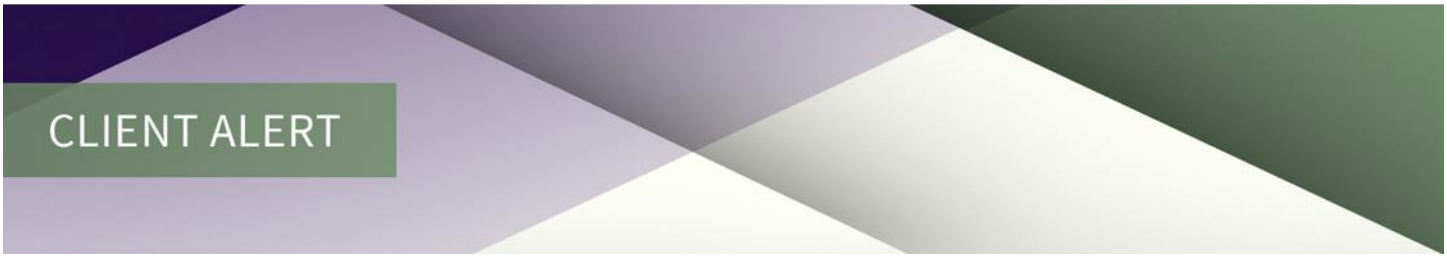

Witness Preparation in International Arbitration

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Introduction

For many people – even senior executives of large corporations – appearing as a witness, giving evidence and being cross-examined is a daunting prospect. Understandably, a witness will want to be familiar with the process and to provide their own accurate and genuine recollection of the relevant facts or events. Equally understandably, a witness will seek to rely on their legal counsel to assist them in preparing for this process. However, in some jurisdictions, excessive witness preparation may be seen as 'tainting' a witness's evidence such that it is distorted and no longer represents the witness's own genuine recollection. Here lies a tension: while legal counsel can and should assist a witness to prepare for the process of giving evidence, counsel must be careful not to cross the line and engage in improper witness preparation or conduct that may be perceived by the tribunal as diminishing the value or weight of witness testimony. This is an area where a nuanced approach by counsel can be fundamental to the effective presentation of witness testimony in support of a case.

There are certain areas of international arbitration law where a common international approach has emerged. A good example is the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules). The IBA Rules were introduced in 1999 to record international best practice for the taking of evidence, and have since gained broad acceptance across the international arbitration community. In other areas, however, no international consensus exists and significant differences remain between jurisdictions. The proper approach to witness preparation falls into this latter category.

In a recent ICC Commission Report on The Accuracy of Fact Witness Memory in International Arbitration, it was observed that, '[t]o date, in the international arbitration context, there is limited guidance on the steps which may be taken by party

counsel to "prepare" a witness, and ***there are no applicable general standards***'.[1] Indeed, the IBA Rules state only that '[i]t shall not be improper for a Party, its officers, employees or legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them'.[2] The IBA Rules do not identify the types of conduct or circumstances that might amount to improper witness preparation.

The lack of general standards applicable to witness preparation means it is critical that parties receive practical advice from their legal counsel on the topic. Given the multi-jurisdictional character of international arbitration, such advice is likely to require nuanced analysis that accounts appropriately for the various jurisdictions implicated. Due consideration should be given not only to applicable ethical standards, but also to the tribunal's expectations regarding the process of taking of evidence. A practitioner's or arbitrator's jurisdictional background and place(s) of qualification will be of particular importance.

Before providing some practical guidance to conducting witness preparation, this article surveys the approach taken in a number of common law jurisdictions – England and Wales, Singapore, Australia and the United States. As will be seen, there are significant differences between these common law jurisdictions. This article does not seek to cover the various other differences that exist in the approaches taken in civil law countries. For example, in Germany, aside from ethical proscriptions against encouraging false testimony or crafting the substance of a witness's testimony, there are no formal rules governing witness preparation.[3] Nonetheless, a German court may well attribute little or no weight to the evidence given by a heavily prepared witness.

At the outset, it is important to note that in each of the jurisdictions surveyed, the treatment of witness preparation in the arbitration-specific context is limited. As a result, this article looks primarily to the state of the case law and other relevant rules and regulations.

England and Wales

In England and Wales, a conservative approach has traditionally been taken to witness preparation. The fundamental rule is that a witness should provide their own honest and independent recollection of the events at issue, and that their recollection should be uninfluenced by what anyone else has said or done.[4]

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1 ICC Commission Report, "The Accuracy of Fact Witness Memory in International Arbitration" (2021), at para. 5.3.5.

