uncontestably unethical to

²¹⁰ Bar Council's Code of Conduct, para. 705(a); Written Standards for the Conduct of Professional Work, para. 6.3.1; PTWI Code and PTWI Guidance, *supra* note 174.

²¹¹ Cf. Partly Dissenting Opinion of Judge Kuniko Ozaki, *supra* note 9, para. 14 note 22 (pointing out that in jurisdictions other than the US, rehearsals are not expressly allowed). In the context of the opinion, the reference might be interpreted as suggesting that rehearsals are thereby prohibited in all other jurisdictions because they amount to 'witness coaching', which is not fully accurate.

²¹² See text accompanying *supra* notes 175 and 176.

²¹³ *Ibid.*, at 303 (observing that 'New Zealand and Australian practice reflects the judgment that the risk of this occurring does not outweigh the benefits to the adversarial system of a party's ability to offer testimony from adequately prepared witness').

jointly prepare witnesses subject to the usual ban on coaching.²¹⁴ Importantly, however, the general stance in England and Wales, New Zealand and Australia is clearly more apprehensive about this technique. Although in the latter two countries it is not regarded unethical as such and recourse to it may be justified in limited circumstances, it is a notoriously controversial trial tactic that carries negative implications for witness credibility.

To summarize, it is true that the regime in the United States is more permissive than in other common law countries in that it expressly permits the broadest possible range of preparation techniques and expects attorneys to make use of them for effective and zealous case presentation. But it would be going too far to claim that the divergence of the American approach, extreme as it may be, from the rest of the common law world is such as to earn it a title of comparative anomaly or abnormal deviation. Most of the techniques practiced in the US are neither expressly forbidden nor condemned as unethical in other countries. Leaving aside the substantial gap between the US and England and Wales, the more subtle difference between the US and other countries concerns the level of professional support for some of the more invasive preparation methods. 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.

Therefore, the seeming similarity between the common law countries other than England and the US in their non-prohibition of more invasive preparation techniques is to a certain extent negated by attitudinal differences which predetermine their informal and actual status in the litigation practice. These diverging perceptions arguably reflect deeply rooted differences between the systems as to what they deem to be the optimal ways of fact-finding in the criminal process and the proper balance between the risks and benefits of endorsing or condoning more suggestive forms of witness preparation. The differences between the US and the Commonwealth countries may have to do with ‘epistemic variation’ as much as with ‘different foci of concern in adjudication’.²¹⁵ In particular, one could attribute them to the reduced emphasis within the American trial system on the goal of establishing the truth in relation to

²¹⁴ Mahoney, *supra* note 5, at 299.

²¹⁵ Mirjan Damaška, ‘Epistemology and Legal Regulation of Proof’, (2003) 2 *Law, Probability and Risk* 117, at 127.

other values, especially as compared to England.²¹⁶ While a full examination of these differences lies beyond the scope of the present inquiry,²¹⁷ it is worth underlining the one which is most relevant in the evidentiary context of pre-trial witness contact.

In some jurisdictions, and especially in England and Wales, the courts prefer to receive testimony which is as spontaneous and unrehearsed as possible under the circumstances. In their view, this enables a more credible evaluation of evidence to take place and more accurate findings to emerge from the court.²¹⁸ In others, a more *laissez-faire* approach is adopted which gives parties a greater leeway to make an impact on the manner in which the evidence reaches the fact-finder. The appropriate degree of testimonial spontaneity is related to how desirable party control over evidence is considered to be both before and during the trial presentation and what extent of preparatory input by the parties should be permitted in order to further the truth-finding goal. The comparative divergences between the approaches to witness preparation can be explained by the extent to which partisan influence on the judicial evaluation of evidence is considered acceptable in the individual jurisdictions and by how highly testimonial spontaneity is valued. Beyond the national context, the relevance of this point has been neatly illustrated by the witness-proofing debate in relation to international criminal tribunals. In particular, the consideration of the required degree of ‘spontaneity’ of testimony for effective truth-finding has featured prominently in the early ICC jurisprudence.²¹⁹

²¹⁶ Atiyah and Summers, *supra* note 5, at 161 (arguing that ‘fact-finding processes in civil and criminal cases in England tend to be much more truth-oriented than in the United States’ and that the English system ‘has greater “truth formality”’ and is stronger committed to generating accurate trial outcomes than the US system).

²¹⁷ *Ibid.*, at 162-167 (discussing systemic features of the English legal system distinct from the American system that are likely to enable it to establish the truth more effectively, including but not limited to the prohibition on witness coaching).

²¹⁸ See e.g. *R. v. Momodou*, *supra* notes 141 and 151.

²¹⁹ *Lubanga* proofing pre-trial decision, *supra* note 9, para. 37 note 41 (‘particularly providing witnesses with the questions that they will be asked during their testimony ... creates the risk of depriving court-room testimony of all its spontaneity and of giving the impression of being “canned”.’); *Lubanga* proofing trial decision, *ibid.*, paras 51-52 (‘A rehearsed extent may not provide the entirety or the true extent of his memory or knowledge of a subject, and the Trial Chamber would wish to hear the totality of an individual’s recollection. ...[T]he preparation of witness testimony by parties prior to trial may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court’s ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings.’)

IV. How anomalous is the liberal extremity? The US approach and its discontents

1. *Risk of abuse*

The foregoing analysis supports the thesis that witness preparation in the United States is subject to considerably more lax regulation and is markedly more permissive than in some, albeit not all, common law jurisdictions. The United States encourages practices that are either explicitly prohibited or shunned as ethically questionable in other countries in view of their perceived truth-defeating effects. Concerns about the effects of witness preparation on the truth-finding process and on the integrity of the adjudicative system that led other jurisdictions to become less permissive in practice are not unknown in the United States. Despite the systemic reliance on, and the recognized need for, prepared evidence, witness preparation is a controversial issue in the US trial system. The proper extent and forms of substantive preparation of witnesses and its appropriateness have long been a matter of debate in the US.

The proponents of extensive witness preparation acknowledge the existence of a ‘grey area’ between ethical conduct and subornation of perjury.²²⁰ They are aware of associated risks, in particular that preparation could be used and abused by dishonest lawyers and witnesses – whether acting individually or in concert – as a vehicle for reshaping evidence to best promote the party’s cause. However, they posit that those risks are manageable as long as the adversarial system functions properly.²²¹ The risks are outweighed by the benefits of the liberal practice for the orderly administration of justice and for the elicitation of effective testimony in the adversarial context.²²² The prohibition on eliciting false testimony, severe disciplinary sanctions that await counsel caught in witness coaching, and the opportunity to cross-examine on any suspect preparation practices – further cemented by the presumption of professional integrity of lawyers as the cornerstone of the adversarial system – are regarded as a sufficient check on potential abuse.²²³ From this perspective, it is clear that the accuracy of trial outcomes is not necessarily accorded primacy over the values of partisan

²²⁰ E.g. G. Walpin, ‘America’s Adversarial and Jury Systems: More Likely to Do Justice’, (2003) 26 *Harvard Journal of Law and Public Policy* 175, at 179; Shargel, *supra* note 23, at 1271.

²²¹ Applegate, *supra* note 1, at 334.

²²² E.g. Shargel, *supra* note 23, at 1273 (‘advocates should not be afraid to take on ethical risks’; ‘the excessive moral caution of the truth trumps camp ... stems, in part, from a profound disgust for criminal defendants.’)

