Witness Preparation

Purpose	To assist barristers to identify what is permissible by way of factual and expert witness familiarisation and preparation, in both civil and criminal cases
Overview	Prohibition on coaching witnesses – permitted familiarisation for witnesses – guidance in *R v Momodou* – application in criminal cases – potenti al application in civil cases — witness statements in civil cases – discussions with factual witnesses – discussions with expert witnesses
Scope of application	All barristers
Issued by	The Ethics Committee
Originally issued	October 2005
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Status and effect	**Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.**

Introduction

The aim of this document is to assist counsel in addressing:

The ethical duties that may arise generally from managing one's client's witnesses outside court;

The specific issues that arise in respect of witness coaching in the light of the decision of the Court of Appeal in *R v Momodou* [2005] EWCA Crim 177, [2005] 1 WLR 3442, [2005] 2 Cr App R 6. It covers only the issues surrounding witness preparation, and should be read in conjunction with the relevant Rules C6.2 and C9 in the BSB Handbook, as well as gC6 and gC7, the latter of which provides guidance on putting conflicting evidence to witnesses. It is not intended to affect one's ability to discuss the merits of the case with one's lay client.

1. Counsel can play a significant role in the preparation and presentation of witness evidence. Clients wish to ensure that the evidence in support of their case is presented to best effect. In addition, it is important that those facing unfamiliar court procedures are put at ease as much as possible, especially a witness who is nervous, vulnerable or apparently the victim of criminal or similar conduct. To those ends, barristers are being asked to prepare witnesses or potential witnesses for the experience of giving oral evidence in criminal and civil proceedings. The purpose of this document is to clarify what is and what is not permissible by way of witness interaction and preparation, in whatever form it is conducted.

2. The main rule which defines and regulates counsel's functions in relation to the preparation of evidence and contact with witnesses is Rule C9.4 in the BSB Handbook. The fundamental prohibition is that "*you must not rehearse, practise with or coach a witness in respect of their evidence*". This is explained as flowing from Core Duty 3 (the duty to act with honesty and integrity): and see, too, Outcomes C6 and C7. This needs to be read in conjunction with Rule C9.2(d), which prohibits counsel from drafting any witness statement or affidavit that contains any statement of fact other than the evidence which one reasonably believes the witness would give if the witness were giving evidence orally, and with Rule C9.3, which prohibits counsel from encouraging a witness to give evidence which is misleading or untruthful. One should also take note of Rule C6.2 and gC6 and gC7.

3. The guidance below is subdivided into separate sections for criminal, civil and family cases. Inevitably there is a significant amount of cross-over within the ethical duties applied to each area of law.

Criminal law

4. The Court of Appeal considered this topic in connection with witness training courses in the criminal case of *Momodou*, especially at [61]-[65]. The Court of Appeal emphasised that witness coaching is not permitted. However, the Court drew a distinction between witness coaching (which is prohibited) and arrangements to familiarise witnesses 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 ("witness familiarisation"). Such arrangements prevent witnesses from being disadvantaged by ignorance of the process or taken by surprise at the way in which it works, and so assist witnesses to give their best at the trial or hearing in question without any risk that their evidence may become anything other than the witnesses' own uncontaminated evidence. As such, witness familiarisation arrangements are not only permissible; they are to be welcomed.

5. Although the Court of Appeal did not expressly address the point in *Momodou*, it is also appropriate, as part of a witness familiarisation process, for counsel to advise witnesses as to the basic requirements for giving evidence, e.g. the need to listen to and answer the question put, to speak clearly and slowly in order to ensure that the Court hears what the witness is saying, and to avoid irrelevant comments. This is consistent with the duty to the Court to ensure that one's client's case is presented clearly and without undue waste of the Court's time.

6. The Court of Appeal in *Momodou* further stated that it is permissible to provide guidance to expert witnesses and witnesses who are to give evidence of a technical nature (e.g., crime-scene officers and officers with responsibility for the operation of observation or detection equipment) on giving comprehensive and comprehensible evidence of a specialist kind to a jury, and resisting the pressure to go further in evidence than matters covered by the witnesses' specific expertise. Again, this would not diminish the authenticity or credibility of the evidence which is given by such witnesses at trial.

