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 – potential application in civil and family cases — witness statements in civil cases – discussions with factual witnesses – discussions with expert witnesses
Scope of application:	All barristers
Issued by:	The Ethics Committee
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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.

A. General points

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 may have been the victim of criminal or similar conduct. To those ends, barristers are increasingly 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 rules which defines and regulate counsel's functions in relation to the preparation of evidence and contact with witnesses are 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 Rule C9.3, which prohibits counsel from encouraging a witness to give evidence which is misleading or untruthful. (It is a contempt of court to try to persuade a witness to alter his or her evidence – see *Re B(JA) An Infant* [1965] Ch. 1112)[1]) One should also take note of Rule C6.2 and gC6 and gC7.

[1] 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 QB 372.

3. Barristers should also be aware of the BSB's Guidance on Investigating and Collecting Evidence and Taking Witness Statements[2].

4. Those Rules and Guidance must be read together with Rule C9.4 which contains a fundamental prohibition, 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.

5. 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.

B. Criminal law

6. 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.

7. 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.

[2] https://www.barstandardsboard.org.uk/static/5769487c-c973-4b2a-bf7dde1c2a052d35/b4ffabc4-8287-4599-9a555f810a880f80/Investigating-and-Collecting-Evidence-and-Taking-Witness-Statements.pdf

8. 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.

9. For further guidance concerning the evidence of experts, see paragraphs 30 to 33 below.

10. There is also detailed guidance on "Speaking to Witnesses at Court" in The Code for Crown Prosecutors[3], much of which is, in the opinion of the Committee, of value to defence counsel as well.

11. In relation to structured witness familiarisation or expert training programmes offered by outside agencies (i.e. not the routine familiarisation given by the witness service), the Court of Appeal gave broad guidance, as follows:

General requirements:

11.1 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.

11.2 None of those involved in the provision of the programme should have any personal knowledge of the matters in issue in the trial or hearing in question.

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

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

[3] https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court

11.5 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.

11.6 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. A note should be made if and when any such warning is given.

11.7 All documents used in the process should be retained, and if relevant to prosecution witnesses, handed to the CPS (or other prosecuting authority[4]) as a matter of course, and in relation to defence witnesses, produced to the court. None should be destroyed.

Prosecution witnesses:

11.8 The prosecuting authority should be informed in advance of any proposal for a witness familiarisation course for prosecution witnesses.

11.9 The proposals for the intended familiarisation course should be reduced into writing, rather than left to informal conversations.

11.10 If appropriate after obtaining police input, the prosecuting authority should be invited to comment in advance on the proposals.

11.11 If relevant information comes to the police, the police should inform the prosecuting authority.

11.12 If, having examined the proposals, the prosecuting authority suggests that the course may be breaching the permitted limits, it should be amended.

11.13 Although not directly addressed in *Momodou*, the Ethics Committee considers that prosecuting counsel, and those instructing them, have a duty to ensure that the trial Judge and the Defence are

[4] *Momodou* was a case where the prosecuting authority was the CPS; although relevant prosecution witnesses were employees of Group 4 (now G4S), which had arranged the witness training programme. This explains the manner in which the Court of Appeal expressed itself. The guidance given must however apply where other prosecuting authorities are involved.

informed of any witness familiarisation programme organised for prosecution witnesses[5].

Defence witnesses:

11.14 Advice from counsel (whether defence counsel, or another independent counsel with no involvement in the proposed witness familiarisation course) should be sought in advance, with written information about the nature and extent of the proposed course for defence witnesses.

11.15 The proposals for the intended familiarisation programme should be reduced into writing, rather than left to informal conversations.

11.16 Defence counsel should be invited to comment in advance on the proposals. If, having examined them, defence counsel suggests that the course may be breaching the permitted limits, it should be amended.

11.17 Defence counsel has a duty to ensure that the trial Judge and the prosecuting authority are informed of any familiarisation course or programme organised by the Defence using outside agencies.

12. In relation to counsel's professional obligations in relation to witness familiarisation programmes using outside agencies, 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."

