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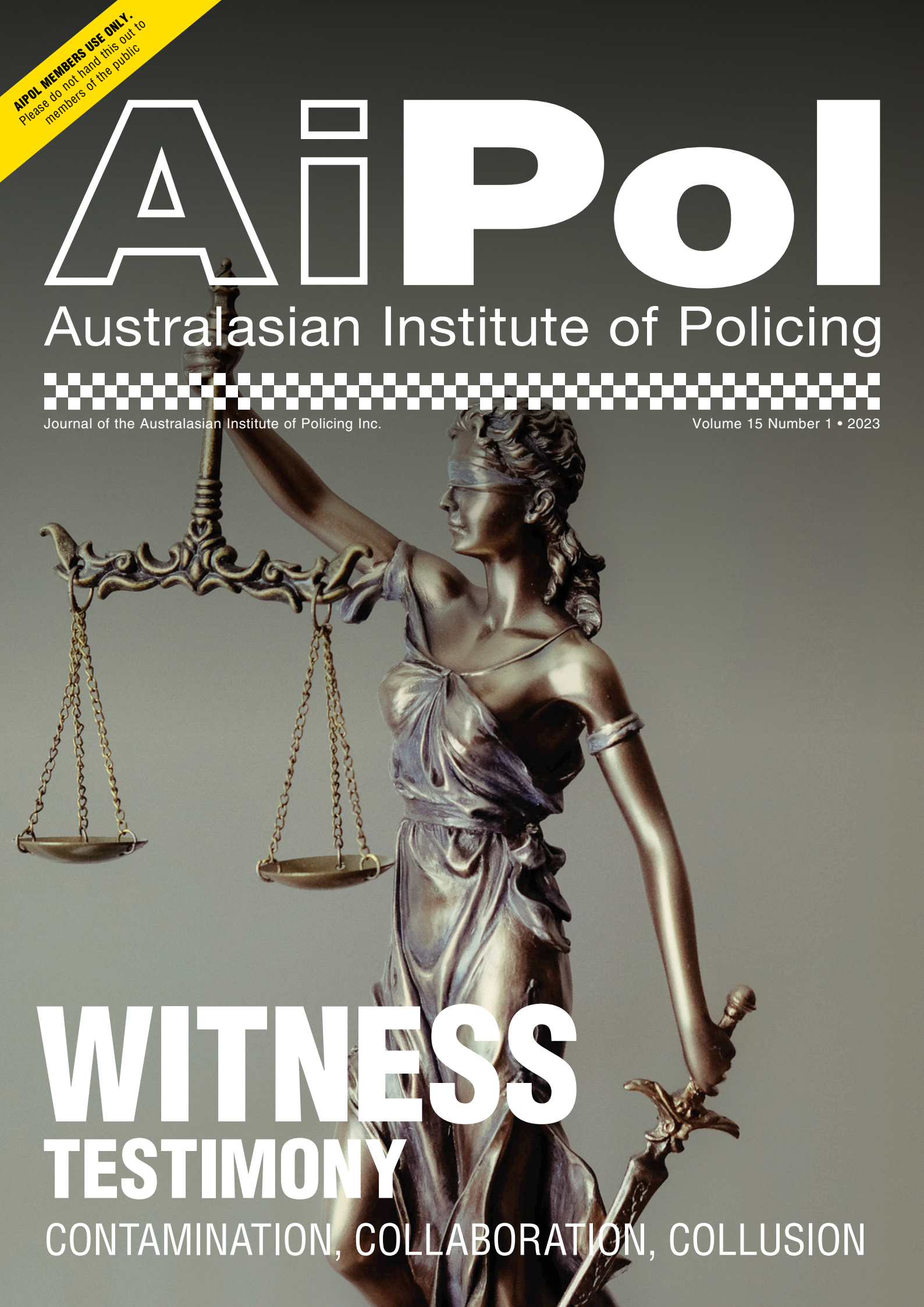

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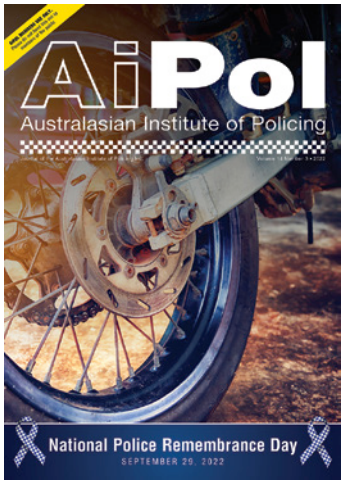

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Contributions

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Contents

ROBAM, YOUR BEST CULINARY LIFESTYLE

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Editorial

DR AMANDA DAVIES

Editor, Assistant Professor Policing and Security at the Rabdan Academy, Abu Dhabi

This edition focuses on that very complex field of witness testimony, the potential for contamination, collaboration, collusion in the preparation and delivery of that crucial element of the judicial process.

Dear AiPol readers,

Welcome to the first edition of AiPol for 2023 and best wishes for the year ahead.

This edition focuses on that very complex field of witness testimony, the potential for contamination, collaboration, collusion in the preparation and delivery of that crucial element of the judicial process.

There are many challenges associated with preparing and presenting witness testimony as police officers experience and it can win or lose a case for the prosecution when the defence parties are able to disrupt well prepared witnesses, their recall of events and their court testimony. There is a very interesting article by Elizabeth Loftus which discusses the vulnerability and susceptibility of eye witnesses particularly in the moments when questioned in court, again contributing to (a) potential loss of credibility of police and the associated investigation and (b) confidence of the prosecutorial work. Whilst, as yet there is no definitive solution to mitigating such circumstances there are good practices to follow which may best prepare witnesses and counter defence lawyer questioning tactics. This leads to the interesting case in Singapore, the article by Weiner and Sams which explores and illustrates the fine line between witness familiarization and witness coaching. The article offers insight into the actions of witness preparation in the United States, Hong Kong and Singapore which enables a comparison with respective Australian jurisdiction.

One of the central themes in the articles of this edition and one which is the foundation of ethical police practice as a key driver is the search for the truth which unfortunately can be sidetracked in court cases by allegations of police coaching witnesses. To support police prosecutors and optimize the potential for successful prosecutions, where it is not currently addressed in police education programs, consideration of inclusion of learning which guides police as to the fine lines between coaching, collaboration, collusion could be a future strategy. The important aspect is to keep this training current, as defence develop more challenging tactics, police education and preparation similarly needs to keep pace if we are to provide solid unwavering testimonial accounts. Scoping the national and international landscape of cases and publications pertaining to developing best practice is an avenue to support police agencies endeavors in this field.

The articles selected for this edition we trust you will find interesting and a valuable contribution to informing on the sustained efforts of police agencies in achieving the ultimate aim of successful prosecutions.

We look forward to bringing you interesting and relevant topics in the future editions of AiPol 2023.

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Authorised by Chris Stone, Liberal Party of Australia, NSW Division, Level 2, 131 Macquarie Street, Sydney NSW 2000.

President's Foreword

Police officers across Australia give evidence in criminal matters and indeed civil matters on a regular basis but there is little discussion on the 'up stream' actions by prosecutors or defence lawyers when dealing with witnesses relating to your case.

JONATHAN HUNT-SHARMAN

President, Committee of management, Australasian Institute of Policing

Many of the ethical and legal considerations of prosecutors and defence lawyers are similar to those of the front-line police officer but there are also substantial differences.

Police are in a unique position of being an investigator for a crime, obtaining evidence and interviewing witnesses, whilst also then becoming a witness themselves in those same proceedings.

The role of a police officer as a witness in court proceedings becomes even more complex when the matter before the court includes evidence from police of firsthand observations of a criminal act occurring, where their observations are no different to a civilian. For example, where an offender is seen assaulting a victim, runs when approached by police and is later apprehended based on what the police officers observed, along with the victim's account.

There is different expectations of the evidence given by police officers versus the 'lay person'. As such there is a difference in how witness statements are prepared. Although there is academic and legal debate on whether there should in fact be a difference in 'type' of witness.

Police officers play a crucial part in obtaining the facts from witnesses and articulating those facts accurately when obtaining witness statements. Indeed, it is crucial that police officers are obtaining witness statements to ascertain the truth, not a conviction.

Experienced police practitioners are well aware that a witness can be manipulated accidentally or deliberately, during preparation of their witness statement. Police practitioners are mindful not to ask leading questions, manipulate or exclude the facts, or expressly or implicitly suggest the evidence to be given etc. Police Officers take their high ethical standard and independence of office, seriously.

In Court, defence lawyers take great professional delight to accuse police officers of coaching each other and/or witnesses. They also accuse police of collusion when preparing their police witness statements.

The reality, many police officers reading this, have experienced the attempts by defence lawyers to make out to the jury that police officers have coached witnesses when obtaining their witness statements and prior to appearance in Court. And the most common 'trick' of defence lawyers is to try and distil in the jury that police have colluded, when in fact, police witness statements have been prepared in corroboration with each other to ensure absolute accuracy. Sadly, we have seen young and inexperienced police officers be 'rattled' by such questioning, which is the whole purpose of the defence lawyer's tactic, which is, in my opinion, far from ethical or fair or indeed seeking the truth.

Of course, on the converse, if a police officer's written statement were to differ from his/her colleague, the same defence lawyer would be claiming that one officer's statement is true and the other officer's statement is not, and how can we rely on their oral testimony to be accurate if their witness statements differ?

It is important for Police practitioners not to be afraid of defence lawyer tactics, but it is also incumbent upon prosecutors/DPP to object when such line of questioning and accusations are made in Court. Although the judiciary may ignore such tactics, the concern remains that it negatively influences the jury and causes perceived reputational damage to the serving Police Officer from a 'lay person's' perspective.

Collusion is unethical and illegal, however corroboration is ethical and legal, particularly in relation to police witness statements.

It is important to note that in some jurisdictions, in relation to shootings, police guidelines place boundaries around conferring and corroborating after such an incident. Police officers involved in incidents in which a firearm has been discharged may collaborate in the writing-up of their notes, however certain important caveats are included.

A critical factor is for police practitioners to have a contemporary understanding of the potential ethical issues when obtaining witness statements and preparing their own police witness statements. This is an area of judicial consideration and varying academic and legal opinions. When-ever there is a police critical incident, there are calls, often ill-informed, for more reform of police practices and procedures.

Coaching of police officers or witnesses is of course unethical and rightly illegal. However, this must not be confused with witness preparation for Court, which is legal and ethical. In practice, police officers are not involved in the preparation of witnesses for Court. This role/task is for the Prosecutors/DPP. However, in a general sense, experienced police officers may prepare less experienced police officers for Court experience by explaining procedures, processes and cross examination techniques of defence lawyers etc, which is not case specific, nor anything remotely resembling the evidence to be given, but is purely to ensure professional presentation of evidence before the Court.

Although the words 'collusion' and 'corroboration' and 'coaching' and 'preparation' sound interchangeable to the 'lay person' it is important for police practitioners to understand the very important difference to ensure that they do not accidentally end up on the wrong side of the blue line.

Accused Hillsborough trio ‘altered statements to mask police failings’

Police accounts of failings during the Hillsborough disaster were covered up after a government lawyer highlighted areas where their force might be criticised at an official inquiry, a court heard yesterday.

April 21, 2021

DAVID BROWN

Journalist, The Times

Donald Denton, a retired South Yorkshire Police chief superintendent, Alan Foster, a former detective chief inspector, and Peter Metcalf, a retired solicitor, are charged with intending to pervert the course of justice.

The accusations are linked to the deaths of 96 Liverpool fans crushed during the FA Cup semi-final against Nottingham Forest at the Hillsborough stadium in Sheffield in April 1989.

Sarah Whitehouse, QC, for the prosecution, said: “These three tried to minimise the blame that might be heaped upon the South Yorkshire Police at the many different forms of inquiry that followed that dreadful day. They did this by altering accounts given by police officers who were present on the day. They knew that those accounts were inevitably going to end up being sent to a number of inquiries that would follow the disaster.”

Metcalf, 71, advised on alterations in the witness statements of officers on duty while Denton, 83, and Foster, 74, ensured the changes were made, the jury sitting at The Lowry theatre, Salford, was told.

“The effect of the alterations was to mask failings on the part of South Yorkshire Police in their planning and execution of the policing of the football match,” said Whitehouse.

Video of Liverpool fans outside the turnstiles of Leppings Lane terrace and the fatal crush of supporters in the central pens was shown to the jury.

Metcalf, then a partner in solicitors’ firm Hammond Suddards, had been asked to act for Municipal Mutual Insurance, the insurers of South Yorkshire Police, because of expected substantial compensation claims, the court heard. He was also asked to act for the force at the inquiry into the disaster headed by Lord Justice Taylor and to represent South Yorkshire police in any civil litigation.

Liverpool fans at Hillsborough trying to escape severe overcrowding during the match against Nottingham Forest in 1989 David Giles/PA

The court heard how at a meeting 11 days after the disaster attended by Metcalf and senior officers a barrister said they must be concerned about later litigation and “at this stage present our evidence in the most appropriate manner having an eye towards the future”.

He said the police should consider themselves as “the accused” and that they should “prepare accordingly”. The barrister added: “We would choose what we want to leave in and what we want to leave out, and where the emphasis should lie.”

West Midlands Police was appointed to gather evidence for the Taylor inquiry and inquests into the fans’ deaths. It asked South Yorkshire for copies of statements written by 120 officers.

Whitehouse said there was a “significant” moment when a government solicitor supporting the Taylor inquiry sent South Yorkshire police an official letter setting out areas where officers might be criticised.

These included not preventing a crush of supporters outside the entrance to Leppings Lane terrace, communication failures, and taking too long to help the injured.

Whitehouse told the jury that Hillsborough had become linked in many people’s minds with “a cover-up and attempts to hide the real facts” but added: “You should forget everything that you may have heard and concentrate only on the evidence that you hear in this court.”

The trial continues.

The Ethics of Witness Preparation:

The Fine Line of Ethical Witness Preparation

At its basis the role of a witness is simple – to tell the court the truth about what you observed (in the case of a lay witness) or to provide your professional opinion (in the case of an expert).

THOMAS NEVIN

Director, Loquitur Witness Training

This is easy to say, but in practice it can be very difficult to do. Witnesses are at an inherent disadvantage when giving evidence: the formal and unfamiliar setting, the stress and pressure, the need to speak in public, the unusual way of questioning and the unnatural way witness evidence is adduced in court. Add to this an opposing counsel's professional training to cross examine witnesses, their familiarity and experience in this environment, and preparation for the cross examination itself, and the role of the witness becomes increasingly tough.

It is true that some of these disadvantages can be ameliorated by effective witness preparation. A poorly prepared witness may undermine an otherwise robust case, and the evidence of such a witness may reflect poorly not only on the witness, but also on their organisation, including its structure, management and training syllabus. Conversely a well prepared, well presented witness can strengthen a case, while improving the perception and reputation of their organisation or department.

However, there are very strict rules around this preparation, and for good reason. Indeed, an improperly (and unethically) prepared witness may itself result in a worse outcome in proceedings, as well as worse outcomes for the witness themselves, and their employer. This of course begs the question: where are the lines of ethical witness preparation drawn?

Unsurprisingly, this has been the subject of some judicial consideration, often arising (unfortunately) from cases where witness preparation has been undertaken in an ethically questionable manner. To quote Justice John Griffiths in speech delivered on 5 March 2014:

"There is a fine line between legitimate witness preparation and unethical coaching of a witness. Despite the difficulty of drawing that line, the courts insist upon its maintenance. Whether or not preparation amounts to unethical coaching is necessarily fact specific and involves matters of degree." [1]

Some Definitions and Concepts

Before we turn to determine where this "fine line" of ethical witness preparation is drawn, it is necessary to consider and define various relevant concepts and activities.

Witness Proofing

Witness proofing is effectively obtaining a written summary of what the witness will say in testimony. It will often form the basis of their affidavit/witness statement and should be kept as a record of this. It is best practice for lawyers to do so as not only does it allow the legal practitioner to fully understand the evidence on which the case is founded, it can serve as a record in the event of any allegations of impropriety in the preparation of a witness. Witness proofs should be undertaken separately for different witnesses, so there can be no suggestion of collusion between witnesses.

As noted by Sheller JA, *"It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately"* [2].

Witness Preparation

Witness preparation is a general term used in respect of the preparation of a witness for cross examination at trial. It often involves a discussion of the witness' evidence with the legal team in the lead up to trial and may include proofing and types of (ethical) training.

The preparation of witnesses has been considered by the relevant solicitors' regulatory authorities and can (and perhaps indeed should) include: *"Questioning and testing in conference the version of evidence to be given by a prospective witness" and "Drawing the witness' attention to inconsistencies or other difficulties with the evidence…"*[3] Similar wording can be found in the various Australian barristers' rules.

Witness training

Witness training is difficult to define. It is often used as a general term for witness preparation, witness familiarisation[4], and has been used to describe unethical witness coaching. It can include teaching of a witness techniques and strategies to give effective evidence and to deal with cross examination techniques. It is not unethical *per se* – indeed in some cases it can be very beneficial to both the witnesses, and the Court receiving evidence. Its ethics, and its efficacy, is a question of circumstance and degree.

Witness training was considered by Lord Justice Judge in *R v Momodou* and it was found that training to give comprehensible evidence and to develop the ability to resist the inevitable pressure

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of going further in evidence is allowed. It was stated that *"The critical feature of training of this kind is that it should not be arranged in the context of law related to any forthcoming trial, and can therefore have no impact whatsoever on it."* [5]

Witness Coaching

Witness coaching is unethical and rightly prohibited. It is the rehearsal or influencing a witness' evidence or responses, or "*the orchestration of the evidence to be given"* [6]. Coaching will occur *"when the witness' true recollection of events is supplanted by another version suggested by the interviewer or other party, whether by repetitive reading of a statement to the point where their testimony is mere regurgitation or by otherwise influencing the witness"* [7].

This common law position is reflected in the professional rules governing Australian legal practitioners. The Australian Solicitors' Conduct Rules 2015 – Rule 24 (Integrity of Evidence) provides a prohibition on the *"coaching"* of witnesses[8], as do the relevant barristers' regulations[9].

However, the precise determination of whether witness preparation amounts to coaching is not a simple exercise. It is a matter of degree and will depend on the facts and actions of parties, their respective knowledge and their conduct.[10]

Case Law

Having established the legal and ethical framework under which witness preparation must be conducted in the Australian courts (and legal system more generally) it is pertinent to turn to some cases to see what is (and what is not) allowed – to see where the fine ethical line was crossed, and the consequences of doing so.

Australia – Civil Proceeding

The first case we look at is the NSW Civil Case *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110[11]. In this case, solicitors were defending a personal injuries action by a ski lift operator who was struck by a wayward skier. The solicitors prepared a letter to one of the witnesses:

- Setting out questions that witness and other witnesses may be asked and the types of things they should say in response.
- Telling the witnesses to satisfy themselves that certain things were the case, in particular, things like:
  - The number of guests skiing that day.
  - The signage.
  - The distance to the stop button 'because we intend to adduce evidence that it wasn't too far…'
  - The general conditions at the ski lift that day.
- Telling that witness to tell another witness to familiarise himself with things which he doesn't know anything about.
- Asking that witness to pass the letter on to the other relevant witnesses[12].