7. For further guidance concerning the evidence of experts, see paragraphs 22 -25 below.

8. In relation to witness familiarisation or expert training programmes offered by outside agencies, the Court of Appeal provided the following broad guidance:

General requirements:

> 8.1 The witness familiarisation or expert training programme should normally be supervised or conducted by a solicitor or barrister with experience of the criminal justice process, and preferably and if possible by an organisation accredited for the purpose by the Bar Council and Law Society[1].
>
> 8.2 None of those involved should have any personal knowledge of the matters in issue in the trial or hearing in question.
>
> 8.3 Records should be maintained of all those present and the identity of those responsible for the programme, whenever it takes place.

[1] Responsibility for accreditation of courses was subsequently passed from the Bar Council and Law Society to the BSB and SRA, and as of December 2016 is no longer undertaken by either.

8.4 The programme should be retained, together with all the written material (or appropriate copies) used during the sessions.

8.4.1 (e) None of the material should bear any similarity whatever to the issues in the criminal proceedings to be attended by the witnesses, and nothing in it should play on or trigger the witness's recollection of events.

8.4.2 (f) If discussion of the instant criminal proceedings begins, it must be stopped, and advice must be given as to precisely why it is impermissible, with a warning against the danger of evidence contamination and the risk that the course of justice may be perverted. Note should be made if and when any such warning is given.

8.4.3 (g) All documents used in the process should be retained, and if relevant to prosecution witnesses, handed to the CPS as a matter of course, and in relation to defence witnesses, produced to the court. None should be destroyed.

Prosecution witnesses:

- The CPS should be informed in advance of any proposal for a witness familiarisation course for prosecution witnesses.
- The proposals for the intended familiarisation course should be reduced into writing, rather than left to informal conversations.
- If appropriate after obtaining police input, the CPS should be invited to comment in advance on the proposals.
- If relevant information comes to the police, the police should inform the CPS.
- If, having examined them, the CPS suggests that the course may be breaching the permitted limits, it should be amended.

Defence witnesses:

- Counsel's advice should be sought in advance, with written information about the nature and extent of the familiarisation course for defence witnesses.
- The proposals for the intended familiarisation course should be reduced into writing.
- Counsel has a duty to ensure that the trial Judge and the CPS are informed of any familiarisation process organised by the defence using outside agencies.

9. In particular in relation to counsel's professional obligations in relation to witness familiarisation programmes, in *Momodou* the Court of Appeal expressly stated that:

"63…. In any event, it is in our judgment a matter of professional duty on counsel and solicitors to ensure that the trial judge is informed of any familiarisation process organised by the defence using outside agencies, and it will follow that the Crown Prosecution Service will be made aware of what has happened…

"65… It should be a matter of professional obligation for barristers and solicitors involved in these processes, or indeed in the trial itself, to see that this guidance is followed."

10. Two points arise from the Court of Appeal's guidance in relation to courses offered by outside agencies:

10.1 First, the advice referred to in paragraph 9(3)(a) should be sought from defence counsel or independent counsel with no involvement in the proposed witness familiarisation course. Such advice should be provided in writing.

10.2 Second, in view of the Court of Appeal's warning that none of the course materials should bear any similarity to the issues in the relevant criminal proceedings, it would be good practice for both the party subscribing to the familiarisation course and the participants to provide signed written confirmation that the course materials do not have similarities with any current or forthcoming case in which the participants are or may be involved as witnesses.

11. As part of a familiarisation process, counsel may be asked to take witnesses through a mock examination-in-chief, cross-examination or re-examination. One must bear the following points in mind when advising on, preparing or conducting any such exercise:

11.1 A mock examination-in-chief, cross-examination or re-examination may be permissible if, and only if, its purpose is simply to give a witness greater familiarity with and confidence in the process of giving oral evidence.

11.2 If, however, there is any risk that it might enable a witness to add a specious quality to his or her evidence, counsel should refuse to approve or take part in it.

