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Mad Dogs and Englishmen (2013)

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“Mad Dogs and Englishmen” is a song Noel Coward wrote and was first performed by Beatrice Lillie in *The Third Little Show* on June 1, 1931 at the Music Box Theatre in New York City (“Mad Dogs and Englishmen go out in the midday sun.”). Thirty-nine years later, Joe Cocker appropriated the title for his live album of songs recorded at the Fillmore East in New York City on March 27–28, 1970.


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It is widely believed that George Bernard Shaw once observed that “[t]he United States and Great Britain are two countries separated by a common language.” A recent professional experience has brought home that sentiment more directly than I had previously understood. Sent around the world to help prepare critical witnesses for cross-examination on an important matter, I arrived to find that none of the witnesses had any cross-examination preparation. Why? Because under the ethical rules governing English lawyers, those lawyers could not “prepare” the witnesses for their upcoming experience. That was news to me (and the client).

WHEN IN BRITAIN, DO AS THE BRITS...

Under the applicable ethics rule in England, “[a] barrister must not rehearse, practice or coach a witness in relation to his evidence.” This principle applies equally to solicitors. Two leading English cases—R. v. Momodou and Limani and Ultraframe (UK) Ltd. v. Fielding & Others—have given guidance as to what this rule means:

- “There is a dramatic difference between witness training or coaching, and witness familiarization. Training or coaching for witnesses… is not permitted…. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training.”

- It is permissible “to familiarize the witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of

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2. From my research, however, original authorship cannot definitively be given to Shaw. Oscar Wilde, however, did once write: “We have really everything in common with America nowadays, except, of course, language.” The Canterville Ghost (1887).
5. [2005] EWCA Crim. 177.
6. [2005] EWHC 1638 (Ch).
the various participants…[But] none of this … involves discussion about proposed or intended evidence.”

The General Council of the Bar in England has “fleshed out” those judicial teachings, just a tad:

- “[I]t is… appropriate, as part of the witness familiarization process, for barristers to advise witnesses as to the basic requirements for giving evidence, e.g., the need to listen to and answer questions put, to speak clearly and slowly… and to avoid irrelevant comments.”

- “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.”

The Grand Council of the Bar has also published an additional piece of guidance:

- ‘[M]ock cross-examination or rehearsals or particular lines of questions that counsel proposes to follow are not permitted…. [A Barrister’s] duty is to extract the facts from a witness, not to pour into them; to learn what the witness does know himself, not to teach him what he ought to know.”

And in another publication, The Grand Council of the Bar– with typical English understatement– has highlighted the dangers of violating the no-coaching rule: such a violation “may place the barrister in a position of professional embarrassment…”

7. See supra note 5 at ¶¶ 61 and 62.
9. Id. § 12(2).
IN THE UNCIVILIZED COLONIES, ON THE OTHER HAND...

The U.S. Supreme Court has made it clear that lawyers may not improperly influence a witness’s testimony,¹² but the Court left what that means up to the ethics rules we lawyers write to enforce our own conduct. ABA Model Rule 3.3 bars a lawyer from knowingly offering false testimony; ABA Model Rule 3.4(b) mandates that a lawyer not “falsify evidence [or] counsel or assist a witness to testify falsely….”¹³

Subject to those broad proscriptions, any American trial lawyer worth his or her salt would believe it would be malpractice not to “horse shed” a witness prior to his or her testimony.¹⁴ And while some legal academics may think this is a “dirty little secret,”¹⁵ I distinctly remember my “Trial Techniques” course in 1976, taught by the legendary Irving Younger, in which he openly (and proudly) taught his eager students the ins and outs of how to “horse shed” a witness. And my subsequent tutelage as a young lawyer in private practice—under some of the finest trial lawyers in America—only reinforced and bolstered the teachings of Professor Younger.

It is, of course, easy to find examples where lawyers in preparing witnesses have pushed well over the ethics line—essentially suborning perjury (or worse).¹⁶ Putting that to one side, however, can there be any serious argument—at least by and among American lawyers—that zealous advocacy permits trial lawyers to “horse shed” in (at least) the following ways?: (i) familiarizing a witness with documents he or she

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will likely be questioned about;\textsuperscript{17} (ii) explaining to a witness the nature of the case, where he or she fits in, and what themes you want to develop through his or her testimony;\textsuperscript{18} (iii) taking a witness through both a mock direct examination and a mock cross-examination; (iv) explaining that, especially on cross-examination, most questions can be answered “yes,” “no,” “I do not know,” and “I do not recall” (the converse of this is to not volunteer information not responsive to a specific question); (v) explaining to a witness the importance of limiting his or her testimony to first-hand, personal knowledge (the obverse of this is to not guess or make assumptions); (vi) explaining to a witness, especially on cross-examination, the importance of listening to each word in a question and not passively accepting the accuracy of the questioner’s presumed facts; (vii) explaining to a witness the importance of going slowly (the obverse of this is not to get into a rhythm with the questioner); (viii) giving the witness some tips on how to handle opposing counsel (e.g., be polite); (ix) explaining how to react if the opposing lawyers get into a tussle over a question; and (x) explaining to a witness the importance of telling the truth (and giving some body language tips to make it seem like that is what is actually taking place).\textsuperscript{19}

The above items, to me at least, seem like Mom, apple pie, and the Flag. But, at the same time, they are obviously not Mum, fish and chips, and the Union Jack.\textsuperscript{20} Oh well, as they say in Paris: “à chacun son goût.”