²²³ See Alcorn, *supra* note 2, at 19 (objecting to this argument by saying that ‘[t]he fact that a witness will be cross-examined regarding the preparation ... certainly cannot be a substitute for ethics’).

autonomy and zealous representation, even though it can sometimes be argued that the greater risks associated with rehearsed testimony in terms of decisional rectitude are justified because witness preparation equips American lawyers to ascertain the truth more effectively than English barristers.²²⁴

Some commentators are not persuaded that the checks available in the adversarial context duly enable lawyers and courts to expose the distortions of truth that can occur as a result of proofing sessions and they argue for more qualified acceptance of witness preparation.²²⁵ Other scholars go further by fundamentally challenging the practice as they point to its unseemly role in the system as well as its implications for the quality of evidence on which trial verdicts are based and the search for truth depends throughout the criminal process. Judge Marvin Frankel has pointed out that ‘the “preparing” of witnesses may embrace a multitude of other measures, including some ethical lapses believed to be more common than we would wish. ... [T]he process often extends beyond helping organize what the witness knows, and moves in the direction of helping the witness to know new things’ and has described the ‘American practice of preparing witnesses’ as ‘so wide open to the concoction of false stories or the severe editing of truthful ones’.²²⁶ Likewise, William Pizzi, the staunchest critic of adversarial excesses in the US trial system, takes issue with accepting unqualified witness preparation, because as compared to other countries including England, ‘the United States is at the extreme in openly encouraging the presentation of evidence at trial that has palm prints and fingerprints of the lawyers all over it as the evidence is shaped, reshaped, and sometimes distorted a bit for adversarial advantage’.²²⁷ The view that lawyers use witness preparation to manipulate evidence in order to promote their clients’ interests is reflected in public perceptions and the practice contributes to the negative public image of the legal profession.²²⁸

²²⁴ Atiyah and Summers, *supra* note 5, at 164 (‘American lawyers might concede that their system involves greater risk that “coached” testimony will affect outcomes, yet argue that overall they are permitted to become much better prepared on the facts than English barristers, with the result than American trials more nearly approximate the truth, all things considered.’)

²²⁵ Applegate, *supra* note 1, at 282, 342-343.

²²⁶ Frankel, *supra* note 5, at 15-16 (noting also ‘our own style of witness preparation and direct examination is a major item of battle planning, not a step toward the revelation of objective truth.’)

²²⁷ Pizzi, *supra* note 5, at 126.

²²⁸ Applegate, *supra* note 1, at 279 (observing that ‘for many other lawyers and most nonlawyers, witness preparation represents the worst qualities of the legal system’ and that it is ‘treated as one of the dark secrets of the legal profession’) and *ibid.*, note 3, citing D. Luban, *Lawyers and Justice: An Ethical Study* (1988) 96 (‘The interviewing and preparation of witnesses ... is a practice that, more than almost anything else, gives trial lawyers their reputation as purveyors of falsehoods.’); Salmi, *supra* note 3, at 178 (‘In recent years, the American legal profession’s reputation has suffered because lay people do not trust lawyers, and they believe that

The fact that there are grounds for such apprehension is attested by incidents of attorneys' misconduct during witness preparation which occasionally come to the public's view. One notorious recent example is the high-profile *United States v. Moussaoui* case against the Al Qaeda '20th hijacker' in the 9/11 attacks.²²⁹ During the second week into the trial, the proceedings were suspended to enable inquiry into the government's disclosure of improper witness preparation by attorney Carla Martin of the Transportation Security Administration, who worked on the part of the prosecution case relative to aviation security.²³⁰ The court established that she had committed a bouquet of violations, which included instructing via e-mail seven government witnesses on how they were to address the perceived 'gaps' in the prosecution's opening in their testimony, breaching the court's special sequestration order for non-victim witnesses pursuant to Rule 615 of the Federal Rules of Evidence by forwarding witnesses the copies of trial transcripts, and obstructing the defence's access to the witnesses.²³¹ Upon this finding, the court barred the government from presenting any testimony and exhibits on aviation security measures, which seriously undermined the prosecution case.²³² In its motion for reconsideration of that decision, the attorney's actions were denounced by the government as 'aberrant' and 'criminal'. Ultimately, the court amended its decision and allowed testimony of witnesses who had not been 'prepped' by Martin.²³³ But this incident subsequently led to Martin's dismissal, an investigation for witness tampering (although no charges were brought at the end), and a series of third-party suits against her by the families of 9/11 victims.²³⁴

Instances of abusive witness preparation such as this come to light seldom and get little publicity. One possible reason is that attorneys generally stay within the ethical limits of the practice and that cases of overt abuse like *Moussaoui* are

all attorneys are crooks who will tell their witnesses and clients to say anything in order to win a lawsuit.')

²²⁹ Zacarias Moussaoui was charged on 11 December 2001 with conspiracy with other Al Qaeda members to commit murder. He pled guilty to all six charges in the indictment on 22 April 2005, with the trial commencing on 6 March 2006. Given the plea, the issue at trial was the appropriate penalty (execution or life imprisonment). In detail on the case, see Rosengart, *supra* note 30, at 35; Felicia Carter, 'Court Order Violations, Witness Coaching, and Obstructing Access to Witnesses: An Examination of the Unethical Attorney Conduct that Nearly Derailed the Moussaoui Trial', (2007) 20 *Georgetown Journal of Legal Ethics* 463-474.

²³⁰ Carter, *supra* note 229, at 463 (referring to Government's Disclosure of Possible Violation of Judge's Sequestration Order Regarding Witnesses, *US v. Moussaoui*, No. 1:01CR455 (E.D. Va. 13 March 2006)).

²³¹ Rosengart, *supra* note 30, at 37; Carter, *supra* note 229, at 466-471.

²³² Rosengart, *supra* note 30, at 37; Carter, *supra* note 229, at 463 and 467 (exclusion set back the government's argument for death penalty).

²³³ Carter, *supra* note 229, at 464 and 468.

²³⁴ *Ibid.*

indeed rare. Another, less optimistic but probably correct, explanation is that only a tiny proportion of attorney misconduct, particularly of subtle violations of ethical standards, are exposed and sanctioned.²³⁵ An abiding suspicion of the corrupting nature of witness preparation and its unseemly implications for the truth-finding goal can be gleaned from a significant body of American scholarship concerning the subject which reveals a degree of insider dissatisfaction with its truth-defeating potential. A closer review of the common objections to the American approach to witness preparation will help to determine whether the practice is ‘anomalous’ not only in comparative terms but also when evaluated against the goals and values at the heart of the US adjudicative system.

Critics suggest that the liberal approach to witness preparation characteristic of the US and the lack of specific guidance given to attorneys on how to conduct the practice is anything but innocuous insofar as it ultimately diminishes the courts’ ability to establish the truth. Whether or not the pursuit of the truth is (or should be) the centerpiece of the adversarial system and the main preoccupation of its key players is a matter of recurring debate. For example, some commentators skeptical of the idea of the supremacy of the truth-value argue that ferreting out the truth is not a proper function of defence attorneys.²³⁶ However, many others are of the opinion that the search for truth must be viewed as the important objective of all adjudication systems including adversarial ones.²³⁷ In this light, scholars have noted and expressed concern over the failure of the American system of justice to give truth-finding the weight it deserves, which stands in unfavorable contrast with Continental systems.²³⁸ Numerous

²³⁵ Wydick, *supra* note 3, at 23 and 27 (noting that the cases of blatant as well as more covert misconduct stand low chances of being reported and disciplined).

²³⁶ E.g. Shargel, *supra* note 23, at 1278 (‘As a zealous advocate, I have a duty to prepare my client for trial and to enhance his decision-making power. ...[M]y role as a criminal defense attorney is to protect my client, not to ferret out truth.’) See also Damaška, *Evidence Law Adrift*, *supra* note 121, at 123 (noting that ‘in criminal cases, ... United States courts seem to expect and to tolerate behaviour on the part of defense counsel that has little, if any, relation to the search for the truth.’)