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[5] The contrary view, that this is a matter of disclosure of relevant prosecution material in accordance with statutory tests, does not recommend itself to the Committee. It is rather a matter that goes to the integrity of the trial process itself, which should always be disclosed. See paragraph 12 of this Note.

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

13.1 First, the advice referred to in paragraph 11.14 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.

13.2 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.

14. As part of such a familiarisation course or programme, a barrister (who should be independent counsel with no involvement in the anticipated hearing) 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:

14.1 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.

14.2 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.

14.3 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.

14.4 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.

15. 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.

16. In relation to the use of intermediaries in criminal proceedings, see paragraphs 48 to 49 below, within the family cases section, for guidance.

C. Civil cases

17. 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.

18. There is no objection to showing a witness, before he gives evidence, any statement he has previously made.

19. If the witness upon reading such a statement, or spontaneously, discloses something material which is not part of his existing written evidence, counsel will have to consider with his client, and if necessary with the other parties, whether it is (i) appropriate to draft a supplemental witness statement at court to deal with the new matter raised or (ii) to deal with the issue within any evidence in chief, having given all parties notice of what is to be said by the witness. A small piece of new information may warrant the latter approach. Larger amounts of new evidence may best be set out in a supplemental statement.

20. Occasionally a witness may come to court (whether voluntarily or by witness summons) without any previous statement having been made and with no solicitor available to take a statement at court. There is nothing unethical about counsel drafting a witness statement in these circumstances, if it would otherwise be appropriate for a solicitor to do so. Counsel should seek permission from the judge, and notify the other advocates accordingly.

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

Witness statements

22. Counsel in civil proceedings are typically involved in settling witness statements[6]. 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:

22.1 That the evidence in the witness statement has been manufactured by the legal representatives; or

22.2 That the witness had been influenced to alter the evidence which he or she would otherwise have given.

23. 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).

24. One should however bear in mind 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*

[6] As distinct from "Investigating and Collecting Evidence and Taking Witness Statements", on which see paragraph 3 above.

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 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.*"

25. If any party discovers that a witness statement which it has served is incorrect in any way, 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 corresponding duty upon learning of the matter, to ensure that such notice is given, and if necessary a correcting supplemental statement is served: see paragraph 19 above. (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 24 above.)

26. If a court adjourns with a witness's evidence part-heard, and the judge fails to instruct the witness that he is not to speak to anyone about his evidence during the adjournment, counsel should give that advice. If counsel becomes aware that such discussions have taken place the judge will need to be told at the earliest opportunity.

Witness familiarisation

27. The principles set out in *Momodou* apply in criminal proceedings. There is currently no authority on these matters in relation to civil proceedings, although *Momodou* has been cited (with apparent approval) in at least one civil proceeding; *Ultraframe (UK (Ltd v Fielding* [2006] EWHC 1638 (Ch). Until further 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 6 above), which may extend to advising witnesses as to the basic requirements for giving evidence (see paragraph 7 above), in order to assist witnesses to give their best at the trial or hearing. But that process

must not risk their evidence becoming anything other than their own uncontaminated evidence.

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

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

28.2 In any discussions with witnesses regarding the process of giving evidence, there is no ethical difficulty about giving general guidance about *how t*o give evidence – e.g. to 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; etc. But 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 on any question or issue: that would be impermissible coaching.

28.3 If a formal or structured witness familiarisation course or programme is to be conducted by an outside agency:

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

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

28.3.3 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.

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

28.4 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:

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

28.4.2 There is no risk that it might enable a witness to add a specious quality to his or her evidence; and

28.4.3 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

28.4.4 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.

28.5 If any formal witness familiarisation course or programme has been delivered by an outside agency, the other parties and the court should be informed of that fact[7].

29. The points made above are equally germane to any contact that counsel has with witnesses, including in conference or outside court. There is no equivalent in civil or family proceedings to the witness service in the Crown Court and so counsel will often be a witness's first point of contact on arrival at court. An anxious witness may well ask counsel what they will be asked in cross-examination. Priming the witness with suggested questions would clearly infringe the Rule C9.4 prohibition. It is probably permissible to provide very general guidance/ reassurance (i.e. "you may be asked about 'x' incident and why you think the child should live with 'y'")[8] but counsel should not address in any detail the issues likely to arise in cross-examination.

