Witness Preparation: What Is Ethical, and What Is Not

by Elaine Lewis

The line between ethical and unethical witness preparation would seem to be the line between truth and tampering with the truth. The question is: When is that line crossed?

Many attorneys believe the line is crossed whenever an outside consultant is hired to conduct the witness preparation. But focusing on who does it fails to address the broader issue: When is witness preparation ethical—no matter who does it?

Some who are opposed to consultants have the suspicion that a consultant is primarily an acting coach who is hired to teach witnesses to deliver scripted answers in a believable way, or to present themselves in a manner that masks their true personality. One attorney with this view, Paul Luvera, a personal injury attorney from Seattle, made an application for the deposition of a consultant who had prepared a witness in a medical malpractice case, *Adkins v. Elliott*, No. 02-2-15703 KNT 2003. His position was, "I want to know who's been fiddling with a witness, and I want to know who this (witness) was before they fiddled with him, and the jury's entitled to know that." *Arizona Capitol Times*, Sept. 19, 2005.

Other litigators fear that by using a consultant's services, they will be giving up some control of their case. Bruce Fader, a senior litigator at Proskauer Rose LLP, one of the world's largest law firms, is confident that his firm has the necessary skill to handle every facet of a trial, including witness preparation. He reasons, "We don't want to chance an unfavorable result caused by anybody but us."

On the other hand, there are attorneys who will not go to trial without the services of a witness consultant. Some law offices employ a consultant as part of their staff.

Although there is no prohibition of witness preparation in the United States, many foreign national and international courts ban the practice completely. In England, barristers follow paragraph 705a of the code of conduct of the Bar Council, which states, "A Barrister must not rehearse, practice or coach a witness in relation to his evidence." A supplemental paper by the Bar Council's professional standards committee further clarifies the direction:

> [M]ock 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.

Guidance on Preparation of Witness Statements—Preparing Witness Statements for Use in Civil Proceedings—Dealings with Witnesses, Oct. 2005.

Other countries where codes of conduct prohibit witness preparation by attorneys include Belgium, Italy, France, and Switzerland.

International law regarding the ethics of witness preparation is complicated because nationals from different legal systems are involved. The subject of the scope of witness preparation to be allowed, if any, was brought before the Trial Chamber of the International Criminal Court (ICC) at The Hague, in the Netherlands, prior to a criminal case it was scheduled to hear. For guidance in making its decision, the court undertook a detailed analysis of the practices found in the national legal systems of countries including Australia, Canada, the United States, and England and Wales. In a rather lengthy opinion, the court said:

> [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

Elaine Lewis is president of Courtroom Communications LLC in New York City.

> 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.

Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial No.: ICC-01/04-01/06, Nov. 30 2007.

Many foreign legal systems divide witness preparation into two categories: witness "proofing" and witness "familiarization." The court defined witness proofing as the "practice whereby a meeting is held between a party to the proceedings and witness before the witness is due to testify in Court, the purpose of which is to re-examine the witness's evidence to enable more accurate, complete and efficient testimony." Witness familiarization was defined as "assisting the witnesses to understand fully the court proceedings and the roles that they and the participants play in them. The practice would also involve explaining the process of direct examination and cross examination."

The Trial Chamber at The Hague used this division in explaining its decision:

> While witness familiarisation as defined in this decision will be permitted as well as the practice of providing a witness, for the sole purpose of refreshing memory, with his or her previous statements prior to testimony in Court, the practice of "witness proofing" . . . is prohibited.

Witness proofing was not allowed because the court believed it could result in improper influence on the substance of the testimony. The court recognized that some aspects of witness proofing might be helpful in terms of organization, relevance, and completeness of testimony, but the court deemed it more important to hear a witness's unfiltered recollections and knowledge. Witness familiarization, although allowed,

There is no authoritative guideline on the ethics of witness preparation.

was assigned to a separate Victims and Witnesses Unit so that lawyers could not inadvertently influence the core testimony when giving instructions on testifying rules and explaining the trial process.

In the United States, there is no authoritative guideline on the ethics of witness preparation and what its scope should be. The American Bar Association's Model Rules of Professional Conduct are silent on the subject.

Occasionally, state courts have considered challenges to various elements of witness preparation. More often the controversies have been about testimony that may have been manipulated by an attorney, rather than concerns about what help a witness was provided with and by whom.