²³⁷ Atiyah and Summers, *supra* note 5, at 157 (‘Mechanisms for the effective ascertainment of the truth are plainly important for all legal systems.... If courts do not seek the truth, they can not consistently implement rules of law embodying social policies of any kind.’); Damaška, *supra* note 215, at 122 (observing that ‘the cultivation of truth values remains important for all adjudication’).

²³⁸ E.g. Pizzi, *supra* note 5, at 5 *et passim*; Mirjan Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’, (1973) 121 *University of Pennsylvania Law Review* 506, at 587-588 (arguing that the Anglo-American adversary system exhibits a lesser commitment to the ‘pursuit of historical verity’ than the continental systems); John H. Langbein, *The Origins of the Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) 331-343 (providing historical explanation for undervaluing the truth in adversarial criminal trials); Stephen A. Salzberg, ‘Lawyers, Clients, and the Adversary System’, (1985-6) 37 *Mercer Law Review* 647, at 654-655 (rather than the search for truth, ‘[t]he goal of the adversary system is

judicial *obiter dicta* postulate the search for the truth as the irreducible goal of the US criminal process.²³⁹ That being said, witness preparation is often mentioned as an example of a practice that, despite some ability to assist in truth-finding, is ultimately not favorable to that aspiration.²⁴⁰ The ‘almost anything goes’ approach to regulation of witness preparation turns a blind eye to the risk that lawyers might engage, intentionally or unknowingly, in coaching which at the end of the day undermines the capacity of the adjudicative system to deliver accurate trial outcomes.²⁴¹

In the adversarial context, attorneys both on the prosecution and defence side are bent on ‘winning’ and have strong incentives to impel their witnesses to furnish the court with convenient stories.²⁴² The alignment of interest between the attorney and those of many witnesses whom they prepare for trial in relation to the trial outcome increases the risk of collusion in concocting a mutually satisfying revisionist version of past events based on quasi-facts rather than the actual truth. The attorney’s desire to gain adversarial advantage will in many cases meet a witness’s conscious or subconscious wish to help their case. Friendly witnesses – and first and foremost clients – have a particular interest in supplying

to apply the substantive legal principles so that those who have rights may claim them and those who have liabilities must face them.’); Thomas L. Steffen, ‘Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble’, (1988) 1988 (4) *Utah Law Review* 799, at 803-804.

²³⁹ E.g. *Perry v. Leeke*, 109 S. Ct. 594, 601 (1989); *Nix v. Whiteside*, *supra* note 31, at 166; *US v. Nixon*, 418 U.S. 683, 710 (1974). See Applegate, *supra* note 1, at 324, 326. Cf. Damaška, *Evidence Law Adrift*, *supra* note 121, at 123 (observing that whereas ‘one finds a plethora of solemn judicial statements proclaiming that the discovery of the truth is the basic purpose of all trials ... [o]n the close scrutiny it appears that these proceedings should not be taken at face value.’)

²⁴⁰ Frankel, *supra* note 5, at 15 (‘we all know that the preparation of our witnesses is calculated, one way or another, to mock the solemn promise of the whole truth and nothing but. To be sure, reputable lawyers admonish their clients and witnesses to be truthful. At the same time, they often take infinite pains to prepare questions designed to make certain that the controlled flow of truth does not swell to an embarrassing flood.’); H.R. Uviller, ‘The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea’, (1975) 123 *University of Pennsylvania Law Review* 1067, at 1973 (‘this essential and thoroughly professional preparatory conference can only be taken as having nothing whatever to do with Truth.’); Applegate, *supra* note 1, at 326; Atiyah and Summers, *supra* note 5, at 163-164.

²⁴¹ E.g. Fred C. Zacharias and Bruce A. Green, ‘The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors’, (2009) 98 *Boston University Law Review* 1, at 9 (‘Prosecutors’ interviewing techniques may further encourage false testimony by signaling what a witness must say to obtain the offered benefits. Although both criminal statutes and professional codes forbid prosecutors to intentionally elicit false testimony, they are otherwise silent with respect to prosecutors’ methods of preparing witnesses.’ Footnote omitted.)

²⁴² Applegate, *supra* note 1, at 279, 329; Alcorn, *supra* note 2, at 14; Joy and McMunigal, *supra* note 3, at 48 (‘preparation allows lawyers to hide evidence unfavourable to the client and fabricate favorable evidence.’)

the court with false information.²⁴³ Consequently, there is a strong temptation for them to use the knowledge obtained during preparatory conferences to make their self-serving and not necessarily truthful stories look more plausible.²⁴⁴

As shrewdly observed by American commentators, witness proofing occupies an ‘awkward position’ in the US system, being caught in a conflict within the adversary system itself between partisanship and zealous representation, on the one hand, and the duty of candor towards the court, commitment to truth and the integrity of adjudicatory system, on the other hand.²⁴⁵ The tension between these procedural values results in competing commitments and renders the open-textured ethical standards even more inconclusive for those who are required to abide by them. Under these circumstances, the risk of the preparation session being turned into an opportunity for reshaping of evidence in a traceless manner is not one that can be easily discarded.²⁴⁶

Despite the obvious risk of coaching, it has been argued that the system provides very limited means of disclosing and preventing inappropriate conduct and this renders disciplinary responsibility provisions toothless for the most part. Even though the classic view that ‘[c]ross-examination is the greatest legal tool ever invented for the discovery of truth’ still has its supporters,²⁴⁷ it often takes more than a skilled cross-examiner to unveil coaching before a jury.²⁴⁸ Even

²⁴³ Alcorn, *supra* note 2, at 14; LeGrande and Mierau, *supra* note 34, at 954; Gershman, *supra* note 108, at 847-850.

²⁴⁴ The ability of witness preparation to encourage and assist the client’s perjury is most problematic: Applegate, *supra* note 1, at 289; Shargel, *supra* note 23, at 1267.

²⁴⁵ Applegate, *supra* note 1, at 281-282, 289, 323-324, 326; Salmi, *supra* note 3, at 137; Altman, *supra* note 44, at 38; Piorkowski, *supra* note 3, at 389.

²⁴⁶ Zacharias and Martin, *supra* note 3, at 1010 (‘The primary danger of coaching is the possibility that a lawyer may so change a witness’s presentation that the resulting testimony is either false or conveys an incorrect impression about the facts that cross-examination cannot counteract.’)

²⁴⁷ Wigmore, *supra* note 79, §1367 (‘in more than one sense [cross-examination] takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.’) For more recent reaffirmation of the faith in the ability of cross-examination to disclose coaching, see *Geders v. United States*, 455 U.S. 80, 89-90 (1976) (‘Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant’s credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.’)

²⁴⁸ Applegate, *supra* note 1, at 309, 311 (doubting that ‘cross-examination deserves the praise heaped upon it or the faith placed on it’ in view of ‘little empirical support’ and observing ‘there are hundreds of cross-examinations that are barely serviceable’); Salmi, *supra* note 3, at 142-143; Ambos, “‘Witness Proofing’ before the ICC”, *supra* note 10, at 610. See also John H. Langbein, ‘The German Advantage in Civil Procedure’, (1985) 52 *University of Chicago Law Review* 823, at 833 note 31 (the system’s reliance on cross-examination for establishing the truth is ‘nothing more than an article of faith’); Jerome Frank, “‘Short of Sickness and Death’: A Study of Moral Responsibility in Legal Criticism”, (1951) 26 *New York University Law Review* 545, at 559.

where the fact of improper witness contact is established, the enforcement of disciplinary responsibility remains contingent upon the finding of the attorney's intent or at least recklessness with respect to eliciting falsehoods. Except perhaps in cases of overt coaching by an incompetent attorney who is reckless enough to let the relevant facts transpire, the requisite mental element is hard to ascertain, inasmuch as each preparation mode can be executed both with and without intent to reshape a witness's recollection, whatever the actual outcome.

