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WITNESS PREPARATION BEFORE TRIAL

What the Rules of Ethics Do Not Say

Singapore's rules of ethics do not expressly address witness preparation before trial. Recent judgments of the High Court and Court of Appeal and a disciplinary case decided this year take up the issue of what lawyers may do and not do in preparing witnesses for trial and, in particular, whether witnesses may be prepared as a group. This article examines these cases, the former ethics rules (which applied to the disciplinary case just mentioned) and the current ethics rules. It will be shown that the statutory law remains unsatisfactory in this critical area of ethical practice and that appropriate rules governing witness preparation must be introduced to the current ethics rules.

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I. Introduction

1 Recent case law has raised critical evidential and ethical considerations in the preparation of witnesses before trial. In *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala*[1] ("*Compania* (HC)"), the observations of the High Court on the preparation of witnesses for trial led to the initiation of disciplinary proceedings ("the disciplinary case") against the defendant's three lawyers ("the Respondents") pursuant to ss 83(2)(*b*) and 83(2)(*h*) of the Legal Profession Act[2] ("LPA"), and r 54 of the Legal Profession (Professional Conduct) Rules 2010[3] ("LP(PC)R 2010").[4] The Respondents were exonerated by the disciplinary tribunal.[5] In determining the defendant's substantive appeal against the High Court's judgment (which had been granted in favour of the plaintiff companies),

1 [2017] SGHC 14.
2 Cap 161, 2009 Rev Ed.
3 Cap 161, R 1, 2010 Rev Ed.
4 As *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 concerned events in 2014, the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) applied.
5 *Law Society of Singapore v Nehal Harpreet Singh SC* DT 9/2017.

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the Court of Appeal in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA*[6] ("*Compania* (CA)") made its own observations on the legitimate parameters of witness preparation in the context of the evidential reliability of testimony. This article will examine the practice of witness preparation and the state of the law under the former LP(PC)R 2010 (as they were in force at the time the witnesses were prepared for trial), the position under the current Legal Profession (Professional Conduct) Rules 2015[7] ("LP(PC)R 2015") and the significance of the above cases and the current law.

II. Practice of witness preparation and circumstances in disciplinary case.

2 Lawyers normally prepare their witnesses for trial by reviewing their affidavits of the evidence-in-chief ("AEICs") and related evidence, posing possible questions that might be asked in cross-examination (some law practices conduct formal mock cross-examinations) and correcting the witness's phraseology in the interest of effective communication. None of these practices is improper if the lawyer complies with the fundamental rule that that the substance or content of the witness's evidence must not be altered. Indeed, legitimate witness preparation (as opposed to "coaching" or "training" or deliberately encouraging a witness to give false evidence or to state facts which he would not have otherwise testified to) serves the interests of justice by ensuring that the witness's testimony is concise and understandable.[8] As for the synonymous preparation of two or more witnesses ("group preparation"), this is often undertaken by lawyers in the arbitration field and it is not uncommon in cases before the courts.

3 The circumstances in the disciplinary case concerned the preparation of five witnesses in Sydney, Australia, for trial in Singapore. While the third respondent prepared one witness, the first and second respondents prepared the others in a group to "be better able to present their evidence at trial".[9] The disciplinary tribunal considered that the Respondents' conduct of the group preparation of witnesses could not be faulted in the absence of any evidence that contradicted the first and

6 [2018] 1 SLR 894. The appeal was from the decision of the High Court in *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14.

7 S 706/2015.

8 See *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) at paras 5.027 and 5.028 and Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 17.022–17.026.

9 Disciplinary Tribunal's Report at para 6.2.2.

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second respondents' testimonies: "when one witness was being taken through his or her evidence, none of the onlooking witnesses were allowed to comment on the evidence" and there was no suggestion that they influenced the witnesses in any particular way.[10] If a witness made a mistake, he or she would be referred to the evidence so that the error would be rectified.[11] As there was "relatively little" overlapping evidence between the witnesses, the risk of contamination was limited.[12]

4 The disciplinary tribunal considered that the preparation of witnesses in a group may be beneficial in enhancing the accuracy and clarity of testimony: "[T]here is a real benefit that reading or hearing the evidence of other witnesses can help to jog a witness's own memory or correct his mistaken impressions. The witness may also notice an error or omission made by another witness and point this out."[13] This enables the lawyer to verify the position with the latter and, if necessary, arrange a new affidavit or, if appropriate, an oral qualification in court.[14] Regarding the danger that witnesses may consciously change their evidence after hearing other witnesses, the disciplinary tribunal did not see this as a significant problem because (in its view) most lawyers would pre-empt this (out of concern that false testimony would be exposed in cross-examination to detrimental effect) by exhorting the witnesses to speak the truth.[15] As for the possibility that witnesses prepared in a group might become subconsciously influenced by each other's recounting of the facts, the disciplinary tribunal thought that this risk already exists when lawyers show AEICs of witnesses to each other: "In modern litigation practice, lawyers do inform the witnesses of the evidence of other witnesses giving evidence on the same topic by showing them the AEICs of other witnesses, so this is a risk that is already present."[16] The disciplinary tribunal added that "there is nothing unethical about a lawyer reviewing a witness's evidence in detail in witness preparation" for the purpose of determining whether the witness still stands by his AEIC in every respect.[17]

5 Even the Law Society agreed that there was no ethical rule against witness preparation either singly or in a group,[18] although it contended that the Respondents ought to have issued a cautionary warning to their client and witnesses during witness preparation not to

10 Disciplinary Tribunal's Report at para 6.2.4.
11 Disciplinary Tribunal's Report at para 6.2.5.
12 Disciplinary Tribunal's Report at para 6.2.6.
13 Disciplinary Tribunal's Report at para 6.2.7.
14 Disciplinary Tribunal's Report at para 6.2.9.
15 Disciplinary Tribunal's Report at para 6.2.8.
16 Disciplinary Tribunal's Report at para 6.2.9.
17 Disciplinary Tribunal's Report at para 6.2.9.
18 Disciplinary Tribunal's Report at paras 6.1.1 and 6.2.12.