As an example, in a case before the Intermediate Court of Appeals of Hawaii, *In re Hawaii v. Damien Chong*, 86 Haw. 290, 949 P.2d 130 (1997), the issue was dismissal of a case by the First Circuit Court because the state had given written questions and answers to witnesses prior to their appearance before a grand jury. The state, on appeal, argued that "[e]verything that we get is directly from the witnesses' reports or from talking to the witnesses." Among the reasons cited for preparing the questions and answers was "to keep the grand jury proceeding focused on the key issues so that the proceeding could be handled as quickly and efficiently as possible." The appeals court concluded, "Although the use of predicate questions and answers by the state may be risky, ethically, we cannot conclude that the [s]tate overstepped the ethical boundary line in this case."

The narrower subject of what transpired between a witness and a consultant has sometimes come up in a limited way at trial or in pre-trial discovery attempts, but the challenges have usually yielded to claims of work product and attorney-client privilege.

At the federal level, there is only one appellate court case specific to third-party witness preparation. It is the decision by the Third Circuit Court of Appeals in *In re Cendant Corp. Securities Litigation*, 343 F.3d 658 (3d Cir. 2003). At a deposition in the underlying case, Cendant questioned Simon Wood, a former Ernst & Young senior manager, about his sessions with Dr. Phillip C. McGraw (currently Dr. Phil of TV fame). At the time, Dr. McGraw was a trial consultant hired by Ernst & Young to prepare the witness for trial. Opposing counsel wanted to depose Dr. McGraw to find out about the things he had told Mr. Wood. In September 2003, Chief Judge Scirica of the Third Circuit held:

> Compelled disclosure of the substance of conversations between Wood, his counsel, and Dr. McGraw would require disclosure of communications protected by the work product doctrine. The communications took place during a consultation that focused on those issues that counsel and Dr. McGraw perceived to be central to the case. Moreover, the communications were intended to be confidential and made in anticipation of litigation. As such, the communications are at the core of the work product doctrine and are only discoverable upon a showing of rare and exceptional circumstances.

By implication, the court supported the concept of witness preparation. It did not question the ethics of the preparation. It protected the privilege.

Clearly, the preparation of witnesses in the United States is both accepted and expected, at least by convention and practice. The paucity of law on this subject suggests there is not a groundswell of ethical concern. The ABA's website lists many pages of books and articles on how to prepare witnesses.

In the absence of any specific regulations, the limits on witness preparation are generally time, money, and common sense. The level of preparation given witnesses is determined by the various policies of lawyers and law firms. Many larger law firms maintain mock courtrooms for the purpose of giving their witnesses practice in testifying under more realistic circumstances. Some firms, with time and money available, will do mock trials during which they arrange to have their witnesses evaluated by mock jurors. The goal is to determine what needs to be fixed prior to trial. The testing methods can take many forms, including high-tech dial testing, which produces a graph printout of a running impression of the witness.

Although there are no restrictions on the kind of help witnesses can be given, the help most often under fire is that offered by consultants. As someone who has worked as a witness consultant for the past 18 years, I would like to address the concerns of the critics of consultants and argue that (1) if attorney

preparation of witnesses in the United States system is considered ethical, hiring a consultant, under the supervision of a lawyer, to help prepare witnesses should be considered ethical as well, and (2) the use of consultants is a service that can help attorneys in their obligation to represent their clients thoroughly and effectively.

At times, I get phone calls from witnesses who plead with me to prepare them. The reason for these calls is always the same. They are nervous about testifying, and they don't believe they are getting the necessary preparation from their lawyers. One recent caller had just done his first day of deposition in a medical malpractice case and was very upset. He told me he had asked his lawyer for help before the deposition but was told that preparation wasn't necessary and that all he needed to do was tell the truth. He said he tried to tell what happened but was totally intimidated by the questioning format. Facing another day of the deposition, he wanted my help. He explained he had been out of work for several years and said, "This is my life. I have to do well." Unfortunately, because I work only through attorneys, I had to tell him I couldn't help unless his attorney engaged me. I do not work without an attorney's approval and guidance. The attorney said no.

A few years ago, I conducted a survey asking 150 forensic accountants at a national meeting about their work with attorneys preparing for trial. The answers were written and unsigned. I wanted to know what they liked about their preparation and also if they encountered any problems. The most notable complaint was that preparation was often too little and too late. One respondent said he found attorneys always in "crisis mode."

