TRUTH BE TOLD: NAVIGATING THE INTRICACIES OF WITNESS PREPARATION

"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. A case prepared in such a manner may come to resemble a thriving but barren plant: the fibres of (apparent) consistency, coherence, and plausibility may grow large and strong, but the fruit – the truth of what transpired between the parties – withers on the vine."

Justice Andrew Phang, *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA*[1]

Introduction

In many countries (including Singapore), witnesses in a trial are required to swear or take an oath to "tell the truth, the whole truth, and nothing but the truth". But do advocates have a duty to prepare witnesses to tell the truth? If so, when does an advocate cross the line from legitimate preparation to compromising the integrity of a witness's evidence?

The Law Society's forum on "Witness Preparation: Where to Draw the Line?", held as a live webinar on 6 August 2020, examined these thorny questions against the backdrop of the Singapore Court of Appeal's decision in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* (***De La Sala***).[2]

In *De La Sala*, the Court of Appeal provided three broad guidelines on witness preparation flowing from the fundamental principle that a witness's evidence must be his own independent testimony. These "rules of thumb" were: (1) solicitors cannot allow anyone (including themselves) to supplant the witness's testimony; (2) witness preparation should not be too lengthy or repetitive; and (3) witness preparation should not be carried out in groups to prevent contamination of witness testimonies.

In his opening remarks to the forum, which was attended by over 400 members of the Law Society, the President of the Law Society, Mr Gregory Vijayendran, SC, outlined three facets to witness preparation. First, there appeared to be an Anglo-American divide, with the United Kingdom (UK) being the most conservative and the United States (US) being the most liberal in approaching witness preparation. Second, he noted that English judges were suggesting a more cautious approach to relying on oral evidence. Third, witness preparation needed to be assessed against the wider lens of psychological research showing the susceptibility of human memory to distortion.[3]

The two panel discussions at the forum, comprising a multi-jurisdictional group of speakers and moderated by Mr Alvin Chen, raised diverse and interesting viewpoints on witness preparation in litigation and international arbitration. This article recounts some of the highlights of the panel discussions.

Panel Session 1: Comparative Law Perspectives on Witness Preparation

Contrasting jurisdictional approaches

The first panel session began with insightful perspectives from Mr David Bateson and Mr Wade Coriell on the Anglo-American divide to witness preparation. Referring to the seminal criminal case of *R v Momodou*,[4] Mr Bateson explained the distinction drawn by the English Court of Appeal between witness familiarisation (permissible) and witness training/coaching (impermissible). Witness coaching was prohibited because of the well-established principle that witnesses should not discuss their evidence with, or disclose their statements or proofs to, one another. He attributed the UK's conservative approach to, amongst others, the fact that a witness's honest and independent recollection was deemed to be sacrosanct and the need to reduce the risk of a witness tailoring his evidence.

On the US approach, Mr Coriell agreed that it was the most liberal as US lawyers were permitted to rehearse a witness's testimony and even suggest the choice of words to the witness. He cited the adversarial nature of the US legal system; the aggressive style of questioning of witnesses; the lack of a solicitor-barrister divide in the US legal profession; and a more litigious society with a relatively young judicial system as some factors that could account for the US's liberal approach.

Turning to the Australian position, Mr Cameron Ford acknowledged that it was a 'middle ground' between the UK and US approaches. He shared that while it was appropriate for Australian lawyers to prepare witnesses to a certain degree, supplanting a witness's testimony with additional evidence would be impermissible.

This mid-way approach would also avoid the perils of under-preparing as well as over-preparing a witness - excessive preparation could actually jeopardise a witness's credibility as in some cases that he had seen, the pressures of cross-examination could cause the witness to take the easy way out by blaming the lawyer for having told the witness what to say on the stand.

Lastly, on the position in Singapore, Mr Vijayendran drew a distinction between the prohibition on witness preparation as an *ethical proscription* on the one hand, and an *evidential preclusion* on the other; while the former concerned the ethical prohibitions on a solicitor's conduct, the latter was concerned with the issue of the contamination of a witness's testimony and the consequential question of how much weight, if any, should be accorded by the court to the witness's testimony. In this regard, he noted that in *De La Sala*, Justice Andrew Phang had pointed out that a breach of the three guidelines could result in the court according less weight, or no weight at all, to a witness's testimony.