2. Inadvertent distortions of truth

The other, less conspicuous yet even more vexing, problem with taking a relaxed approach towards witness preparation, in light of the truth-finding goal, is its inability to contain the inadvertent distortive effects on witness recollection. Non-deliberate distortions of witness memory are bound to occur in a system which hinges on a bi-partite structure of case presentation and the partisan ownership of witnesses. At the same time, the risk of unintentional alterations of testimony is considerably more difficult to counteract than any deliberate fabrication.²⁴⁹ This is how Judge Frank described the mechanism of inadvertent alterations of witness recollections six decades ago:

No matter how scrupulous the lawyer, a witness, when thus interviewed, often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed. So we have inadvertent but innocent witness-coaching. The line, however, between intentional and inadvertent grooming of witnesses cannot easily be drawn.²⁵⁰

Substantive discussions of evidence prior to in-court testimony are likely to result in unintended modifications to the original recall because adversary parties do not interview witnesses in detached ways; their questioning will in most cases tend to be subtly suggestive even if it is not meant to be such and therefore have a potential to undermine the genuine search for the truth.²⁵¹ The suggestions inherent in the lawyer's unfortunate choice of words, facial expressions and non-

²⁴⁹ Henning, *supra* note 23, at 357-258 ('The issue of witness preparation sliding into falsity is ... rarely one of outright falsehood by the witness, when the person simply fabricates a story.')

²⁵⁰ Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton, NJ: Princeton University Press, 1950) 86.

²⁵¹ Damaška, *Evidence Law Adrift*, *supra* note 121, at 96 ('Being champions of their clients, lawyers do not interview potential witnesses in neutral ways: their one-sided attitude is likely to be expressed in queries suggesting answers that are favourable to their client's cause.');

id., *supra* note 215, at 120 (corroborating the point by making reference to a study in psychology).

verbal language in reaction to the witness's answers may lead an unsure or impressionable witness to substantially alter her evidence.²⁵² Witnesses are viewed and often view themselves as performers for the respective party in the first place rather than conveyors of the truth.²⁵³ They may be strongly inclined to internalize a lawyer's additions to their original memory images as proper and truthful recollections.²⁵⁴ Worse still, a witness whose initial account has been modified will likely remain unaware of this fact and be convinced that she testifies from her own knowledge.²⁵⁵ Any damage to the truth brought about by non-deliberate distortions of the witness recollections will probably be irrevocable, given that subtle modifications of memory images are utterly difficult if not impossible to establish during cross-examination.²⁵⁶ One can be even less sure about the preventive and remedial effect of the disciplinary norms and penal statutes, which require at least knowledge or the duty to know about possible

²⁵² LeGrande and Mierau, *supra* note 34, at 954 (contrasting the possible effects of using articles 'a' and 'the' on the witness, the latter being considerably more suggestive); Gershman, *supra* note 108, at 842-843.

²⁵³ Frank, *supra* note 250, at 86 ('the contentious method of trying cases augments the tendency of witnesses to mold their memories to assist one of the litigants, because the partisan nature of trials tends to make partisans of the witnesses. They come to regard themselves, not as aids in an investigation bent on discovering the truth, not as aids to the court, but as the "plaintiff's witnesses" or the "defendant's witnesses". They become soldiers in the war, cease to be neutrals.');

Pizzi, *supra* note 5, at 197 ('to an extent that is almost unimaginable and would even be unethical and wrong in other trial systems, our adversary system turns witnesses into weapons to be used against the other side.');

Damaška, *Evidence Law Adrift*, *supra* note 121, at 98 ('some persons begin to conform to expectations inherent in their assignment as a witness for one side to the controversy: they come to feel like "members of the team", identifying—consciously or unconsciously—with the party calling them to the stand.')

²⁵⁴ Damaška, *Evidence Law Adrift*, *supra* note 121, at 96 ('experimental psychology teaches that these [suggestive] queries can have a serious distorting effect on memory images. Gaps in recollections can be filled by interviewees with the suggested material, and this material can then be used by them in the inferential reconstruction of events.')

Altman, *supra* note 44, at 41 ('it is not always easy for the witness to distinguish between the genuine recollection of a previously unrecalled memory and what seems like such recollection but is, in fact, based on the witness's imagination or the attorney's suggestion.');

LeGrande and Mierau, *supra* note 34, at 955.

²⁵⁵ Damaška, *Evidence Law Adrift*, *supra* note 121, at 96 ('Most troubling about this process is that additions to memory often appear to the individuals involved as accurate reproductions of their original sensory perceptions.');

Applegate, *supra* note 1, at 309 and 329 ('it is entirely possible for witnesses to remain unaware that they are being manipulated; therefore, the resulting testimony can be subjectively candid, but objectively wrong.');

id., 'Presentation of Evidence and Factfinding Precision', *supra* note 121, at 1094.

²⁵⁶ Damaška, *Evidence Law Adrift*, *supra* note 121, at 97 ('interviews conducted by partisan lawyers in preparation for the adversary trial can potentially pollute informational sources in ways that cannot later be detected even by skillful in-court examination: lawyers are prone to place greater faith that is warranted in the power of cross-examination to expose testimonial distortions.');

Wydick, *supra* note 3, at 37 (the inadvertent ('Grade Three') coaching interferes with the court's truth-seeking function); LeGrande and Mierau, *supra* note 34, at 955.

consequences as preconditions for responsibility. It has been rightly noted that ‘the *effect* of a lawyer’s objective conduct on clients, third parties, and the legal system does not depend on the lawyer’s state of mind’.²⁵⁷ Therefore, one should not discharge the lawyer from her responsibility for any such effects by referring to her non-blameworthiness where she resorts to suggestive techniques that are obviously and notoriously capable of altering the witness’s account in ways inconsistent with the principled quest for the truth by the court.

As confirmed by cognitive psychology research, human memory is highly malleable and fallible; original recollections tend to fade with time and are replaced by fresh impressions and overlapping post-event knowledge.²⁵⁸ A witness’s confidence levels may change according to whether posterior information about the same facts received from other sources confirms or conflicts with the witness’s original recollection. It is true that post-event discussions are hardly avoidable since by the time the witness is brought into a preparation session she will most likely have discussed her perceptions and experiences within her social circle and with the police.²⁵⁹ However, the suggestive questioning by a lawyer is all the more apt to reshape the witness recollection because the lawyer will unavoidably speak from a position of knowledge when refreshing the witness’s memory and confronting the witness with alternative accounts.²⁶⁰ It may ‘cause a witness to remember something he or she claims on the stand to have seen’ whilst it is uncertain ‘whether the witness is really remembering something or whether the power of suggestion is taking effect’.²⁶¹ In the worst case scenario, this may result in a totally false recollection.²⁶²

²⁵⁷ Zacharias and Martin, *supra* note 3, at 1006.

²⁵⁸ For detailed discussion, see Applegate, *supra* note 1, at 329-333 (with further references). See also Joy and McMunigal, *supra* note 3, at 48 (‘questioning a witness can heavily influence, either purposefully or inadvertently, what the witness remembers and how she or he expressed what is recalled’); LeGrande and Mierau, *supra* note 34, at 954; Gershman, *supra* note 108, at 838-839.