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change their evidence as a result of what other witnesses said. In the view of the disciplinary tribunal, while this may arguably be the "best practice", the failure to comply with "best practice" was not an ethical breach given that "there is currently no express law or consensus of opinion within the profession". It was sufficient that the Respondents had given "safety warnings only at the first of the witness preparation sessions … and then only in general terms rather than warning against the risk of witness contamination".[19]

6 While the LP(PC)R 2010 prohibited lawyers from intentionally misleading the court and deliberately fabricating evidence (primarily through rr 56, 59(*c*) and 60(*f*) of the LP(PC)R 2010), no such proscription applied to improper management of the process of witness preparation in the absence of an intention to falsify. Similarly, rr 9(2)(*a*)–9(2)(*c*) and 9(2)(*g*) of the LP(PC)R 2015 bar the lawyer from misleading the court and falsifying evidence. However, certain core principles in r 4 and specific principles in rr 9(1) (Conduct of proceedings), 10(1) (Responsibility for client's conduct) and 12(1) (Communications and dealings with witnesses) literally encompass the proper management of witness preparation regardless of the lawyer's actual state of mind. More specifically, r 10(2) requires the lawyer to inform the client of the latter's responsibility to give truthful evidence and to comply with all legal requirements.[20] These provisions in the LP(PC)R 2015 will be examined subsequently. The Law Society's Practice Directions 2013 do not address witness preparation.

7 The absence of regulatory provisions that directly address the preparation of witnesses before trial might be explained by the fact that (in civil cases) the witness's evidence-in-chief is finalised well in advance of the trial through the earlier filing of his AEIC. Therefore, in civil cases, lawyers would be concerned about ensuring consistency between the AEIC and preparation of the witness before trial. This necessarily means that preparing a witness for cross-examination would involve exposing the witness to all types of questions which could shake the veracity of the witness's evidence, which is already contained in the AEIC. Indeed, this practice was very clearly reflected by the provisions of the LP(PC)R 2010, which specifically address the content of affidavits but not witness preparation. Rule 59(*c*) of the LP(PC)R 2010 stated that the advocate and solicitor:

> … shall not contrive facts which will assist his client's case or draft any … affidavit … containing:

19 Disciplinary Tribunal's Report at para 6.1.1.
20 See r 10(2) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015), which is discussed at paras 35–41 below.

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…

(*c*) in the case of an affidavit or witness statement, any statement of fact other than the evidence which in substance according to his instructions the advocate and solicitor reasonably believes the witness would give if the evidence contained in the affidavit or witness statement were being given orally.

8 Similarly, r 9(2)(*h*)(iv) of the LP(PC)R 2015 retains the essential terms of r 59(*c*) of the former LP(PC)R 2010. In a series of cases, the courts have focused on the lawyer's ethical responsibilities in drafting the AEIC.[21] Conversely, until *Compania*, no Singapore court had expounded on the manner of witness preparation just before a civil trial. The clear and obvious assumption is that if the ethics rules governing the integrity of the AEIC are complied with, the court can reasonably expect to rely on it as the truthful expression of the witness's evidence. Consequently, if a lawyer causes the witness to alter the evidence during witness preparation just prior to trial, this would normally be apparent and could be detrimental to his case. Nevertheless, there is still a risk that a witness may answer certain questions falsely during cross-examination and yet maintain the integrity of his AEIC. For example, he might be questioned on why he acted in a particular manner (as described in his AEIC) when he could have chosen a different, more appropriate course of action. Anticipating this line of questioning, the lawyer may encourage or influence the witness so that he responds in a manner that is favourable to the party represented by the lawyer and yet is not inconsistent with the AEIC. If this response is untruthful, the lawyer would be ethically accountable for being complicit in the falsification of evidence. Such an outcome may occur more subtly when the lawyer fails to properly manage the preparation of witnesses in a group so that the response favourable to the party emerges through conscious or subconscious acceptance of what another witness might say.

III. High Court's observations on witness preparation in *Compania*

9 In *Compania* (HC), the High Court had the first opportunity to thoroughly consider the propriety of witness preparation before trial in a non-disciplinary context for determining the credibility of certain witnesses. The case involved claims by the plaintiff companies for the recovery of shares, assets and/or funds that the defendant had allegedly

21 See *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455 at [21]; *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 at [74]; *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137; and *Win-Win Aluminium Systems Pte Ltd v Law Society of Singapore* [2012] SGHC 123 at [35].

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transferred to himself contrary to the terms of a family trust. The defendant called family members as witnesses. The issue of witness preparation arose from questions and answers during the cross-examination of these witnesses. During this phase of the proceedings, the court became aware that "group training sessions" had been conducted by the Respondents in Sydney, Australia, three weeks before trial. Furthermore, a 14-page document ("D-3") that had been prepared in advance of trial, which consisted of questions that a certain witness might face and answers that he would give, came to light during his testimony.[22] The High Court considered D-3 to be "a scripted answer" concerning the position the witness should take in the course of cross-examination.[23] However, the High Court did not state that the Respondents were involved in the preparation of D-3. The disciplinary tribunal ruled that there was no evidence to link any of the Respondents to the creation or content of that document or that they had any knowledge of it until it was produced by the witness in court.[24] The High Court judgment led to a referral by the Attorney-General's Chambers ("AGC") of information concerning the conduct of the defendant's lawyers pursuant to s 85(3) of the LPA.

10 In *Compania* (HC), Quentin Loh J applied the principles in *R v Momodou*[25] ("*Momodou*"), a case in which the English Court of Appeal was specifically concerned with witness preparation in criminal proceedings. In *Momodou*, Judge LJ stated in no uncertain terms that while "*familiarisation*" of the witness with the trial process is legitimate, "witness training for criminal trials is prohibited".[26] Indeed, Judge LJ declared that even one-to-one preparation and discussion is prohibited in criminal cases. Judge LJ was essentially applying the relevant regulatory provisions governing professional conduct in England and Wales, even though they were not cited in his judgment. *Momodou* reflects the position in the codes which govern the professional conduct of barristers and solicitors (who appear in court) in England, which, *inter alia*, prohibit the lawyer from rehearsing and practising with witnesses.[27] These rules did not exist in the LP(PC)R 2010 and are not part of the LP(PC)R 2015.