If witnesses were thoroughly prepared, we would not see so much unfortunate testimony at trials, and we would not read so often, or see on TV, the agonized responses and inappropriate behavior of witnesses who are of interest to the media. Some high-profile witnesses who testified poorly include former President Bill Clinton, Enron CEO Kenneth Lay, and Bill Gates of Microsoft.

Reporter Elizabeth Wasserman described Bill Gates's testimony as follows:

> The federal judge presiding over Microsoft's antitrust trial shook his head and laughed during portions of Bill Gates' videotaped deposition played in court. In a rambling 50-minute segment, Gates engaged in a verbal duel with U.S. Justice Department attorney David Boies, splitting hairs over literal interpretations of e-mails and memos. . . ."

IDG News Service, Washington, Nov. 17, 1998.

Gates subsequently became a YouTube laughing stock when excerpts of the elusive, rambling testimony were headlined under the title "Gates Deposition Greatest Hits."

The often expansive answers Kenneth Lay attempted at his fraud and conspiracy trial demonstrated that he was not aware that cross-examination was not the place to try to explain and make his case. The prosecutor told him at one point, "Mr. Lay, let me have a yes or no answer. If you feel you have to elaborate, you can do that under your defense lawyer on redirect." Trial transcript, *United States v. Lay*, No. H-04-0025 (S.D. Tex. 2006). His testimony reflected a lack of understanding of how to answer questions and when to elaborate on an answer.

President Clinton's tortured responses during his 1998 grand jury testimony on the Monica Lewinsky affair, his tedious and contradictory explanations when "yes" or "no" would have been appropriate, and his false statements that were all the more obvious with his laughable verbal gymnastics and disputes over definitions of terms such as "is" and "alone," nearly collapsed his presidency. One wonders if it was assumed, regrettably, that he didn't need help on how to testify because he was both a former lawyer and an accomplished public speaker.

Had these otherwise accomplished and intelligent individuals been thoroughly prepared, their testimony may not have gone so wrong. They certainly knew what their cases were about, but they demonstrated little understanding of the best way to present themselves.

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.

The ABA Model Rules of Professional Conduct regarding client representation state:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Client-Lawyer Relationship Rule 1.1. Competence.

Surely, one may fairly conclude from this direction that thorough preparation of witnesses is part of providing "competent representation."

Typically, lawyers spend most of their witness preparation time reviewing the facts of the case. The area of preparation not covered as well is how to present those facts. How do I know this? I hear it directly from witnesses when I am called in to prepare them after they have given poor depositions, and I see it myself when working with attorneys. I regularly have to re-focus our sessions to make sure enough attention is paid to presentation.

What consultants do is teach witnesses techniques of answering questions. They make clear why volunteering information to the opposing attorney is not helpful. They help witnesses to understand the theme of their testimony and its relationship to the case. They teach the difference between direct and cross-examination, how to address the judge, and the purpose and use of a deposition. They deal with distracting mannerisms, inappropriate attitudes, problems with volume or speed of delivery, and general misunderstandings. They explain how to correct a mistake, how to ask for a break, how to address the judge, and deal with myriad other details that often plague witnesses and prevent them from testifying well. None of this information has anything to do with deception or lying.

A favorite concern of attorneys when trying to find out what a consultant told a witness is, "Did she tell you how to dress?" A consultant may offer advice on dress, but not to make the witness into someone he is not. Dress suggestions are given, when necessary, to make certain the appearance of a witness is consistent with his background and testimony. For example, a young man from the ghetto with no source of employment suddenly appearing at trial in a suit and tie would seem disingenuous. The suit and tie would not help his credibility. A businessman appearing at trial in a golf shirt would seem to hint at a lack of respect or seriousness about the court appearance. Dress recommendations

A consultant cannot turn an elephant into a giraffe.

are not made in an attempt to present a witness dishonestly. The suggestions are made to help the witness make a respectful and appropriate appearance.

Another favorite attorney question to witnesses about a consultant's advice is: What did she tell you to say? Consultants do not tell witnesses what to say. There is no training in memorizing answers to anticipated questions.