²⁵⁹ This is particularly true if witnesses come from the same family or are colleagues. See Mahoney, *supra* note 5, at 304; *R. v. Skinner* (1994) 99 Cr App R 212, at 216.

²⁶⁰ Applegate, *supra* note 1, at 332 (‘Even if asked general, neutral questions, the witness repairs incomplete perception or memory either by pure invention or by “logical” interpolation. Apparently nonconforming or inconvenient facts can unknowingly be suppressed, altered, or substituted. The preparer may subtly encourage the witness to take sides, so that the witness’s own biases will facilitate a favourable reconstruction of the event.’ Footnotes omitted.) For discussion of effects of suggestive questioning on the malleability of memory, see Wydick, *supra* note 3, at 9-12.

²⁶¹ Pizzi, *supra* note 5, at 125 (providing an example that the witness is more likely to suddenly ‘remember’ that the robber was indeed wearing white gloves, despite the failure to mention this to the police earlier, if informed by the lawyer that other witnesses accounts provide thus detail).

²⁶² Alcorn, *supra* note 2, at 14.

Over and above the possible changes in the substance of proposed testimony, witness preparation contributes to improving the witness's performance during trial testimony by making the evidence more credible in the eyes of the jury. Training witnesses to testify more convincingly might 'artificially increase a witness's stated confidence level' without them knowing it.²⁶³ The modification of demeanor combined with the ironing out of internal inconsistencies in the prospective testimony serves the purpose of securing a desired impact on the jury to the benefit of the party for which the witness appears. However, the unintended result of this effort is that the in-court testimony will be deflected away from the original recollection and the demeanor presented in the courtroom will not reflect the natural demeanor and the real confidence levels of the witness with respect to the reported facts.²⁶⁴ Where direct examination is deprived of real – as opposed to the rehearsed – spontaneity, the testimony becomes a theatrical performance tailored to convey slanted half-truths rather than 'the truth, the whole truth and nothing but the truth'.²⁶⁵

In the adversarial tradition which emphasizes the importance of oral testimony, demeanor is the primary basis for the fact-finder's assessment of witness credibility and therefore decisive for the outcome of the case.²⁶⁶ Thus, where the courtroom demeanor has been influenced by prior discussions of evidence, juries are largely prevented from knowing what the witness originally believed to be true and how strong her belief was in the accuracy of her perception. Similarly, the possibility of the opposing counsel bringing out the differences between the witness's original perception and the post-event knowledge through cross-examination is all the more limited if the witness is herself unaware of the effects the preparation sessions have had on her recollections and the level of confidence. Unrestricted witness preparation embodies a preference for evidence honed and polished by the lawyer over

²⁶³ Bruce A. Green and Ellen Yaroshefsky, 'Prosecutorial Discretion and Post-Conviction Evidence of Innocence', (2009) 6 *Ohio State Journal of Criminal Law* 467, at 500; Sandra Guerra Thompson, 'Eyewitness Identifications and State Courts as Guardians against Wrongful Conviction', (2010) 7 *Ohio State Journal of Criminal Law* 603, at 611, note 45, citing John S. Shaw, III & Kimberley A. McClure, Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence, (1996) 20 *Law & Human Behavior* 629, 630-31, 649-50.

²⁶⁴ Applegate, *supra* note 1, at 332 ('Distortion can occur along two axes: the substantive content of the memory and the certainty with which the memory is held. The second is as dangerous as the first.')

²⁶⁵ Damaška, *Evidence Law Adrift*, *supra* note 121, at 98 ('Under these circumstances the spontaneity of testimony can entirely disappear – at least from direct examination. The interrogation process begins to resemble theater.') Cf. Douglas, *supra* note 18, at 25-26 (describing testimonial process in terms of performance or production).

²⁶⁶ Alcorn, *supra* note 2, at 14. See also *supra* note 79.

unsmooth yet more authentic testimonial accounts.²⁶⁷ It can therefore be argued that the need to rely on the prepared evidence turns the court's evaluation from a direct inquiry as to the facts known to the witness and an assessment of her accuracy into the process of second-guessing the effects of witness preparation on the substance and form of the testimony.

3. *Truth and ethics – an inclusive approach*

It follows from the discussion above that a system that allows for extensive witness preparation is less concerned with the direct and instinctive pursuit of the truth as such and more concerned with upholding the autonomy of the parties in the matter of presentation of evidence, which is believed to be a sufficient guarantee under the adversary process for the establishment of the truth. It is also clear that some of the widely used forms of witness preparation, which remain ethical as long as they do not amount to deliberate inducements of false testimony, are particularly capable of altering witness recollections and the substance of testimony in ways inconsistent with the procedural truth-finding goal.²⁶⁸ One can thus discern a tension between a narrow and broad understanding of unethical witness preparation, whereby the broader notion encompasses, in addition to formal compliance with the ethical standards, a consideration also of the actual effects of witness preparation on the testimony. Indeed, some commentators have suggested that the ethical conduct in the course of witness preparation should go beyond the proscription of subornation of perjury.²⁶⁹ To that end, it is argued, the

²⁶⁷ Pizzi, *supra* note 5, at 126 ('We have a trial system that on the one hand emphasizes the need for live testimony so that the demeanour of witnesses can be assessed by the jury. But on the other hand the system is frightened of spontaneity and prefers witnesses who are coached and rehearsed. Instead other trial systems want evidence presented at trial in as close to its original state as possible.');

Applegate, *supra* note 1, at 310 ('By expecting entirely unrealistic completeness and consistency in a witness's perception, memory, and recitation, the legal system values the well-rehearsed witness ... more highly than the less polished but more spontaneous witness.')

²⁶⁸ Frank, *supra* note 250, at 86 ('much inaccurate testimony, not be classified as perjurious, results from a practice that is not dishonest: [witness interviews]'); Applegate, *supra* note 1, at 334 ('In two significant respects, presentation of half-truths and the distortion of memory, witness preparation seriously undermines the important truth-seeking goals of the adversary system. Moreover, both problems inhere in witness preparation that is entirely legal and ethical.')

²⁶⁹ See Zacharias and Martin, *supra* note 3, at 1005 ('The hasty conclusion too often drawn by ... litigators is that a lawyer acts ethically as long as her coaching ... practices would not be viewed ... as the deliberate subornation of perjury. Everything else ... merely entails a permissible attempt to put the evidence in its most favorable light.') and 1006 ('any attorney who thinks that she can determine ethical conduct simply by looking at and following the letter of the codes will not even be *trying* to act ethically.')

See also *ibid.*, at 1017 ('ethical practice' of lawyers goes beyond operating 'within ethical boundaries established by court rules, ethical codes, and other statutes').

notion of ethical witness preparation hinges upon its conformity with the objective of truth-finding and the availability of untainted evidence before the court, which at least requires the attorneys to leave the substance and substance-related presentational aspects of original accounts undisturbed in the course of their preparatory activities.²⁷⁰

Under the approach that prevails at present, however, the ethical boundaries of witness preparation are drawn in a manner which is largely independent from considerations of quality and authenticity of evidence as well as its ability to accurately establish alleged facts. The problem is that the truth-distorting risks of the liberal approach to witness preparation, such as those associated with any inadvertent changes to the witness's recall, tend to remain ignored or understated. The underlying view is that it is not unethical to prepare a witness in a manner calculated or likely to alter the witness's original recall, unless the evidence becomes knowingly false. In order to reconcile this with the truth-seeking goal, an argument may be advanced that not all alterations of an authentic and spontaneous witness account brought about by 'ethical' preparation, impair the search for truth by the court. The truth-finding goal may instead be facilitated inasmuch as the witness's original recollections are too often inaccurate and need to be polished by the attorney before they become truthful reconstructions of facts and can be presented to the court.²⁷¹