22 This document was produced in court after its existence emerged during the witness's testimony.
23 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [279(a)].
24 Disciplinary Tribunal's Report at para 6.3.1.
25 [2005] EWCA Crim 177; [2005] 2 All ER 571.
26 *R v Momodou* [2005] EWCA Crim 177; [2005] 2 All ER 571 at [61].
27 Rule C9.4 of the Bar Standards Board Handbook (3rd Ed, 2017) states: "[Y]ou must not rehearse, practise with or coach a witness in respect of their evidence."

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11 It must be emphasised that *Compania* (HC) is not a case on professional responsibility in the disciplinary sense. Furthermore, Loh J did not declare that the Respondents had acted unethically (although there is comment on the general management of the witness preparation sessions).[28] The primary concern of the court was the extent to which it could rely on the evidence of witnesses whom it regarded as having given untruthful testimony.[29] Having considered *Momodou*, Loh J took the view that the same standard articulated in that case should apply to civil cases as well:[30]

> The core principles of *Momodou* are integral to the adversarial process in the reception of evidence leading to the finding of facts in civil proceedings and I do not think it unrealistic to apply them to civil cases; on the contrary I think they equally should apply.

12 Loh J added a qualification: "What I can agree with is that with more complex civil cases,[31] *some* group discussion early on in evidence gathering is inevitable but it always depends on the integrity of the Respondents to ensure it is handled responsibly and to remind potential witnesses of the dangers of coming to a common advantageous view when that is *not* the recollection of some of them" [emphasis in original].[32] Loh J further stated: "There is also 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."[33] Loh J's reference to "*some* group discussion *early on* in evidence" [emphasis added] suggests that group discussion should not be permitted close to trial. The phrase "it would be wrong to start coaching him on what is the right answer" would presumably concern the improper modification of the content of the witness's evidence so that it becomes untruthful. Loh J's view that there is "nothing wrong with a lawyer asking questions of his witness as the witness might face in cross-examination" as long as it does not involve coaching to the extent of altering the content of the testimony, affirms the principle that a lawyer

28 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [285].

29 In particular, see *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [290].

30 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [278] (citing *Ultraframe (UK) Ltd v Gary Fielding* [2005] EWHC 1638 (Ch) at [25]).

31 Quentin Loh J considered the case before him as being within the category of complex cases: *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [275].

32 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [278].

33 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [279].

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may assist his witness in communicating the *original* evidence effectively in the interest of clear and accurate testimony in court.

13 Loh J also cited *Ultraframe (UK) Ltd v Gary Fielding*[34] ("*Ultraframe*"), in which Lewison J identified the various differences between the criminal and civil process and concluded that, nevertheless, "the principle that a witness'[s] evidence should be his honest and independent recollection, expressed in his own words, remains at the heart of civil litigation too".[35] Lewison J went on to state that as oral evidence-in-chief is absent from civil trials, "the importance of the witness's own independent recollection in giving his evidence under cross-examination is all the greater".[36] However, Lewison J did not provide any definitive ruling on the scope of witness preparation in *Ultraframe*. As Loh J pointed out in *Compania* (HC), Lewison J "was of the view that the question raised very difficult issues which must be the subject of wide consultation before any conclusions could be reached".[37] *Compania* (HC) also acknowledges arguments in the UK for a broader approach[38] and cites Hollander.[39] Hollander's primary argument is that the practice in civil cases does not sit well with the *Momodou* principles.[40] In his view, discussion with witnesses as a group may be necessary to ensure the efficacy of testimony: "Surely, discussion as to the evidence of a witness, if handled responsibly, can improve its quality rather than detract from it. Is group discussion of key issues not inevitable anyway?"[41] He observes that in particularly complex cases, "witnesses will often be assumed by the court to have not merely read the proofs of other witnesses but, if they are important witnesses, to have a grasp of the issues in the case in so far as they impact on the evidence".[42]

34 [2005] EWHC 1638.

35 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [275] (citing *Ultraframe (UK) Ltd v Gary Fielding* [2005] EWHC 1638 (Ch) at [25]).

36 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [275] (citing *Ultraframe (UK) Ltd v Gary Fielding* [2005] EWHC 1638 (Ch) at [25]).

37 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [276] (citing *Ultraframe (UK) Ltd v Gary Fielding* [2005] EWHC 1638 (Ch) at [31]).

38 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [277].

39 Charles Hollander QC, *Documentary Evidence* (Thomson Reuters, 12th Ed, 2015) at paras 29-9–29-10.

40 Charles Hollander QC, *Documentary Evidence* (Thomson Reuters, 12th Ed, 2015) at para 29-10.

41 Charles Hollander QC, *Documentary Evidence* (Thomson Reuters, 12th Ed, 2015) at para 29-10.

42 Charles Hollander QC, *Documentary Evidence* (Thomson Reuters, 12th Ed, 2015) at para 29-10.

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14 Although Loh J considered the *Momodou* principles to be applicable in civil cases in Singapore (subject to the learned judge's qualification concerning complex cases[43] and his acknowledgement of the current debate in the UK concerning their applicability in the civil realm),[44] they have yet to be definitively applied to civil proceedings in England by any authority. *Ultraframe* does not do so and there is other authority which contradicts such an extension.[45] It would therefore be strange for the *Momodou* principles to set the standard of professional conduct in civil proceedings in Singapore given that the ethics rules governing witness preparation in England (from which those principles stem) have no place in Singapore, where witness preparation is not expressly regulated. Indeed, as will be shown, there are common assumptions among legal practitioners in Singapore that support a broader approach than the applicable position in England.[46] The upshot of the High Court's observations in *Compania* (HC) on witness preparation (that is, that the *Momodou* principles apply to civil cases in Singapore subject to the qualification mentioned earlier) is that they introduce a stricter approach towards witness preparation than previously contemplated by litigators (in the absence of any professional conduct regulations on witness preparation). Lewison J in *Ultraframe* thought that this question raised very difficult issues, both of law and professional conduct, which must be the subject of wide consultation before any conclusions could be reached.[47]