Unsurprisingly, this was found to be witness coaching. It influenced the evidence to be given, and a new trial was ordered. The Defendant's solicitors were asked to show cause as to why the matter shouldn't be referred to the Legal Services Commissioner, and the matter was subsequently referred to the Commissioner[13].

Australia – Criminal Proceeding

A further relevant case is *Majinski – v – The State of Western Australia* [2013] WASCA 10[14]. This was a West Australian criminal case regarding sexual offences against a child. The identity of the defendant was likely to be an issue in the proceedings.

The complainant child had met with the prosecutor during which a "wide-ranging and comprehensive" discussion was had. The prosecutor:

- Showed the complainant an earlier interview with the complainant;
- Invited complainant to comment or respond to questions upon aspects of the evidence; and
- Showed the complainant a photo of the accused and asked him to identify him.

At the trial, the appropriateness of the prosecutor's conduct was called into question. It was found that:

- Showing the complainant a video of his previous evidence and speaking with him about his evidence and what he might be asked about did not cross the boundary of propriety[15].
- Showing photograph of the defendant when the issue of the defendant's identity was likely to be an issue was more problematic. It was inappropriate in the circumstances. However, there was found not to be any coaching because there was no prejudice to the evidence itself, primarily because the complainant stuck to his oral evidence regarding identification and was not influenced by the prosecutor's conduct[16].

It was held that the *"boundary of impropriety is only crossed if the course taken by the prosecutor has the effect of suggesting to the witness the evidence that should be given, either expressly or implicitly.*[17]*"* Thus, despite the inappropriate conduct by the prosecutor, witness coaching was avoided because the inappropriate conduct did not affect the evidence given.

English Case Law

Prosecution conduct was also in issue in the case of *R v Momodou* [2005] EWCA Crim 177[18], an English criminal case. This involved a riot by inmates at an immigration detention facility in UK. As part of the resulting criminal trial, various guards took sessions with a third-party witness trainer. This training was one of the grounds for appeal of the conviction.

As part of the training, the guards were set into groups of eight and given a "hypothetical" scenario to discuss. The "hypothetical" scenario was a riot at a fictitious immigration detention facility where they were also guards – effectively the same set of substantive facts. They also conducted "debriefing" sessions between groups of the guards on the actual evidence.

It was held that the training offered was *"wholly inappropriate and improper"* [19]. Of particular issue with the similarity of the case study and the fact that evidence was discussed in groups. However, in this case the improper training did not undermine the safety of the conviction because the jury was aware of the training programme conducted and the trial judge gave a strong warning to the jury of the evidentiary dangers involved with it[20].

Finally, we look to another English criminal case, *R v Salisbury* [2005] EWCA Crim 3107[21]. This was a murder trial in which one of the prosecution witnesses had attended a "witness familiarisation" training course provided by an independent third party witness training provider. One ground of appeal by the defendant was that the evidence provided by this witness was inadmissible on account of the familiarisation training course[22].

The course itself was delivered by a member of the Bar who was well aware of the ethical obligations surrounding witness preparation.

The witness on the course was told of the possible consequences of collusion and was forbidden to discuss their actual evidence. The training was not conducted in respect to facts of the case, nor anything remotely resembling them, rather the witness underwent a process of familiarisation with the pitfalls of giving evidence and was instructed how best to prepare for the ordeal of giving evidence under cross examination[23].

The court held that it *"was an exercise any witness would be entitled to enjoy were it available."* What the witness received was merely a knowledge of process involved which enabled the witness to give a sequential and coherent account. This was different from the objectionable coaching of witnesses[24].

Witness Training as part of Witness Preparation

While considering the ethical standards which must be met in the preparation of witnesses, these cases also look at the role of formalised witness training in the context of witness preparation. The rise of such training organisations is a relatively new innovation in Australia, however is common (and indeed best practice) in England and Wales where such training was developed.

Typically this training (like in *R v Salisbury* – above) is conducted by third party training organisations separately and independently of any underlying legal proceedings. Crucially, this training is not proofing or witness preparation by the witnesses' legal team or their department or organisation. Witness training is a separate service which complements this preparation, rather than replaces it[25].

Such training must of course adhere to strict requirements to ensure it complies with the ethical obligations demanded of practitioners and by the law more generally. Crucially this training is conducted independently. It is conducted by independent third party organisations with no knowledge of the underlying proceedings, using independent materials prepared prior to and with no knowledge of the underlying proceedings. This material is chosen by the independent third party. The instructor is an independent barrister – not only independent of any proceedings, but also governed by the relevant ethical conduct rules[26].

This strict focus on independence ensures that there can be no risk of coaching as there can be no risk of influencing the actual evidence to be delivered. Furthermore, it does not involve any discussion of underlying evidence itself by participants. This is strictly prohibited and discussion relates solely to the independent, hypothetical scenarios posed.

Such training, when done properly, will allow for an enhanced and improved level of witness preparation, beyond what the legal representatives and other stakeholders can provide, and in this way can help improve witness confidence and understanding. This allows the witness to present their own evidence to the court in a more coherent, confident and effective manner. This in turn benefits the court, which will be provided with an improved quality of evidence. It avoids the risk

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of legal team or other related party or organisation doing themselves and thus avoids any risk of real or perceived impropriety. In this way both the witness and their organisation can be assured that the witness will present in the best way possible.

This process *"may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness' own uncontaminated evidence.*[27]*"*

Some Common Themes

Some common themes arise from the above cases. At the outset we see the importance of witness preparation as part of any trial. It is essential that the witness is properly prepared and legal representatives and organisations go to great lengths to do so.

However, such preparation must not amount to witness coaching – it must not influence the evidence to be given. It (obviously) cannot tell the witness how to answer a question directly, but also cannot implicitly suggest this, such as through the provision of other relevant information, or constant rehearsal of responses. The witnesses cannot discuss their evidence between themselves, and care must be taken by their representatives and organisation to ensure this.

We can also see the wider effects of witness preparation – on the underlying proceedings and the relevant stakeholders. Unethical witness preparation will be censured. It may result in the loss of the proceedings, an appeal (and potentially acquittal or re-trial) and may even result in criticism of the witness, their representatives or organisation.

Conversely, we can also see how independent third party training providers can potentially benefit and assist legal representatives and organisations with training for individuals who will be giving, or likely to be giving evidence. There are specific requirements to ensure that this training is conducted within the ethical requirements (including in particular the requirement for independence) and when conducted properly they can be of great benefit to witnesses and stakeholders.

Conclusions

While there are many considerations in the preparation of witnesses for trial, it is essential that such preparation is done, it is done well, and that it is done ethically. A failure to properly prepare witnesses for trial may result in a nervous and incoherent witness, unable to effectively articulate their evidence to a court, and thus may appear unimpressive, unconvincing, or even evasive.

Conversely, a well prepared witness will be able to present their own evidence to the court in a more composed, coherent and effective manner, to the benefit of the court and the judicial process. Such a well prepared and confident witness will also reflect positively on their organisation or department, who can be reassured that their witness will present in the best way possible.

However, in preparing a witness it is essential that strict ethical boundaries are rigorously observed. Such preparation of witnesses can (and ideally should) involve proofing the witness. It can also involve discussing with witnesses (individually) the strengths and weaknesses with their evidence, and the evidence of opposing witnesses. However, it cannot amount to the suggestion to a witness of how to answer a question – any influencing of the evidence to be given. This is coaching. It is prohibited, and to engage in such conduct will result in censure of the witness, their legal team and potentially even their organisation, as well as adversely impact any proceedings they are involved in.

Additionally, third party witness training organisations exist to facilitate the training of individuals likely to be giving evidence in an ethical and effective manner. Crucially, these training providers and their trainers are independent – both of any underlying proceedings and of the witness' organisation itself. As such there can be no suggestion of coaching and the fine ethical line of witness preparation can be ensured.

About the author:

Tom Nevin is a practising solicitor and director at Loquitur, Australia's leading witness training provider. Tom is dual qualified in both Australia (Queensland) and England & Wales, and has practiced extensively across both jurisdictions. He has an expertise in litigation – primarily commercial litigation – and has worked in both private practice, in-house and in Government departments.

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3 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, Rules 24.2.2 and 24.2.3: https://legislation.nsw.gov.au/view/html/inforce/current/sl-2015-0244#sec.24

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16 Majinksi at para 41.

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19 Momodou at para 45.

20 Momodou at para 67.

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22 Momodou at para 55 onwards.

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24 At 60, citing paras 27 to 29 of the original unreported judgement.

25 https://loquitur.com.au/witness-skills/witness-skills-benefits/.

26 See, for example https://loquitur.com.au/faqs/.

27 Lord Justice Judge, in Momodou at para 62.

Some Ethical Issues for Legal Practitioners

November 19, 2015

JUSTICE JOHN GRIFFITHS

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1. I propose to deal with the preparation of witnesses for the giving of evidence.

Witness preparation

(i) ***When does ethical preparation become unethical coaching?***

2. There is a fine line between legitimate witness preparation and unethical coaching of a witness. Despite the difficulty of drawing that line, the courts insist upon its maintenance. Whether or not preparation amounts to unethical coaching is necessarily fact specific and involves matters of degree.
3. In *Re Equiticorp Finance Ltd* (1992) 27 NSWLR 391, Young J emphasised that the interests of justice require "very severe limits" being placed on legal practitioners in preparing a witness to give evidence.

There is no difficulty with a witness conferring with his or her lawyer, or the lawyer or the party calling the witness, and receiving proper advice regarding preparation for and the giving of evidence. Indeed, that practice is to be encouraged because, if it works properly, it will assist in the due administration of justice by limiting evidence to issues which are genuinely in dispute and save court time. Young J said at 395 of *Equiticorp* that such advice may include:

- advice that the witness should refresh his or her memory from
- contemporaneous documents;
- calling the witness' attention to points which might arise in cross examination;
- describing the court layout and likely procedure;
- directing the witness' attention to points in his or her evidence which appear to be contradictory or incredulous;
- reminding the witness to bring all relevant documents to court;
- advising witnesses as to the manner of answering questions, along the lines of advising that, in cross examination, listen carefully to the question, be directly responsive to the question and try to be as concise as possible; and
- giving advice as to appropriate dress and grooming (apparently matters of particular concern to his Honour).

4. Young J correctly emphasised the core requirement that solicitors should not advise a witness as to how particular questions should

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be answered (other than that the question should be answered truthfully) or suggest words which the witness should use.

5. In a case decided on the other side of Australia, Martin CJ described the difference between legitimate proofing a witness and impermissible coaching in the following terms in *Majinski v State of Western Australia* [2013] WASCA 10 at [32]:

> Questioning of the 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, whether by repetitive reading of a statement to the point where their testimony is mere regurgitation or by otherwise influencing the witness… A solicitor or counsel should not advise a witness as to how to answer a question… By way of example, in *Day v Perisher Blue Pty Ltd* the defendant's solicitors prepared an extensive document for the defendant outlining "possible areas of questioning (to be passed onto the prospective witnesses)" and included suggestions as to appropriate responses which would be in line with the defendant's case. This conduct, alongside the holding of a pre-trial conference by the practitioner in which multiple witnesses jointly discussed evidence to be given at trial, was held to seriously undermine the trial and "tainted" the defendant's case.

6. Some experienced practitioners provide prospective witnesses with written guidance notes on preparing and giving evidence. I think this is a good idea. It provides the witness with a clear statement of relevant matters (which they can review at convenient times) and minimises the risks of any misunderstanding. The sorts of matters which could be covered in such a document include:

    the overarching requirement that witnesses must give truthful evidence at all times, even if they think that this could be prejudicial to themselves or the overall case. Very often a witness' perception of what is prejudicial is misguided. Few things impress a court more than a witness who candidly admits to error and does not shy away from frankly answering questions which expose seemingly adverse matters;

    the duty to provide responsive answers to questions. It should be made clear, however, that this does not preclude the witness saying in appropriate circumstances that he or she cannot remember or does not know. Emphasise the undesirability of the witness effectively taking over the role of counsel from the witness box by giving non-responsive answers to questions or seizing on a particular question to advance what the witness regards to be his or her case by proffering more by way of answer than is strictly required;

    the desirability of providing concise answers to questions and avoiding the danger of trying to anticipate where a cross examination is heading: like cricket, every ball/question should be dealt with on its merits;

    encouraging the witness not to be afraid to ask the cross-examiner to repeat or rephrase a question which the witness does not understand. It is critical that the witness fully understand a question before a response is given. A brief pause before answering a question will not only provide the witness with an opportunity to assess whether they properly understand the question but will also provide counsel with an opportunity to object to the question before it is answered;

    encouraging the witness to familiarise themselves with their affidavit or witness statement before the hearing. It is also generally proper for a witness who has prepared a statement contemporaneously with, or soon after, an incident in respect of which he or she is asked to give evidence to review that statement prior to giving evidence (see, for example, *R v Pachonick* [1973] 2 NSWLR 86 and *Majinski* at [30] per Martin CJ, with whom Buss and Mazza JJA agreed);

    providing advice on the fact that the witness could be compelled to produce any documents brought into the witness box by the witness and to which he or she refers, including a copy of their affidavit or witness statement, particularly if it contains handwritten annotations or musings;

    if the witness gives an answer and subsequently considers that the answer is incomplete or requires elaboration, advise them to raise the matter with the cross-examiner and/or the Court and seek permission to give further evidence on the relevant topic. Even if leave is not granted, the witness will have conveyed the need for the issue to be raised in re-examination;

    explaining the need to give evidence in direct and not indirect speech, a practice which does not come easily to many witnesses who frequently start their answers with "I (or someone else) would have said…." or "I would have done…". A few concrete examples should highlight the distinction. By the same token if the witness is asked to say what they or someone else said on a particular occasion and they do not have a clear recollection of the precise words, they should say so and then indicate their best recollection of the thrust of what was said;

    providing a brief description of the choice between giving evidence on oath or affirmation and the layout of the court, including the location of the witness box in relation to the bench and bar table and the desirability of the witness seating themselves in a way which enables them to achieve some eye contact with the judge, bearing in mind that it is the judge to whom the evidence is primarily directed, not the cross examiner;

    reassure the witness that if there is likely to be a lengthy cross-examination he or she should not feel inhibited about asking the judge for a brief adjournment if their concentration is suffering or for more personal reasons;

    reminding the witness of the prohibition on them discussing their evidence with other prospective witnesses in the proceeding and also describe the constraint upon any communication with legal advisers while the witness is under cross-examination;

    also remind the witness that they must never look to their legal team

for any prompts or assistance by way of body language or gestures while they are giving evidence, all lawyers should remain sphinx-like during the giving of oral evidence, as well as when an oath or affirmation is being administered;

describe the process of re-examination, which attracts many of the principles described above, while also stating that the witness should not be alarmed or draw any inference if there is no re-examination; and

above all, urge the witness to remain as calm and collected as possible and that the potentially unpleasant experience of giving evidence will soon be over!

7. Particular issues may also arise in the case of a child witness, where the danger of suggestion is especially acute (see the discussion in *Majinski* at [29]-[42]).

(ii) Relevant Australian legal profession rules

8. There are professional and ethical rules relating to the integrity of evidence which bind both solicitors and barristers. Under the Professional Conduct and Practice Rules (Solicitors Rules) 2013, which commenced on 1 January 2014, there are various rules relating to the prohibition on a solicitor influencing evidence as well as other rules which are directed to maintaining the integrity of evidence.

9. The relevant Solicitors' Rules are as follows:

24. Integrity of evidence – influencing evidence

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

25. Integrity of evidence – two witnesses together

25.1 A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time:

25.1.1 about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing; and

25.1.2 where such conferral could affect evidence to be given by any of those witnesses,

Unless the solicitor believes on reasonable grounds that special circumstances require such a conference.

25.2 A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

26. Communication with witnesses under cross-examination

26.1 A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination, unless:

26.1.1 the cross-examiner has consented beforehand to the solicitor doing so; or

26.1.2 the solicitor:

(i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;

(ii) has, if possible, informed the cross-examiner beforehand of the solicitor's intention to do so; and

(iii) Otherwise does inform the cross-examiner as soon as possible of the solicitor having done so.

27. Solicitor as material witness in client's case

27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

10. The comparable rules under the current NSW Bar Rules (which commenced on 6 January 2014) are as follows:

Integrity of evidence

68. A barrister must not:

(a) advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

(b) coach a witness by advising what answers the witness should give to questions which might be asked.

69. A barrister will not have breached Rule 68 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the

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evidence which the witness believes to be true.

70. A barrister must not confer with, or condone another legal practitioner conferring with, more than one lay witness including a party or client at the same time:
    (c) About any issue which there are reasonable grounds for the barrister to believe may be contentious at a hearing, and
    (d) Where such conferral could affect evidence to be given by any of those witnesses,

Unless the barrister believes on reasonable grounds that special circumstances require such a conference.

71. A barrister will not have breached Rule 70 by conferring with, or condoning another legal practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

72. A barrister must not confer with any witness including a party or client called by the barrister on any matter related to the proceedings while that witness remains under cross-examination, unless:
    (e) the cross-examiner has consented beforehand to the barrister doing so; or
    (f) the barrister –
        (i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;
        (ii) has, if possible, informed the cross-examiner beforehand of the barrister's intention to do so; and
        (iii) Otherwise does inform the cross-examiner as soon as possible of the barrister having done so.

Group witness conferences and unethical coaching

11. Apparently it is not an uncommon occurrence in the USA to conduct mock cross examinations prior to trial. There is a distinct danger that such behaviour could be regarded in Australia as constituting unethical coaching.

12. Those dangers are highlighted by the English Court of Appeal's decision in *R v Momodou* [2005] 2 All ER 571. The case involved an appeal against a criminal conviction for violent disorder. A group of security staff were crucial witnesses for the prosecution and also potential witnesses in a related civil claim brought by their employer. The employer arranged training for the witnesses which involved the witnesses forming groups of 8 to discuss case studies with strong similarities to the pending proceedings; to take part in sessions explaining the theory, practice and procedure of giving evidence and to participate in mock cross examinations on real-life experiences unconnected with the subject matter of the proceedings. The Court of Appeal made the following observations at [61]:

    > There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings… is not permitted.

13. The Court explained the rationale for such a distinction on the basis that it:

    > …reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so…the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant.

14. The Court made clear at [62] that this principle did not preclude pre-trial arrangements to familiarise the witness with the layout of the court, the likely sequence of events in giving evidence, and a balanced appraisal of the different responsibilities of the various participants. It added:

    > … equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, for example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witness' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of law related to any forthcoming trial, and can therefore have no impact whatsoever on it.