2 IBA, Guidelines on the Taking of Evidence in International Arbitration (2020), Article 4(3).

3 The authors thank their colleague, Svenja Wachtel, for her input on the position in Germany.

4 *See Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), at para. 25 ('[T]he principle that a witness's evidence should be his honest and independent recollection, expressed in his own words is at the heart of civil litigation'.); *R v Momodou* [2005] EWCA Crim 177, at para. 61 ('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 most extensive exposition of the English approach to witness preparation was given by the Court of Appeal in the criminal case of *R v Momodou*.[5] The case involved an appeal against conviction and sentence for violent disorder. Certain prosecution witnesses attended witness training sessions organised by their employer. The training was intended to 'give witness[es] an experience very similar to going to court' and included group discussions of case studies with similarities to the proceedings and mock cross-examinations based on real-life experiences unconnected with the proceedings.[6]

The Court of Appeal drew a distinction between two forms of witness 'preparation': (i) legitimate witness familiarisation; and (ii) improper witness coaching. The Court made clear that witness coaching is impermissible because it risks 'adversely affect[ing] the accuracy of the evidence'.[7] The Court explained that the rule against witness coaching applied even to one-on-one sessions between a witness and someone completely removed from the facts of the case. This is because 'the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him'.[8]

Moreover, in the Court's view, the dangers of witness coaching are 'dramatically increased' where witnesses are jointly trained with other witnesses to the same events. As the Court explained, in such situations, '[w]itnesses may bring their respective accounts into what they believe to be better alignment with others' with the result that, '[w]hether deliberately or inadvertently, the evidence may no longer be their own'.[9]

The Court also provided some guidance on permissible witness preparation. The Court explained that the rule against witness coaching does not preclude conduct that included familiarising witnesses with the layout of the court, the likely sequence of events when giving evidence, or the different responsibilities of the participants involved.[10] Such familiarisation should, however, not involve discussions about proposed or intended evidence.

It is important to emphasize that *R v Momodou* arose through criminal litigation. English courts have not given the same level of guidance in the civil context. The High Court in *Ultraframe (UK) Ltd v Fielding* did, however, observe that there are 'significant differences between civil and criminal procedure'.[11] In that case, Lewison J remarked that witness

5 *R v Momodou* [2005] EWCA Crim 177.

6 *R v Momodou* [2005] EWCA Crim 177, at paras. 39-44.

7 *R v Momodou* [2005] EWCA Crim 177, at para. 61.

8 *R v Momodou* [2005] EWCA Crim 177, at para. 61.

9 *R v Momodou* [2005] EWCA Crim 177, at para. 61.

10 *R v Momodou* [2005] EWCA Crim 177, at para. 62.

11 *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), at para. 25.

preparation is not itself improper, 'provided that it does not amount to coaching of a witness as to what to say'.[12] The Court also cautioned that extensive witness preparation may 'reflect badly on the witness who, perhaps through no fault of his or her own, may appear evasive because he or she has been "trained" to give evidence in a particular way'.[13] This may result in the evidence being afforded less or even no weight.[14]

As to the ethical rules applicable to English qualified lawyers, barristers are regulated by the Bar Standards Board (BSB) and solicitors are regulated by the Solicitors Regulation Authority (SRA). The BSB and the SRA have each published rules that reflect the conservative English position, but without comprehensively regulating how witness preparation should be conducted in practice. For instance:

a) Rule 9 of the BSB Handbook provides that the duty to act honestly and with integrity includes that a barrister must not 'encourage a witness to give evidence which is misleading or untruthful' (Rule 9.3) and must not 'rehearse, practice with or coach a witness in respect of their evidence' (Rule 9.4).

b) Article 2 of the SRA Code of Conduct provides that a solicitor must 'not misuse or tamper with evidence or attempt to do so' (Article 2.1) and must 'not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence' (Article 2.2).

Singapore

In Singapore, the leading case on witness preparation is *De La Sala v Compañia De Navegación Palomar SA*.[15] The case arose from a bitter and acrimonious dispute between two factions of the De La Sala family over six companies incorporated in the British Virgin Islands and Panama.

In the course of the proceedings, it eventuated that one member of the family, Elena, had been involved in various 'training sessions' of another family member, Tony. Elena conceded on cross-examination that the training sessions had

12 *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), at para. 25.

13 *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), at para. 25.