15 In *Compania* (HC), Loh J acknowledged that "[t]he extent to which witnesses in a civil case may properly discuss their evidence with one another or the solicitors of the party that had called them as witnesses before it amounts to impermissible preparation has not been directly addressed by the Singapore courts". This observation establishes that the Respondents were not subject to any express restrictions in case law, let alone regulatory law, at the time of the preparation of witnesses. In reaching his conclusions, Loh J adopted the views expressed in English and Australian authorities,[48] although the position in Australia (at least now) does contemplate extensive witness preparation before trial (including witness conferences).[49] As pointed out by Loh J, the

43 See para 12 above.
44 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [277]. Also see *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [134].
45 See Hollander's discussion of *Odyssey Re (London) Ltd v OIC Run-Off* (2000) 97 13 LSG 42.
46 See paras 2–8 above.
47 *Ultraframe (UK) Ltd v Gary Fielding* [2005] EWHC 1638 (Ch) at [31].
48 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [283].
49 See para 29 below.

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matter of witness preparation "is obviously one of degree and very fact sensitive and I should not lay down any hard and fast rules". The learned judge added: "Few will argue with the principle that a witness's evidence should be his honest and independent recollection, expressed in his own words. This remains at the heart of civil litigation."[50] Nevertheless, it is actually quite common in Singapore practice for AEICs to be drafted by lawyers on the basis of information supplied by the witnesses. While a witness will undoubtedly read his AEIC before signing it, parts of the document will be in the words of the lawyer who drafted it. This is acknowledged by Loh J himself, who stated: "Time and again we see words and elegant phrases that a particular witness deposes to in his affidavits, but when cross-examination ensues, it is obvious that the words and language used are not familiar to the witness."[51]

IV. Court of Appeal's observations on witness preparation in *Compania*

16 In *Compania* (CA),[52] the Court of Appeal had the opportunity to consider the High Court's observations on witness preparation. Andrew Phang Boon Leong JA explained how witness preparation ought to be conducted to ensure the reliability of a witness's evidence at trial:[53]

> 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

50 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [283] (citing *Ultraframe (UK) Ltd v Gary Fielding* [2005] EWHC 1638 (Ch) at [25]).

51 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [272].

52 The Court of Appeal's judgment in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 is first referred to at para 1 above.

53 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [136].

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> of the questions which opposing counsel might then ask with regard to the possible inconsistency. … The line that *must not be crossed* is this: the witness's evidence *must remain his own*. [emphasis in original]

17 The learned judge then observed that this principle gives rise to three rules, "the breach of which *may* – depending on all the circumstances – lead the court to accord less weight (or even no weight) to the resulting testimony" [emphasis in original]. Phang JA emphasised that "these are rules of thumb and not to be applied mechanistically. The ultimate question is still whether the preparation has compromised the fundamental principle that the witness's evidence must be his own independent testimony".[54] The three rules are as follows:[55]

> 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. … 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 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. … 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

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54 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [137].

55 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [138]–[140].

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> 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.
>
> [emphasis in original]

18 As for the case itself, the Court of Appeal concluded that the circumstances "cast *serious doubt* on whether" [emphasis in original] a certain witness's evidence was his own.[56] However, the court clarified that it was "not suggesting that any of the solicitors involved *knowingly* influenced [the witness's] evidence, nor that they intentionally arranged for other witnesses to be present in order to *create* opportunities for (or, rather, a risk of) contamination of witness testimony" [emphasis in original].[57] It pointed out that, on the facts, there was insufficient evidence to make such a finding.[58] Phang JA went on to state that as far as witness credibility is concerned, "the innocence of the breach would not mitigate the consequences in terms of how the court should *approach the evidence* once these serious doubts have been raised".[59] The learned judge then said this:[60]

> The rules against witness coaching are prophylactic in nature. They of course prohibit *intentional wrongdoing* – and solicitors who are responsible for such wrongdoing may expose themselves to severe professional sanctions – which has clearly influenced a witness's testimony, but they apply *equally* to innocent breaches which *may or may not* have actually affected his testimony. [emphasis in original]

19 On the basis of Phang JA's earlier observations and the syntax of the extract immediately above, it is clear that the learned judge was not declaring broad ethical accountability for improper witness preparation; rather, the learned judge was distinguishing between intentional (unethical) wrongdoing and innocent wrongdoing, both of which may compromise witness testimony. Although the Court of Appeal addressed witness preparation in the context of the reliability of witness testimony, its tangential observations on the lawyer's ethical responsibility are consistent with the position under the LP(PC)R 2010

56 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [141].
57 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [142].
58 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [142].
59 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [142].
60 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [142].