15. The potential pitfalls associated with multiple witnesses getting together before or during a trial are also highlighted by the NSW Court of Appeal's decision in *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731. It emerged during the course of the trial that the defendant's solicitors had held a pre-trial teleconference with their client's senior management and witnesses. During the conference, the evidence of each witness was discussed at some length and reviewed. Following the teleconference, one witness received a letter from the solicitors outlining the matters all the witnesses were expected to address, the sorts of questions that they could each be asked during the cross-examination ***and, significantly, the responses they should give.*** The letter was also circulated among the other witnesses but it was unclear whether that was done by the solicitors or by the first recipient of the letter. The evidence also demonstrated that the witnesses had discussed the contents of their witness statements while staying at the same hotel, both before and during the trial. That conduct drew the following observations by the Court (Sheller and McColl JJA and Windeyer J) at [30]:

    > It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss

their evidence with others and particularly not with other potential witnesses. For various reasons, witnesses do not always abide by those instructions and their credibility suffers accordingly. In the present case, it is hard to see that the intention of the teleconference with witnesses discussing amongst themselves the evidence that they would give was for any reason other than to ensure, so far as possible, that in giving evidence the defendant's witnesses would all speak with one voice about the events that occurred. Thus, 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. This seriously undermines the process by which evidence is taken. What was done was improper.

16. The Court of Appeal ordered the defendant's solicitors to show cause why the proceeding should not be referred to the Legal Services Commissioner (at [37]). In the 'show cause' hearing (*Day v Perisher Blue Pty Ltd (No 2)* [2005] NSWCA 125) the two solicitors for the defendant who were responsible for the conduct of the proceeding deposed that the purpose of the teleconference was to deal with matters concerning court procedure and protocol and practical arrangements relating to the witness' attendance at court. The solicitors said that they did not recall discussing the contents of the witness statements or the likely evidence, and they did not intend that their letter be distributed to other witnesses.
17. Ultimately, the Court found that it was not dissuaded from sending the relevant papers to the Legal Services Commissioner for further investigation.

(iii) Expert witnesses

18. Related problems can occur with preparing expert witnesses. In *Road Corporations v Love* [2010] VSC 253 a meeting was held between the respondent, the respondent's lawyers and a number of experts engaged by the respondent for the purpose of a briefing relating to the proceeding. In cross-examination it emerged that at the meeting one of the experts strongly emphasised the quality of the stone resource on the land, a critical issue in the proceeding. There was general discussion at the meeting to "flush out any problems with an aim to get everyone in accord with the position that there was a quarry which should be valued as such" (at [16]).
19. At [38] Vickery J found that this meeting:

    …fell into the species of the conduct described in Perisher Blue [at [30]] insofar as it went beyond the mere provision of factual information… Even if the meeting was confined to the provision of purely factual information for the assistance of the experts, a meeting of this kind was an inappropriate vehicle to have used to impart such information. It would run the 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. In the circumstances of this case, the meeting of 14 March 2006 was improper.

20. However, Vickery J went on to note at [40] that "not all pre-trial meetings of witnesses will be improper in this sense. At least the following three classes of case may be acceptable:
    (a) It has been common in Australia across many fields of practice for expert witnesses to prepare draft reports and for those drafts to be exchanged between experts where the opinion of one expert depends upon information to be provided by others. If this occurs, such drafts may be called for when the expert is giving evidence. Successive drafts may also be called for and examined upon.
    (b) Meetings may be convened for the purposes of lawyers being provided with information which in turn is provided to a party with legal advice. Communications occurring at such a meeting may retain legal professional privilege.
    (c) Where expert evidence is adduced, the Court may direct under the relevant rules of court that the experts for both or all sides confer before trial with a view to identifying areas of agreement and subjects which remain in controversy.

Cut and Paste Credibility Evidence

September, 2016

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Introduction

1. This paper explores the law in relation to allegations of witness contamination in legal proceedings from a witness copying another's statement (i.e. "cutting and pasting") or if the witness simply looks at the evidence of another.
2. Copying written material has a pedigree well before word processing. Think of the monks in the Middle Ages who laboriously copied the Bible by hand. However with the advent of word processing, copying, for monks, and ordinary people, is now easier.
3. Coping of witness statements has occurred in both civil and criminal cases. There seem to be two major culprits. Firstly Police, and the main critics of the practice, Lawyers.

The Law

Criminal Cases - Police copying

4. Police are adept at using the word processor; hint they also know how to email statements.
5. The copying by police of other police statements has a pedigree well before the advent of Word.
6. In *R v Bass* [1953] 1 QB 681 police officers produced near-identical accounts of an interview of a suspect. They were cross-examined and they denied copying. The Court said this (at p. 686):

   > This court has observed that police officers nearly always deny that they have collaborated in the making of notes, and we cannot help wondering why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper when two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.

7. That logic, I would have thought, is debatable. However while it might be counterintuitive that different rules could apply to different witnesses, even to the same events the following has been said to justify the practice.
   (a) Because police have an investigatory function they need to confer in relation to evidentiary matters.
   (b) As a consequence of being constantly involved in incidents police need to refresh themselves to remember them.
   (c) Police will not immediately know which matters will be contentious (i.e. a plea of not guilty) and to require them to spend more time on statements and notes detracts from spending time catching criminals.
   (d) Finally as a practical issue of self-protection. Criticisms of the use of force will always be made of police and no other job, apart from the military, has the same exposure to criticism from the use of force.

Operation Barmouth

8. It is convenient to start with the report to the NSW Parliament by the Police Integrity Commission entitled "Operation Barmouth (the "Report")1. The Report provides valuable discussion in relation to issues of police "cross –contamination".
9. Operation Barmouth arose out of events occurring in Ballina in 2011 and the arrest of Cory Matthew Barker.
10. Basically Mr. Barker was arrested by police and at the police station there was an allegation that he punched one Senior Constable Hill in the nose. All but one police officer (whose reluctance to write a statement can be more ascribed to laziness rather than to altruistic whistle-blowing) made statements giving similar versions of the punch, some with nice details.
11. Barker was charged with punching Hill in the nose.
12. CCTV footage from the police station, that should have shown the incident, was faulty.
13. The matter came on for hearing and the learned Magistrate (Heilpern) ordered the CCTV to be looked at by NSW Police Force Special Technical Investigation Branch to see if it could be recovered.
14. The Special Branch managed to retrieve the footage and by all accounts it did not show a punch to the nose. At least not against police.
15. The Report noted extracts from the NSW Police Force Handbook (and other internal police guidelines) in relation to police preparing statements. Broadly speaking those police guidelines instruct police that corroboration and collaboration between police in the preparation of their statements is acceptable provided each statement is that office's own account of the incident and the officer acknowledges any materials that he or she has used in making their statement.
16. The Report widely discussed the English decision of Underhill J in *R (on the application of Saunders) v Independent Police Complaints Commission* [2008] EWHC 2372.

Parliament House, Canberra

17. *Sauders* was a case involving judicial review of an investigation by the Independent Police Complaints Commission of two police shootings. In that case it was noted at [11]-[12]:

> Police officers routinely have to write accounts, as soon after the events in question as possible, of incidents in which they have been involved or which they have witnessed ("first accounts"). Typically the first account of an incident will be written up in the officer's pocket-book, although that may subsequently be followed by a more formal statement for use in court or otherwise; and in some circumstances an officer may proceed straight to a formal statement without an intermediate note.
>
> There has never been any prohibition in English law, or as a matter of police practice, on police officers who have been involved together in an incident speaking to one another about their involvement before they give their first account. Not only may they confer in the immediate aftermath - as would be entirely natural and may often be necessary for operational reasons - but they may collaborate in the writing up of the first accounts themselves.

18. The danger of conferring and contamination was well set out in *Saunders:*

> The acceptance of this practice - which was referred to before me comprehensively as "conferring", although it might in fact be more useful to distinguish between "mere" conferring and actual collaboration in the production of notes or statements - obviously has the potential to impact on the value of evidence which an officer may subsequently have to give about an incident. That evidence will often depend very heavily on the officer's first account, to which he will be allowed to refer in giving his evidence. However much an officer who has conferred with colleagues may strive to record only what he has seen or heard for himself, there is a real risk that his recollection will have been "contaminated" by what he has been told; and he may in perfect good faith incorporate elements in his own account which have in fact derived from other witnesses, or subconsciously suppress elements which seem to him inconsistent with their accounts. That is a matter of common sense and common experience, but it is confirmed by psychological studies (helpfully reviewed and summarised in the recent paper published by the Research Board of the British Psychological Society entitled *Guidelines on Memory and the Law:* see in particular section 6.ii).
>
> There is also the risk that, quite apart from such innocent contamination, officers collaborating in producing their notes or statements may be tempted deliberately to produce an account which does not accurately reflect the individual recollections of each. Such collusion may involve no more than the smoothing out of minor inconsistencies which the officers fear may lead to the evidence being regarded as unreliable (though the unsophisticated belief that inconsistencies always diminish the credibility of evidence is in fact wrong); but it may sometimes involve substantial distortion or fabrication. Collusion of the latter kind is no doubt rare, but it is a very serious matter when it occurs. (I should add that

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although the distinction which I have drawn between innocent contamination and deliberate collusion is conceptually clear, its application may of course be a lot less clear in particular cases.) Similar risks of contamination are of course well-recognised in other contexts: see e.g. *R v Richardson* [1971] 2 QB 484 (at p. 490 B-C - witnesses not to be shown each others' statements before giving evidence); R *(Green) v. Police Complaints Authority* [2004] 1 WLR 725 ([2004] UKHL 6) (risk of "trimming" if complainants see other witnesses' statements - esp. *per* Lord Rodger at para. 71, pp. 747-8); and *R v Momodou* [2005] 1 WLR 3442 ([2005] EWCA Crim 177) (witness coaching- see esp. para. 61, p. 3453).

19. Paragraph 61 of R v Momodou is as follows:

> There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See Richardson [1971] CAR 244; Arif, unreported, 22nd June 1993; Skinner [1994] 99 CAR 212; and Shaw [2002] EWCA Crim 3004.) 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 the 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. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, 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. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. 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. So we repeat, witness training for criminal trials is prohibited.

20. However in *Saunders* it was noted that an “uncontaminated” first account of an incident is not necessarily more accurate than an account produced after discussions; at[15]. The court was unwilling to endorse a general prohibition on police conferring. It noted that the risk to the quality of the evidence by conferring can vary greatly. It also noted practical considerations; that a “ban” could be difficult to enforce and would, in many cases, have serious operational disadvantages. Also the theoretically optimal practice of notetaking could be cumbersome; see [16].

Australian Authorities

NSW

21. In *The State of NSW v Houda* [2005] NSWSC 1053 Cooper AJ held that the weight to be given to police officers using statements from other police was “seriously diminished”. The relevant portion of the judgment is as follows [246] –[247]:

> All of the police officers said that they saw nothing wrong with using the notebook or statement of another police officer in order to assist them in preparing their own statements. They emphasised that it was merely to help them refresh their memory and if something was said with which they did not agree they would not have adopted it as part of their own statement.
>
> The fact, however, is that what each of the officers was doing was not writing down something that was his/her own independent recollection. What they were doing was accepting the recollection and statements of Constable Stebbing as their own recollection. This practice overlooks the fact that in relying upon another officer’s statement as to the details of conversations there is a real danger of it being accepted as correct even though the personal recollection of the writer of the statement may be unclear or slightly different.
>
> Furthermore, the value of evidence as corroboration is seriously diminished when that evidence is all based upon a statement of the witness sought to be corroborated.

Western Australia

22. The issue was dealt with by Johnson J in the Supreme Court in *Heanes v Herangi* (2007) 175 A Crim R 175. Mr Heanes was found guilty in the Magistrate’s Court of disorderly conduct. Police had approached Mr Heanes after it was said that he deliberately walked into one of them crossing a road. While being questioned Mr Heanes’s phone rang and he took the call. Police asked him to get off the phone, to which Mr Heanes loudly said “I am on the phone. I am on the phone. I’m fucking talking to my dad. Fuck off”. Mr Heanes was then arrested.

23. Johnson J rejected an appeal against conviction. One of the grounds of the appeal was that the evidence of the police officers should have been rejected, as inadmissible because one of the police officers had used the other one’s statement as a template in making her own statement.

24. Unsurprisingly Her Honour rejected this argument and decided that the issue of collaboration was a question of weight. Her Honour made the following comments:

> It would be naïve to suggest that witnesses do not discuss with others events which are significant or important to them. Witnesses make complaints to others who might question them and to police officers who participate in obtaining a statement from the witness. With respect to police officers, in many cases it will be necessary to discuss the circumstances of an incident with a fellow officer in order to determine the extent of the available evidence and whether charges should be laid. There are a multitude of circumstances with the potential to affect a witness's account of a particular event. If the absence of discussion with another were the criteria for admissibility there would be little available evidence.
>
> Of course, the type of discussion or collaboration which occurred in this case, and which is the subject of the appellant's submission, is with another person with actual knowledge of the event as a result of which there is the potential for one person's recollection to be influenced by the other person's recollection of events. However, police officers who take statements from witnesses often also have knowledge of the event. That, too, would be a situation where there is the potential for the witness's recollection to be influenced by the person preparing the statement. If the potential for personal recollection to be influenced provides a basis for excluding evidence, the effect of such a principle would be far-reaching indeed.

25. However Johnson J seemed to go further and condoned collaboration, even with respect to contentious matters, at [87]-[88]:

> With respect to contentious matters, provided that police officers are aware that they may reproduce the recollection of another officer only if it accords with their own recollection, I can see no problem with using the statement of another officer as a template from which to produce their own statement...
>
> I consider the practice adopted to be a legitimate and efficient method of preparing witness statements, provided the content of the statement is in accordance with the particular officer's recollection of events; something which should be tested in cross-examination as it often is with lay witnesses.

26. Johnson J indicated comments in *Houda* were case specific.

Civil Cases

27. In the matter of Colorado Products (in prov liq) [2014] NSWSC 789 Justice Black set out various matters in circumstances where a "cut and paste" was involved, at [16]:

> … It does not seem to me to matter whether the identical passages in Helen's and Kenneth's affidavit evidence was the result of collusion between the witnesses personally or was the result of Helen's adopting evidence that had been copied from Kenneth's affidavit, or Kenneth's adopting evidence that had been copied from Helen's affidavit, since each substantially devalues both witnesses' affidavit evidence where no explanation has been given of what occurred. It is not possible for the Court to be satisfied in this situation, in my view, that Helen's and Kenneth's evidence reflects a genuine recollection of events….
>
> *In Seamez v McLaughlin* [1999] NSWSC 9, Sperling J concluded from the high degree of similarity in content, detail, terminology and sequence between the affidavits of three witnesses that they could not have come into existence without direct or indirect collaboration and observed at [40]) that:
>
> "[a]cceptance of one of the three accounts of the events ... means not only that the other two are not genuinely recollected, independent accounts. It also means that the authors of those other accounts have misstated the way in which their respective accounts came into existence, and seriously so. The credit of the others would then be worthless."

28. His Honour further noted at [18] – [19]:

> I accept that, in some cases, the courts have taken the view that difficulties of this kind do not render the credit of a witness worthless, although they require care before accepting the evidence of one or other of the witnesses: *Macquarie Developments* above at [89]-[91]; *Rosebanner Pty Ltd v Energy Australia* [2009] NSWSC 43; (2009) 223 FLR 460 at [324], [326] per Ward J; *Celermajer Holdings* above at [183]-[189]. In this case, where the difficulties relate to the most important disputed conversations and where the manner in which they arose remains unexplained by the Plaintiffs, I consider that they substantially devalue the weight to be given to the affidavit evidence of each of Helen and Kenneth as to those matters, to the point that neither's affidavit evidence can be treated as reflecting a genuine individual recollection of events as distinct from a collective reconstruction of them.
>
> These difficulties are exacerbated by the fact that Kenneth was provided by the Plaintiffs' solicitors, prior to his cross-examination, with access to the transcript of Helen's cross-examination, although he claimed in cross-examination that he had read only some parts of that transcript (T328). This further undermined the likelihood that Kenneth could give independent evidence under cross-examination.

29. In civil cases it appears that lawyers, in particular are often the culprits; but this still affects the evidence. In *Macquarie Developments v Forrester* [2005] NSWSC 674 Palmer J observed (at [89] - [90]) that:

> Clearly, the Defendants' solicitor failed to appreciate that the evidence of each witness must be in the words of that witness and that it is totally destructive of the utility of evidence by affidavit if a solicitor or anyone else attempts to express a witness' evidence in words that are not truly and literally his or her own.
>
> Save in the case of proving formal or non-contentious matters, affidavit evidence of a witness

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which is in the same words as affidavit evidence of another witness is highly suggestive either of collusion between the witnesses or that the person drafting the affidavit has not used the actual words of one or both the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason.

30. In Celermajer *Holdings Pty Ltd v Kopas* [2011] NSWSC 40, Justice Ward took this up and noted, at [186]:

    … even if there has not been collusion as such between the witnesses, in the sense of changing their evidence to make it fit with that of another, the fact that the affidavits may not contain the actual words of one or other of the deponents devalues their evidence.

31. In another case, *Rosebanner Pty Ltd v Energy Australia* [2009] NSWSC 43 Her Honour also observed at [334]:

    At the very least, the way in which Mr Lyons' affidavit evidence was prepared must give rise to doubts as to whether that evidence represented his own views uninfluenced by Mr Wawn. While I accept it likely that Mr Lyons expressed to Mr Wawn in no uncertain terms what he recalled of the meeting, the fact that Mr Wawn cast (or perhaps recast) it in such substantially similar terms can be consistent only with the pair having near perfect and later, (which seems unlikely, particularly as the way in which Mr Lyons identical recall of a particular conversation, some two years gave evidence was not in such formal language) or did so in collaboration with each other to an extent which must devalue the weight of their evidence.

Discussion

32. For all that might be said about the decision in Heanes there is a point that comments made by judges about witness collaboration do have to be read in the context of the actual decisions being made. How the witnesses is otherwise viewed may be an important factor in the weight that is given to the conferring of a witness.
33. In relation to credibility (whether focused in veracity or reliability) it is for the tribunal of fact to assess whether it accepts a witness. The law has always held that the tribunal of fact need not accept everything that the witness has said nor reject it all, but one thing a Judge must do is give reasons.
34. It seems to me that the following observations can be made:
    (i) Whether a witness has conferred with another witness will be a question of weight not admissibility.
    (ii) Distortion of evidence can occur from conferring; and this can be conscious or unconscious.
    (iii) Conferring on uncontentious matters is often seen as acceptable and possibly advantageous (although this begs the question; what is "uncontentious"?).
    (iv) There might be operational or investigatory reasons why police will need to confer between themselves as potential witnesses.
    (v) Witnesses should set out the sources they have used in making their statements particularly on contentious matters.
35. I do not think many practitioners, and the weight of authority, would readily endorse the general acceptance of Her Honour in *Heanes* of police using statements as "templates"; but this approach may be closer to reality and human nature than the reverse.

Addition matters - Proof matters and some tips.