Witness consultants are not acting teachers either. There is no instruction on how to change one's character. There seems to be a view among some attorneys that consultants have magical powers far with witnesses in excess of what consultants really do. A consultant cannot turn an elephant into a giraffe. The challenge of cross-examination is too overwhelming. For most people, it is impossible over the long term to be someone they are not.

It's hard to imagine that the advice given to a client by a witness consultant is different from the advice that would be given by a lawyer skilled in the art of teaching presentation and communications skills to others, and with enough time available to cover all the concerns and testifying fears or misunderstandings of a witness.

For those attorneys who worry that a consultant will tamper with the facts, it is important to note that it is not the consultant who determines the information about which a witness will testify. The facts to be presented are decided on by the attorney, through conferences with the witness. Consultants take their direction from the attorney.

It is highly unlikely that a consultant would suggest changing facts or attempt to do so. Most consultants who prepare witnesses are members of an organization called the American Society of Trial Consultants (ASTC), and adhere to the ASTC guidelines:

> Techniques and methods employed by trial consultants, as well as the structure of the preparation sessions, are based on the goals of the attorney or other client, the assessed needs of the witness, and the training, experience and expertise of the consultant. When preparing witnesses, ASTC members do not attempt to alter or conceal the truth of witness testimony, nor do they condone such attempts by others.

ASTC Professional Code—Witness Preparation, www.astcweb.org.

The ASTC guidelines, under the heading Methods, recommend that "[w]hen working with an attorney, agree the attorney will be present for the session, or confirm that no substantive testimony will be addressed outside the attorney's presence."

Certainly, no respected attorney would knowingly ask a consultant to help a witness present false testimony, but if distorted evidence is presented, the avenue for its appearance is through the attorney-client relationship—not through a preparation session with a consultant. For example, when the client of a lawyer is informed about the law specific to the case, it could cause the client to alter his testimony to fit the law. Or when an attorney questions his client about past details, it is possible that by asking leading questions to jog the client's memory, the power of suggestion could distort the client's recollections. That is an attorney issue. It is up to the attorney not to cross the line. It is not the role of a consultant to detect or facilitate perjury. A consultant can deal only with the fact pattern offered.

Although most consultants work alongside attorneys, it is possible for a consultant, with little case knowledge, to prepare a witness without an attorney present. Very few do, but it can be done. In my practice, I occasionally have the opportunity to offer what I call "witness class" to groups of experts who will be testifying in the same case. (This is very like what is done in the witness familiarization process accepted by the ICC and assigned to the Victims and Witnesses Unit.) What I do in class is explain the conventions of depositions and trial, and teach witnesses how they are expected to answer questions and about behavior that is appropriate for a witness. There is no group discussion having anything to do with the specifics of the case.

Usually, the way consultants work is to have an attorney ask mock questions of a witness, the witness answers (the witness-proofing rehearsal process banned in many countries), and the consultant comments and guides the witness in the best ways to respond. It is the lawyer who selects the content of the questions. The consultant comments on delivery and behavior. This is not meant to suggest that in the United States, consultants should work apart from attorneys, nor that attorneys should not ask practice questions of their witnesses. Practice is one of the best ways to give a witness confidence. I mention this only to demonstrate that the fear that a consultant will tamper with evidence or character is unfounded.

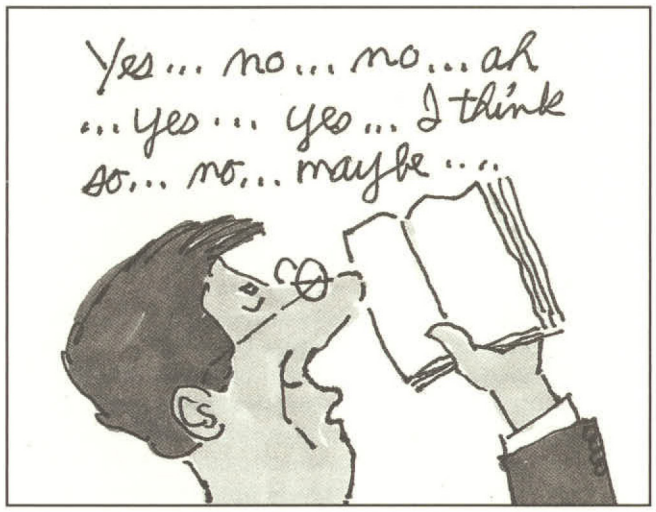
There are certainly attorneys who prepare their witnesses well,

without the use of consultants, and who rarely have to worry about how their witnesses will perform. But some attorneys, in spite of their best efforts, have witnesses who do not testify as well as hoped or expected.