14 For an example, *see Recover Partners GP Ltd v Rukhadze* [2018] EWHC 2918 (Comm), at para. 12 (Cockerill J 'had very little confidence that the evidence … was their unclouded recollection rather than a heavily overwritten version based on their reconstruction of events in the light of their microscopic review of the documents – and their own view of their own case'. This was because 'the majority of the witnesses called were very intelligent and motivated and had plainly worked extensively to prepare for their evidence; firstly with the legal teams in preparation of their lengthy witness statements and secondly with the documents in preparation for their cross-examination'.).

15 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16.

involved a 'transcript and script' and that if Tony made a mistake in a practice answer, he would be led through the relevant questions again to ensure he answered it correctly.[16]

The Singapore Court of Appeal held that the key issue in cases concerning alleged improper witness preparation is 'whether the preparation has compromised the fundamental principle that the witness's evidence must be his own independent testimony'.[17] The Court went on to observe that from this principle, at least three rules follow which may, if compromised (and depending on the totality of the circumstances), lead the court to attribute less or no weight to the relevant evidence:

a) *First*, the lawyer(s) preparing the witness must not allow other persons to actually supplant or supplement the witness's own evidence.[18]

b) *Second*, even if the first rule is observed, the preparation should not be too lengthy or repetitive.[19] 'Over time, oblique comments, non-verbal cues, and the general shape of the questioning (especially when reiterated) may *influence* the witness to adopt answers which he does not believe to be the truth, but which he has surmised would be more favourable to his case'.[20]

c) *Third*, witness preparation should not be done in groups.[21] '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'.[22]

In the event, the Court of Appeal held that the contents of the 'script', in the context of the relevant circumstances, cast serious doubt on whether Tony's evidence was his own.[23] The first-instance judge was accordingly correct to find that Tony's evidence should be given little weight.[24]

The professional obligations of Singapore lawyers are governed by the Legal Profession Act, various pieces of subsidiary legislation, practice directions, official guidelines and rulings of the Law Society of Singapore, and the judgments of the

16 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16, at paras. 135-136.
17 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16, at para. 137.
18 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16, at para. 138.
19 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16, at para. 139.
20 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16, at para. 139.
21 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16, at para. 140.
22 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16, at para. 140.
23 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16, at para. 142.
24 *De La Sala v Compañia De Navegación Palomar SA* [2018] SGCA 16, at para. 143.

Singapore courts.[25] While these authorities do not regulate comprehensively the correct way to conduct witness preparation in practice, pertinent restrictions are found in Rules 9 and 10 of the Legal Profession (Professional Conduct) Rules 2015. In short, the lawyer must not permit the client to give false evidence (Rule 10(1)(a)), and must not be involved in any impropriety by encouraging or assisting the client in giving false evidence (Rules 10(a)(c), 10(3), 10(6), and Rules 9(1)(a)-9(2)(c), 9(2)(g) and 9(2)(h)(iv)).[26]

Australia

In Australia, witness preparation will be improper when it amounts to 'coaching' the witness. The Court of Appeal of Western Australia in *Majinski v State of Western Australia* explained that preparation of a witness moves beyond 'proofing' to impermissible 'coaching' 'when the witness' true recollection of events is supplanted by another version suggested by the interviewer or other party'.[27] In all cases, this question will inevitably be a matter of fact and degree.[28]

Day v Perisher Blue Pty Ltd is an example of a case where improper coaching had occurred.[29] In that case, Perisher Blue's solicitors had prepared an extensive document for the defendant outlining 'possible areas of questioning' for each witness and had included suggested responses which would be in line with the defendant's case.[30] There was also a meeting at which multiple witnesses jointly discussed the evidence to be given at trial. On appeal, the New South Wales Court of Appeal set aside the first-instance decision on the basis that the trial judge had paid insufficient regard to the improper witness preparation and ordered a new trial. The Court also referred its judgment and the relevant papers to the Legal Services Commissioner to investigate whether an ethical complaint should be initiated against Perisher Blue's legal team.[31]

Guidance on the permissible extent of witness preparation can be found in Young J's decision in *Re Equiticorp Finance Ltd*.[32] Young J acknowledged that lawyers may meet with witnesses and give them certain advice in preparation for giving evidence. Examples of legitimate advice were said to include the following:[33]

a) Advising the witness to refresh his or her memory from contemporaneous documents;

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25 Jeffrey Pinsler, "Witness Preparation before Trial," (2018) 30 SAcLJ 978, at para. 22.

26 *See also* Jeffrey Pinsler, "Witness Preparation before Trial," (2018) 30 SAcLJ 978, at para. 37.