36. The proof of whether a witness has been influenced by another relies upon opportunity. In both a criminal and civil context the relationship will normally provide the opportunity for collaboration to occur.
37. Check whether a statement has been copied simply by checking the words, spelling and grammar.
38. A lot can be taken from the form of a statement as opposed to its substance. For instance the date it was created, who witnessed the statement, the language and grammar as well as the setting out of ideas in the statement.
39. For instance in relation to the setting out of ideas, it may or may not be remarkable that another witness has dealt with the similar ideas in the same sequential order as another witness.
40. Also if a witness appears to have limited English in the witness box, the very fact of their written language or grammar, in a statement can be important; and this applies equally to people of English speaking backgrounds.
41. In my experience I can't really remember coming across two witnesses similarly misspelling the same unusual word which is an example often used to show collaboration. However I have often come across, detailed conversations, which are either word for word, or near word for word. How can this happen without conferring?
42. Also in my experience police officers are quite reluctant to acknowledge their use of each other's statements. However it seems more common nowadays for police is to say that they have referred to the fact sheet (a COPS event entry) or to their notebook in making a statement.
43. Remember the "Fact Sheet " is likely to have been written by the Officer in Charge (i.e. it is the same as looking at some else's statement). See whether it has conversations recorded in it because otherwise a cut and paste must have come from other material. One tip for the common answer from police that they "cannot remember whether they saw anyone else's statement" is to cross-examine on the police guidelines. The answer "I can't remember" seems a bit disingenuous to me if they acknowledge they follow the guidelines; as the real answer should either be yes or no; and if they don't follow the guidelines what do they follow? Also why, if they mention the fact sheet, would they not remember reading someone else's statement at that time? Also see above, police can email statements.
44. While this may make interesting cross-examination, my experience is that unless a Judge has another reason to doubt evidence, conferring is normally tolerated.

Exploring The Influence of Courtroom Questioning and Pre-Trial Preparation on Adult Witness Accuracy

In adversarial systems considerable faith continues to be placed in the capacity of cross-examination to expose flaws and errors in witness testimony.

ELLISON, L. & WHEATCROFT, J.M.

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At the same time, a substantial body of research suggests that questioning techniques commonly used in cross-examination can both mislead and confuse witnesses – children and adults - undermining the accuracy and completeness of evidence presented in legal proceedings (for discussion see Ellison, 2001; Wheatcroft & Wagstaff, 2003). Court observation and analysis of trial transcripts have, for example, revealed how witnesses are commonly confronted with complex questions containing multiple parts, negatives, double-negatives and advanced vocabulary and/or legal terminology (Brennan & Brennan, 1988; Kebbell et al, 2003, Taylor, 2004; Zajac & Cannan, 2009). Unsurprisingly, studies indicate that such questions can be difficult to decipher and respond to with accuracy (Perry et al, 1995; Kebbell & Giles, 2000; Wheatcroft et al, 2001; Wheatcroft et al, 2004; Zajac & Hayne, 2006). Leading questions which contain pre-suppositional statements and often implicitly demand a 'yes' or 'no' response have similarly been shown to have an adverse influence on accuracy when compared to more open questioning strategies (Loftus, 1975; Gudjonsson, 1992).

In England and Wales, witness familiarisation courses aim, inter alia, to acquaint witnesses with the standard questioning techniques employed by lawyers in the course of cross-examination and to provide witnesses with practical advice on how best to approach the interaction (Bond & Solon, 1999; Stockdale & Gresham, 1995). Despite a cautious view of witness familiarisation, the courts have endorsed this practice, approving the right of barristers to prepare witnesses for the experience of giving evidence (R v Momodou [2005] 2 All ER 571). Exponents maintain that pre-trial preparation has a beneficial impact on the ability of inexperienced witnesses to monitor comprehension of lawyers' questions and provide accurate testimony (for discussion see Ellison, 2007). More specifically, familiarisation is said to put witnesses 'on their guard' with the result that they are more likely to seek clarification and less likely to be confused or unduly influenced by the form of cross-examination questions.

In a context in which witness familiarisation has attracted little empirical attention, this Arts and Humanities Research Council funded project sought to evaluate the basis of these claims.

Summary of Key Findings

- The use of complex vocabulary and syntax during cross-examination was associated with reduced adult witness accuracy
- Prepared witnesses were significantly more likely than their unprepared counterparts to provide correct responses to cross-examination questions
- Prepared witnesses were additionally more likely to seek clarification during cross-examination
- Prepared witnesses were typically appreciative of the guidance they received prior to questioning

Method

Sixty adult participants recruited from the community watched a 5 minute video depicting a criminal offence and were then individually cross-examined about its contents according to four conditions by a qualified barrister in a mock courtroom environment. Participants in Group One underwent a 'lawyerese'-scripted cross-examination, containing complex vocabulary, leading and multipart questions and double negatives. In Group Two, participants underwent a simply phrased cross-examination which – while containing leading and multipart questions - employed less complex vocabulary and contained no double negatives but was otherwise identical to the lawyerese script. After viewing the video event and prior to questioning, Groups Three and Four received a leaflet entitled A Guide to Cross-examination. In outline, this document contained a short explanation of the two-fold function of cross-examination - to test evidence and elicit information favourable to the cross-examiner's case - and practical guidance to assist participants when answering questions which included directions to listen carefully to questions, to ask for clarification if a question was not fully understood and to answer all questions truthfully. The leaflet also included an example of a leading question, a question containing a double negative and a multipart question, and, in reference to leading and multipart questions, advice that participants should not agree with a suggestion ventured by the cross-examiner unless it was accurate. Participants in Group Three then underwent the same scripted cross-examination as participants in Group One while participants in Group Four underwent the same scripted cross-examination as participants in Group Two.

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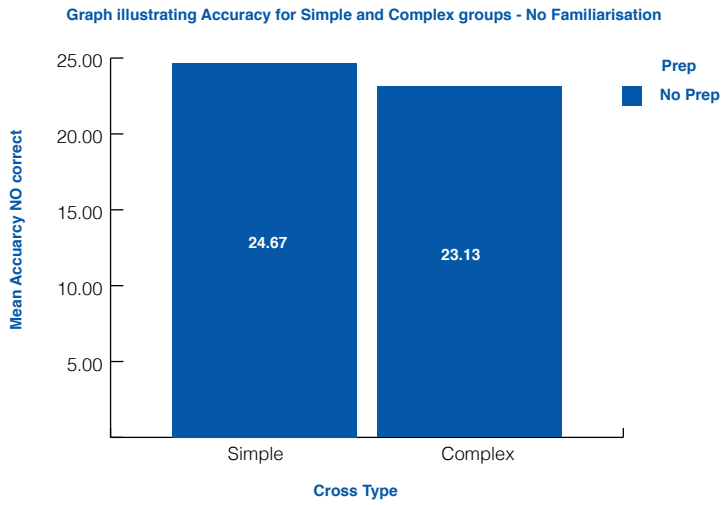
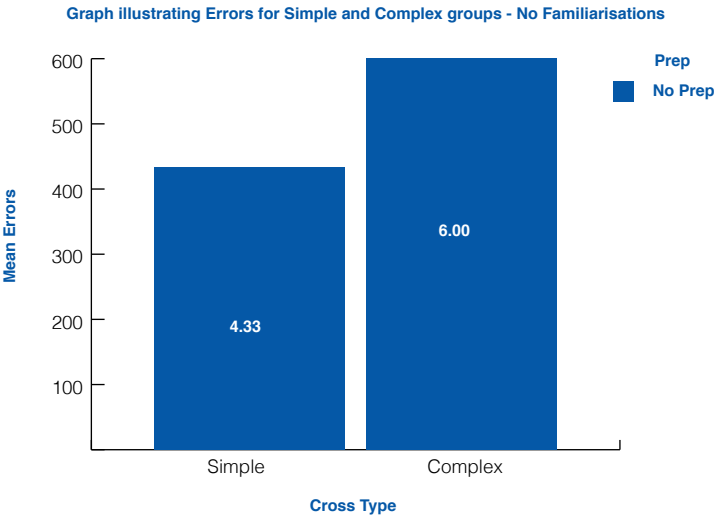
The cross-examinations were recorded, transcribed and scored for accuracy.

With the exception of multipart questions, a simple scoring system was adopted with participants scoring 0 for an incorrect answer and 1 point for a correct answer. When answering multipart questions, participants scored 0 for an incorrect response, and were awarded one point for each part answered correctly. If a participant responded with an 'I don't know' or 'I don't remember' response, the answer was recorded but scored as neither correct nor incorrect. Each participant was asked 28 questions and, following this scheme, participants could achieve a maximum accuracy score of 35 and a maximum error score of 28. Finally, the number of times participants asked for questions to be repeated or rephrased was recorded. As well as analysing cross-examination responses, further relevant data were gathered from two questionnaires. In the first questionnaire (completed prior to watching the video event) participants provided basic demographic information including gender, age, occupation and educational level. In the second questionnaire (completed after cross-examination) participants were invited to comment on their experience of cross-examination and, where appropriate, evaluate the helpfulness of the guide to cross-examination leaflet.





Outline of Key Findings

Witness Performance in the Absence of Familiarisation

Consistent with previous research, lawyerese style questioning was associated with reduced witness accuracy in the present study, as evidenced by mean accuracy and error scores. Participants in the complex-no familiarisation condition achieved an overall mean accuracy score of 23.13 and a mean error score of 6.00 (90 errors in total). Meanwhile, participants in the simple-no familiarisation condition made significantly fewer errors (65 in total), scoring a mean error score of 4.33 and an overall mean accuracy score of 24.67.

Comparing scores for individual questions, our results specifically show that participants were generally less accurate when responding to questions containing complex vocabulary and that accuracy scores decreased further when advanced vocabulary was combined with complex syntax (e.g. double negatives). Leading multipart questions (which featured in both conditions) additionally proved problematic as participants often answered such questions as if only one answer was required. Also noteworthy is the fact that participants in Groups One and Two were more likely to agree than disagree with propositional statements contained within leading questions with negative consequences for witness accuracy. This finding concurs with previous research which indicates that adults are potentially susceptible to suggestive questioning techniques of the kind used routinely in cross-examination especially when quizzed about peripheral details or facts about which they are uncertain. (Gudjonsson, 1992).

While our participants evidently failed to understand or follow some questions asked during cross-examination, requests for clarification were exceptional across the complex-no familiarisation condition (n =1) and the simple-no familiarisation condition (n =1). Questionnaire responses revealed two main reasons for this result. A sizeable number of participants indicated that they were simply "too intimidated" to signal their confusion or were inhibited by the quick-fire pace of cross-examination. At the same time, many participants indicated that they had not sought clarification as they had, to their mind, "fully understood" all the questions they had been asked. An examination of individual accuracy scores nevertheless revealed that respondents falling within this category made numerous errors when responding to complex questions and often failed to spot the different components of multipart questions. These results suggest, in turn, that adult witnesses may frequently fail to identify confusing questions asked during cross examination.

The Effects of Familiarisation

Mean accuracy (number correct) for each condition was compared across the conditions (cross-examination type and preparation) by means of a 2 (complex

/ simple) x 2 (preparation / no preparation) ANOVA. A significant main effect of preparation was found, F= 6.97 (1,56), p< .02. Correct responses were found to be higher in the preparation group (M=26.23, SD=3.64) compared with those witnesses who received no preparation (M=23.90, SD=3.22). Thus, those participants who read the guide to cross-examination leaflet prior to questioning were significantly more likely to provide correct responses to cross-examination questions. Participants in the complex-plus familiarisation condition achieved an overall mean accuracy score of 25.60 while participants in the simple-plus familiarisation condition achieved a mean accuracy score of 26.87; a descriptive increase shown for preparation utilised with simpler question conditions.
No main effect was observed for cross-examination type, F=2.51 (1,56), p> .05, and no interaction was found, F=0.02 (1,56), p> .05. See graph for illustration.

Mean errors were also compared across the conditions (cross-examination type and preparation) by means of a 2 (complex / simple) x 2 (preparation / no preparation) ANOVA. A significant main effect of preparation on the number of errors witnesses made was found, F= 9.06 (1,56), p<.01. Witness errors were lower in the prepared group (M=3.40, SD=2.16) compared with those witnesses who received no preparation (M=5.17, SD=2.46). Participants in the complex-plus familiarisation condition made 54 errors (M=3.60), while those in the simple-plus familiarisation condition attained the lowest error score (M=3.20), making 48 errors in total; as illustrated in the graph below. No main effect was found for cross-examination type, F=3.10 (1,56), p>.05, nor was an interaction observed, F= 1.16 (1,56), p>.05.

Mean accuracy of responses and errors made to multipart questions were also compared across the conditions. This analysis revealed that responses made to multipart questions overall showed a significant main effect for preparation, F=6.27 (1,56), p< .02. Participants who received the leaflet were less likely to provide single responses and were more likely to recognise an inaccurate premise embedded within a question compared to their unprepared counterparts. Accurate responses were accordingly higher in the prepared group (M=5.70, SD=2.44) compared with those witnesses who received no preparation (M=4.27, SD=1.99). No similar effect was shown however for cross-examination type, F=2.43 (1,56), p>.05, and no interaction was observed, F=.17 (1,56), p> .05.

In respect of overall errors made to multipart questions, again a significant main effect was shown for preparation, F= 5.87 (1,56), p<.02. Fewer errors were made by the prepared group (M=.97, SD=1.24) than those who received no preparation (M=1.70, SD=1.12). No main effect was observed for cross-examination type, F=2.38 (1,56), p>.05, nor was an interaction shown, F=.77 (1,56), p>.05. See graphs below for relevant illustrations. The guide to cross-

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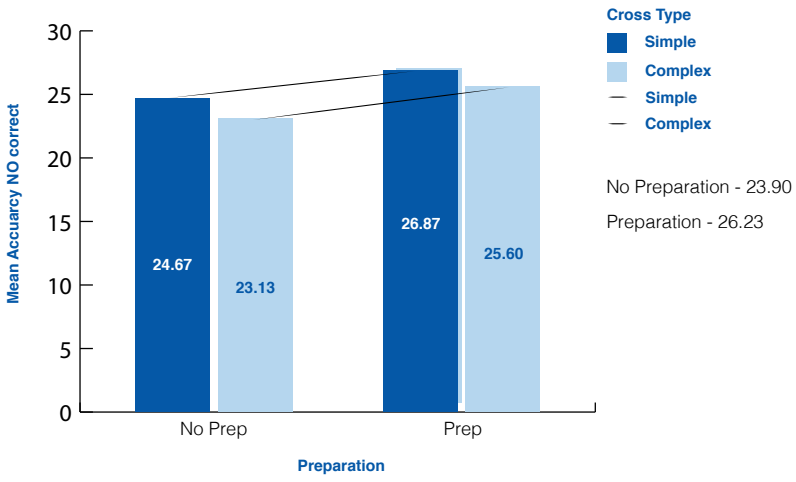
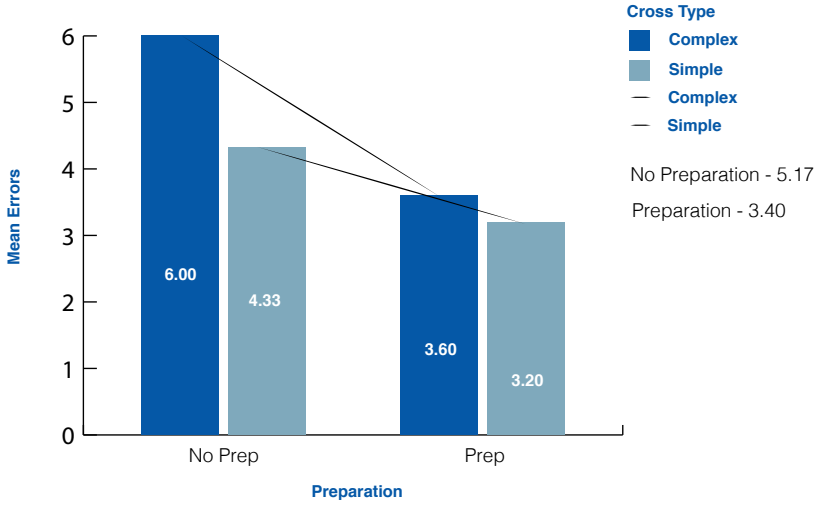
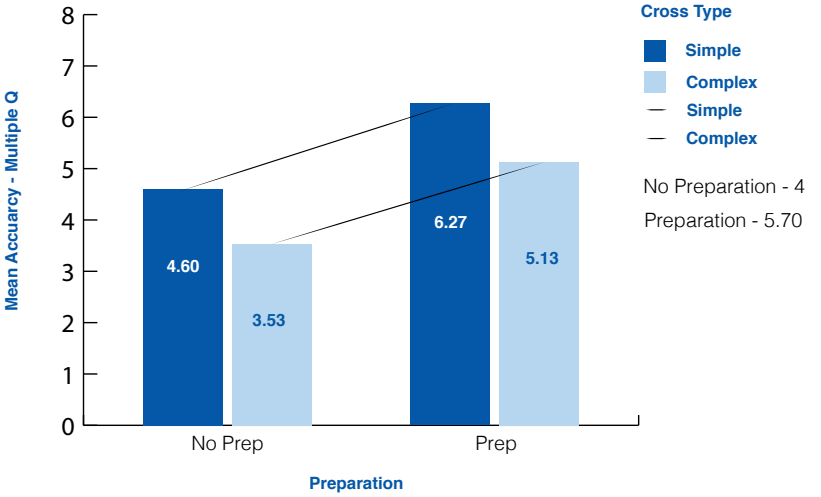
Graph illustrating Mean Accuracy for Preparation and Cross Type



Graph illustrating Mean Errors for Preparation and Cross Type



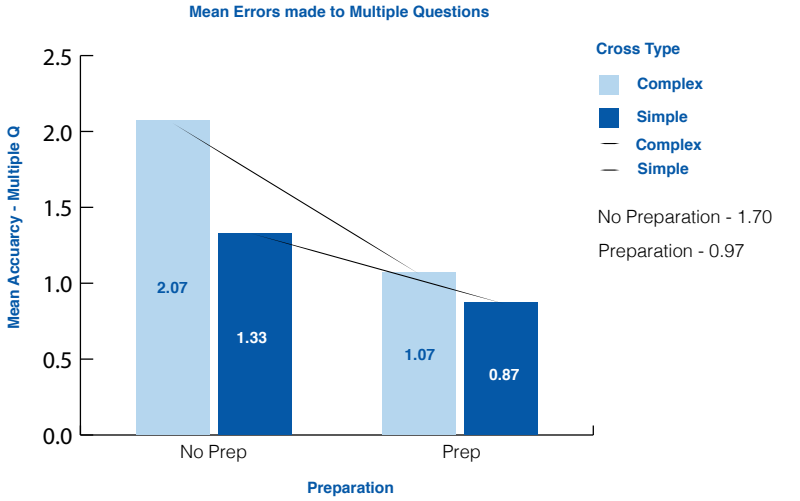
Graph illustrating Mean Accuracy to Multiple Questions