11.3 If counsel is asked to approve or participate in a mock examination-in-chief, cross-examination or re-examination, all necessary steps should be taken to satisfy oneself that the exercise is not based on facts which are the same as or similar to those of any current or impending trial, hearing or proceedings at which a participant is or is likely to be a witness. If it appears that such an exercise may not satisfy these requirements, counsel should not approve or take part in it.

11.4 In conducting any such mock exercises, counsel must not rehearse, practise or coach a witness in relation to his/her evidence: Rule C9.4. Where there is any reason to suspect that a mock examination-in-chief, cross-

examination or re-examination would or might involve a breach of the BSB Handbook, one should not approve or take part in it.

12 When discussing evidence with experts in criminal cases, counsel should adopt a similar approach to civil cases, and must also keep in mind the expert's duty to help the court achieve the overriding objective as required by the Criminal Procedure Rules r.19.2. Pre-trial discussions between experts and the appointment of a single joint expert in criminal cases are also subject to the Criminal Procedure Rules rr.19.6-19.8.

13 In relation to the use of intermediaries in criminal proceedings, see paragraph 49 below, within the family law section, for guidance.

Civil Cases

14 Civil proceedings differ from criminal proceedings in the form of witness evidence and the process of its preparation. The Civil Procedure Rules provide that witness evidence is to be adduced by way of witness statements and expert reports exchanged before trial, which are to stand as the evidence-in-chief of the witness in question unless the court orders otherwise: CPR rules 32.4(2) and 32.5.

Witness statements

15 Counsel in civil proceedings are typically involved in settling witness statements. However, the courts have emphasised that a witness statement must, so far as possible, be in the witness's own words: see e.g. *Aquarius Financial Enterprises Inc. v Certain Underwriters at Lloyd's* [2001] 2 Ll Rep. 542 at 547; Chancery Guide 2016 para. 19.2; Commercial and Admiralty Court Guide para. H1.1(i) and H1.2; Technology and Construction Court Guide, para. 12.1. When settling witness statements, great care must be taken to avoid any suggestion:

- That the evidence in the witness statement has been manufactured by the legal representatives; or
- That the witness had been influenced to alter the evidence which he or she would otherwise have given.

16 Furthermore, the evidence in a witness statement must not be partial; it must contain the truth, the whole truth and nothing but the truth in respect of the matters on which the witness proposes to give evidence: see Rules C6.2 and C9.2(d) in the BSB Handbook; Chancery Guide 2016, Chapter 19; Queen's Bench Guide, 2016, paras. 7.9.2 to 7.9.5; Admiralty and Commercial Courts Guide, para. H.1. One should remember that "*great care... must be taken in the preparation of witness statements. No pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence. It is improper to serve a witness statement which is known to be false or which the maker does not in all respects actually believe to be true*" (Chancery Guide 2016, para. 19.6).

17 One should also remember that "*a professional adviser may be under an obligation to check, where practicable, the truth of facts stated in a witness statement if you are put on*

enquiry as to their truth" (Chancery Guide 2016, para. 19.6). For example, you may be put on enquiry in relation to witness X's evidence, because witness Y's evidence contradicts it, or because there is documentation which contradicts it. However, whilst you may be entitled or obliged to check the evidence "*it is not for you to decide whether your client's case is to be believed*"; see gC6 in the BSB Handbook. In this regard see gC7 - "*You are entitled and it may often be appropriate to draw to the witness' attention [to] other evidence which appears to conflict with what the witness is saying and you are entitled to indicate that a court may find a particular piece of evidence difficult to accept. If the witness maintains that the evidence is true, it should be recorded in the witness statement and you will not be misleading the court if you call the witness to confirm their witness statement. Equally there may be circumstances where you call a hostile witness whose evidence you are instructed is untrue. You will not be in breach of Rule rC6 if you make the position clear to the court.*" However, where there is evidence which clearly contradicts a witness it may be that the duty to not knowingly or recklessly mislead the court (rC3 and rC6) comes into play, so that whilst the questionable evidence can be put forward, counsel may have a duty also to ensure that the contradictory evidence is drawn to the court's attention. In this aspect regard must be had to gC4 "*knowingly misleading the court includes being complicit in another person misleading the court… recklessly means being indifferent to the truth, or not caring whether something is true or false*".