An uneven international playing field?

If lawyers from different jurisdictions 'play' by different rules in witness preparation, a question that naturally arises is whether an uneven playing field is created in international arbitration practice. The panellists generally agreed that the lack of rules or guidelines on witness preparation at the supranational level did not necessarily create an uneven playing field for arbitration practitioners. Mr Bateson shared that given the intrinsically transnational nature of international arbitration, the strict rules applicable to witness preparation in UK criminal cases did not generally apply to international arbitration.

Practically speaking, he suggested that a better approach for arbitral counsel would be to follow the guidelines provided by the International Bar Association (IBA) on party representation,[5] which were more suited to the nature of arbitral proceedings, and more harmonised to ensure equality of representation.

Agreeing generally with Mr Bateson's comments, Mr Coriell also observed that practical issues pertaining to equality of arms might still arise, for example, where lawyers used to a stricter or more conservative approach to witness preparation are likely to adopt the same approach in their first few international arbitration cases, whilst a more liberal approach might be adopted by their counterparts (say, from the US). Agreeing with Mr Bateson and Mr Coriell, Mr Ford suggested that excessive witness preparation might not ultimately affect the outcome of an international arbitration matter, taking into account the nature of the witnesses involved and the experience of the arbitral tribunal.

Acknowledging that the fundamental objective of equality of arms to level the playing field in witness preparation was equally applicable to Singapore arbitration practitioners, Mr Vijayendran observed that Singapore practitioners would already be aware of what they were ethically permitted or not permitted to do with regard to witness preparation under the Legal Profession (Professional Conduct) Rules 2015 (**PCR**). Based on his reading of the *De La Sala* guidelines as an evidential preclusion rather than an ethical proscription, there should be fewer concerns that the guidelines placed Singapore practitioners at a disadvantage vis-à-vis their foreign counterparts in international arbitration proceedings.

Panel 2: Ethics and Best Practices in Witness Preparation

Crossing the ethical boundaries

When would illegitimate witness preparation practices constitute ethical transgressions? This issue was one of the main talking points for the second panel session. From the judicial perspective, the Honourable Justice Choo Han Teck observed that in practice, it was difficult for a judge to discern the ethical intentions or conduct underlying a witness's evidence, as cross-examination would typically only expose fallacies in a witness's testimony. Even where several witnesses used the same words or fanciful language in their written statements, it would be difficult for a judge to be certain whether this was the result of a common scribe transcribing their oral evidence in the same way, or if it was in fact the scribe's own words telling the witnesses what to say.

With regard to the more permissive witness preparation regime in the US, Associate Professor Helena Whalen-Bridge observed that there were nevertheless two areas where ethical boundaries could be crossed. First, in suggesting words to a witness, a lawyer would be on firmer ethical ground if the suggestion was framed as an open-ended clarification of what the witness was trying to say, as opposed to a binary one (do you mean X or Y?). The former approach would allow the witness to build on his or her own recollection and account of the events, which might in turn enhance the witness's credibility in the courtroom. Second, she regarded group witness preparation as a "higher risk strategy" because it presented not only ethical issues, but also problems with the persuasiveness of the evidence.

In particular, group witness preparation could give the appearance of collusion, which might then have to be denied. Hence, it would be more appropriate for the lawyer to evaluate the capabilities of each witness, and assess the minimal level of support required to assist the relevant witness in testifying clearly in court.

Is a comprehensive ethical rule on witness preparation needed in the PCR or in international arbitration?

Another intriguing issue was whether a comprehensive ethical rule governing witness preparation was needed in the PCR or in international arbitration. Mr Dinesh Dhillon opined that it was not necessary to amend the PCR to include a comprehensive ethical rule on witness preparation, as the PCR already contained sufficient ethical principles and rules that were relevant to governing witness preparation. Besides Rule 9(2)(g) PCR, which prohibited a lawyer from concocting or contriving evidence, he referred to a number of other broader principles and rules in Rules 9 and 10 of the PCR pertaining to the administration of justice. In his view, the Court of Appeal's guidelines in *De La Sala* merely reinforced the existing ethical framework.