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(the rules that applied to the facts which arose in 2014) and the subsequent LP(PC)R 2015.[61]

20 Having referred to Loh J's qualification that group discussion at the early stage of evidence gathering in complex cases is inevitable, the Court of Appeal stopped short of endorsing the unqualified application of the *Momodou* principles in civil proceedings in Singapore.[62] Rather, it enunciated the fundamental principle that a witness's evidence must be his own. This means that "training or preparation sessions are *relevant* to assessing whether the witness's evidence at trial is his unvarnished as well as uncontaminated evidence, but they are not *determinative* as the credibility of a witness is ultimately a fact-sensitive issue" [emphasis in original].[63] As the *Momodou* principles do not fully apply in Singapore and the second rule formulated by the Court of Appeal (the exhortation to avoid the preparation of witnesses in a group) is phrased exhortatively rather than mandatorily,[64] and is a "rule of thumb" and "not to be applied mechanistically",[65] it may not be accurate to say that the preparation of witnesses in a group is absolutely prohibited in all circumstances by the case law. The real message conveyed by the Court of Appeal is that lawyers who engage in group preparation of witnesses run the risk that the evidence presented at the trial may be accorded less weight or treated as wholly unreliable. Ultimately, the outcome of evidential assessment (being "a fact-sensitive issue") must depend on the particular circumstances of the case. In the disciplinary case, the disciplinary tribunal stated that "it cannot be said that the three rules are necessarily ethical rules, a breach of which will inevitably entail professional sanctions", that those rules are primarily concerned "with the credibility and weight to be accorded to a witness's testimony", and that they "should be taken as a working guide for all lawyers going forward".[66]

V. Parameters of ethical accountability

21 It will be recalled that the Law Society charged the Respondents under ss 83(2)(*b*) and 83(2)(*h*) of the LPA, and r 54 of the LP(PC)R

61 The position of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) on witness preparation is considered at paras 32–41 above.

62 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [134].

63 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [134]. Also see Disciplinary Tribunal's Report at para 8.12.2.

64 In the second rule (as in the case of the third rule) the word "should" is used instead of "must", which appears in the first rule.

65 See para 17 above.

66 Disciplinary Tribunal's Report at para 8.12.6.

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2010.[67] These provisions will be examined sequentially to the effect that the charges against the Respondents were wholly unjustified. Section 83(2)(*b*) includes "fraudulent or grossly improper conduct in the discharge of [the lawyer's] professional duty or … a breach of any usage or rule of conduct" made under the LPA. Section 83(2)(*h*) pertains to "misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession". It is a fundamental principle of justice that liability must be established by a written or unwritten rule of applicable law or administrative imperative. The importance of this principle is accentuated for professional regulation which is ordinarily governed by legislative and administrative frameworks and related case law. The professional conduct of lawyers is governed by the LPA, a variety of sources of subsidiary legislation, practice directions, official guidelines and rulings of the Law Society, and the judgments of the Singapore courts.

22 A lawyer can only be held ethically accountable if he or she is in breach of a specific regulatory provision or has otherwise engaged in conduct which the court declares as being unethical within the meaning of a more general statutory provision such as s 83(2)(*b*) or 83(2)(*h*) of the LPA.[68] Section 83(2)(*b*) concerns particularly serious misconduct that invariably involves dishonesty or malice or grossly improper conduct of a case. In the absence of any evidence that the Respondents had intentionally falsified or intentionally caused a witness to falsify evidence, and in view of the uncertainty of the state of the law concerning what a lawyer is permitted to do in the preparation of witnesses, a charge under s 83(2)(*b*) was clearly inappropriate. In *Law Society of Singapore v Chiong Chin May Selena*,[69] the Court of Three Judges accepted that conduct unbefitting an advocate and solicitor under s 83(2)(*h*) differs from grossly improper conduct under s 83(2)(*b*) in two respects: it does not have to arise in the course of professional duty, though it may do so; and the distinction between the two provisions is one of degree rather than kind.[70]

23 Therefore, s 83(2)(*h*) is intended to address less serious conduct in the sense that a lawyer would be ethically responsible if he behaves in a manner that is clearly improper and therefore unbefitting of a member

67 As *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 concerned events in 2014, the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) applied. The charges are summarised at para 1 above.

68 The other paragraphs of s 83(2) of the Legal Profession Act (Cap 161, 2009 Rev Ed) apply to specific rather than general circumstances.

69 [2013] SGHC 5.

70 *Law Society of Singapore v Chiong Chin May Selena* [2013] SGHC 5 at [25].

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of an honourable profession.[71] Nevertheless, s 83(2)(*h*) is not a catch-all provision that encompasses *all* conduct which is unregulated by statute. A different interpretation would mean that the lawyer would have to work in a constant state of uncertainty facing indeterminate liability arising from the omissions in the regulatory system. This would be extremely unjust. Section 83(2)(*h*) would cover conduct that is obviously unbefitting a lawyer. For example, it would clearly be unbefitting for a lawyer to engage in a close romantic relationship with his or her client while acting for him or her in divorce proceedings or to assault a person or to drive while in an intoxicated state. However, it is quite a different matter where it is unclear that a course of conduct is proper or improper in the absence of specific regulation or a case law pronouncement. It would be unconscionable to accuse a lawyer of acting improperly simply because he chooses to conduct a process (such as witness preparation) in a certain manner (as other lawyers have done) pursuant to his rightful belief that he is not constrained by legislation or judicial pronouncement. In *Law Society of Singapore v Ng Chee Sing*,[72] the Court of Three Judges stated: "Section 83(2)(*h*) of the Legal Profession Act is a catch-all provision which can be invoked when the conduct does not fall within any of the other enumerated grounds but is nevertheless considered unacceptable." Was the synonymous preparation of witnesses in a group in *Compania* considered "unacceptable" at the time of the case? It was not.[73]

24 Although the standard of unbefitting conduct in s 83(2)(*h*) is "less strict" than the misconduct contemplated by s 83(2)(*b*), the misconduct has to be *prima facie* serious enough to suggest that the lawyer is not fit to practise ("such conduct as would render him unfit to remain as a member of an honourable profession"). It is difficult to contemplate a scenario in which a lawyer acting in a professional capacity should be held to this standard when he has not breached any ethical rule or practice direction. This is particularly so in relation to witness preparation (including mock cross-examination sessions) which is commonly conducted by lawyers prior to trial. If s 83(2)(*h*) is applied in such circumstances, a sizeable proportion of the legal profession would have been unfit to practise at the time of the case. These observations are made without losing sight of the fundamental rule that lawyers must not deliberately encourage, assist, influence or permit witnesses to give false testimony. This would be an extremely serious breach which would justify a charge under s 83(2)(*b*) in addition to s 83(2)(*h*) of the LPA.