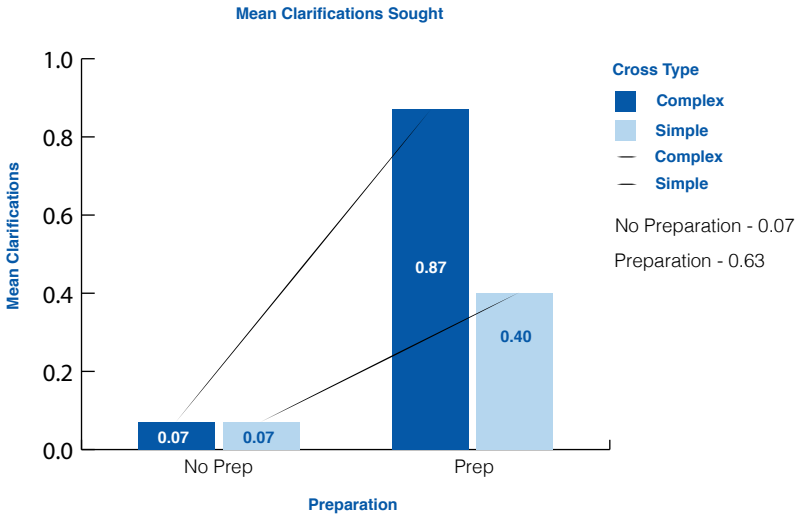


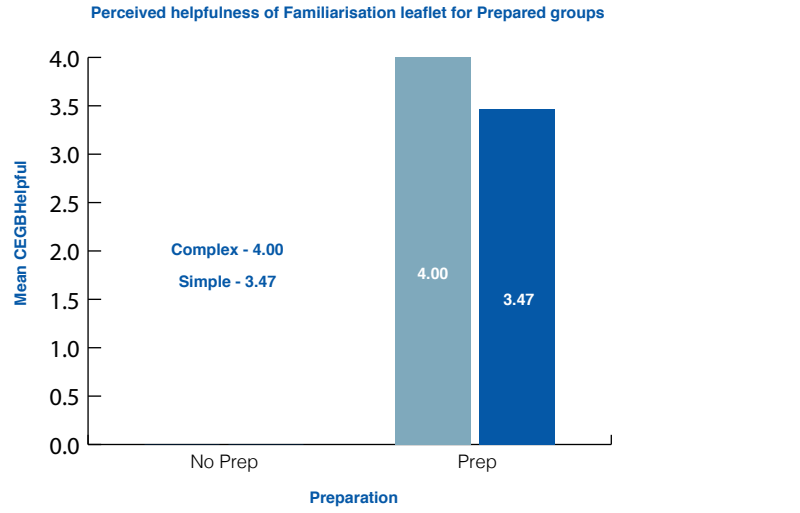
examination leaflet specifically advised participants that questions could contain more than one part and gave an example of a multipart question. It may be inferred from these results that this information prompted participants to listen more attentively to cross-examination questions, which, in turn, increased their accuracy. The leaflet also provided an example of a leading question and guidance that participants should not agree with a suggestion contained within a leading question unless it was true. This may have had the effect of reducing interpersonal trust between witness and cross-examiner so that witnesses were less likely to acquiesce to misleading questions (Schooler & Loftus, 1986; Warren et al, 1991; Gudjonsson, 1992; Baxter et al, 2006). In other words, it is possible that "a suspicious cognitive set makes witnesses scrutinize the interrogator's questions more closely, and this helps them identify discrepancies between what they originally observed and what has been subsequently suggested to them" (Gudjonsson, 1992: 126). Our results lend some support to this hypothesis although we cannot be sure that the improvements in performance were directly attributable to increased suspicion and not some other factor or a combination of factors. Increased confidence and improved comprehension monitoring may, for example, have played a part. It is important to stress, however, that in both familiarisation conditions participants continued to provide single responses to multipart questions, indicating that this question form remains potentially problematic in terms of witness accuracy in forensic settings.

Mean clarifications sought by mock witnesses for each condition were compared across the conditions and a significant main effect for preparation on the number of clarifications sought by witnesses was observed, F= 12.72 (1,56), p<.01. Clarifications were higher for those who received preparation (M=.63, SD=.85) than those who did not (M=.07, SD=.26). Fourteen prepared participants made twenty clarification requests, compared to just the absence of familiarisation. In turn, the increased tendency of participants to signal confusion led to more correct responses as participants generally answered rephrased questions accurately. Participants confronted with lawyerese style questioning were, as might be anticipated, most likely to seek assistance (n = 9 participants), and this resulted in increased accuracy scores for questions involving complex vocabulary, in particular, with participants either querying the meaning of specific words or simply requesting that complex questions be asked "in an different way". As with multipart questions, however, it is important to note that linguistically complex questions continued to be associated with decreased witness accuracy, with participants in the simple-plus familiarisation condition outperforming other participants, as noted above.

Of the thirty participants who received the leaflet, 18 rated the information it contained either 'extremely helpful' or 'very







helpful' (on a 5 point scale ranging from 'not helpful' to 'extremely helpful'); 10 rated the guidance 'fairly helpful' and only 2 participants rated the leaflet 'not helpful'. Questionnaire responses indicated a higher mean perception of helpfulness for the familiarisation leaflet amongst those subject to complex cross-examination (M=4.00, SD=1.00) in comparison to those who underwent a simplified cross-examination (M=3.47, SD=.99); see graph below for illustration. Participants in the complex-plus familiarisation condition stated that they had found the guidance either 'extremely helpful' or 'very helpful' when it came to identifying different questioning techniques during cross-examination (n=10), listening carefully to questions (n= 12), asking for questions to be rephrased (n = 11) and saying what they wanted to say in response to the cross-examiner's questions (n=10). In the simple-plus familiarisation condition, responses were generally more evenly split between participants who rated the guidance 'extremely/very helpful' and those who rated the leaflet 'fairly helpful'. Notably, very few participants rated the leaflet unhelpful in any of these respects.

Invited to provide further comment, participants reported that the guidance had usefully told them "what to expect" during cross-examination. Some respondents suggested that the guidance had helped them to answer questions more effectively with one participant stating, "It explained how the questions could or would be asked and therefore made them easier to answer". Other participants indicated the guidance had given them the self-assurance to "speak up" and ask for help when they needed it.

Methodological Note

Our participants were cross-examined in a mock courtroom environment by a qualified barrister who also assisted with the scripting of cross-examination questions to promote authenticity. In addition, steps were taken to ensure that participants represented a broad cross-section of the community in terms of age and educational attainment. The limitations of the method employed in this research must nevertheless be borne in mind. The number of mock witnesses in any one cross-examination condition was relatively small and this must be taken into account when considering the findings outlined herein; though numbers were sufficient for statistical purposes. It is also necessary to exercise caution when extrapolating from an experimental context to actual forensic settings. In real cases testimony has important consequences for those involved and witnesses may accordingly feel a greater compunction to ensure that they have understood questions and given accurate answers. It is also possible that prior commitment to a version of events (e.g. in a police statement; examination in chief) may reduce suggestibility to misleading questions in a trial context (Bregman & McAllister, 1982). At the same time, however, we would suggest that it is equally possible for negative effects of complex questions observed in this study to be augmented in trial settings, where witnesses are questioned in more intimidating surroundings about experiences that may provoke strong emotions and result in greater cognitive burdens.

Another feature of real trials is that lawyers are likely to use various linguistic ploys to reassert discursive control in exchanges with witnesses. In the present study our barrister was instructed to comply with clarification requests and to rephrase questions in simpler terms when mock witnesses expressed confusion. In a courtroom, if a question fails to elicit the desired answer a witness may simply be cut off by a cross-examiner and the question repeated or reframed in equally convoluted language. In court, witnesses will accordingly be dependent on trial judges and magistrates exercising vigilance and intervening when cross-examiners engage in, what Walker terms, "communicative mischief" (Walker, 1993: 59). Lay witnesses may otherwise find themselves at an insurmountable disadvantage, regardless of the pre-trial preparation they have received.

Finally, we confined our investigation to the impact of written guidance and it is possible that familiarisation which involves experiential training (role play & mock cross-examination) would have different, perhaps more pronounced, effects on witness accuracy though this would have to be empirically tested.

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Ethics And International Arbitration

Coaching A Witness Under Different Perspectives

December 31, 2020

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ABSTRACT

The aim of this article is to analyse the topic of witness coaching in the international arbitration. Ethical obligations are different amongst the jurisdictions and there are different 'conflict rules'; so, a lawyer can face a positive conflict of ethical rules (to wit, its own home rules and the rules of the seat of arbitration). The issue of contact between lawyers and witnesses (witness preparation, witness coaching and witness familiarization) is a conflicting one, because it is differently regulated and this can lead to a uneven playfield. The arbitral community has tried to solved this clash of rules, but a final and satisfactorily solution has not been found yet. In conclusion, the author suggest a possible way to solve (or to minimize) this conflict among different points of view.

1. Aim of this article.

The aim of this article is to analyse the topic of witness coaching in the international arbitration under professional conduct rules from different jurisdictions and – particularly – if counsels are bound by their national ethical rules while conducting an arbitration abroad. The issue has a practical outcome, because it can affect the party's right to present its own case and 'in certain circumstances, this can jeopardise the integrity of the entire arbitration process and lead to an award being overturned on appeal'[1] or set aside or not enforceable.

At the end, the author shall try to find a level playground for lawyers involved in the international arbitration proceedings.

2. Ethics and legal profession.

Ethics and legal profession have always been intertwined.

For instance 'one of the earliest examples or regulation of the legal profession can be found in Chapter 29 of the Statute of Westminster 1 (1275) in which "deceit or collusion" by lawyers was forbidden'[2].

Another famous example was the decision *Re G Mayor Cooke*[3], in which Lord Esher MR stressed that an act of professional misconduct is committed by a lawyer who does something which is 'dishonourable to him as a man and dishonourable in his profession'.

But ethics are decided in very different ways amongst jurisdictions. There is no uniformity in deciding whether or not a certain conduct is ethical[4] and we have to bear in mind that lawyers involved in international arbitration proceedings 'can be governed by multiple and possibly incompatible national codes of conduct'[5], because there can be a positive conflict of rules[6]. A learned scholar stressed that 'few bar authorities expressly extend their ethical rules and regulatory authority extraterritorially or into foreign arbitration contexts'[7].

Many people think that there is a great difference between civil law countries and common law countries, but – for the reasons stated below – I cannot share this point of view. I think that the great difference is between the USA system and the other systems.

In some Countries, lawyers are considered as an officer of the Court[8], in other Countries, they have 'an overriding duty to the Court to act with candour and independence in the interests of justice'[9] and they 'must never knowingly attempt to deceive or participate in the deception of a court'[10].

In this article, we can see how the witness coaching is dealt with in various Countries, especially in case of international arbitration proceedings.

3. Witness coaching and witness preparation.

There is a difference between witness coaching and witness preparation.

A US scholar wrote: 'To begin, we differentiate the two terms as one positive (preparation) and the other negative (coaching), even though the lay definitions may be similar. Attorney Paul D. Friedman, according to an article by Robert Ambrogi, believes the phrase 'witness coaching' is sometimes "perceived as obfuscating the truth or instructing the witness to lie." Ambrogi, on the other hand, describes preparation as the act of "instructing the witness on demeanor, language [and] truthfulness'[11].

But there is another kind of interaction with the witness: familiarization.

Familiarization means to explain to the witness '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'[12]; any familiarization should be supervised by a lawyer, 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: that would be coaching'[13].

Another scholar pointed out that 'English cases have distinguished between three kinds of interactions with witnesses: interviewing, familiarization, and coaching. *Interviewing* is basically interaction with a witness for the purpose of obtaining evidence needed for production of a witness statement. Familiarization involves explaining the process and such techniques as cross-examination. The British will even permit mock cross-examination, but only on hypothetical facts – just to help the witness understand how cross-examination works – and not on the actual facts of the case at hand. That would be coaching. *Coaching* is viewed as a detailed

discussion of the specific facts in order to rehearse the witness with respect to questions likely to be asked, and with respect to witness responses that would be appropriate'[14].

In practice, 'there is a fine line between legitimate witness preparation and unethical coaching of a witness'[15].

One scholar[16] divides witness coaching in three grades:

1. Where the lawyer knowingly and overtly induces a witness to testify to something the lawyer knows is false
2. The same as the first one, but the lawyer acts covertly
3. Where the lawyer does not knowingly induce the witness to testify to something the lawyer knows is false, but the lawyer's conversation with the witness alters the witness's story

Another scholar[17] prefers to divide witness coaching into four grades:

1. Where the lawyer[18] knowingly and explicitly induces a witness to give false testimony
2. The same that the first one, but the lawyer acts covertly
3. Where the lawyer does not knowingly induce a witness to relay false testimony, but the lawyer's conversation with the witness alters the witness's story
4. The lawyer knowingly induces a witness to alter his or her false testimony.

We can assume that 'witnesses may not be placed under pressure to provide other than a truthful account of their evidence nor may witnesses be rehearsed, practised or coached in relation to their evidence or in the way in which it should be given'[19].

4. How the contact lawyer / witness is dealt with.

4.1 The different approaches.

The USA system allows a great degree of 'contact' between lawyers and witnesses.

A famous scholar stated that 'the adversary system benefits by allowing lawyers to prepare witnesses so that they can deliver their testimony efficiently, persuasively, comfortably, and in conformity with the rules of evidence'[20].

From the USA point of view 'witness preparation is an expected and essential part of deposition and trial preparation. Courts frequently observe that it is proper for a lawyer to prepare a witness for deposition or trial testimony'[21].

A scholar has noticed that 'In the United States, witness coaching is an inevitable consequence of the adversary process as it is implemented here. "Practice guides" for trial lawyers recommend witness preparation in civil and criminal cases for all witnesses, especially expert witnesses. Many trial lawyers consider it malpractice not to go to the edge of ethical boundaries (if not beyond) to win for their side'[22].

This attitude must not lead to presenting a misleading and false testimony, as Judge Francis Finch said: 'The lawyer's duty is to extract facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know'[23].

On the other side, we can note a different approach.

For instance, in England and Wales, witness coaching is not possible[24] as stated in *R v Momodou* and others 'there is no place for witness training in this country, we do not do it. It is unlawful'[25].

In *Momodou*, Judge LJ stressed that '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 *Momodou* case also dealt with the issue of group preparation, that it is prohibited[26]; in Day v Perisher the NSW Court of Appeal stated that the group preparation 'seriously undermines the process by which evidence is taken. What was done was improper'[27].

Pursuant Sec. 9 and 12 Legal Profession (Professional Conduct) Rules 2015, Singaporean lawyers cannot influence their witnesses, because they are bound by the overriding 'duty to assist in the administration of justice, and must act honourably in the interests of justice'[28].

Recently, Singaporean courts dealt with the witness preparation issue in the *Compañia De Navigación Palomar* case[29].

Singapore High Court (Quentin Loh J) relied on the authority of Momodou and he stressed that there is 'nothing wrong with a lawyer asking questions of his witness as the witness might face in cross-examination but it would be wrong to start coaching him on what is the "right" answer to be given. It is important that the answer is his own'[30].

The Court of Appeal (Andrew Phang Boon Leong JA[31]) stated that: 'There is nothing inherently wrong with a solicitor performing a "practice run", so to speak, with a witness, nor is there anything wrong with the solicitor informing the witness when he has given an answer which contradicts his affidavit evidence or other statements he has made. The crucial question is what happens after that point. One possible (and appropriate) response is for the solicitor to direct the witness to those contradictory statements and to invite him to consider what the ***true answer*** is. The witness may then realise that his memory has played a trick on him and that his earlier answer was correct; if so, there is, we think, usually nothing wrong in a record being made to remind the witness of the exchange that occurred on this point. Alternatively, the witness may realise that he had gotten it wrong on the earlier occasion, in which case the proper course would be (in the example of an affidavit) to amend the affidavit at the appropriate time. In either case, there is also nothing wrong with informing the witness of the questions which opposing counsel might then ask with regard to the possible inconsistency. The Judge recognised as much at [278]–[279] of the Judgment, and we do not think his view is at all unrealistic or detached from practice. The line that *must* ***not*** *be crossed* is this: the witness's evidence must remain ***his own***'[32].

The Court of Appeal set out three rules, that it is worth quoting in full: 'First, and most obviously, the solicitor in preparing (not coaching or training) the witness must not allow other persons – including the solicitor – to actually supplant or supplement the witness's own evidence.

Secondly, even if the first rule is observed, the preparation should not be too lengthy or repetitive. As the Hong Kong Court of Appeal observed in *HKSAR v Tse Tat Fung* [2010] HKCA 156 at [73] (cited in the Judgment at [280]), the court must guard against "repetitive 'drilling' of a witness to a degree where his true recollection of events is supplanted by another version suggested to him by an interviewer or other party". Even if no one ever tells the witness to change his evidence, the exercise by its nature carries an inherent danger. 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

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be the truth, but which he has surmised would be more favourable to his case. Indeed, a witness may even come to convince himself, quite sincerely, that the more favourable answer is the true one.

Thirdly, witness preparation should not be done in groups. As the court in Momodou observed, group preparation or training exacerbates 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). The same is true where a witness is prepared together with other involved persons, notwithstanding that they may not themselves be called as witnesses. Again, this may occur even if the solicitors and witnesses approach the exercise with the purest of intentions. Human beings are social animals; all but the most contrarian of us naturally incline toward seeking agreement with others who are aligned with us. 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'[33].

Under English law, a barrister 'must not rehearse, practise with or coach a witness in respect of their evidence'[34].

Regarding the 'rehearse', the USA approach considers it as 'practices that are ethically and tactically unobjectionable'[35].

In Hong Kong, a barrister can meet a witness, but 'must not coach or encourage any witness to give evidence different from the evidence which the witness believes to be true'[36]; regarding the solicitors they may 'interview and take statements from any witness or prospective witness'[37], but a solicitor should be extremely careful in interviewing a witness called by the opponent [38] and 'must not tamper with the evidence of a witness or attempt to suborn the witness into changing his evidence'[39].

In Australian case law, a witness can be prepared to give evidence before the court, but the lawyers should not advise a witness as to how particular questions should be answered or suggest words that the witness can use[40], in the *Majinski* case, Martin CJ underlined that 'A solicitor or counsel should not advise a witness as to how to answer a question … By way of example, in *Day v Perisher Blue Pty Ltd* the defendant's solicitors prepared an extensive document for the defendant outlining "possible areas of questioning (to be passed onto the prospective witnesses)" and included suggestions as to appropriate responses which would be in line with the defendant's case. This conduct, alongside the holding of a pre-trial conference by the practitioners in which multiple witnesses jointly discussed evidence to be given at trial, was held to seriously undermine the trial and "tainted" the defendant's case"[41]. Professional rules state that a solicitor must not advise or suggest to a witness that false evidence should be given or 'coach a witness by advising what answer the witness should give to questions which might be asked'[42].

In Austria, the rules on professional conduct do not deal with the admissibility of witness coaching and – under Austrian law – contacts between lawyer and witness are allowed 'as long as every kind of "improper influence" on the witness is avoided'[43]; however, it is not clear which behaviour can lead to the "improper influence".

In Germany, 'witness preparation in civil proceedings as well as in arbitration proceedings is per se legitimate. Neither statutory provisions nor professional guidelines prohibit witness preparation, although it is possible that the German legislature will enact new provisions on witness preparation in the future'[44].

In Italy, a lawyer may contact a witness (or a potential witness) but he must not suggest words or behave in a way that can modify the testimony[45].

In France, a counsel must not discuss the case with a witness prior to a hearing, but – in 2008 – the Paris Bar passed a resolution allowing member of such Bar to prepare witnesses in case of international arbitration proceedings. The same is in Switzerland, where contacts between lawyers and witnesses are allowed in international arbitration cases[46].