There are a number of ways attorneys go wrong in preparing witnesses. Some give a handout of do's and don'ts. If the handout is the only preparation a witness receives, it will likely not produce a prepared witness. There needs to be guided practice of the rules. It is as illogical to think that a witness can testify well by reading a list of instructions as it would be foolish to assume that someone could read a book of rules about football and then go out on a field and play the game without any practice.

Sometimes attorneys will offer a video on how to be an effective witness. This is a little more helpful than written handouts, but the training is still impersonal and general rather than specific. Video instruction, just as written handouts, can supplement witness communications training but does not work well as a stand-alone method.

One reason some attorneys may not be completely successful in preparing their witnesses is that communications training has not typically been an area of focus in law schools.



In some cases, attorneys may just plain run out of time and thus send their witnesses to trial or depositions armed only with the advice, "Just tell the truth; you'll be fine." This is unfair to the client and threatens unnecessary damage to the case.

Whenever it becomes clear a witness is not responding well to mock questions, for whatever reason, calling in a consultant may be the most ethical way to ensure giving the client the best representation possible.

What ethical concerns do judges have regarding the use of a consultant to prepare witnesses? In my experience, not many. In a recent case for which I was retained, the witness was questioned at length about his preparation, presumably to find out if he had been inappropriately influenced. The witness answered truthfully, and the judge seemed unimpressed by the entire exploration. The following excerpts from the questioning are taken from the transcript. The names of all the parties have been changed except mine.

After several pages of questions to establish that I had prepared Mr. Green, how much time I spent with him, my title, and the like, the questioning continued onto what I did with the witness at the sessions.

Q: And when you started working with Ms. Lewis, did you look at her website or receive any marketing material from her?
A: No.
Q: So did you know that lay witnesses—your lay witnesses are trained with amazing success to be effective? Did you know that?
A: No.
Q: Well, when you were with her, were the lawyers with you?
A: Yes.
Q: And the lawyers were with you the entire time?
A: I think I testified about that. With the exception of the first visit, yes.
Q: What happened at the first visit?
A: She told me who she was and what she does, and she explained to me what a deposition is. That's it.
Q: And what did she tell you who she was?
A: She told me that she was a consultant.
Q: A consultant for what?
A: For witnesses and people giving depositions, I assume.
Q: And when she told you she's a consultant for witnesses, what did she tell you she does with witnesses?
A: She makes you understand what a deposition is, what is expected of you, who gets to use that information, who doesn't, who it benefits, who doesn't. She told me what a cross is, what a direct is, taught me the proper way to answer in each circumstance.
Q: And she helped you—did she help you?
A: Yeah, I have no experience at this.
Q: Did she help you, you believe, to be a better witness?
A: I think she helped me—
Q: That's a yes or no question. Would you please answer it that way.
A: Yes.
Q: And would you agree that—and answer this yes or no, please—that she taught you how to be a persuasive witness?
A: No.
Q. Did she tell you how she thought you ought to dress for when you were a witness?
A: No.
Q: Did she tell you how to answer questions your lawyer presented to you?

Then there was an objection by Mr. Green's attorney, followed by a lengthy conversation between the attorneys and the judge about whether or not the cross-examining attorney was getting into attorney-client privilege.

The Court: Is that the question you wish to ask? Did she tell you what to say?

Mr. Brown: Yes.
The Court: Overruled.
The Witness: I lived this. She doesn't need to tell me what I need to say.
Mr. Brown: Move to strike the answer.

(Please turn to page 56)

Opening Statement

(Continued from page 2)

details he had misremembered or not recalled, get his reactions and revisions to what we had written. We agonized over each word in his affidavit to get the most accurate but also most persuasive statement. Who knows whether the painstaking drafting in English survived the translation into Russian. I believed that it did, as we made many of the edits with the witness and the translator.