**WHILE WE ARE AT IT…**

There is another area in which the two jurisdictions’ laws governing lawyers differ—big time—and it deserves a quick mention. Who should own a law firm? In England (and Australia), non-lawyers may invest in, own, and/or control law firms. In America, that (at least for now) cannot be the case.

\begin{itemize}
\item \textsuperscript{17} Of course, lawyers must never forget that any written materials used to refresh a witness’s memory (including attorney work product) is fair game under Fed. R. Evid. 612. See, e.g., Redvanly v. NYNEX Corp., 152 F.R.D. 460 (S.D.N.Y. 1993); Berkey Photo Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977).
\item \textsuperscript{18} See In re Cendant Corp. Securities Litigation, 343 F.3d 658 (3d Cir. 2003).
\item \textsuperscript{19} By such preparation, is not a lawyer fulfilling his or her most basic obligation to the client, as specified in ABA Model Rule 1.1 (competence)?
\item \textsuperscript{20} This is not to suggest that the English ethics rules do not have a bite or that The Grand Council of the Bar does not enforce those rules. That said, however, by their own admission they need to tighten things up a bit. See R. Buettner, “Falling Far Short of the Whole Truth,” *New York Times* A21 (February 14, 2013).
\end{itemize}
This “brave new world” all got its start when an Australian personal injury law firm, Slater & Gordon, became the first law firm to invite capital infusions from non-lawyers. Listed on the Australian Stock Exchange in May 2007, Slater & Gordon has since more than tripled its revenues, added 30 offices (it now has 50), and has more than doubled its employees to circa 1,000. In 2011, England followed suit with the Legal Services Act, allowing for British firms to solicit investment by outsiders.21

Spurred by the Australian/British foray into this new business model, as well as by the fact that the District of Columbia Bar has allowed for non-lawyers who work at law firms (e.g., lobbyists) to have an equity stake of firms within the District since the 1980s,22 the ABA’s 20-20 Ethics Commission considered, but then dropped (in 2012), a notion akin to the DC rule: to allow non-lawyers who work at law firms to own as much as 25% of the firm.23

Wholly independent of the ABA’s consideration of its proposal, the Jacoby & Meyers law firm decided to litigate the broader issue: it challenged on constitutional grounds the ethical restrictions barring outside investors from taking equity positions in law firms. Initially, the law suit was dismissed by Judge Kaplan in the Southern District of New York because, even if New York’s applicable ethical rule (Rule 5.4(d)(1)) were to be struck down (Judge Kaplan ruled that Jacoby & Meyers had not shown it had suffered actual harm from the rule), two statutory provisions (New York Judiciary Law § 495 and New York Limited Liability Company Law § 201) independently bar outside, non-lawyer investment in law firms; on November 21, 2012, the Second Circuit vacated the

21. Afterward, a spate of applications were made to invest in British law firms. For example, Slater & Gordon bought Russell Jones & Walker for 54 million pounds; and a private equity firm, Duke Street, paid approximately 50 million pounds for a majority stake in Parabis Group.

22. See DC Rules of Professional Conduct 5.4(b). The District of Columbia does not allow for non-lawyers, outside of the law firm, to have an ownership interest therein. See Comment 8.

decision, remanded the case to Judge Kaplan, and allowed Jacoby & Meyers to challenge the New York statutes on the same basis.24

When (and how) the Jacoby & Meyers case will ultimately turn out is anyone’s guess. But even if it turns out in favor of the law firm, will it really change things in America? One man’s view (mine) is no. Why? Because lawyers and law firms are, and will still be, governed by Rule 5.6. That rule is a very explicit bar against lawyer non-competition restrictions (except with respect to retirement benefits). Unlike in Australia and England (and unlike for every other profession in this country), we American lawyers have carved out for ourselves a rule that non-competition restrictions will not apply to the legal profession.25 And so long as a lawyer (or a group of lawyers) is free to move from law firm A to law firm B with impunity, why would Ron Perelman or Carl Icahn invest $100 million in law firm A on day one, knowing that they could leave for law firm B on day two? That is a rhetorical question.

CONCLUSION

Even though many of the traditions of the American legal system have been handed down or derived from jolly old England, we must face the fact that we are two similar, yet different, systems.26 That fact is certainly brought home most starkly on the witness preparation front. It gives me another reason to be proud to be an American!

25. Unfortunately, my new favorite television show, “Suits,” has gotten this wrong. The partners of Pearson Hardman are locked into the firm by restrictive covenants. I guess this also means that George Reeves really could not fly in “Superman”! 😞
26. One area not touched on above is the fact that the legal profession is no longer self-regulated in England; rather, the government has taken on that job. On this side of the Atlantic we should resist being too smug on that score, however, given the Securities and Exchange Commission’s attempt to pre-empt lawyer regulation, at least as to those who practice securities law. See C. E. Stewart, “New York’s New Ethics Rules: What You Don’t Know Can Hurt You!” NY Business Law Journal (Fall 2009).
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