71 See *Law Society of Singapore v Ng Chee Sing* [2000] 1 SLR(R) 466 at [40], where the Court of Three Judges stated that the standard of unbefitting conduct under s 83(2)(*h*) of the Legal Profession Act (Cap 161, 2009 Rev Ed) is "less strict".

72 *Law Society of Singapore v Ng Chee Sing* [2000] 1 SLR(R) 466 at [40].

73 This is clearly evident from the Disciplinary Tribunal's Report.

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25 The Law Society also charged the respondents under r 54 of the LP(PC)R 2010. This provision states:

> **Conduct of proceedings in client's interest**
>
> **54.** Subject to these Rules, an advocate and solicitor shall conduct each case in such a manner as he considers will be most advantageous to the client so long as it does not conflict with the interests of justice, public interest and professional ethics.

26 It is apparent that r 54 is solely concerned with the lawyer's responsibility to the client, not to the administration of justice. This is borne out by the title to this rule: "Conduct of proceedings in client's interest". Moreover, r 54 is the only provision in Pt IV of the LP(PC)R 2010 which concerns the responsibility of the lawyer to the client to put forward the client's best case in court. Such a rule must exist and it is found nowhere else. The ending phrase of r 54, "so long as it does not conflict with the interests of justice, public interest and professional ethics", necessarily circumscribes the lawyer's duty to the client. It does not impose separate duties with regard to the administration of justice as these are fully covered in the remaining rules of Pt IV. If r 54 is read as imposing separate sets of duties on the lawyer, any charge made under this rule would be duplicitous. No rule in the LP(PC)R 2010 (and, for that matter, the LP(PC)R 2015) amalgamates duties in separate spheres of ethics. Such an approach would contravene the principles of drafting. Indeed, this is borne out by the first words of r 54: "Subject to these Rules". It is also borne out by the last words of r 54 ("interests of justice, public interest and professional ethics"), which are in the most general terms possible. Rule 54 is quite unique in that it is expressed more as a principle than a rule. This makes sense as its position as the first rule in Pt IV of the LP(PC)R 2010 and its terminology suggests that it is a precursor of the other rules in Pt IV. The duties of the lawyer to the administration of justice are set out not in r 54 but in the other rules of Pt IV. In dismissing the charge brought under r 54, the disciplinary tribunal accepted this argument by holding that the Law Society had inappropriately relied on the "interests of justice" and "professional ethics" proviso in r 54 as an independent legal basis for a charge when the central obligation of that rule was to define the lawyer's duty to his client.[74]

27 A further related point of importance must be addressed concerning the position in other jurisdictions. Singapore lawyers are not subject to ethical standards in foreign countries unless those standards have been applied through local legislation, practice directions or court judgments. It cannot be the case that a Singapore lawyer should be held

74 Disciplinary Tribunal's Report at para 7.4.

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responsible for his conduct (in this case, the preparation of witnesses for trial) on the basis that it is proscribed by the regulations or case law of a foreign country. And it would be grossly unjust if a Singapore court applies a foreign rule of ethics (which is not part of the law of ethics in Singapore) to the previous conduct of a lawyer, who would have rightfully assumed that any such rule did not extend to him. The position becomes even more untenable if the scope of application of the foreign rule is limited (for example, it concerns conduct in a criminal case and there is uncertainty *in that very jurisdiction* concerning its applicability to civil cases),[75] and it is applied *post factum* in this jurisdiction to professional conduct in civil proceedings. Even if (for the sake of discussion) such broad-sweeping, indeterminate accountability is justified, how would the lawyer have known whether a court would apply the approach of one jurisdiction over the different positions taken in other jurisdictions? As will be shown in the following paragraphs, there is no unanimity internationally concerning what is permissible and what is not permissible in witness preparation.

28 *Momodou* represents one of multiple approaches to witness preparation in various jurisdictions. The position in the US is much more liberal. Paragraph 116(1) of the *Restatement of the Law Third, The Law Governing Lawyers* provides that a lawyer "may interview a witness for the purpose of preparing the witness to testify". The commentary to this provision (in sub-para (b)) elaborates by stating, *inter alia*, that the lawyer "may invite the witness to provide truthful testimony favourable to the lawyer's client", that he may discuss "probable lines of hostile cross-examination that the witness should be prepared to meet", that the testimony may be rehearsed and that the lawyer may "suggest choice of words that might be employed to make the witness's meaning clear". The only prohibition is that the lawyer must "not assist the witness to testify falsely as to a material fact".

29 In Australia, the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 ("the Australian Rules") expresses the fundamental rule that a solicitor must not encourage a witness to give "false or misleading" evidence, nor "coach a witness by advising what answers the witness should give to questions which might be asked".[76] However, the Australian Rules permit, *inter alia*, "questioning and testing in conference the version of evidence to be given by a prospective witness"[77] and the involvement of more than one witness in conference (that is, the preparation of several witnesses) if "the solicitor believes on reasonable grounds that special circumstances require such a

75 See para 14 above.
76 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 r 24.1.
77 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 r 24.2.2.

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conference".[78] The relevant rule in New Zealand[79] prohibits a lawyer from, *inter alia*, "suggest[ing] to a witness or potential witness, whether expressly or impliedly, that false or misleading evidence ought to be given or that evidence should be suppressed". This proscription is explained in footnote 24 of those rules as follows: "A lawyer may assist a witness in preparing to give evidence by assisting in the preparation of a brief of evidence, and by pointing out gaps, inconsistencies in the evidence (with that witness's evidence or the evidence of other witnesses), the inadmissible nature of the proposed evidence, or irrelevancies in evidence that the witness is proposing to give."