In Japan, 'lawyers must not entice a witness to commit perjury or tender evidence that he knows to be false'[47],while – in Mainland China – 'a lawyer is deemed to have acted fraudulently or provided false materials, if, he withdrew information from judicial authorities, refuse to provide evidence, or modify, conceal, destroy or forge evidence'[48]; in particular, a lawyer shall not 'intentionally providing false evidence or intimidating or luring another person into providing false evidence, for the purpose of preventing the other party from obtaining evidence lawfully'[49] . So, witness coaching can lead to breaching such rules of conduct.

So, we have seen that the ethical rules are not the same, amongst the jurisdictions.

But, it is worth noting that, according to Born[50], matters such as witness preparation are intimately bound up with the arbitral procedure and should not be regarded as presumptively subject to the professional conduct rules of the lawyer's home jurisdiction but to the tribunal's procedural rules (to wit, under this approach, French counsels can do everything that a Singaporean lawyer can do); furthermore 'in most continental European countries (Austria, Germany, the Netherlands, Sweden) counsel may approach and meet a prospective witness'[51]; so – let aside the USA position – the differences among Countries are not wide.

A learned scholar have pointed out that 'in all these and other jurisdiction it is abundantly clear that a lawyer must not intentionally or knowingly cause or permit a witness to give false testimony (the fundamental rule)'[52].

4.2 International arbitration proceedings.

A learned silk[53] has noticed that 'this witness evidence mechanism is fundamentally flawed in terms of procedure, theory and assumptions. This is because our approach to witness evidence is not built on sound understanding of the workings of the human mind, and it often serves to undermine rather than assist witnesses' recollection'.

Art. 4.3 IBA Rules on Taking the Evidence states that 'It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them'. In practice, many arbitral tribunals are 'including in their procedural orders permission for counsel to have contact with their witnesses of fact. This is a positive initial step but tribunals

arguably should seek to go further and include wording to help maintain the equality of arms with regard to witness preparation'[54].

The IBA Guidelines on Party Representation allow a counsel to 'assist Witnesses in the preparation of Witness Statement'[55], providing that 'a Witness Statement reflect the Witness's own account of relevant facts, events and circumstances'[56].

This position is substantially mirrored in LCIA Arbitration Rules 2014, Article 20.5[57] and in the Swiss Rules, Article 25.2[58]; under SIAC Arbitration Rules 'It shall be permissible for any party or its representatives to interview any witness or potential witness (that may be presented by that party) prior to his appearance to give oral evidence at any hearing'[59].

Other arbitral institutions (like ICC, SCC, HKIAC, CIETAC, SHIAC and VIAC) are silent on this issue.

It is worth mentioning also the Cyrus Benson's Checklist of Ethical Standard for Counsel in International Arbitration[60], The Hague Principles for Counsel appearing before International Courts and Tribunals drafted by the International Law Association, and the International Code of Ethics for Lawyers Practicing before International Arbitral Tribunals proposed by Doak Bishop and Margrete Stevens[61].

On a regional basis, we can add the Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, issued by CCBE[62] in 2006.

However, all these efforts has been regarded as unsuccessful.

Regarding IBA Guidelines, some scholars stressed that the Guidelines are focused on the primacy of loyalty to the party and the duty to present the party's case and this 'effectively deprives the IBA Guidelines of any meaningful scope of application and incorporates the existing differences in definitions of ethical conduct'[63].

5. Witness preparation and weighing the evidence.

Alongside of the ethical aspect, another issue arises.

In case of witness preparation, the witness statements[64] 'are sometimes dismissed as useless because they are drafted by lawyers and by implication may not be trusted' [65] , as illustrated in the case of *Energy Solutions EU v Nuclear Decommissioning Authority [2016]* EWHC 1988 (TCC)[66] and in Djibouti v Boreh[67]; this is in line with the principle that a witness statement must, so far as possible, be in the witness's own words[68]. On this issue, Landau affirms that – in his professional practice – he has seen a lot of witness statements 'spilling into over eighty pages of sophisticated Victorian English … while the witness himself would be … unable to utter a coherent sentence in the English language'[69].

Some reported that 'it is not uncommon for a panel made up of English lawyers to instinctively assign less credibility to a witness who has obviously been coached'[70].

Actually, 'the science of memory confirms that witness preparation and written declarations diminish the informational reliability of testimony … The current practices of international arbitration diminish the informational value and credibility of oral evidence, and increase its rhetorical function'[71]

6. Conclusive remarks.

It is clear that the current situation needs to be changed[72], but how? It is true that 'the supposedly orderly realm of international arbitration remains a frenzy of conflicting ethical codes, a nurturing ground for misunderstandings, whether intentional or not'[73].

Some are of view that 'a uniform, binding international code of ethics be developed for attorneys engaged in international arbitration'[74], because this 'would help bring sunshine to a cloudy area. An international code would help provide transparency and certainty for proper attorney conduct, help level the playing field, contribute to the fairness of the procedure, and improve the confidence of the participants and the public in the arbitration process' [75]. This approach has been criticized by other practitioners, because 'adding an overriding layer of ethical regulation, authority and sanctioning powers to international arbitration would detract from its consensual nature which of course is one of the key attractions of this form of binding dispute resolution over national court litigation'[76] .

Landau prefers focusing on the arbitral tribunal's role and suggest that 'the tribunal's burden regarding assessing the witness's "*credibility*" must be viewed in light of the understanding of that "*credibility*" is affected by a number of factors that have nothing to do with the genuine credibility of the witness and more submissions from witnesses must be allowed, and the firm grip of lawyers on witnesses must be loosened'[77] and that the arbitrators should be trained in cross-cultural issues.

I think that an 'holistic approach' is necessary.

In the future, the IBA can play a leading role in persuading local Bar Associations and Law Societies to amend their own rules in order to create a special status for the 'international lawyer'.

The 'international lawyer', I mean a lawyer involved in transnational disputes (either before a court or before an arbitral tribunal), should be regulated in an uniform way across the world[78]; the playground should be leveled.

But this takes a lot of time; so, for the time being, it is up to the arbitrators trying to level the playground.

In order to achieve this target, at the Case Management Conference (or in another early stage of the arbitration), the arbitral tribunal – upon hearing the parties and having considered their respective submissions – should direct how the contacts between lawyers and witnesses should be dealt with.

We need to develop a real global culture of arbitration; it should not be 'Western focused' but it needs to take into account other points of view[79]. In this development, arbitral institutions[80] can and should play a major role, providing courses, organizing conferences, symposia et cetera.

Arbitrators are required to do bigger efforts and they should be 'open minded' and 'cross-cultural' as far as possible. How can arbitrators develop this skills?

I would like to borrow a renowned arbitrator's words: 'by doing it [and] by watching others do it. There are a number of very good chairpersons in international arbitration, each with his or her own style and tools'[81].

Finally, I want to quote a learned scholar: 'the challenge of ethical self-regulation is a challenge for international arbitration to think beyond its present situation, to future generations and future developments in an ever-more globalized legal world. It is a challenge for international arbitration to bring to bear all the pragmatism, creativity, and sense of the noble duty to transnational justice that it has demonstrated in the very best moments of its history'[82] .

We all, as member of the international arbitration community, have to do our best in order to promote a global arbitration culture that combines equality in diversity.

REFERENCES

1 Christopher Lockwood et al., Levelling the playing field? – IBA Guidelines on Party Representation in International Arbitration, INTERNATIONAL ARBITRATION QUARTERLY, Sep. 2013, 1.

2 KATHRYN WRIGHT & CLARE FIRTH, PROFESSIONAL CONDUCT, FOUNDATIONS FOR THE LPC 2018-2019, CLARE FIRTH (ed.) 4 (Oxford University Press 2018). Chapter 29 stated that '…if any Serjeant, Pleader or other, do any manner of Deceit or Collusion in any King's Court or consent in deceit of the FCIArb beguile the Court or the Party and thereof be attainted, he shall be imprisoned for a year and a day from thenceforth shall not be heard to plead in Court for any Man'.

3 Re G Mayor Cooke (1889) 5 TLR 407

4 Of course, there is uniformity towards some unethical behaviours. There is no jurisdiction where bribing a judge is allowed.

5 Anna Foerstel & Katharina Riedl, The IBA Guidelines on Party Representation in International Arbitration: Problem Solved?, GLOBAL ARBITRATION NEWS (Jun. 17, 2015), https://globalarbitrationnews.com/the-iba-guidelines-on-party-representation-in-international-arbitration-problem-solved-20150601/. See also Margaret L. Moses, Ethics in International Arbitration: Traps for the Unwary, 10 Loyola U. Chi. Int'l. L. R. 73 (2012).

6 In many Countries, lawyers acting abroad are still bound by their "home" code of conduct together with the national code of conduct of the seat of the arbitration (and the code of conduct of the venue of the hearings, if they are not held at the seat of the arbitration). For instance, see Code of Conduct of the Bar of the Hong Kong SAR 2018 Chapter 3.3 (A barrister appearing as an advocate or providing legal services outside Hong Kong shall: – a) observe the rules of professional conduct, ethics and etiquette applicable to advocates in the jurisdiction in which he appears or provides legal services; and b) subject so sub-paragraph (a) thereof, otherwise remain bound by this Code) and Chapter 12.3 (Save where a provision is expressly or by necessary implication made inapplicable, this Code applies to and binds any foreign lawyer who has been admitted as a barrister in Hong Kong on an ad hoc basis for the purposes of a specific case or cases under section 27(4)) . Substantially, the same rules apply also to the Hong Kong Solicitors (THE LAW SOCIETY OF HONG KONG, THE HONG KONG SOLICTORS' GUIDE TO PROFESSIONAL CONDUCT, 3rd ed. 2013, Principles 1.02 and 1.08), but in Commentary 2 to Principle 1.08 the Law Society underlines that the HK Solicitor practicing outside Hong Kong must respect the IBA International Code of Ethics 'whenever the same is not inconsistent with this Principle'. Under the Italian Bar Code of Conduct, art. 3.1, the Italian lawyer practicing abroad must respect either the Code and the ethical rules of seat; if there are conflict, the latter shall apply (art. 3.2). On the other hand, 'Singapore lawyers are not subject to ethical standards in foreign countries unless those standards have been applied through local legislation, practice directions or court judgements' (Jeffrey Pinsler, Witness Preparation before Trial. What the Rules of Ethics Do Not Say, SINGAPORE ACADEMY OF LAW J., Oct. 5 2018, 1, 16). Someone has correctly pointed out that can be difficult to determine the "home jurisdiction" in case of a multi-qualified lawyer (Jane Wessel & Gordon McAllister, Towards a Workable Approach to Ethical Regulation in International Arbitration, 10 CANADIAN INT. LAWYER, 5, 5 (2015).

7 CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION, 104 (Oxford University Press 2014).

8 Bar Council of India Rules Chapter II Preamble. In England and Wales, solicitors are officers of the barristers are not as Lord Upjohn stated 'the barrister is engaged in the conduct of litigation whether civil or criminal before the courts. He is not an officer of the court in the same strict sense that a solicitor is' in Rondel v Worsley [1969] 1 AC 191, at 282.

9 Code of Conduct of the Bar the Hong Kong SAR 2018 Chapter 10.29. See also the Preamble to the NSW Barristers' Rules: 'The administration of justice in New South Wales is best served by reserving the practice of law to officers of the Supreme Court who owe their paramount duty to the administration of justice'.

10 THE LAW SOCIETY OF HONG KONG, THE HONG KONG SOLICTORS' GUIDE TO PROFESSIONAL CONDUCT, 3rd ed. 2013, Principle 10.03. In Mainland China, 'A lawyer shall protect the lawful rights and interests of parties, ensure the correct implementation of law, and safeguard fairness and justice of the society' (Law of the PRC's on Lawyers, 2007, Art. 2).

11 Robert Ambrogi, Attorney Ethics: Witness Preparation Vs Coaching, IMS EXPERT SERVICES, Mar. 2011, www.ims-expertservices.com/bullseye/march-2011/attorney-ethics-witness-preparation-vs-coaching/

12 The Ethics Committee of the General Council of the Bar, Witness Preparation, 2017 reviewed, 2

13 The Ethics Committee of the General Council of the Bar, Witness Preparation, 2017 reviewed, 8, paragraph. 20.2

14 Margaret L. Moses, Ethics in International Arbitration: Traps for the Unwary, 10 LOYOLA U. CHI. INT'L. L. R. 73, 77 (2012). See also Ian Meredith & Hussain Khan, Witness Preparation in International Arbitration –A Cross Cultural Minefield, MEALEY'S INT. ARB. REP., Sep. 2011, 1, 1.

15 Justice John Griffiths, Some Ethical Issues for Legal Practitioners, Professional Skills Development Programs, The Banco Court, Mar. 5 2014, 7.

16 Richard C. Wydick, The Ethics of Witness Coaching, 17 CARDOZO L. R., 1, 1-2 (1995).

17 Brittany R. Cohen, "Whose Line is it anyway?": Reducing Witness Coaching by Prosecutors, 18 LEGISLATION AND PUBLIC POLICY, 985, 991-992 (2015).

18 In the article cited, the author refers to 'a prosecutor'.

19 .A. Ipp, Lawyers' Duties to the Court, 114, L.Q.R., 63, 91-92 (1998).

20 Richard C. Wydick, The Ethics of Witness Coaching, 17 CARDOZO L. R, 1, 1 (1995).

21Richard Alcorn, "Do we implant memories? Yeah, probably we do. Is that something that is wrong? I believe it is", ARIZONA ATTORNEY, Mar. 2008, 14, 14. See, also, State v McCormick 259 S.E. 2d 882 (1979). See also, James H. Mutchink et al., Put Me In, Coach: the Ethics of Witness Preparation, ABA SECTION OF ANTITRUST LAW – COMPLIANCE AND ETHICS COMMITTEE, 63rd Annual Antitrust Spring Meeting, 17.

22 Robert M. Sanger, answering to the author of this article see www.researchgate.net/post/How_is_witness_coaching_regulated_in_your_Country

23 In re. Eldridge 37 N.Y. 161, 171 (1880). But, under professional rules, a lawyer 'may suggest language and even the substance of a witness' testimony in preparing the witness' (District of Columbia Legal Ethics, D.C. Ethical Opinion No. 79, (1979); we can find a similar wording in the Restatement of the Law Governing Lawyers by the American Law Institute, (2000), at § 116 [8].

24 Bar Council Code of Conduct, Part II, Sec. 705 (a). For solicitors, the Solicitors' Regulation Authority Code of Conduct provides that they 'do not attempt to deceive or knowingly or recklessly mislead the court' (O5.1), they

'are not complicit in another person deceiving or misleading the court' (O5.2) and they 'do not make or offer to make payments to witnesses dependent upon their evidence or the outcome of the case' (O5.8). A solicitor did not act properly, if he (or she) has attempted to influence a witness, when taking a statement from that witness, with regard to the contents of their statement (IB 5.10) or he (or she) has tampered with evidence or has sought to persuade a witness to change their evidence (IB 5.11). We have to bear in mind that – for a solicitor – the first ethical Principle is 'uphold the rule of law and the proper administration of justice' (to act in the best interest of the client is only the Principle number 4) and that if 'two or more Principles come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice' (SRA Code of Conduct Principles).

25 R v Momodou [2005] EWCA Crim 177.

26 Regarding group preparation, Alcorn's opinion is that 'Interviewing and preparing several potential witnesses at the same time and in the same setting presents multiple ethical problems. It should be avoided' (Richard Alcorn, "Do we implant memories? Yeah, probably we do. Is that something that is wrong? I don't believe it is", ARIZONA ATTORNEY, Mar. 2008, 14, 19).

27 Day v Perisher Blue Pty Ltd (2005) 62 NSWLR 731. For expert witness group preparation, see Road Corporation v Love [2010] VSC 253.

28 Sec. 9 (1) (a) Legal Profession (Professional Conduct) Rules 2015.

29 Compañia de Navigación Palomar, SA v Ernest Ferdinand Perez De La Sala [2017] SGHC 14 and Ernest Ferdinand Perez De La Sala v Compañia de Navigación Palomar, SA [2018] SGCA 16. The issue at stake was a group witness preparation held in Australia, three weeks before trial.

30 Compañia de Navigación Palomar, SA v Ernest Ferdinand Perez De La Sala [2017] SGHC 14 at [279].

31 Sitting with Judith Prakash JA and Steven Chong JA.

32 Ernest Ferdinand Perez De La Sala v Compañia de Navigación Palomar, SA [2018] SGCA 16 at [136]. Emphasis in original.

33 Ernest Ferdinand Perez De La Sala v Compañia de Navigación Palomar, SA [2018] SGCA 16 at [138-140]. Emphasis in original.

34 Bar Standards Board Handbook, Rule C9.4.

35 Richard C. Wydick, The Ethics of Witness Coaching, 17 CARDOZO L. R., 1, 7 (1995), 'rehearsal with a witness is fine' (Kevin W. Smith, Prepping, Not Coaching: The Ethics of Witness Preparation in Civil Litigation, FARRIS LLP, http://www.farris.com/images/uploads/Article_-_Ethics_of_Witness_Preparation.pdf). In the same article, regarding Canada, Kevin Smith suggested that 'best practice should be to avoid conducting rehearsal examinations or mock trials based on the actual facts of the case at hand'.

36 Code of Conduct of the Bar the Hong Kong SAR 2018 Chapter 10.25. This rule of conduct underlines that "a barrister will not have breached the foregoing by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness' attention to inconsistencies or other difficulties with the evidence'.

37 THE LAW SOCIETY OF HONG KONG, THE HONG KONG SOLICTORS' GUIDE TO PROFESSIONAL CONDUCT, 3rd ed. 2013, Principle 10.12.

38 Commentary 3 to Principle 10.12 recommends: 'It may be wise in these circumstances for the solicitors offer to interview the witness in the presence of a representative of the other side'. to offer to interview the witness in the presence of a representative of the other side'.

39 THE LAW SOCIETY OF HONG KONG, THE HONG KONG SOLICTORS' GUIDE TO PROFESSIONAL CONDUCT, 3rd ed. 2013, Principle 10.12, Commentary 2.

40 Re Equiticorp Finance (1992) 27 NSWLR 391.

41 Majinski v State of Western Australia [2013] WASCA 10.

42 Professional Conduct and Practice Rules (Solicitors Rules) 2013, Rule 24.1. Under Rule 25. Group coaching is prohibited. Substantially, the same rules apply also to the barristers (see NSW Bar Rules, Rule 69 and 70).

43 Anna Foerstel & Katharina Riedl, The IBA Guidelines on Party Representation in International Arbitration: Problem Solved?, GLOBAL ARBITRATION NEWS (Jun . 17, 2015), https://globalarbitrationnews.com/the-iba-guidelines-on-party-representation-in-international-arbitration-problem-solved-20150601

44 Christian Wolf, The limits of witness preparation in German court and arbitration proceedings, NORTON ROSE FULBRIGHT, Nov. 2016, 23.

45 Italian Bar Code of Conduct, Art. 55.1. If the lawyer has induced the witness to give false testimony, both of them have committed the criminal offence of false testimony and sentenced from two to six years imprisonment (Art. 372 Criminal Code).

