

# THE ETHICS OF WITNESS PREPARATION: A Peek Inside the Woodshed

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## THE ETHICS OF WITNESS PREPARATION



*"I love my testimony. You've really captured my voice."*

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## The English Position

### **U. K. Bar Standards Board Code of Conduct.** A barrister must not:

- rehearse, practise or coach a witness in relation to his evidence;
- you must not encourage a witness to give evidence which is misleading or untruthful;
- [rC9, .3, .4]

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## THE AMERICAN POSITION

“It is the 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. . . . There is no doubt that these practices are often abused.”

HAMDY & IBRAHIM MANGO CO. v. FIRE ASSOC. OF PHILA., 20 FRD 181 (SDNY 1957)

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## THE AMERICAN POSITION

A lawyer has an “ethical duty to prepare a witness.”

In re Stratosphere Corp. Securities Litigation, 182 FRD 614 (D.Nev. 1998)

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## THE AMERICAN POSITION

“[The witness] underwent intensive coaching prior to trial,

- to freeze his testimony,
- to prevent unexpected responses, and
- to assure that he would provide critical information . . . without the necessity of tedious, repetitive pinpoint questioning.
- This is not improper, so long as the testimony actually given is truthful.”
- U.S. v. JOHNSON, 487 F.2d 1318 (5<sup>th</sup> Cir. 1973)

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## PERMISSIBLE PREP TECHNIQUES

- Restatement Of Law Governing Lawyers, Section 116, comment b. (2000):
- (1) a lawyer may interview a witness for the purpose of preparing the witness to testify.

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## RESTATEMENT SEC. 116, COMMENT b, CONT.

Permissible preparation includes:

- “Discussing probable lines of hostile cross-examination.”
- **Suggesting choice of words “to make the witness’s meaning clear.”**

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