GROUP WITNESS PREPARATION - PSYCHOLOGY MATTERS

Introduction

Improper witness preparation for the purposes of trial (referred to as "witness preparation" in this article) has been a highly controversial issue in adversarial legal systems. Different common law countries have adopted different approaches in drawing the line between permissible and impermissible witness preparation. It has been suggested that the American approach lies on one end of the spectrum (wide discretion to lawyers), while the approach in England and Wales lies on the other end (much more rigid with an "outright prohibition on 'rehearsing, practising or coaching'), with Australia, New Zealand and Canada occupying the middle ground.[1]

In Singapore, the complex issue of witness preparation came to the fore last year when the Court of Appeal (CA) issued its decision in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [*Ernest Ferdinand*].[2] The CA observed that in witness preparation, the fundamental principle is that the witness's evidence must remain his own.[3] From this basic principle, the CA stated that at least three rules followed (**the Three Rules**):

a) The solicitor preparing a witness must not allow other persons, including the solicitor, to supplant or supplement the witness's testimony (**the First Rule**);
b) The preparation should not be too lengthy or repetitive (**the Second Rule**); and
c) Witness preparation should not be done in groups (**the Third Rule**).[4]

The breach of any of the Three Rules might result in the Court, depending on the facts of the case, to "accord less weight (or even no weight) to the resulting testimony".[5] However, the CA emphasised that the Three Rules were "rules of thumb and not to be applied mechanistically", as the ultimate question was still whether the preparation had "compromised the fundamental principle that the witness's evidence must be his own independent testimony".[6]

This article takes a closer look at the principal risk underpinning the CA's conception of the Third Rule, which we will term as "psychology" for convenience. It then examines the different practical contexts where such a risk may arise in group witness preparation.

Given the scarce local literature on the risks of group witness preparation, it is important for legal practitioners practising in the Singapore courts to understand the complex contexts in which group witness preparation can occur, as illustrated by examples from jurisdictions such as Australia and the United States.

This article is therefore not concerned with the potential downstream consequences (e.g. ethical), if any, of breaching the Third Rule.

Psychology

In explaining the raison d'être for the Third Rule, the CA observed that group witness preparation "exacerbate[d] the risk that witnesses may change their testimony to bring it in line with what they believe the 'best' answer to be (and, in particular, to make their testimonies consistent with each other)".[7] Such a risk would apply not only to a group of witnesses, but also to a group comprising witnesses and "other involved persons … who may not themselves be called as witnesses".[8] This was so "even if the solicitors and witnesses approach the exercise with the purest of intentions".[9]

The CA put forward a psychological explanation for this risk: "Human beings are social animals; all but the most contrarian of us naturally incline towards seeking agreement with others who are aligned with us."[10] Hence, "[a] witness, upon hearing the answer of another witness (or observing the other witness's reaction to the first witness's answer) may come to doubt, second-guess, and eventually abandon or modify an answer which was actually true."[11]

In essence, the risk of witnesses tailoring their evidence with one another is one of "contamination of evidence". As emphasized in *R v Momodou*:[12]

"Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant."[13]

The Third Rule is therefore directed at reducing the risk of contamination of evidence. Simply put, if no group witness preparation sessions are conducted, the risk of contamination of evidence through group psychology is minimized. This approach is echoed by Australian commentary, in the context of an Australian ethical rule generally prohibiting group witness preparation, that the rule "is directed at reducing the risk of contamination of evidence through collusion, an interest that outweighs any considerations of efficiency that stem from multiple interviewing" [emphasis added].[14]

Contexts in Which the Risk of Contamination of Evidence May be Increased

The contexts in which group witness preparation may occur will give rise to different levels of the risk of contamination of evidence. Legal practitioners should not assume that the risk of contamination of evidence is the same in every case. In some contexts, the risk of contamination of evidence is likely to be higher in view of one or more of the following factors:

- The suggestibility of the witnesses involved;
- Whether the witnesses are in unequal bargaining positions; and
- Where the witnesses involved owe a duty to the court.

Given that *Ernest Ferdinand* is the first and only Singapore case to date to discuss the risks of group witness preparation, it is useful to look at some of the specific contexts which can increase the risk of contamination of evidence, based on foreign academic literature and cases.

1. Elderly Witnesses

If one or more of the witnesses involved in a group witness preparation is an elderly person, the risk of contamination of evidence may be heightened. As noted by some US commentators, elderly witnesses may be suggestible in relation to a lawyer's conduct in witness preparation.[15] Research suggests that elderly persons may be "more susceptible to suggestion regarding what they believed they witnessed".[16] Moreover, lawyers who intend to prepare elderly witnesses in a group should bear in mind that the risk of contamination of evidence in a group witness preparation can be increased if the witnesses in question have the same interest in the outcome.[17]

2. Employer-Employee Relationship

Concerns regarding influencing and reshaping the witness's independent recollection may be heightened "where the joint session includes witnesses whose economic interests are dependent upon others participating in the session (for example, employer and employee)".[18] Hence, it has been suggested that group witness preparation "generally should be avoided" in such cases.[19]

Consider the Australian case of *Day v Perisher Blue*,[20] where several employees and a former employee of the defendant employer had participated in a telephone conference before the trial to discuss the evidence that they would give. The telephone conference had been organised by the employer's lawyers, who had provided in advance written summaries of the evidence that each witness should give in response to potential areas of questioning. These summaries supported the employer's case.