27 *Majinski v State of Western Australia* [2013] WASCA 10, at para. 32.

28 *Majinski v State of Western Australia* [2013] WASCA 10, at para. 30.

29 *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110. *See also Roads Corporation v Love* [2010] VSC 253.

30 *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110, at para. 22.

31 *Day v Perisher Blue Pty Ltd* [2005] NSWCA 125.

32 *Re Equiticorp Finance Ltd, ex parte Brock (No. 2)* (1992) 27 NSWLR 391.

33 Griffiths J has suggested that providing witnesses with a written guidance note can be a good idea and has outlined the types of matters which could properly be included in the note. *See* Griffiths J, "Some Ethical Issues for Legal Practitioners" [2014] FedJSchol 4, at para. 21.

b) Directing the witness to points he or she may be cross-examined on;

c) Informing the witness about the relevant procedure;

d) Directing the witness's attention to points in his or her evidence that may be contradictory or fantastical; and

e) Advising the witness as to the manner of answering questions (e.g. listen carefully to the questions being asked, give short and concise answers, etc.).

In Australia, separate ethical rules generally apply to barristers and solicitors. These include rules aimed, *inter alia*, at ensuring the integrity of evidence.[34] Specifically, both barristers and solicitors are prohibited from advising a witness to give false or misleading evidence, and from coaching a witness as to what answers should be given. The applicable rules also provide guidance as to legitimate witness preparation, providing that barristers and solicitors may: (i) advise a witness to tell the truth; (ii) question and test the version of evidence to be given by a witness; or (iii) draw the witness's attention to inconsistencies or other difficulties in their evidence.

In addition, the ethical rules state that barristers and solicitors must not confer with more than one lay witness at a time regarding any contentious issue where such conferral could affect the evidence to be given by any of the witnesses.

United States

The United States is often regarded as the most liberal common law country in respect of its stance on witness preparation. Under United States ethical rules, lawyers are permitted (and arguably required) to extensively prepare witnesses, including, for example, through mock cross-examination.[35] A failure to do so may even be viewed as amounting to professional misconduct. Indeed, a highly experienced United States litigator wrote that 'in the world in which I have practiced law the failure of counsel adequately to prepare the witness both for direct and cross-examination would be regarded as a serious dereliction of professional duty'.[36]

[34] Solicitors are regulated according to the Legal Profession Uniform Australian Solicitors' Conduct Rules (2015), Articles 24-25, while barristers are regulated according to the Legal Profession Uniform Conduct (Barristers) Rules (2015), rr 69-72.

[35] Catherine Rogers, *Ethics in International Arbitration* (2014), at para. 3.32.

[36] Robert Rifkind, "Practices of the Horseshed" in Laurent Levy and Johnny Veeder (eds.) *Arbitration and Oral Evidence* (2004) 55, at p. 55.

The *Restatement (Third) of the Law Governing Lawyers* is a useful guide as to how most United States jurisdictions will approach witness preparation.[37] Section 116(1) states that 'A lawyer may interview a witness for the purpose of preparing the witness to testify'. Comment (b) to section 116(1) goes on to say:

> [A] lawyer may invite the witness to provide truthful testimony favourable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: … reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet.

Witness preparation may also permissibly include rehearsing a witness's testimony, and in the United States a lawyer may even suggest words the witness may use to make the witness's meaning clear.

The American Bar Association's *Model Rules of Professional Conduct* also provide authority relevant to all United States jurisdictions. However, the *Model Rules* only proscribe lawyers from 'offer[ing] evidence that the lawyer knows to be false'.[38] They are otherwise silent as to what is and is not permitted in terms of witness preparation. State rules, such as those in New York, contain a similar level of detail.[39]

Outside of the prohibition on offering or procuring false evidence, United States lawyers have a wide discretion to prepare witnesses, so long as they do not infringe broad and indeterminate proscriptions in various ethical rules against fraudulent or unbecoming conduct.[40] One United States ethics committee wrote:

> The fact that the particular words in which testimony … is cast originated with the lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading. … If the particular words suggested by the lawyer, even though not literally false, are calculated to convey a misleading impression, this would be equally impermissible from the ethical point of

[37] Although American *Restatements of the Law* are not binding authority in and of themselves (unless and until applied by a court), they are highly persuasive because they are formulated over several years with extensive input from law professors, practicing attorneys and judges.

[38] *Model Rules of Professional Conduct*, American Bar Association, r 3.3(a)(3).