30 Apart from *Momodou*,[80] the High Court in *Compania* (HC) also relied on a Hong Kong criminal case, *HKSAR v Tse Tat Fung*[81] ("*Tse Tat Fung*"), in which the Hong Kong Court of Appeal agreed with the position in *Momodou*. However, apart from being a criminal case (like *Momodou*), the facts showed extreme interference by counsel: "… the repetitive drilling of a witness to a degree where his true recollection of events is supplanted by another version suggested to him …"[82] This is far from the circumstances of *Compania* (HC), in which there is no evidence of such intrusion. The High Court in *Compania* also relied on *Day v Perisher Blue Pty Ltd*[83] ("*Perisher Blue*"), although that was another extreme case in which the defendant's lawyers had prepared potential questions and suggestions as to the appropriate responses which would be consistent with the defendant's case.[84] In *Compania* (HC), there was no evidence that the respondents had acted in the brazen manner which characterised the conduct of the lawyers in *Tse Tat Fung* and *Perisher Blue*.

31 In *Compania* (HC), the learned judge quite rightly pointed out that the stage at which preparation of witnesses becomes impermissible "has not been directly addressed by the Singapore Courts" and accepted that "the line between witness coaching and training and permissible witness familiarisation can be a very fine one".[85] However, by adopting the principles espoused in the English and former Australian

78 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 r 25.1.2.
79 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (SR 2008/214) r 13.10.8.
80 See para 10 above.
81 [2010] HKCA 156.
82 See *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [280].
83 [2005] NSWCA 110.
84 See *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [282].
85 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [283].

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authorities,[86] and without considering the ethical standards in the LP(PC)R 2010 (even though the case did not involve a disciplinary context), the learned judge effectively endorsed an approach which is stricter and more onerous than that prevailing in Singapore at the time of the case. The differences between the jurisdictions show that there is a lack of unanimity concerning what a lawyer is permitted to do in witness preparation. However, in all these and other jurisdictions it is abundantly clear that a lawyer must not intentionally or knowingly cause or permit a witness to give false testimony (the fundamental rule). In the absence of any rules and practice directions specific to pretrial preparation of witnesses, a lawyer is entitled to prepare his witnesses as he sees fit within the scope of Singapore's ethics infrastructure. The primary issue in *Compania* (HC) was the weight which could be attributed to the testimonies of the witnesses rather than any ethical misfeasance on the part of the Respondents. Nevertheless, in determining whether the Respondents had acted *properly*, a consideration of Singapore's legal ethics rules would have been apposite, and certainly of greater consequence than multi-jurisdictional cases characterised by varying standards and lack of consensus in the approach to witness preparation.

VI. LP(PC)R 2015 and issue of witness preparation: The current position

A. Position under LP(PC)R 2015

32 As in the case of the LP(PC)R 2010, the LP(PC)R 2015 includes principles and rules which address the lawyer's primary duty to the administration of justice. However, while the LP(PC)R 2015 does not specifically address witness preparation before trial, it does include principles and rules that are more germane to this practice than the provisions under the LP(PC)R 2010. Rules 4(*a*) to 4(*c*) of the LP(PC)R 2015 state in different ways the core principle that the lawyer's duties to the court and the administration of justice override his responsibility to his client. Pursuant to this injunction, he has a duty "to assist in the administration of justice, and must act honourably in the interests of the administration of justice" (r 9(1)(*a*)), that his work "whether preparatory or otherwise … will uphold the integrity of the court or tribunal and will contribute to the attainment of justice" (r 9(1)(*b*)), must not present, or permit to be presented, any evidence or information which the legal practitioner knows to be false (r 9(1)(*d*)) and "must … conduct [his] case in a manner which maintains the

86 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [283].

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fairness, integrity and efficiency of [the] proceedings and which is consistent with due process" (r 9(1)(*e*)).

33 The principles clearly contemplate that the lawyer's duty to the administration of justice extends *beyond* presenting evidence or information which *he knows* to be false (as provided by r 9(1)(*d*)). Rules 9(1)(*a*), 9(1)(*b*) and 9(1)(*e*) (which are not limited to intentional wrongs) ensure that the process by which the lawyer gathers evidence (including witness preparation) is properly managed in the interest of the administration of justice. The essence of this principle is that the lawyer must act as a reasonable lawyer would be expected to act when preparing a witness for trial and innocent intention is not an excuse for improper management. This necessarily means that where the synonymous preparation of two or more witnesses is justified, the training sessions must be responsibly controlled and supervised and the witnesses must be carefully cautioned about the importance of testimonial truthfulness and accuracy (see r 10(2), which includes this requirement where the lawyer is preparing the client for trial).[87]

34 Unfortunately, r 9 does not provide a specific rule governing witness preparation. Rules 9(2)(*a*) to 9(2)(*c*) and 9(2)(*g*) (these are the paragraphs in r 9(2) concerned with the presentation of evidence) simply prohibit the lawyer from misleading the court and fabricating facts. The nature of a principle is invariably broader than the rules that are derived from it. While the principle expresses the ethical position, the rules apply the principle to specific circumstances. Although a lawyer might contravene one of the principles in rr 9(1)(*a*), 9(1)(*b*) and 9(1)(*e*), there is no rule in r 9 that holds him accountable for negligently mismanaging a witness preparation session even though his conduct is unintentional. The principles have interpretative rather than regulatory effect. The core principles in r 4 and the specific principles that govern each rule or set of rules provide that they "guide the interpretation [of the rule or rules]". Therefore, it is not possible for a lawyer to be held accountable for breach of a principle in the absence of a rule that addresses his improper conduct. Nevertheless, it has been observed that the rules of ethics "should … be perceived as an embodiment of the moral compass and aspirations of the profession".[88] The principles in the LP(PC)R 2015 express that moral compass.

35 In contrast to r 9, witness preparation is clearly contemplated by r 10(2). Rule 10 addresses the lawyer's responsibilities to the

87 Rule 10(2) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) is explained at paras 35–41 below.

88 See *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934 at [84]; *Lim Mey Lee Susan v Singapore Medical Council* [2013] 3 SLR 900 at [37]; and *Law Society of Singapore v Leong Pek Gan* [2016] 5 SLR 1091 at [40].