This may, admittedly, be true at least in some circumstances: witness preparation has a potential to disclose and correct inaccuracies in a 'raw' witness's account which is conditioned by her personal biases and past experiences with the result that it could enhance not only the effectiveness but also the factual accuracy of the testimony. This raises questions, however, as to who should be entrusted to make basic decisions on the accuracy of the information provided by the witness and at what stage. Should the decision rest with the party who, in determining whether and how the witness recollection needs to be enhanced for the fact-finder's consumption, will make a preliminary assessment of truthfulness during the preparatory session? Or should it rather be reserved for a fact-finder at trial? In relation to the former approach, the parties' ability to make such assessments impartially is doubtful at least. The alterations of the witness's original perceptions under the lawyer's influence are likely to accord

²⁷⁰ Alcorn, *supra* note 2, at 16 ('Ethical witness preparation occurs without influencing the substance of testimony or "reshaping" the witness's raw, independent recollection. It is appropriate and legitimate to enhance the manner and clarity with which a witness will present his or her untainted recollection. Conversely, it is not appropriate to attempt to change the substantive testimony of the witness, nor to suggest answers or fill the witness with information.')

²⁷¹ Monroe H. Freedman, 'Counseling the Client: Refreshing Recollection or Prompting Perjury?', (1976) *Litigation*, at 35 and 46; Salmi, *supra* note 3, at 158; LeGrande and Mierau, *supra* note 34, at 954 ('Typically, a witness' original memory of a situation is filled with gaps and is colored by his or her individual biases and past experiences.')

primarily with what the respective party perceives to be the ‘truth’, this being a version of the facts that maximizes the party’s advantage. However, the ability of the fact-finder to establish truth should not be held hostage to the partisan lawyer’s personal judgment as to what the truth is or should be. As long as the fact-finder is deprived of the opportunity to evaluate, on a first-hand basis, the evidence that is as free as possible from partisan imprints at the time it is presented, one cannot be sure that distortive adjustments of the witness’s original recollection are not a more common outcome of extensive witness preparation than its occasional contribution to enhanced factual accuracy.

As observed earlier, the ethical standards governing the professional conduct of attorneys in the US and certain other common law countries do not expressly rule out or disfavor any methods of witness preparation solely because they have a tendency to obfuscate the truth.²⁷² At the same time, some commentators argue that ‘[o]ne should not infer ... that techniques which pose an unreasonable risk of eliciting perjury are legitimate.’²⁷³ An objective or inclusive approach to ethics in the context of witness preparation demands that lawyers must be alert to such risks and remain at all times concerned as to whether their preparation activities are not such as to alter the substance of the proposed testimony and to misrepresent facts initially provided, and believed to be true, by the witness.²⁷⁴ While this approach to ethical regulation is clearly more restrictive than the present liberal policy, it is arguably more advantageous in that it addresses the weakness of the liberal approach head-on. In particular, it could provide more conclusive and meaningful guidance to attorneys faced with insoluble ethical dilemmas in the context of pre-trial interviews.

In essence, the approach entails reconsidering the legitimacy of certain particularly intrusive and suggestive preparation techniques, without prejudicing the right of the parties to meet with their witnesses in advance in order to inquire into matters within their personal knowledge and to clarify relevant details. In determining the admissibility of a preparation method, the question to be answered should be whether its truth-defeating potential is not so high as to outweigh any possible benefits for the administration of justice.²⁷⁵ Instead of

²⁷² Mahoney, *supra* note 5, at 301 (noting that ‘there is a small class or rules which forbid conduct that, while not inherently improper, is so fraught with danger that it is appropriate to ban it’).

²⁷³ Zacharias and Green, *supra* note 241, at 9 (footnote omitted).

²⁷⁴ Piorkowski, *supra* note 3, at 390 (‘Attorneys would be better guided by considering whether their witness preparation techniques may have the effect of inducing a witness to falsify or misrepresent material facts, either expressly through actual testimony or implicitly through demeanour.’)

²⁷⁵ Alcorn, *supra* note 2, at 19 (‘[I]legitimate argument can be made that any benefits or efficiencies the ... legal system potentially may realize from allowing extensive witness preparation are substantially outweighed by the potential or actual harm of such practices. It is

vesting faith in the propriety of the processes and outcomes associated with extensive witness preparation, despite the empirical indications to the contrary, one needs to be candid about acknowledging that ‘the line between assisting and corrupting the adjudicative process can become difficult to maintain in the context of witness preparation’.²⁷⁶ Even more, it must be recognized that drawing that line is outright impossible with respect to some of the preparation methods. This notion advocates giving up the most problematic practices as unavoidably manipulative and ethically hazardous.

This idea is hardly new: in the past, commentators have almost unanimously condemned the practice of jointly preparing witnesses for the reason that the attached risks of unethical coaching and truth-distortion are presumably greater than any conceivable benefits for judicial process.²⁷⁷ Arguably, the same could be said of a number of other stratagems which, in addition to seeming ‘anomalous’ from a comparative perspective, are objectionable due to the inordinate danger of distorting, albeit non-deliberately, original witness recollections. Controversial measures such as suggesting a particular choice of words, discussing the applicable law before hearing a witness on the facts and rehearsal of in-court testimony are too often associated with deliberate manipulation or inadvertent abuse to remain ignored.²⁷⁸ A stricter approach would be to identify the preparation methods which are intrinsically suspect and to discourage attorneys from resorting to them, altogether or except in special circumstances, with the risk of litigious consequences or even disciplinary action where these were resorted to. The remainder of this section identifies a few examples of particular preparatory techniques that would need to be subjected to stricter ethical scrutiny if this approach were adopted.

The first technique that needs to be more strictly regulated is the resort to substantive discussion of facts in the case with a witness who is unaware of them. Such discussions obviously go beyond learning what the witness has to say on a particular matter and prompt her to reconsider those aspects of her story which do not fit in with the attorney’s theory of the case or are deemed by the attorney to be

arguable that aggressive and unrestrained witness preparation merely enables lawyers and litigants to conceal and misrepresent the truthful facts and to formulate a different, more favorable version of events.’)

²⁷⁶ Alcorn, *supra* note 2, at 19.

²⁷⁷ E.g. *ibid.*; Applegate, *supra* note 1, at 349 and 351 (calling it by no other term than ‘collusive witness preparation’ and positing that it ‘poses extraordinary dangers of collusion, influence, and fabrication’). See, however, Mahoney, *supra* note 5, at 301 (acknowledging ‘the common justification for the current ban on witness conferences’, being ‘a high risk of abuse’ and ‘an opportunity for impropriety’ but arguing that complete prohibition is not warranted).

²⁷⁸ Alcorn, *supra* note 2, at 19; Applegate, *supra* note 1, at 343 (arguing that ‘polishing, scripting, and rehearsing (especially repeated rehearsing) seem undesirable’); Rudin and Hutchings, *supra* note 5, at 4.

inaccurate. Confronting the witness with contradictory evidence may not in all cases cross the line into unethical behavior.²⁷⁹ But where the witness is informed of conflicting evidence in specific terms rather than by way of hypothesis or *arguendo*, she may be inappropriately pressed into doubting the accuracy or plausibility of her original recollection and amending her initial story. Discussions of the factual context of the case beyond the witness's personal knowledge may have 'subtle and highly deleterious effects on the accuracy of testimony'.²⁸⁰ As a result, the chances of any cross-examiner uncovering that the witness has testified to facts that are beyond her personal knowledge are relatively low. It is often impossible for an opposing party to discover that the witness has been 'educated' during preparation sessions where the witness is herself not aware of the effects the pre-trial discussions have had on the development of her original recollections.²⁸¹ This means that the calling party's unilateral and perhaps well-intentioned effort in ensuring the accuracy of the presented testimony will go largely unchecked. If the attorney is genuinely concerned about the factual accuracy of the proposed testimony, it is always open to him to refrain from calling the relevant witness. Otherwise, in-depth and open discussions of facts based on the other available evidence are hard to distinguish from an unabashed attempt to persuade a witness to adjust her story or to adopt an alternative view. The only reason for the attorney to proceed that way is to try to ensure that the witness can appear for the respective party, which is an adversarial consideration that has little if anything to do with the quest for the truth.