18 Moreover, if a party discovers that a witness statement which has been served is incorrect, it must inform the other parties immediately: see Rules C6.2, C9.2(d), and C9.3 in the BSB Handbook; Chancery Guide 2016, para.19.6; Queen's Bench Guide 2016, paras. 7.9.2 to 7.9.5. Counsel has a duty, therefore, to ensure that such notice is given if counsel becomes aware that a witness statement contains material which is incorrect: for example, if a client were to inform you that an earlier statement or instruction, now contained in a witness statement, was incorrect or untrue. However, if you only suspect or believe your instructions (and evidence reflecting them) to be untrue, for example because of contradictory evidence or documents, then it is not for you to decide whether this is in fact the case; see gC6 in the BSB Handbook and paragraph 17 above.

Witness familiarisation

19 The principles set out in *Momodou* apply in criminal proceedings. There is currently no authority on these matters in relation to civil proceedings, although it has been cited (with apparent approval) in at least one civil proceeding; *Ultraframe (UK(Ltd v Fielding* [2006] EWHC 1638 (Ch). Until such authority emerges, it would be prudent to proceed on the basis that the general principles set out in *Momodou* also apply to civil proceedings. Thus while witness coaching is prohibited, a process of witness familiarisation is permissible and desirable (see paragraph 5 above), may extend to advising witnesses as to the basic requirements for giving evidence (see paragraph 6 above), in order to assist witnesses to give their best at the trial or hearing but risking their evidence becoming anything other than their own uncontaminated evidence.

20 The following approach is suggested in relation to any witness familiarisation process for the purpose of civil proceedings:

20.1 Any witness familiarisation process should normally be supervised or conducted by a solicitor or barrister.

20.2 In any discussions with witnesses regarding the process of giving evidence, great care must be taken not to do or say anything which could be interpreted as suggesting what the witness should say, or how he or she should express himself or herself in the witness box: that would be coaching.

20.3 If a witness familiarisation course is conducted by an outside agency:

20.3.1 Records should be maintained of all those present and the identity of those responsible for the programme, whenever it takes place.

20.3.2 The programme should be retained, together with all the written material (or appropriate copies) used during the sessions.

20.3.3 None of the material used should bear any similarity whatever to the issues in the current or forthcoming civil proceedings in which the participants are or are likely to be witnesses.

20.3.4 If discussion of the civil proceedings in question begins, it should be stopped.

20.4 Counsel should only approve or take part in a mock examination-in-chief, cross-examination or re-examination of witnesses who are to give oral evidence in the proceedings in question if, and only if:

- Its purpose is simply to give a witness greater familiarity with and confidence in the process of giving oral evidence; and
- There is no risk that it might enable a witness to add a specious quality to his or her evidence; and
- All steps have been taken to ensure that the exercise is not based on facts which are the same as or similar to those of any current or impending trial, hearing or proceedings at which a participant is or is likely to be a witness; and
- In conducting any such mock exercises, counsel does not rehearse, practise or coach a witness in relation to his/her evidence: Rule C9.4. Where there is any reason to suspect that a mock examination-in-chief, cross-examination or re- examination would or might involve a breach of the Code, counsel should not approve or take part in it.

Experts

21 It is standard practice in civil cases for barristers to be involved in discussions with experts and to consider drafts of the expert's report prior to service of the report on the other side. In this connection, counsel has a proper and important role in assisting an expert as to:

- The issues which the expert should address in his or her report;
- The form of the report and any matters which are required by the rules of court to be included in it; and
- Any opinions and comments which should not be included as a matter of law (e.g. because they are irrelevant or usurp the function of the court or go beyond the expert's experience and expertise).