46 Swiss Code of Conduct (Code Suisse de Deontologie), Art. 7 ('L'avocat s'abstient d'influencer les témoins et experts. Demeurent réservées les règles particulières des procédures d'arbitrage et des procédures devant les Tribunaux supranationaux').

47 Richard W.S. Wu & Kay-Wah Chan, Regulatory Regimes for Lawyers' Ethic in Japan and China: A Comparative Study, 5 TSINGHUA CHINA L.R. 49, 62 (2012).

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49 Law of the PRC's on Lawyers, 2007, Art. 40 (6).

50 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, I , § 21.03 [B][4]. (Wolters Kluwer, 2014).

51 HANS VAN HOUTTE, COUNSEL-WITNESS RELATIONS AND PROFESSIONAL MISCONDICT IN CIVI LAW SYSTEMS, INTERNATIONAL ARBITRATION, CASES AND MATERIALS (GARY BORN ed.), 1039, (Wolters Kluwer, 2015), see also CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION, 100 (Oxford University Press 2014) and UNCITRAL Notes on Organizing Arbitral Proceedings, paragraph 90.

52 Jeffrey Pinsler, Witness Preparation before Trial. What the Rules of Ethics Do Not Say, SINGAPORE ACADEMY OF LAW J., Oct. 5 2018, 1, 19.

53 Toby Landau, Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration, NEIL KAPLAN, http://neil-kaplan.com/wp-content/uploads/2016/06/The-Kaplan-Lecture-2010-final.pdf.

54 Ian Meredith & Hussain Khan, Witness Preparation in International Arbitration – A Cross Cultural Minefield, MEALEY'S INT. ARB. REP., Sep. 2011, 1, 4.

55 IBA Guidelines on Party Representation, Guideline 20. This provision also apply to Expert Witnesses.

56 IBA Guidelines on Party Representation, Guideline 21.

57 Subject to the mandatory provisions of any applicable law, rules of law and any order of the Arbitral Tribunal otherwise, it shall not be improper for any party or its legal representatives to interview any potential witness for the purpose of presenting his or her testimony in written form to the Arbitral Tribunal or producing such person as an oral witness at any hearing'. LCIA, in its Notes for Parties, stressed that 'As highlighted in the Annex to the 2014 Rules, a party's legal representative should not knowingly procure or assist in the preparation of any false evidence, nor knowingly conceal or assist in the concealment of any document' (para 74).

58 'Any person may be a witness or an expert witness in the arbitration. It is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses, potential witnesses, or expert witnesses'.

59 SIAC Arbitration Rules 2016, Rules 25.5. The same wording has been used in Rule 22.5 SIAC Investment Arbitration Rules 2017.

60 Cyrus Benson, Can Professional Ethics Wait? The Need for Transparency in International Arbitration, 3 DISPUTE RESOLUTION INTERNATIONAL, 78, 88-94 (2009).

61 Doak Bishop & Margrete Stevens, The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy, ARBITRATION ADVOCACY IN CHANGING TIMES, 15, ICCA CONGRESS SERIES (VAN DEN BERG ed.), 391 (2011). Rules 24 and 25 are dealing with witness preparation.

62 Conseil des barreaux européens – Council of Bars and Law Societies of Europe.

63 Anna Foerstel & Katharina Riedl, The IBA Guidelines on Party Representation in International Arbitration: Problem Solved?, GLOBAL ARBITRATION NEWS (Jun . 17, 2015), https://globalarbitrationnews.com/the-iba-guidelines-on-party-representation-in-international-arbitration-problem-solved-20150601

64 In Italy, witness statement has been introduced in 2009 (according to art. 257 bis Civil Procedure Code), but they are seldom used. I did not find any Italian Supreme Court decision on this issue.

65 MICHAŁ KOCUR, WITNESS STATEMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION, THE CHALLENGE AND THE FUTURE OF COMMERCIAL AND INVESTMENT ARBITRATION, LIBER AMICORUM PROFESSOR JERZY RAJSKI, BEATA GESSEL-KALINOWSKA VEL KALISZ (ed.) 168, (Lewiatan Court of Arbitration, 2015).

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70 Ian Meredith & Hendrik Puschmann, Notes on the Cultural Dimension of International Commercial Arbitration, SLOVENSKA ARBITRA NA PRAKSA, Mar. 2016, 33.

71 David J.A. Cairns, The Premises of Witness Questioning in International Arbitration, CREMADES Y ASOCIADOS, https://www.cremades.com/pics/contenido/DAVID%20JA%20CAIRNS-The%20Premises%20of%20Witness%20Questioning-FINAL-20May2016.PDF, 11.

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73 ROBERT PFEIFFER & STEPHAN WILSKE, THE EMERGENCE OF THE GUERILLA TACTICS PHENOMENON IN INTERNATIONAL ARBITRATION, GUERILLA TACTICS IN INTERNATIONAL ARBITRATION, GÜNTHER J. HORVATH & STEPHAN WILSKE (eds.), 17 (Wolters Kluwer 2013).

74 Margaret L. Moses, Ethics in International Arbitration: Traps for the Unwary, 10 Loyola U. Chi. Int'l. L. R. 73, 79 (2012).

75 Margaret L. Moses, Ethics in International Arbitration: Traps for the Unwary, 10 Loyola U. Chi. Int'l. L. R. 73, 80 (2012).

76 Jane Wessel & Gordon McAllister, Towards a Workable Approach to Ethical Regulation in International Arbitration, 10 CANADIAN INT. LAWYER, 5, 12 (2015).

77 Toby Landau, Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration, NEIL KAPLAN, http://neil-kaplan.com/wp-content/uploads/2016/06/The-Kaplan-Lecture-2010-final.pdf.

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79 'The views of practitioners from the Middle East, the Far East, China, India, and great swathes of South America were not represented on the [IBA] Task Force' (Jane Wessel & Gordon McAllister, Towards a Workable Approach to Ethical Regulation in International Arbitration, 10 CANADIAN INT. LAWYER, 5, 11 (2015).

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Truth Be Told

Witness Preparation in Singapore, Hong Kong and the United States

On 27 January 2017, the High Court of Singapore delivered judgment in Compania De Navegacion Palomar, S.A. and others v Ernest Ferdinand Perez De La Sala.

February 2, 2018

LEWIS S. WEINER & JASON TAM

Eversheds Sutherland

Ernest Ferdinand Perez De La Sala, who was a director of six companies inherited from his father Robert Perez De La Sala, was said to have transferred around US$600m to 800m out of the companies' account to his personal account.
The case, apart from it being concerned with one of Australia's wealthiest families, raises important issues on the weight to be given to evidence tainted by so-called "witness coaching".

Compania De Navegacion Palomar, S.A. and others v Ernest Ferdinand Perez De La Sala

The key issue in that case was whether the monies taken away from the six companies were beneficially owned by Ernest, or whether they were held on trust for the De La Sala family. At trial, Ernest called his brother Jerome Anthony Perez De La Sala (Tony) to give oral evidence. During cross-examination, Tony was pressed on the date of his purchase of certain Australian properties initially owned by his family. Tony read out a date from a post-it note, which contradicted his oral evidence given on the previous day. In cross-examination, Tony eventually told the court that he had gotten the dates on the post-it note from an underlying document, which was a 14-page script headed "possible questions", setting out questions and answers created on the back of training sessions Tony attended together with some other witnesses at Clifford Chance's Sydney offices over five days. The script set out the questions which Tony might be asked and answers to those questions. Tony eventually conceded that this document was not a record of his independent recollection, but was the fruit of his discussions with another witness and Ernest's lawyers about his evidence.

In the judgment handed down by the High Court of Singapore, Quentin Loh J examined the law on witness coaching. Citing authorities from Hong Kong, England and Australia, Loh J held that whilst witness familiarisation is perfectly legitimate, lawyers should never put words into the witness' mouth. The distinction between coaching and familiarisation is one of degree and very fact sensitive, but that should not prevent a court from making that distinction. The prohibition on witness coaching applies to civil cases as well as criminal cases, although it is acknowledged that in more complex civil cases, some group discussion early on in evidence gathering may be inevitable. Loh J stated that the principle that a witness' evidence should be his honest and independent recollection expressed in his own words is "at the heart of civil litigation". Unsurprisingly, the Court gave negligible weight to Tony's evidence.

Witness Preparation in Hong Kong

The principles on witness coaching set out in Compania De Navegacion Palomar, S.A. and others v Ernest Ferdinand Perez De La Sala broadly apply in Hong Kong. Before a witness is called to give oral evidence in a trial, she may be asked to attend a preparatory session with lawyers. This familiarisation session may be held to inform the witness about the court process (e.g. when she will be questioned and by whom) and courtroom settings, and may not be objectionable. If the discussion concerns evidence to be given by the witness, the participants will have to bear in mind the distinction between refreshing memory and witness coaching. In general, it is permissible to go through a statement or affidavit to assist the witness' recollection of the facts, refer her to key documents, or ask her questions which she may face in cross-examination. However, it is not permissible to supplement or supplant the witness' true recollection with another version of events, advising the witness to move away from her original answer to one which favours her case or the person calling her as a witness, or allowing witnesses to collaborate on their answers so as to provide a version that is favourable to a party's case.

Preparing Witnesses for Testimony in the United States

In the United States witness "preparation" is considered not only good but an important part of its system of

jurisprudence, whereas witness "coaching" is disfavored. However, there is not a bright line distinction between the two concepts. Whether called "preparation," "coaching" or something else, the most important advice a lawyer can give a witness is "tell the truth."

A lawyer may broadly prepare a witness to testify. There are no specific laws specifically governing the permissible scope of witness preparation but generally a lawyer may invite the witness to provide truthful testimony and they may discuss, among other things:

- the witness's recollection and probable testimony;
- other testimony or evidence that may be presented;
- the witness's recollection or recounting of events in light of other witnesses' testimony;
- the applicable law; the factual context into which the witness's observations or opinions may fit;
- documents or other evidence that may be introduced; and
- probable lines of cross-examination.

In the United States it is permissible for an attorney to suggest a choice of words that may assist the witness in making his or her intent clear, but the attorney cannot improperly influence a witness's testimony or assist the witness to testify falsely as to a material fact. More broadly, an attorney may not suborn perjury or engage in conduct that involves dishonesty, fraud, deceit or misrepresentation.

Documents used to refresh a witness's recollection may be discoverable pursuant to Rule 612 of the Federal Rules of Evidence. Thus, if in preparing a witness to testify an attorney shows a witness documents that help refresh the witnesses recollection as to certain facts, the opposing counsel may request to see those documents. Counsel should be careful not to disclose to a witness facts that may be included in the attorney's privileged work product (in a strategy memo, for example), because if the document refreshes the witness's recollection, it may become discoverable under Rule 612.

Charlie Teo

Teo colleague's 'whole new series of recollections' after contact with lawyers

The credibility of a witness at the disciplinary hearing into neurosurgeon Charlie Teo has been challenged after the emergence of a second statement.

February 14, 2023

BY KATE MCCLYMONT

smh.com.au

The credibility of a witness at the disciplinary hearing into neurosurgeon Charlie Teo has been challenged after a tribunal heard he provided a fresh statement with "a whole series of new ecollections" after consulting the controversial doctor's lawyers.

Dr Amit Goyal, who was Teo's surgical fellow for six months from July 2018, gave evidence via video from the United States where he practises on the second day of a Health Care Complaints Commission's Professional Standards Committee inquiry into allegations of unsatisfactory conduct by Teo.

DAILYTELEGRAPH.COM.AU SATURDAY SEPTEMBER 11 2021 13

DOCTORS RUSH TO DEFEND TEO

EXCLUSIVE

CYDONEE MARDON

A TOTAL of 18 neurosurgeons have thrown their support behind Charlie Teo after he was accused of operating on the wrong side of two patients' brains.

In a statement the doctors — from Australia and abroad — have defended the world-renowned neurosurgeon, saying they were "saddened" to read stories that "only serve to diminish the outstanding work Charlie has contributed to the neurosurgical profession over many years".

A Sydney Morning Herald story in August referred to the case of Bradbury woman Michelle Smith, who underwent a craniotomy in 2003 to remove a tumour after suffering debilitating seizures.

According to that Herald story, specialists who reviewed MRI scans from Ms Smith's brain surgery more than 10 years later were "horrified" when they "suspected" Dr Teo "had not only failed to remove her tumour, he had operated on the wrong side of her brain".

Sydney neurosurgeon Dr Michael Donnellan, who has operated with Dr Teo, said "there is a big difference between a wrong side surgery, versus a contralateral approach — or approach from the opposite side — to a tumour that is close to the midline of the brain".

"This is a well recognised and reasonable approach," he said, adding he had seen Dr Teo choose that method multiple times with good results.

Dr Donnellan said "the possibility of wrong side surgery is negligible" in this setting.

The Herald also reported a medical malpractice suit was filed against Dr Teo after he performed a biopsy on a military serviceman's brain when he was working in Arkansas.

US radiologist Warren Stringer confirmed he was the radiologist involved in the case.

"The fundamental problem is that on this patient the stereotactic CAT scan used to guide the biopsy was mislabelled; right and left were reversed," Assistant Professor Stringer said.

He said the result of the biopsy Dr Teo performed was positive, as it was a bilateral and more or less symmetrical disease.

Dr Teo, who is in Germany as part of an overseas sabbatical where he is discussing neuroscience with leading surgeons in Europe and the US, strongly denied the claims.

"For the record, I have never, ever operated on the wrong side of the brain in my entire career," he told The Sunday Telegraph in August.

The 18 neurosurgeons, who decided to speak publicly after reading the series of articles in the Herald, said Dr Teo's work was of the highest quality.

"As neurosurgical colleagues of Dr Charlie Teo, we have worked with, been taught by and consulted with him on many complex cases over the last 20 years," the statement said.

"We believe Charlie's commitment to teaching, research, and patient care over this period has been of the highest quality."

During his career Dr Teo had been at the "forefront of brain tumour research, surgical technique, and workflow innovation, with special regard to minimally invasive neurosurgery", the statement read.

"His commitment to brain tumour awareness via his charitable work has translated into much needed funds for research, world class publications, advancement of knowledge and heightened public consciousness about this devastating condition.

"Charlie is also heavily involved in teaching and training neurosurgeons in less fortunate countries to advance global neurosurgical treatment."

DOCTORS' LETTER OF SUPPORT

We have been saddened to read the recent stories in the press regarding Charlie. Stories of this nature only serve to diminish the outstanding work that Charlie has contributed to the neurosurgical profession over many years

We believe Charlie's commitment to teaching, research, and patient care over this period has been of the highest quality

Dr Alex Alaybarsch, Dr Andre Grotenhuis, Dr Hamish Baby, Dr Yakubu Hauf, Dr Giovanni Broggi, Dr Ralph Watkins, Dr Matt Coughlan, Dr Clark Peabody, Dr Robert Dodd, Dr Warwick Strong, Dr Brian Dandy, Dr Michael Sughrue, Dr Michael Donnellan, Dr Tim Sui, Dr Peter Gardner, Dr Ashwath Tandon, Dr Amit Goyal, Dr Trong Tuai

ONLINE READ THE FULL LETTER DAILYTELEGRAPH.COM.AU

Our front page story of August 28.

Ruttyn

Signed public letter of support

Kate Richardson SC, acting for HCCC, said Goyal provided a statement to a senior investigator at the commission in February 2020.

The inquiry has heard the outcome of an October 2018 operation performed by Teo was disastrous and that after the surgery the Perth woman didn't wake up.

The inquiry heard Goyal knew there was a complaint about Teo alleging he had not properly explained the risks of surgery to the Perth couple.

The woman had a brain tumour other neurosurgeons had told her was inoperable.

In his first statement dated February 2020, Goyal wrote: "Charlie didn't go into a lot of detail with Mr and Mrs [name suppressed]. However, I do specifically remember his emphasising how risky the surgery was and him telling them that the operation could leave [the woman] in a vegetative state."

He also said in his statement that he was only in the room for two to three minutes.

But Richardson then challenged Goyal after he identified a "whole plethora of risks" that his mentor raised with the patient, despite not including them in his original statement.

Richardson told the inquiry that Goyal had made a second statement in August last year, after consultation with Teo's lawyers, who have claimed legal professional privilege over their dealings with Goyal.

Goyal said he could not remember who the conference call was with but that it did not include Teo.

He said in evidence that he had been sent the new draft of his statement to sign but he had not thought to let the HCCC know he had recalled a whole range of new things not mentioned in his original statement.

In his new statement, Goyal had, the inquiry heard, a "whole series of new recollections" including Teo discussing with the Perth couple academic literature, the complexity of the case, and a whole range of risks including that the operation was extremely risky and that there was limited case history showing that a resection of this kind of tumour had a good outcome.

Dr Amit Goyal

The husband, who took notes during Teo's consultations, has denied these things were discussed.

Goyal admitted in evidence that it was impossible for all of these things to have been discussed in the two to three minutes he was present during Teo's consultation.

Goyal also agreed he could no longer distinguish between what he heard and what Teo later told him he had said to the couple.

Goyal also admitted that he had signed an open letter of support for Teo knowing it was going to be published in the media.

The hearing continues.

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give blood

What can happen to our memory from the time we witness an event to the retelling of that event later? What can influence how we remember, or misremember, highly significant events like a crime or accident? [Image: Robert Couse-Baker, https://goo.gl/OiPUmz, CC BY 2.0, https://goo.gl/BRvSA7]

Eyewitness Testimony and Memory Biases

Eyewitnesses can provide very compelling legal testimony, but rather than recording experiences flawlessly, their memories are susceptible to a variety of errors and biases.

BY CARA LANEY AND ELIZABETH F. LOFTUS

Reed College, University of California, Irvine

They (like the rest of us) can make errors in remembering specific details and can even remember whole events that did not actually happen. In this module, we discuss several of the common types of errors, and what they can tell us about human memory and its interactions with the legal system.

Learning Objectives

- Describe the kinds of mistakes that eyewitnesses commonly make and some of the ways that this can impede justice.
- Explain some of the errors that are common in human memory.
- Describe some of the important research that has demonstrated human memory errors and their consequences.

What Is Eyewitness Testimony?

Eyewitness testimony is what happens when a person witnesses a crime (or accident, or other legally important event) and later gets up on the stand and recalls for the court all the details of the witnessed event. It involves a more complicated process than might initially be presumed. It includes what happens during the actual crime to facilitate or hamper witnessing, as well as everything that happens from the time the event is over to the later courtroom appearance. The eyewitness may be interviewed by the police and numerous lawyers, describe the perpetrator to several different people, and make an identification of the perpetrator, among other things.

Why Is Eyewitness Testimony an Important Area of Psychological Research?

When an eyewitness stands up in front of the court and describes what happened from her own perspective, this testimony can be extremely compelling—it is hard for those hearing this testimony to take it "with a grain of salt," or otherwise adjust its power. But to what extent is this necessary?