Experts

30. 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

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[7] See the adverse comment on the effect of "over-training" of witnesses in *Energysolutions EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) at [81-82] (Fraser J).

[8] Cf https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court,at para 3.4(d).

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:

30.1 The issues which the expert should address in his or her report;

30.2 The form of the report and any matters which are required by the rules of court to be included in it; and

30.3 Any opinions and comments which should not be included as a matter of law (e.g. because they are irrelevant or go beyond the expert's experience and expertise).

31. 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 a draft report with 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.

32. Counsel may also assist in familiarising experts with the process of giving oral evidence, including:

32.1 Explaining the layout of the Court and the procedure of the trial, and

32.2 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.

33. 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.

Arbitration

34. The guidance give above in relation to civil cases applies equally when advising, acting, or otherwise providing legal services in relation to an arbitration, wherever the arbitration is seated or may be conducted. See generally Rules C1 and C2.

35. This means that barristers should not seek improperly to influence any evidence that may be given in arbitration; nor should they coach witnesses in their evidence, or become involved in "witness familiarisation" processes for arbitration otherwise than as indicated above. This applies whether or not other lawyers or party representatives in the arbitration are subject to similar constraints.

36. The BSB has said that it will in due course reconsider how far barristers can be involved in witness preparation for the purposes of international arbitration. But for the time being, the position is as set out above.

Dual qualification

37. In the case of a dual-qualified barrister acting under another professional title (e.g. as a New York attorney) an informal indication has been given by the BSB that it would not ordinarily enforce the Code's rules and guidance where, under that other professional title, different standards apply (e.g. where witness coaching is permitted, and is perhaps expected). But if the matter may involve related proceedings in England or Wales, and evidence of the relevant witness may also be given in those domestic proceedings, all coaching or influencing of the witness' evidence in a way not acceptable by English standards should be avoided.

38. A dual-qualified would however be well advised to check with the BSB before placing reliance on the preceding paragraph.

D. Family cases

Witness statements

39. As in other civil cases, there is no difficulty about showing a witness before he goes into the witness box any statement he has previously made (including to the police, or any Children Act statement he has

given earlier). See paragraphs 19 to 26 above, which apply equally to family cases.

Witness familiarisation

40. It would be prudent to proceed on the basis that the general principles set out in *R v. Momodou* apply to family proceedings. The guidance set out in paragraphs 27 to 29 above applies also to family cases.

Experts

41. The area in which family cases differ most significantly from other civil cases is in relation to expert evidence and contact with expert witness outside of court. Accordingly, the relevant section in the 'civil cases' section above should be read subject to what follows.

42. In cases involving the welfare of children, it is **not** standard practice for barristers to be involved in discussions with experts, or to consider drafts of an expert's report prior to service of the report on the other side. If therefore counsel is asked to speak to such an expert or to propose amendments to an expert report, caution should be exercised, and it may be necessary to refuse the request, to avoid any suggestion that the expert's evidence has been influenced or contaminated.

43. In such cases, experts will generally have been instructed on the parties' joint instruction. Usually the children's solicitor will have taken the lead on such an instruction and counsel for the children will be expected to call the witness. In such a case counsel for the children may introduce himself to the expert at court and ensure that he or she has an up to date set of court papers; but should not otherwise discuss the case.

44. 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.

45. 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.

46. If the court has by direction limited the documents to be seen by a particular expert then such direction must be obeyed irrespective of party agreement. Position statements and skeleton arguments should not routinely be given to such an expert outside court, unless all other advocates agree or, where controversial, the court has granted permission.

47. Other expert witnesses in family cases may however present no special issues. For example in family money cases, expert accountants may be instructed; and there is no reason why counsel should not interact with them in the same way as in other civil cases. See the guidance at paragraphs 30 to 33 above.

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 measure, 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.

<u>Important Notice</u>

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see here.