22 Beyond this, however, the courts have repeatedly emphasised that expert reports should be, and should be seen to be, the independent product of the expert in question: see, e.g., *The Ikarian Reefer* [1993] 2 Ll Rep. 68 at 81; Practice Direction - Experts and Assessors, para. 1.2; Queens Bench Guide para. 7.8; Admiralty and Commercial Court Guide, para. H.2; Chancery Court Guide 2016, para. 17.47. Accordingly, one should not seek to draft any part of an expert's report. Counsel's involvement may, however, include discussing or annotating on a draft report observations and questions for the expert to consider in any revisions to the draft. These comments might include assisting an expert to use plainer language, so that the expert's views are expressed accurately and clearly. When doing this, however, one must keep in mind one's obligations under Rules C9.2(d), C9.3 and C9.4.

23 You may also assist in familiarising experts with the process of giving oral evidence, including:

- Explaining the layout of the Court and the procedure of the trial, and
- Providing guidance on giving comprehensive and comprehensible specialist evidence to the Court, and resisting the pressure to go further in evidence than matters covered by his or her specific expertise.

24 See paragraph 6 above in relation to familiarising expert witnesses with the basics of giving evidence. However, one must take great care not to do or say anything which could be interpreted as manufacturing or in any way influencing the content of the evidence that the expert is to give in the witness box.

Witness statements

25 There is no difficulty showing a witness before he goes into the witness box any statement he has previously made to the police and filed within proceedings or any Children Act statement he has given earlier.

26 If the witness, on reading such a statement, discloses something which is not part of his existing written evidence, counsel will have to consider with the parties whether it is (i) appropriate to draft a supplemental witness statement at court to deal with the matter raised or (ii) to deal with the issue within evidence in chief, having given all parties notice of what was said by the witness. A small piece of new information may warrant the latter approach. Large amounts of new evidence may best be set out in a statement. Occasionally a witness may come to court (whether voluntarily or by witness summons) without any previous statement having been made and no solicitor available to take a statement at court. There is nothing unethical about drafting a witness statement in these circumstances if it is appropriate to do so. Counsel should seek permission from the judge, and notify the other advocates accordingly.

27 Counsel should instruct any witness at Court not to speak to another witness or party or intervener about the case whilst at court. Whilst this may seem artificial where a witness is a friend or household member of someone else involved in the case, counsel should not knowingly run the risk that evidence will become contaminated.

28 In the event that the court adjourns with a witness' evidence part-heard, if the Judge fails to do so counsel should reiterate to the witness that he is not to speak to anyone at all about his evidence during the adjournment (including Counsel – see rC9.5). If counsel becomes aware that such discussions have taken place the judge will need to be told at the earliest opportunity.

29 Plainly the core duties referred to at the start of this guidance apply when dealing with witnesses. The fundamental prohibition under Rule C9.4 is that "*you must not rehearse, practise with or coach a witness in respect of their evidence*". This needs to be read in conjunction with Rule C9.2(d), which prohibits counsel from drafting any witness statement or affidavit that contains any statement of fact other than the evidence which one reasonably believes the witness would give if the witness were giving evidence orally, and with Rule C9.3, which prohibits counsel from encouraging a witness to give evidence which is misleading or untruthful. Note also Rule C6.2 and gC6 and gC7.

30 It is a contempt of court to persuade a witness to alter their evidence – see *Re B(JA) An Infant [1965] CH.1112*). It may not however be a contempt to seek to persuade a witness to tell the truth – see Stephenson LJ in *R v. Kellett [1976] 1 WB 372* .

31 However, the courts have emphasised in a civil context that a witness statement must, so far as possible, be in the witness's own words: see e.g. *Aquarius Financial Enterprises Inc. v Certain Underwriters at Lloyd's* [2001] 2 Ll Rep. 542 at 547;

Chancery Guide, Appendix 9, para. 1; Commercial and Admiralty Court Guide para. H1.1(i) and H1.2; Technology and Construction Court Guide, para. 12.1. When settling witness statements, great care must be taken to avoid any suggestion:

- That the evidence in the witness statement has been manufactured by the legal representatives; or
- That the witness had been influenced to alter the evidence which he or she would otherwise have given.