There is now a wealth of evidence, from research conducted over several decades, suggesting that eyewitness testimony is probably the most persuasive form of evidence presented in court, but in many cases, its accuracy is dubious. There is also evidence that mistaken eyewitness

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evidence can lead to wrongful conviction—sending people to prison for years or decades, even to death row, for crimes they did not commit. Faulty eyewitness testimony has been implicated in at least 75% of DNA exoneration cases—more than any other cause (Garrett, 2011). In a particularly famous case, a man named Ronald Cotton was identified by a rape victim, Jennifer Thompson, as her rapist, and was found guilty and sentenced to life in prison. After more than 10 years, he was exonerated (and the real rapist identified) based on DNA evidence. For details on this case and other (relatively) lucky individuals whose false convictions were subsequently overturned with DNA evidence, see the Innocence Project website **(http://www.innocenceproject.org/).**

There is also hope, though, that many of the errors may be avoidable if proper precautions are taken during the investigative and judicial processes. Psychological science has taught us what some of those precautions might involve, and we discuss some of that science now.

Misinformation

In an early study of eyewitness memory, undergraduate subjects first watched a slideshow depicting a small red car driving and then hitting a pedestrian (Loftus, Miller, & Burns, 1978). Some subjects were then asked leading questions about what had happened in the slides. For example, subjects were asked, "How fast was the car traveling when it passed the yield sign?" But this question was actually designed to be misleading, because the original slide included a stop sign rather than a yield sign.

Later, subjects were shown pairs of slides. One of the pair was the original slide containing the stop sign; the other was a replacement slide containing a yield sign. Subjects were asked which of the pair they had previously seen. Subjects who had been asked about the yield sign were likely to pick the slide showing the yield sign, even though they had originally seen the slide with the stop sign. In other words, the misinformation in the leading question led to inaccurate memory.

This phenomenon is called the misinformation effect, because the misinformation that subjects were exposed to after the event (here in the form of a misleading question) apparently contaminates subjects' memories of what they witnessed. Hundreds of subsequent studies have demonstrated that memory can be contaminated by erroneous information that people are exposed to after they witness an event (see Frenda, Nichols, & Loftus, 2011; Loftus, 2005). The misinformation in these studies has led people to incorrectly remember everything from small but crucial details of a perpetrator's appearance to objects as large as a barn that wasn't there at all.

Misinformation can be introduced into the memory of a witness between the time of seeing an event and reporting it later. Something as straightforward as which sort of traffic sign was in place at an intersection can be confused if subjects are exposed to erroneous information after the initial incident.

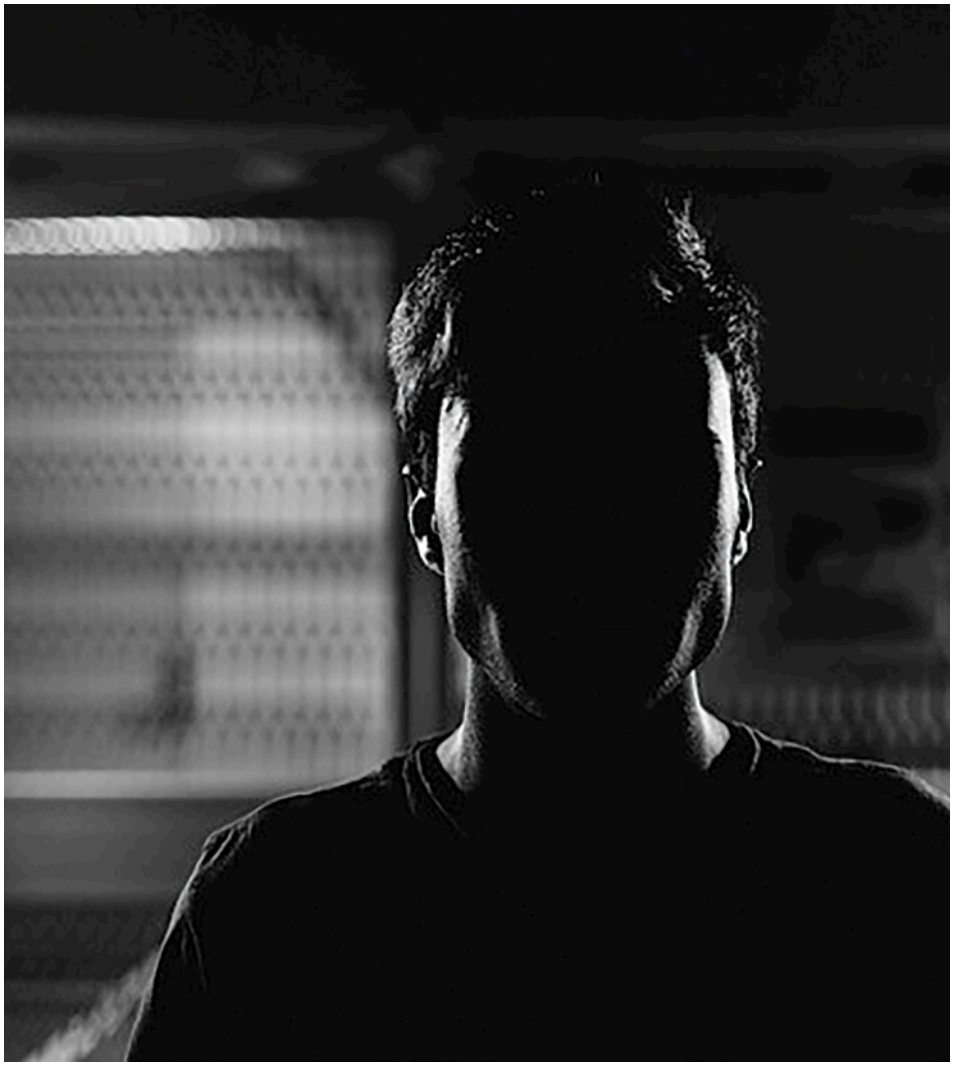
These studies have demonstrated that young adults (the typical research subjects in psychology) are often susceptible to misinformation, but that children and older adults can be even more susceptible (Bartlett & Memon, 2007; Ceci & Bruck, 1995). In addition, misinformation effects can occur easily, and without any intention to deceive (Allan & Gabbert, 2008). Even slight differences in the wording of a question can lead to misinformation effects. Subjects in one study were more likely to say yes when asked "Did you see the

broken headlight?" than when asked "Did you see a broken headlight?" (Loftus, 1975).

Other studies have shown that misinformation can corrupt memory even more easily when it is encountered in social situations (Gabbert, Memon, Allan, & Wright, 2004). This is a problem particularly in cases where more than one person witnesses a crime. In these cases, witnesses tend to talk to one another in the immediate aftermath of the crime, including as they wait for police to arrive. But because different witnesses are different people with different perspectives, they are likely to see or notice different things, and thus remember different things, even when they witness the same event. So when they communicate about the crime later, they not only reinforce common memories for the event, they also contaminate each other's memories for the event (Gabbert, Memon, & Allan, 2003; Paterson & Kemp, 2006; Takarangi, Parker, & Garry, 2006).

The misinformation effect has been modeled in the laboratory. Researchers had subjects watch a video in pairs. Both subjects sat in front of the same screen, but because they wore differently polarized glasses, they saw two different versions of a video, projected onto a screen. So, although they were both watching the same screen, and believed (quite reasonably) that they were watching the same video, they were actually watching two different versions of the video (Garry, French, Kinzett, & Mori, 2008).

In the video, Eric the electrician is seen wandering through an unoccupied house and helping himself to the contents thereof. A total of eight details were different between the two videos. After watching the videos, the "co-witnesses" worked together on 12 memory test questions. Four of these questions dealt with details that were different in the two versions of the video, so subjects had the chance to influence one another. Then subjects worked individually on 20 additional memory test questions. Eight of these were for details that were different in the two videos. Subjects' accuracy was highly dependent on whether they had discussed the details previously. Their accuracy for items they had not previously discussed with their co-witness was 79%. But for items that they had discussed, their accuracy dropped markedly, to 34%.



Mistakes in identifying perpetrators can be influenced by a number of factors including poor viewing conditions, too little time to view the perpetrator, or too much delay from time of witnessing to identification.

That is, subjects allowed their co-witnesses to corrupt their memories for what they had seen.

Identifying Perpetrators

In addition to correctly remembering many details of the crimes they witness, eyewitnesses often need to remember the faces and other identifying features of the perpetrators of those crimes. Eyewitnesses are often asked to describe that perpetrator to law enforcement and later to make identifications from books of mug shots or lineups. Here, too, there is a substantial body of research demonstrating that eyewitnesses can make serious, but often understandable and even predictable, errors (Caputo & Dunning, 2007; Cutler & Penrod, 1995).

In most jurisdictions in the United States, lineups are typically conducted with pictures, called photo spreads, rather than with actual people standing behind one-way glass (Wells, Memon, & Penrod, 2006). The eyewitness is given a set of small pictures of perhaps six or eight individuals who are dressed similarly and photographed in similar circumstances. One of these individuals is the police suspect, and the remainder are "foils" or "fillers" (people known to be innocent of the particular crime under investigation). If the eyewitness identifies the suspect, then the investigation of that suspect is likely to progress. If a witness identifies a foil or no one, then the police may choose to move their investigation in another direction.

This process is modeled in laboratory studies of eyewitness identifications. In these studies, research subjects witness a mock crime (often as a short video) and then are asked to make an identification from a photo or a live lineup. Sometimes the lineups are target present, meaning that the perpetrator from the mock crime is actually in the lineup, and sometimes they are target absent, meaning that

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the lineup is made up entirely of foils. The subjects, or mock witnesses, are given some instructions and asked to pick the perpetrator out of the lineup. The particular details of the witnessing experience, the instructions, and the lineup members can all influence the extent to which the mock witness is likely to pick the perpetrator out of the lineup, or indeed to make any selection at all. Mock witnesses (and indeed real witnesses) can make errors in two different ways. They can fail to pick the perpetrator out of a target present lineup (by picking a foil or by neglecting to make a selection), or they can pick a foil in a target absent lineup (wherein the only correct choice is to not make a selection).

Some factors have been shown to make eyewitness identification errors particularly likely. These include poor vision or viewing conditions during the crime, particularly stressful witnessing experiences, too little time to view the perpetrator or perpetrators, too much delay between witnessing and identifying, and being asked to identify a perpetrator from a race other than one's own (Bornstein, Deffenbacher, Penrod, & McGorty, 2012; Brigham, Bennett, Meissner, & Mitchell, 2007; Burton, Wilson, Cowan, & Bruce, 1999; Deffenbacher, Bornstein, Penrod, & McGorty, 2004).

It is hard for the legal system to do much about most of these problems. But there are some things that the justice system can do to help lineup identifications "go right." For example, investigators can put together high-quality, fair lineups. A fair lineup is one in which the suspect and each of the foils is equally likely to be chosen by someone who has read an eyewitness description of the perpetrator but who did not actually witness the crime (Brigham, Ready, & Spier, 1990). This means that no one in the lineup should "stick out," and that everyone should match the description given by the eyewitness. Other important recommendations that have come out of this research include better ways to conduct lineups, "double blind" lineups, unbiased instructions for witnesses, and conducting lineups in a sequential fashion (see Technical Working Group for Eyewitness Evidence, 1999; Wells et al., 1998; Wells & Olson, 2003).

Kinds of Memory Biases

Memory is also susceptible to a wide variety of other biases and errors. People can forget events that happened

For most of our experiences schematas are a benefit and help with information overload. However, they may make it difficult or impossible to recall certain details of a situation later. Do you recall the library as it actually was or the library as approximated by your library schemata? [Dan Kleinman, https://goo.gl/07xyDD, CC BY 2.0, https://goo.gl/BRvSA7]

to them and people they once knew. They can mix up details across time and place. They can even remember whole complex events that never happened at all. Importantly, these errors, once made, can be very hard to unmake. A memory is no less "memorable" just because it is wrong.

Some small memory errors are commonplace, and you have no doubt experienced many of them. You set down your keys without paying attention, and then cannot find them later when you go to look for them. You try to come up with a person's name but cannot find it, even though you have the sense that it is right at the tip of your tongue (psychologists actually call this the tip-of-the-tongue effect, or TOT) (Brown, 1991).

Other sorts of memory biases are more complicated and longer lasting. For example, it turns out that our expectations and beliefs about how the world works can have huge influences on our memories.

Because many aspects of our everyday lives are full of redundancies, our memory systems take advantage of the recurring patterns by forming and using schemata, or memory templates (Alba & Hasher, 1983; Brewer & Treyens, 1981). Thus, we know to expect that a library will have shelves and tables and librarians, and so we don't have to spend energy noticing these at the time. The result of this lack of attention, however, is that one is likely to remember schema-consistent information (such as tables), and to remember them in a rather generic way, whether or not they were actually present.

False Memory

Some memory errors are so "large" that they almost belong in a class of their own: false memories. Back in the early 1990s a pattern emerged whereby people would go into therapy for depression and other everyday problems, but over the course of the therapy develop memories for violent and horrible victimhood (Loftus

& Ketcham, 1994). These patients' therapists claimed that the patients were recovering genuine memories of real childhood abuse, buried deep in their minds for years or even decades. But some experimental psychologists believed that the memories were instead likely to be false—created in therapy. These researchers then set out to see whether it would indeed be possible for wholly false memories to be created by procedures similar to those used in these patients' therapy.

In early false memory studies, undergraduate subjects' family members were recruited to provide events from the students' lives. The student subjects were told that the researchers had talked to their family members and learned about four different events from their childhoods. The researchers asked if the now undergraduate students remembered each of these four events — introduced via short hints. The subjects were asked to write about each of the four events in a booklet and then were interviewed two separate times. The trick was that one of the events came from the researchers rather than the family (and the family had actually assured the researchers that this event had not happened to the subject). In the first such study, this researcher-introduced event was a story about being lost in a shopping mall and rescued by an older adult. In this study, after just being asked whether they remembered these events occurring on three separate occasions, a quarter of subjects came to believe that they had indeed been lost in the mall (Loftus & Pickrell, 1995). In subsequent studies, similar procedures were used to get subjects to believe that they nearly drowned and had been rescued by a lifeguard, or that they had spilled punch on the bride's parents at a family wedding, or that they had been attacked by a vicious animal as a child, among other events (Heaps & Nash, 1999; Hyman, Husband, & Billings, 1995; Porter, Yuille, & Lehman, 1999).

More recent false memory studies have used a variety of different manipulations to produce false memories in substantial minorities and even occasional majorities of manipulated subjects (Braun, Ellis, & Loftus, 2002; Lindsay, Hagen, Read, Wade, & Garry, 2004; Mazzoni, Loftus, Seitz, & Lynn, 1999; Seamon, Philbin, & Harrison, 2006; Wade, Garry, Read, & Lindsay, 2002). For example, one group of researchers used a mock-advertising study, wherein subjects were asked to review (fake) advertisements for Disney vacations, to convince subjects that they had once met the character Bugs Bunny at Disneyland—an impossible false memory because Bugs is a Warner Brothers character (Braun et al., 2002). Another group of researchers photoshopped childhood photographs of their subjects into a hot air balloon picture and then asked the subjects to try to remember and describe their hot air balloon experience (Wade et al., 2002). Other researchers gave subjects unmanipulated class photographs from their childhoods along with a fake story about a class prank, and thus enhanced the likelihood that subjects would falsely remember the prank (Lindsay et al., 2004).

Using a false feedback manipulation, we have been able to persuade subjects to falsely remember having a variety of childhood experiences. In these studies, subjects are told (falsely) that a powerful computer system has analyzed questionnaires that they completed previously and has concluded that they had a particular experience years earlier. Subjects apparently believe what the computer says about them and adjust their memories to match this new information. A variety of different false memories have been implanted in this way. In some studies, subjects are told they once got sick on a particular food (Bernstein, Laney, Morris, & Loftus, 2005). These memories can then spill out into other aspects of subjects' lives, such that they often become less interested in eating that food in the future (Bernstein & Loftus, 2009b). Other false memories implanted with this methodology include having an unpleasant experience with the character Pluto at Disneyland and witnessing physical violence between one's parents (Berkowitz, Laney, Morris, Garry, & Loftus, 2008; Laney & Loftus, 2008).

Importantly, once these false memories are implanted—whether through complex methods or simple ones—it is extremely difficult to tell them apart from true memories (Bernstein & Loftus, 2009a; Laney & Loftus, 2008).

Conclusion

To conclude, eyewitness testimony is very powerful and convincing to jurors, even though it is not particularly reliable. Identification errors occur, and these errors can lead to people being falsely accused and even convicted. Likewise, eyewitness memory can be corrupted by leading questions, misinterpretations of events, conversations with co-witnesses, and their own expectations for what should have happened. People can even come to remember whole events that never occurred.

The problems with memory in the legal system are real. But what can we do to start to fix them? A number of specific recommendations have already been made, and many of these are in the process of being implemented (e.g., Steblay & Loftus, 2012; Technical Working Group for Eyewitness Evidence, 1999; Wells et al., 1998). Some of these recommendations are aimed at specific legal procedures, including when and how witnesses should be interviewed, and how lineups should be constructed and conducted. Other recommendations call for appropriate education (often in the form of expert witness testimony) to be provided to jury members and others tasked with assessing eyewitness memory. Eyewitness testimony can be of great value to the legal system, but decades of research now argues that this testimony is often given far more weight than its accuracy justifies.

Vocabulary

False memories

Memory for an event that never actually occurred, implanted by experimental manipulation or other means.

Foils

Any member of a lineup (whether live or photograph) other than the suspect.

Misinformation effect

A memory error caused by exposure to incorrect information between the original event (e.g., a crime) and later memory test (e.g., an interview, lineup, or day in court).

Mock witnesses

A research subject who plays the part of a witness in a study.

Photo spreads

A selection of normally small photographs of faces given to a witness for the purpose of identifying a perpetrator.

Schema (plural: schemata)

A memory template, created through repeated exposure to a particular class of objects or events.

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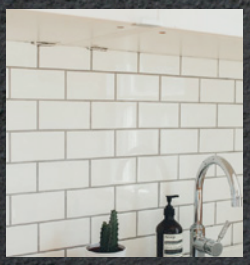

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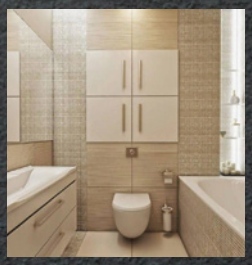

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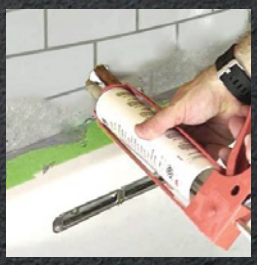

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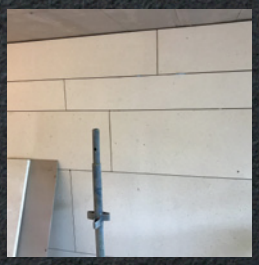

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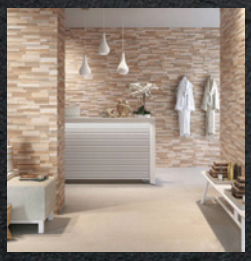

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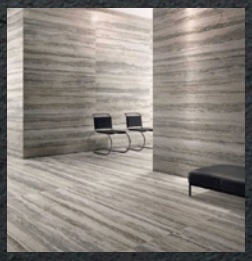

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