From the vantage point of international arbitration, Ms Tan Swee Im observed that although the current guidance on witness preparation in international arbitration was not extensive, establishing more comprehensive ethical rules might create its own problems. For example, introducing prescriptive rules might stymie the inherent flexibility of international arbitration and lead to unnecessary complexity.

At the heart of the ethical inquiry was the intent behind the witness preparation practice in question, which ultimately boiled down to the arbitral counsel's ability to know right from wrong. She suggested that if further clarity on the ethical benchmarks of witness preparation was desirable, more specific guidelines modelled upon the "Red", "Orange" and "Green" lists in the IBA Guidelines on Conflicts of Interest in International Arbitration[6] could be considered.

Whither best practices in witness preparation?

Apart from ethical proscriptions, the panellists also shared valuable insights on formulating best practices regarding witness preparation:

- Justice Choo offered two guideposts for lawyers in preparing a witness's affidavit of evidence-in-chief: first, do not put in evidence that is untrue or that the witness does not know or wish to say; second, in deciding what evidence to include, the lawyer should assess such evidence and evaluate whether the client has a case that can be properly raised in court (and if not, advise the client accordingly);
- Ms Tan agreed that there was a significant difference between testing the veracity of a witness's testimony and teaching a witness to give a false or untrue testimony;
- Mr Dhillon suggested that it would be helpful to set out, for illustrative purposes, what practitioners could do (and not only what they should *not* do) when preparing their witnesses, bearing in mind a lawyer's duty to the court as well as to his or her client; and
- Associate Professor Whalen-Bridge added that learning points from the crossover between lawyers interacting with clients on preparing written and oral testimony respectively might also be useful.

Drawing lessons from witness conferencing in international arbitration

Can witness conferencing or "hot tubbing" in international arbitration be compared with group witness preparation in litigation? Both Mr Dhillon and Ms Tan agreed that witness conferencing was distinguishable from group witness preparation. Mr Dhillon explained that witness conferencing was not so much a form of witness preparation as a procedural option. As witness conferencing was most often used for independent expert witnesses who were not "greenhorns" to the process of giving evidence before the courts, there was little risk of allegations being made of an expert witness contriving evidence. Ms Tan also noted that expert witnesses, who would have prepared their professional reports in advance, would be less likely swayed by any suggestions from lawyers.

Mr Dhillon, however, cautioned that witness conferencing, and likewise group witness preparation, would be inappropriate in cases where there is a likely power imbalance between the witnesses: for example, an employee or reporting subordinate and his/her immediate supervisor. Witness conferencing in such a scenario would not only place the subordinate in an uncomfortable position before his/her superior, but could also have a psychological impact on the witness.

Conclusion

The engaging discussions at the forum have afforded much scope for further reflection and research on various themes pertaining to witness preparation, such as: the convergence and divergence across different common law jurisdictions in approaching witness preparation in both litigation and international arbitration; the interaction between the *De La Sala* guidelines and the existing ethical framework in the PCR; and the key considerations for formulating best practices on witness preparation.

The Legal Research and Development Department would like to take this opportunity to thank all the panellists for their time in contributing to the engaging and insightful discussions during the panel sessions. We would also like to thank all our participants for their enthusiastic participation, as well as comments and questions during the forum.

Please click here for the profiles of our panellists.

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References

1. (2018) 1 SLR 894 at (140) (emphasis in original).
2. (2018) 1 SLR 894.
3. In this regard, Mr Vijayendran referred to the observations made by Lord Justice Leggatt in *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd and another* (2013) EWHC 3560 on the fallibility of human memory.
4. (2005) 1 WLR 3442.
5. International Bar Association, 'IBA Guidelines on Party Representation in International Arbitration' (25 May 2013) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F> accessed 4 September 2020.
6. International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration' (23 October 2014) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918> accessed 10 September 2020.