For similar reasons, it must be asked whether suggestive questioning during a preparation session can reasonably pursue any objective other than prompting the witness to amend her proposed testimony accordingly or influencing her level of confidence in relation to substantive matters. Where it is not meant to confuse a witness (which is not what preparation as opposed to cross-examination at trial is aimed at), the use of leading questions and suggestive language pushes the witness to accept as truthful factual propositions disguised as questions. Suggestive questioning is a proven way to manipulate evidence and to blur any original recollections.²⁸² Without necessarily being caught by the disciplinary rules and the prohibition on perjury, it effectively implants information into the mind of the witness and replaces quasi-evidence for the

²⁷⁹ Alcorn, *supra* note 2, at 16 ('Witness preparation matter-of-factly should not include any intent or effort to change the substance of a witness' independent recollection, although the witness may be asked to reconsider the witness' recall in light of contradictory testimony or other evidence.')

²⁸⁰ Applegate, *supra* note 1, at 311.

²⁸¹ *Ibid.*, at 308.

²⁸² Applegate, *supra* note 1, at 308 ('leading questions not only give the witness conscious clues to shaping the testimony, but can also influence the testimony in such a way that the witness has no sense of lacking candor').

original information that should be supplied to the fact-finder. The method involves a significant risk of inadvertent distortion of witness recollection and opens the door to fabrication of evidence on originally unrecalled facts and facts genuinely unknown to the witness. This raises broad ethical questions from a truth-finding point of view.²⁸³ Objectively, there is hardly anything to be gained from a truth-finding perspective if the witness, consciously or not, follows the questioner's suggestive lead. The use of open-ended rather than closed, leading and otherwise suggestive questions by the lawyer is clearly more consistent with the goal of establishing the truth.²⁸⁴ Therefore, there is much to be said for a proposal that attorneys should refrain from the latter mode of questioning during preparation sessions and emulate instead the mode used at direct examination.

Although the technique of explaining the applicable law to the witness may appear rather uncontroversial at a first glance, this depends on when it is deployed and in what circumstances.²⁸⁵ When the applicable law is clarified before the witness gets an opportunity to relate the facts known to her or, alternatively, after she has relayed a coherent and confident story that appears unhelpful to the attorney, the likely underlying motive is to provide the witness with a clue as to how to amend or supplement her story to help the party's case.²⁸⁶ Even absent such a motive, the foreseeable effects of an untimely 'law lecture' on the witness are that the latter will either be tempted to adjust her story to make it closer to the 'ideal' testimony that her lawyer would like to hear or to interpret the legal discussion as the attorney's implicit attempt to corrupt her. Neither eventuality serves the truth-finding goal and the good reputation of the adjudicative system. Lecturing a witness on the law under these circumstances and in particular early into a pre-trial interview is arguably a discredited practice to be eschewed, unless there are compelling countervailing considerations.

Finally, while rehearsals of in-court testimony may be an effective tool for familiarizing the witness with her role at trial and preparing her substantively and psychologically for cross-examination, they are particularly problematic in terms of maintaining the line 'between the lawyer's knowing what would help the case

²⁸³ Altman, *supra* note 44, at 41 ('never suggest unrecalled details of a relevant event that are anything other than what you believe to be true. Inquire about unrecalled details in an open-ended fashion, neither stating nor implying any suggestion about what happened, when, or how'); Alcorn, *supra* note 2, at 18 (suggesting a choice of words must solely be aimed at clarifying testimony and not changing its substance or causing witness to testify falsely).

²⁸⁴ Joy and McMunigal, *supra* note 3, at 54. Cf. Applegate, *supra* note 1, at 339 (skeptical of the idea that 'witness preparation could consist merely of eliciting the witness's narrative or that it could resemble the direct examination').

²⁸⁵ Salmi, *supra* note 3, at 154-155.

²⁸⁶ Rudin and Hutchings, *supra* note 5, at 4 (arguing that law lectures in either of those instances carries an 'unreasonable risk' of undue influence); LeGrande and Mierau, *supra* note 34, at 956 (on 'a very real danger of altering a witness' testimony' in case of a law lecture that precedes the facts).

and the lawyer's advising the client how to help the case'.²⁸⁷ This line vanishes in the context of mock questioning if the facts of the case are taken as the basis for the role-playing exercise. First of all, the rehearsal gives the lawyer an ample opportunity to instruct the witness, more or less overtly, on what and how to respond to questions put to her during direct and cross-examination. It thus tangibly contributes to the production of contrived testimony.²⁸⁸ Given the lawyer's image as a professional authority figure, the witness will be likely to uncritically accept the attorney's suggestions on demeanor, choice of words and possibly on substantive details. Deliberately or subconsciously, the witness may internalize the additions and modifications to the proposed testimony as her own recollections. Second, during a rehearsal, the lawyer will normally ask the same questions that will be posed during direct examination and in the same sequence as well as questions that will most likely be raised during cross-examination. The repetitive aspect of the 'dry run' exercise takes away the spontaneity of actual testimony and turns it into a courtroom performance which may be a poor basis for the assessment of credibility by the court.²⁸⁹ Unqualified acceptance of a rehearsal practice carries the risk that the facts will be rehearsed with the witness, over and over again, resulting in a scripted and tainted testimony that is neither factually accurate nor the accurate reflection of the witness's original recollections and of her personal knowledge.²⁹⁰

The task of determining which witness preparation practices qualify as ethical or unethical conduct under the present vague deontological standards will be facilitated if objective boundaries of such practices are agreed upon, beyond the notion of 'knowingly eliciting false testimony'. The current status of witness preparation in the US does not envisage any limitations on the objective elements of the conduct. However, there is a strong case for discouraging certain forms of preparation due to their recognized potential to induce witnesses to depart from what they personally know and to engage in falsehood.²⁹¹ Some preparation

²⁸⁷ Applegate, *supra* note 1, at 323.

²⁸⁸ Damaška, *supra* note 215, at 121.

²⁸⁹ Alcorn, *supra* note 2, at 19 (inquiring whether allowing rehearsals 'seriously interfere[s] with and undermine[s] the ability of judges and juries to evaluate the untainted credibility of the witness' and whether 'the adjudicative system truly benefit[s] from repeated "rehearsals" of witness testimony with a lawyer').

²⁹⁰ Wydick, *supra* note 3, at 16 ('If the purpose of role playing is merely to accustom the witness to the rough and tumble of being questioned, then it is ethically unobjectionable. If, however, the lawyer uses the role playing session as an occasion for scripting the witness's answers, then it is unethical.' Footnote omitted.)