The Court found that the group conference was improper as it was "more concerned with ensuring all the witnesses gave evidence which would best serve their employer's case" and to ensure that the witnesses "would all speak with one voice about the events that occurred".[21] The Court further observed that "the evidence of one about a particular matter which was in fact true might be overborne by what that witness heard several others say which, as it happened, was not true".[22]

3. Expert Witnesses

Group witness preparation may also affect the independence of witnesses who owe a duty to the Court, such as experts. In the Australian case of *Roads Corporation v Thomas James Love*,[23] the defendant convened a meeting of all the defendant's experts before the trial, apparently to familiarise them with the factual background to the case so that they could understand the issues in preparing their reports.

On the facts, the court found that the meeting "went beyond the mere provision of factual information" as one of the expert witnesses had conceded that a critical issue raised in the proceedings was discussed at the meeting.[24] Even if the meeting had been confined to providing "purely factual information for the assistance of experts", the Court held that it was "an inappropriate vehicle to impart such information", as there was "a significant risk of bringing into question the independence and credibility of the experts who may attend such a meeting and would otherwise risk compromising their duties to the Court".[25]

The Court elaborated that an expert witness's independence was compromised because his or her evidence would be "in danger of becoming a 'team presentation'".[26] As for the expert witness's credibility, problems would arise in the "adequate testing of the evidence and the information relied upon" because "[t]he content of discussion at such meetings [was] rarely likely to be recorded, and the influences which [were] brought to bear [were] not likely to be assessed with any degree of confidence".[27]

Nevertheless, the Court pointed out that not all pre-trial meetings of expert witnesses would be improper. For example, such meetings may be allowed for the purposes of exchanging draft reports where the opinion of one expert depended upon information to be provided by others.[28] The Court may also direct experts to confer before trial for the purpose of identifying disputed and non-disputed matters.[29]

Conclusion

In essence, witness preparation in groups increases the risk of contamination of the witnesses' evidence by virtue of its group (i.e. social) setting. A witness need not actively seek to influence a fellow witness in order to bring about a distortion of the latter's evidence. It is precisely because contamination may take place subtly (and perhaps even subconsciously) that the CA established the Third Rule.

The risk of contamination of evidence during group witness preparation sessions will vary from situation to situation. While this article has explored three different scenarios where group witness preparation may present a heightened risk to the integrity and independence of the witnesses' evidence, these scenarios are, needless to say, non-exhaustive. For example, witnesses who are family members, or in any other kind of relationship involving a power imbalance, may also present similar challenges when they interact in a group setting. To better manage these litigation risks, lawyers should be alert to the interpersonal dynamics at play when multiple witnesses are involved in testifying for their client, and calibrate their approach based on their situational judgment and the Three Rules.

Authors: Alvin Chen & Gan Jhia Huei

First published in the July 2019 issue of the Singapore Law Gazette

Endnotes

1. See e.g. Courtney Furner, "By reference to the rules in your own jurisdiction, how far do you think it is permissible to go in preparing a witness of fact", International Bar Association Litigation Committee newsletter article (November 2015) <https://www.ibanet.org/Article/Detail.aspx?ArticleUid=1550ca9c-4f43-4ae8-8c6b-83112bb67112> (accessed 24 June 2019).
2. (2018) 1 SLR 894.
3. At (136).
4. At (138)-(140).
5. At (137).
6. At (137).
7. At (140).
8. At (140).
9. At (140).
10. At (140).
11. At (140).
12. (2005) 1 WLR 3342.
13. At (61).
14. GE Dal Pont, Lawyers' Professional Responsibility (Sixth Edition, Sydney: Thomson Reuters (Professional) Australia Limited, 2017), at (17.155).
15. Roberta K. Flowers & Rebecca C. Morgan, Ethics in the Practice of Elder Law (United States: American Bar Association, 2013) at p 242.
16. Id, fn 16.
17. Supra n 15, at p 247.
18. Richard Alcorn, "Aren't You Really Telling Me…? Ethics & Preparing Witness Testimony" (March 2008) Arizona Attorney 14 at 19.
19. Ibid.
20. (2005) NSWCA 110.
21. At (30).
22. At (30).
23. (2010) VSC 253.
24. At (38).
25. At (38).
26. At (36).
27. At (36).
28. At (40).
29. At (40).