Even though the work was familiar, the surroundings and the path that led to this trip were not. For a long time, our client had been on good terms with the government of the witness's home country. But that changed abruptly, and the impact on our client was immediate and significant. Businesses were shut down on pretext of alleged violations. Licenses due to run for several years suddenly "expired" and could not be renewed. Other "owners" and "directors" of the client's subsidiary businesses appeared out of thin air with claims of control that were endorsed by government regulators. The power of the state was used to issue subpoenas and harass our client with searches of offices and demands for documents. Major clients of their businesses (whose contact information was in documents seized by the government) received anonymous threatening calls warning them to take their business elsewhere. Executives and their families were followed by government agents and hauled in at all hours of the day and night for questioning, purportedly about the business but covering all aspects of their lives. Once when we left a restaurant after dinner with our clients, we were startled by the headlights of a surveillance car that ostentatiously prepared to follow us. Our host shrugged.

Although intimidating, the circumstances were not without humor. One executive was under constant surveillance by two cars. Their drivers waited alongside the executive's driver, sometimes for hours, when the executive went anywhere. Eventually, surveillance was reduced to one car. When the executive's driver asked the surveillance driver about the change (typically, they do not speak to each other), the explanation was that were very busy and had had to cut back. We also learned that the executive was often followed by an easily identified white Chevrolet, the only one of its type in the city. However, the license plates were regularly changed, perhaps according to the rules of good surveillance that ignored the scarcity of white Chevrolets.

Despite these lighter moments, most of the acts of intimidation were frightening. They made executives and employees fear for their safety and their livelihood. Most alarming to me was the veneer of lawfulness and the perversion of legal process. I came away from the experience with a new appreciation for societies that aspire to be governed by the rule of law.

With the countless details that swarm our professional lives, we often forget that underlying our work is the rule of law. A society governed by the rule of law is one in which everyone, including government officials, must obey the law, and in which the laws are clear, prospective, predictable, and fairly enforced. Aristotle said that the only stable state is one in which all men are equal before the law. Similarly, Cicero said that we are in bondage to the law so that we might be free. Although we may not always achieve complete adherence to the rule of law in our society, as lawyers we should trumpet its value and defend it when it is threatened. My experience abroad showed me just how precious a thing the rule of law is and how different a place the world can be when it goes missing. □

Witness Preparation

(Continued from page 45)

The Court: Sustained. Is the answer yes, no, or I don't know?

The Witness: No.

After some further questions on where the witness preparations took place, the date, and length of the most recent meeting, Mr. Brown tried one more time to ask about what was discussed.

Mr. Brown: And can you tell me what you and she discussed?

Mr. Gray: Objection, Your Honor, on the same grounds that he's now asking to reveal attorney work product.

The Court: I think we will sustain the objection.

At this point, the judge ended the line of questioning, and the issue of witness preparation by a consultant never surfaced again. From the testimony of the witness, it was clear the work he did with the consultant had to do with testifying rules—not content.

Not only do judges seem to have no ethical issues about the preparation of witnesses by consultants, but also those I have spoken with have told me they appreciate a well-prepared witness. With prepared witnesses, they don't have to waste time with admonitions such as "Speak up," "Answer the question," or "Your behavior is not helping, Mr. Jones."

Jurors, too, are undisturbed by witness preparation. Research has shown that the majority of jurors are very accepting of the practice:

> A research project conducted by members of the ASTC involving more than 500 jury-eligible citizens throughout the United States found 73 percent of respondents believe preparing witnesses to testify is a good idea. Another 66 percent agree that it is appropriate for a witness to practice before testifying. Less than 15 percent of respondents believe that witnesses who practice their testimony have something to hide.

Craig C. New, Samantha Schwartz, and Gary Giewat, "Witness Preparation by Trial Consultants," 18 *The Jury Expert* 8 (Aug. 2006).

Neil J. Kressel and Dorit F. Kressel in their book *Stack and Sway* (Westview Press 2004), which took an objective and sometimes critical look at the trial consulting field, concluded on the subject of witness preparation, "When a witness owes a poor performance not to the content of his or her testimony or the position taken but to quirks of personality, the stress of testifying, or an inadequate stage presence, a witness preparation consultant may well be serving justice."

When lawyers prepare their witnesses but suggest there is something unethical about the use of a consultant, it is somewhat like the pot calling the kettle black. Witness preparation is either ethical or unethical. As long as helping witnesses testify more effectively is accepted practice in the United States, it should not matter from whose mouth the help is given. □