²⁹¹ E.g. Applegate, *supra* note 1, at 342 ('Witness preparation should be channeled into those methods that permit partisan case development but present the least threat of impaired fact finding.');

Rudin and Hutchings, *supra* note 5, at 4 (advocating the adoption of supplemental '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').

methods carry inordinate risks of either deliberate abuse or inadvertent modifications to evidence which impair the fact-finder in the pursuit of the truth. The recognition of these risks in ethical codes, opinions and specialized protocols would help attorneys to be more selective and scrupulous with their choice of tactics. While still having the opportunity to conduct pre-trial interviews, they would be expected to refrain from resorting to those methods for the sake of the ‘equilibrium between partisanship and accuracy’.²⁹² The example of common law countries other than the US demonstrates that counsel can adequately prepare witnesses by resort to means that are not so obviously inimical to the truth-finding goal and integrity of the criminal process. If it is agreed that enhancing the truth-generating potency of the US trial system is a worthy objective, the legislative branch, courts and bar organizations throughout the US may seriously need to consider whether to align the liberal stance they take towards pre-trial contacts with witnesses in accordance with the more conservative approach found in other common law jurisdictions.

V. Towards a closer alignment?

The divergent approaches to witness preparation in the United States and other common law jurisdictions are attributable to different attitudes towards the degree of partisan influence that may be brought to bear upon the evidence which reaches the fact-finder. These attitudes inform the balancing exercise carried out in each jurisdiction between costs and benefits of engaging on particular forms of witness preparation. Some common law countries, England and Wales being a prominent example, adopt a stricter approach discouraging any extensive partisan influence on the form and quality of evidence given the risks that this entails in terms of subverting the truth-finding goal and the integrity of the judicial process. This approach evinces great caution towards many of the witness preparation methods regularly practiced in the US by either prohibiting them altogether or permitting them only in limited circumstances and subject to detailed rules. Other countries fall between the two extremes of the US and England: while they do not go as far as to denounce these techniques as unethical, there is considerable judicial hostility towards those methods that are associated with a significant risk of abuse. Preparation practices are as a result generally less invasive than in the United States. Each jurisdiction has to carry out its own cost—benefit analysis which takes account of its own particular context and the historically predetermined and culturally embedded conceptions of what are the best evidentiary arrangements.

The comparative contrast with jurisdictions adhering to less permissive ethical regimes with regard to witness preparation and the unwavering

²⁹² Applegate, *supra* note 1, at 351.

dissatisfaction in the United States with the practice beg the question whether changing law and policy would be justified. In particular, it ought to be asked whether reforming the liberal approach would assuage concerns about the negative impact of extensive witness preparation on the quality of evidence and the ability of the trial system to deliver accurate outcomes. Some American commentators have indeed referred to the example of England and Wales to suggest that the cautionary arguments underpinning the more restrictive approach in that system merit consideration by the US courts and lawyers.²⁹³ Although there may be a case for aligning US practice with the English approach, the prognosis for witness preparation reform is at present lukewarm and the effects of any shift in policy may be limited.²⁹⁴ Despite the criticisms made of witness preparation, any proposal to restrict it needs to take account of the fact that it is a prerequisite of the US adversarial system. For example, Applegate argued that ‘a rigid rule banning all pre-trial contacts with witnesses would reduce distortion but would be incompatible with the adversary structure that demands that the parties develop facts’.²⁹⁵ Moreover, any proposal for reform would need to withstand resistance to change and attempts to circumvent the new practice.²⁹⁶ Thus, it seems right that the traditional English approach of prohibiting trial advocates from substantively preparing witnesses is overly restrictive to serve as a model for the United States.²⁹⁷ A less radical change of approach would ultimately prove more fruitful. While recognizing the risk of coaching, Wigmore famously asserted that ‘to prevent the abuse by any definite rule seems impracticable. ... [N]othing short of an actual fraudulent conference for concoction of testimony could properly be taken notice of; there is no specific rule of behavior capable of being substituted for the proof of such acts.’²⁹⁸ However, without recommending the English solution as a blueprint, the regulatory approach in England demonstrates

²⁹³ Alcorn, *supra* note 2, at 19 (recommending the practice in England and Wales for ‘further consideration’ by Arizona lawyers and courts, though without an ‘immediate need for the courts to restrict witness preparation beyond existing limits’).

²⁹⁴ Rosengart, *supra* note 30, at 38 (noting that ‘the “law” of witness preparation has always been and will likely remain illdefined’) and 40 (‘it is unlikely that courts, legislatures, or state bars will ever set forth bright-line tests in the area’); Zacharias and Martin, *supra* note 3, at 1016-1017 (observing that ‘coaching’ cannot be fully addressed in the ethical codes).

²⁹⁵ Applegate, *supra* note 1, at 342.

²⁹⁶ There is anecdotal evidence to suggest that the ethical codes are often circumvented because lawyers do not do their best to avoid ‘coaching’ as much as they avoid doing it in a way that can be proven: Alcorn, *supra* note 2, at 19. See also Atiyah and Summers, *supra* note 5, at 161 (observing as regards the truth-orientation of the English and American legal systems that ‘there is less divergence between the “law in books” and the “law in action” in England than in the United States.’)

²⁹⁷ Rudin and Hutchings, *supra* note 5, at 4 (noting that this approach ‘goes too far in its zeal to reduce the risk that trial counsel will corrupt the witness’).

²⁹⁸ Wigmore, *supra* note 79, §788.

by example that it is in principle not impossible to provide a set of detailed ‘rules of behavior’, whether in a form of amendments to the ethical codes or a special practice directive or protocol.

If it is true that the present approach to witness preparation is a disturbing anomaly in the US criminal justice system from the perspective of key constituencies, the avenues for addressing its excesses must be further explored. While the possible changes in ethical and practice standards could provide attorneys with more conclusive guidance, they will be ineffective unless legal policy-makers engage more closely with the empirical data obtained through research in experimental and forensic psychology regarding recollection, memory retrieval and reconstruction. It would appear advantageous to adopt an inclusive approach towards the ethics of witness preparation which takes into consideration the objective consequences or foreseeable effects of attorney conduct in addition to subjective aspects such as the attorney’s intent and motive in employing certain preparation methods. But more needs to be known about what the precise consequences and effects of attorney conduct are on the original memory images of witnesses. Reliance on ‘hard data’, rather than faith-based presumptions, concerning the actual effects of pre-trial interviews on the accuracy of recollection will facilitate attempts to define the proper content of the ethical rules and decide what further qualifications need to be made to what constitutes lawful professional conduct in this area.

One proposed way to inject more certainty into the US rules is to develop a definition of illegal witness coaching.²⁹⁹ Arguably, such definition will only be workable if it provides in detail for which forms of conduct or preparation methods pose an ‘unreasonably high risk’ of undue influence on the witness, with a view to barring lawyers from resorting to them except in limited circumstances.³⁰⁰ A growing consensus is emerging among commentators on the kind of preparation methods that raise such a risk. In addition to joint preparation of witnesses, these include, at least, the use of suggestive questioning on matters that are not included in the original witness recollection; untimely lectures on the applicable law; pointing out other evidence on matters that are outside the witness’s personal knowledge; and, finally, rehearsals and mock examinations on the same or similar facts as in the case *sub judice*. If these practices were identified as ethically improper or suspect in the absence of legitimate reasons for their use and if the courts were to send out a consistent message that they would

²⁹⁹ E.g. Rudin and Hutchings, *supra* note 5, at 4 (recommending a definition of ‘improperly influencing witnesses’ in the comment to the respective ethical rule that would cover broadly preparation creating ‘an unreasonable high risk that the witness will disregard the obligation to refrain from giving false testimony’).

³⁰⁰ *Ibid.* (giving examples of the lawyer’s ‘suggesting that a particular line of proof is essential to his case’ and telling a witness that ‘the adversary, or the trier of fact, will probably be unable to detect false testimony’).

not be approved, this would bring US practice closer to the mainstream in terms of comparative approach. But more importantly, this could help rectify an evidentiary ‘anomaly’ that is believed to undermine the system’s fundamental pursuit of factual accuracy and truth.