32 Furthermore, the evidence in a witness statement must not be partial; it must contain the truth, the whole truth and nothing but the truth in respect of the matters on which the witness proposes to give evidence: see Rules C6.2 and C9.2(d) in the BSB Handbook. Advice given in the Chancery Guide 2016, Chapter 19, the Queen's Bench Guide, 2016, paras. 7.9.2 to 7.9.5 and the Admiralty and Commercial Courts Guide, para. H.1. states that "*great care... must be taken in the preparation of witness statements. No pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence. It is improper to serve a witness statement which is known to be false or which the maker does not in all respects actually believe to be true*" (Chancery Guide, para. 19.6). It would therefore be improper to exclude material where such omission would render untrue or misleading anything which remains in the statement.

33 It is not counsel's duty to vet the accuracy of a witness's evidence other than in order to comply with the obligation to check, where practicable, the truth of facts stated in a witness statement if one is put on enquiry as to their truth (see paragraph 18 and 19 above). Particular regard should be had to gC7 – counsel is entitled and it may often be appropriate to draw to the witness' attention to other evidence which appears to conflict with what the witness is saying (provided you already have, or obtain, the court's permission to disclose that evidence to the witness) and you are entitled to indicate that a court may find a particular piece of evidence difficult to accept. Counsel's duty to the client may even require counsel to discuss such information with a witness – that duty would only conflict with counsel's duty to the court insofar as permission to disclose such material had not been granted. If the witness maintains that the evidence is true, it should be recorded in the witness statement and you will not be misleading the court if you call the witness to confirm their witness statement. Equally there may be circumstances where you call a hostile witness whose evidence you are instructed is untrue. You will not be in breach of Rule rC6 if you make the position clear to the court.

34 If a party discovers that a witness statement which has been served is incorrect, counsel should inform the other parties immediately: see Rules C3, C6.2, C9.2(d), and C9.3 in the BSB Handbook; Chancery Guide 2016, para.19.6; Queen's Bench Guide 2016, paras. 7.9.2 to 7.9.5. .

35 Counsel should in no circumstances discuss the case or exchange any more than common courtesies with witnesses to be called by opposing parties.

Witness familiarisation

36 It would be prudent to proceed on the basis that the general principles set out in *R v. Momodou* also apply to family proceedings. Thus while witness coaching is prohibited, a process of witness familiarisation is permissible and desirable. This may extend to advising witnesses as to the basic requirements for giving evidence in order to assist witnesses to give their best at the trial or hearing. Any risk that their evidence becomes anything other than their own uncontaminated evidence must be avoided. Counsel's duty to the court (CD1) and duty to act with honesty and integrity (CD3) prevail. Under rC3 counsel must not knowingly or recklessly mislead or attempt to mislead the court.

37 There is no ethical difficulty with giving general guidance to a witness about giving evidence – speak up, speak slowly, answer the question, keep answers as short as possible, ask for clarification if the question is not understood, say if you cannot remember and do not guess or speculate.

38 The following approach is suggested in relation to any witness familiarisation process for the purpose of family proceedings:

- Any witness familiarisation process should normally be supervised or conducted by a solicitor or barrister.
- In any discussions with witnesses regarding the process of giving evidence, great care must be taken not to do or say anything which could be interpreted as suggesting what the witness should say, or how he or she should express himself or herself in the witness box: that would be coaching.

39 In the unlikely event any witness familiarisation course is conducted by an outside agency:

- Records should be maintained of all those present and the identity of those responsible for the programme, whenever it takes place.
- The programme should be retained, together with all the written material (or appropriate copies) used during the sessions.
- None of the material used should bear any similarity whatever to the issues in any current or forthcoming family proceedings in which the participants are or are likely to be witnesses.
- If discussion of the family proceedings in question begins, it should be stopped.