[39] The New York Rules of Professional Conduct proscribe lawyers from offering or using evidence that the lawyer knows to be false, but otherwise do not provide further guidance on the topic of witness preparation. New York Rules of Professional Conduct, r 3.3(1)(3).

[40] *See, e.g.*, New York Rules of Professional Conduct, rr 8.4(c) and 8.4(d). ('It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice'.)

> view. … Yet … [t]he fact that a lawyer suggests particular language to a witness means only that the lawyer may be affecting the testimony as respects its clarity and accuracy.[41]

In short, the various United States jurisdictions appear to coalesce around one key principle. In the words of the Washington D.C. Bar Ethics Committee: '[I]t appears to us that the only touchstones are the truth and genuineness of the testimony to be given. The mere fact of a lawyer's having prepared the witness for the presentation of testimony is simply irrelevant'.[42]

Practical Guidance

A number of points of practical guidance emerge from the survey conducted above. *First*, it is crucial that parties and counsel are aware of, and sensitive to, the differing approaches to witness preparation across jurisdictions. For instance, one practical area where jurisdiction-specific approaches differ significantly is when it comes to preparing a witness by conducting a mock cross-examination. While mock cross-examination might be permissible for lawyers qualified in the United States, it is not for lawyers qualified in England and Wales. Particular sensitivity may therefore be required when it comes to this area and others, such as suggesting wording that, while intended only to clarify a witness's testimony, may unintentionally change its substance.

Second, parties and counsel should work together to develop a nuanced approach in each case that is tailored to account for the relevant jurisdictional backgrounds of counsel for both parties as well as the tribunal.

a) Counsel should ensure that they comply with their own ethical obligations in conducting witness preparation. External counsel and a party's in-house legal team should work together to ensure that proper consideration is given to all relevant jurisdictions.

b) Parties may seek to ensure that due consideration is given to the tribunal's jurisdictional background and the impact that may have on its expectations regarding the process of taking evidence. Any witness preparation should be designed to ensure that the evidence given is most helpful to the tribunal, and should conform to what the tribunal will expect. For example, even if counsel on both sides are from the United States, if the case is being heard by an English tribunal, parties and counsel might give careful thought to how witness preparation should most effectively be conducted. If it emerges under cross-examination that a witness has participated in a mock cross-examination, for example, this may well be permissible under United States ethical rules but would

[41] Code of Professional Responsibility and Opinions of the D.C. Bar Legal Ethics Committee (1991 ed.), opinion no. 79, at p. 139. *See also Ibarra v Harris County Texas* 338 Fed. Appx. 457 (5th Cir. 2009).

[42] Code of Professional Responsibility and Opinions of the D.C. Bar Legal Ethics Committee (1991 ed.), opinion no. 79, at p. 139.

still risk undermining the weight the tribunal may attach to the testimony if the tribunal is from different jurisdictions with different expectations.

c) Parties may also seek to ensure that consideration is given to the jurisdictional background of counsel for the other party. Unique considerations may arise where counsel for each party are qualified in different jurisdictions. For example, one party may be represented by United States counsel while the other is represented by English counsel. In this scenario, there may be a perceived inequality of arms because United States counsel can prepare witnesses to a greater extent. A practical way of addressing any perceived inequality in this situation may be through seeking the tribunal's guidance on the permissible extent of witness preparation.

Third, in conducting witness preparation:

a) Counsel should be conscious of a witness's level of familiarity with the process of giving evidence. It is clear that, even in jurisdictions which take a conservative approach to witness preparation, counsel can assist witnesses to be familiar and comfortable with the process by explaining the nature and process of giving evidence.

b) Counsel may meet and confer with witnesses to ensure they are well equipped to provide evidence that assists the tribunal to determine the relevant factual issues and ultimately to resolve the parties' dispute. In the process of obtaining the witness's genuine recollection, it is proper for counsel to discuss with a witness documents as well as the other side's case. Counsel's aim, however, should be to obtain the witness's genuine recollection, and not to influence that recollection or to advise the witness what to say.

c) Parties and counsel should bear in mind that it is usually counterproductive to heavily prepare a witness or to seek to influence their evidence. Tribunals will recognise a witness who has been excessively prepared, and will typically be better assisted by a witness's own genuine recollection as opposed to a heavily lawyered one.

Finally, parties should ensure that legal counsel are always present at witness preparation sessions. This will help to ensure that witness preparation is conducted appropriately and also that any applicable privileges are preserved.

For further information on witness preparation or related topics, please do not hesitate to contact us.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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