40 Counsel should only approve or take part in a mock examination-in-chief, cross-examination or re-examination of witnesses who are to give oral evidence in the proceedings in question if, and only if:

- Its purpose is simply to give a witness greater familiarity with and confidence in the process of giving oral evidence; and

- There is no risk that it might enable a witness to add a specious quality to his or her evidence; and
- Counsel has taken all necessary steps to satisfy himself that the exercise is not based on facts which are the same as or similar to those of any current or impending trial, hearing or proceedings at which a participant is or is likely to be a witness; and
- Particular care should be taken to ensure that the confidentiality attached to a case in family proceedings is not breached by the use of the same or similar facts in a mock exercise; and
- In conducting any such mock exercises, counsel does not rehearse, practise or coach a witness in relation to his/her evidence: Rule C9.4. Where there is any reason to suspect that a mock examination-in-chief, cross-examination or re-examination would or might involve a breach of the Code, one should not approve or take part in it.

41 These points are equally germane to any rehearsal of witnesses in conference or outside court. There is no equivalent in family proceedings to the witness service in the Crown Court and so counsel will often be the witness' first point of contact on arrival. The anxious witness may well ask counsel what they will be asked in cross-examination. Priming the witness with suggested questions they may be asked clearly falls the wrong side of the line. It may be permissible to provide very general reassurance (i.e. "*you may be asked about 'x' incident and why you think the child should live with 'y'*") but counsel should not set out in any detail the issues that are likely to arise in cross-examination.

Experts

42 It is not standard practice in family cases for barristers to be involved in discussions with experts and to consider drafts of the expert's report prior to service of the report on the other side. Accordingly the relevant passages in the 'civil' section above are not repeated here. In the event that one's solicitor asks counsel to speak to an expert or to amend an expert report he should decline to do so. The only exception to this rule will be if all advocates and the court have agreed that counsel should chair an experts' meeting.

43 You may also assist in familiarising experts with the process of giving oral evidence, including:

- Explaining the layout of the court and the procedure of the trial,
- Providing guidance on giving comprehensive and comprehensible specialist evidence to the court, and resisting the pressure to go further in evidence than matters covered by his or her specific expertise.

44 However, one must take great care not to do or say anything which could be interpreted as manufacturing or in any way influencing the content of the evidence that the expert is to give in the witness box.

45 Almost all expert witnesses instructed in cases involving children in the family court will be on the parties' joint instruction. Usually the children's solicitor will have taken the lead on such an instruction and will be expected to call the witness. If counsel is representing the children in such a case he will introduce himself to the expert at court and ensure that he or she has an up to date set of court papers. If the court has by direction limited the documents to be seen by a particular expert then such direction must be obeyed irrespective of the other parties' agreement. Position statements and skeleton arguments should not routinely be given to an expert witness outside court unless all other advocates agree and, where controversial, the court has granted permission.

46 There should be no discussion with a joint expert about the substance of the case unless all other advocates agree and are present – to do otherwise would risk breaching CD3 and CD5. Any such joint discussion should be fully noted and a summary provided to the judge before the expert witness starts giving evidence. Care will need to be taken to avoid cross-examining the expert outside court.

47 Any suggestion that two or more experts should speak together outside court should be approved by the court, even if all advocates agree. Any such discussions should again be undertaken in the presence of all advocates with a full note being taken. Where the court has directed that two or more experts give evidence at the same time ("hot tubbing"), there should still be no discussion between the experts outside court without the court's permission.

Intermediaries

48 In family law cases involving vulnerable parties and witnesses and/or parties and witnesses with learning difficulties, the court will often appoint an intermediary to assist the person to give evidence. Typically the intermediary will be involved when counsel discusses the case with the party/witness outside court as well as when they are giving evidence. Counsel will need to ensure that the intermediary does not rehearse the evidence with the witness and does not lead or prompt them with the 'right' answer when discussing the case outside court.

49 Where Counsel meets a witness outside court and forms the view that they would benefit from an intermediary or other special measures, Counsel must raise this with the court and if necessary seek an adjournment so that an intermediary can be instructed and special measures considered by the court. It will be rare for such an issue to arise at the trial door – most witnesses will have had their statement taken in advance by counsel's instructing solicitor who will have formed their own view about the witness's vulnerability and their capacity to give evidence. If however a witness's mental health has deteriorated since their statement was drafted or if a new unproofed witness comes to court, counsel will need to be aware of the possible need for special measures.

Important Notice

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