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administration of justice concerning his client's conduct. Paragraphs (*a*) and (*c*) of r 10(1) express the relevant principles:

> (*a*) A legal practitioner's duty to assist in the administration of justice includes a responsibility, commensurate with the amount of control the legal practitioner has over his or her client, to prevent the client from misleading a court or tribunal in any manner and from otherwise acting improperly.
>
> …
>
> (*c*) A legal practitioner must not engage in any conduct which would be unlawful, unethical or otherwise improper, whether or not such conduct would promote the cause of his or her client.

36 Rules 10(2), 10(3) and 10(6) have a particular bearing on the truthfulness of the client's evidence:

> (2) A legal practitioner whose client is a party to any proceedings before a court or tribunal must inform the client of the client's responsibilities to the court or tribunal, and to every other party to those proceedings, including the client's duties —
>
> > (*a*) to be truthful towards the court or tribunal; or
> >
> > (*b*) to comply with every legal requirement concerning the conduct and presentation of the client's case.
>
> (3) To the extent that a legal practitioner is able, the legal practitioner must prevent his or her client from, must not be a party to, and must not assist the client in, doing either or both of the following:
>
> > (*a*) suppressing evidence;
> >
> > (*b*) giving false evidence or false information to a court or tribunal.
>
> …
>
> (6) A legal practitioner must not knowingly assist or permit his or her client —
>
> > (*a*) to mislead a court or tribunal; or
> >
> > (*b*) to do any other thing which the legal practitioner considers to be dishonest.

37 The following specific duties regarding the preparation of a client as a witness may be gleaned from the above provisions. The lawyer must not permit the client (to the extent that the lawyer is reasonably able to exercise the necessary control over the client) to give false evidence (r 10(1)(*a*)). Obviously, this means that the lawyer himself must not be involved in any impropriety by encouraging or assisting the client in giving false evidence (rr 10(1)(*c*), 10(3), 10(6), and rr 9(2)(*a*)–9(2)(*c*), 9(2)(*g*) and 9(2)(*h*)(iv)).

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38 More specifically, the lawyer must "inform the client of the client's responsibilities to the court or tribunal, and to every other party to those proceedings, including the client's duties – (*a*) to be truthful towards the court or tribunal; or (*b*) to comply with every legal requirement concerning the conduct and presentation of the client's case" (r 10(2)). If the lawyer fails to properly inform the client of these duties, he would be in breach of r 10(2) regardless of his innocence and non-involvement in the client's decision to falsify evidence and regardless of whether the client does actually falsify evidence. Rule 10(2) applies to the drafting of the affidavit of the evidence in chief and to any situation in which the client's evidence is discussed; in particular, in the course of his preparation for cross-examination. Therefore, a witness preparation session should ideally be preceded by the caution in r 10(2). The caution is critical because it sets the ethical standard for the ensuing preparation of the witness. Having administered the caution, the lawyer would be in a position to exercise reasonable control over the client-witness so as to prevent the fabrication of facts (see rr 10(1)(*a*) and 10(3)).

39 As r 10 of the LP(PC)R 2015 applies to the lawyer's client, its requirements do not extend to other witnesses. Although r 12 of the LP(PC)R 2015 addresses "[c]ommunications and dealings with witnesses", only the principle in r 12(1)(*a*) encompasses witness preparation:

> A legal practitioner must ensure that the legal practitioner acts in a manner consistent with the administration of justice when dealing with any witness, regardless of the effect or potential effect of the evidence given or to be given by that witness.

40 As mentioned in respect of r 9, the nature of a principle is invariably broader than the rules that are derived from it. While the principle expresses the ethical position, the rules apply the principle to specific circumstances. Hence, while the principle in r 12(1)(*a*) literally extends to ethical witness preparation, none of the provisions in rr 12(2)–12(8) concern witness preparation. Although a lawyer might contravene the principle in r 12(1)(*a*), there is no rule in r 12 that holds him accountable. In the LP(PC)R 2015, the principles have interpretative rather than regulatory effect. The core principles in r 4 and the specific principles that govern each rule or set of rules provide that they "guide the interpretation [of the rule or rules]". Therefore, it bears repeating that it is not possible for a lawyer to be held accountable for breach of a principle in the absence of a rule that addresses his misconduct.

41 To summarise the position under the LP(PC)R 2015, it may be said that r 10(2) is the only rule which addresses witness preparation and is subject to two limitations. First, it only applies to the lawyer's client in the latter's capacity as a witness. Second, r 10(2) has the sole purpose of requiring the lawyer to inform the client of his legal duties to

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the court including the obligation to be truthful in his testimony. There is no provision which is entirely dedicated to the preparation of witnesses generally. Such a provision would include the duty to inform in r 10(2) (although it would extend to informing *all* witnesses, not just the client), as well as *other necessary safeguards* to ensure that the process of preparing a witness or a group of witnesses is legitimate and does not raise the risk of improper influence or contamination. Such a rule would make the lawyer accountable for mismanaging witness preparation even if he did not encourage or influence the witness to testify falsely and was not complicit in the witness's mendacity. The standard is one which a reasonable lawyer would be expected to attain in his capacity as an honourable member of the profession and an officer of the court. Such an approach would be consistent with the core principles in rr 4(*a*)–4(*c*) and the specific principles in rr 9(1)(*a*), 9(1)(*b*) and 9(1)(*e*), rr 10(1)(*a*) and 10(1)(*c*), and r 12(1)(*a*), which require the lawyer to prioritise the interests of the administration of justice above and beyond the interests of his client.

B. *Impact of Court of Appeal's observations on ethical responsibilities*

42 Having considered the LP(PC)R 2015 on the matter of witness preparation, the question arises as to the effect of the general principles stated by the Court of Appeal in *Compania* (CA).[89] It has been shown that the Court of Appeal was concerned with the effect of improper witness preparation by a party on the reliability of testimonial evidence he presents in court. The Court of Appeal clarified that it was not making any pronouncements on the ethical responsibilities of the lawyers involved.[90] Phang JA formulated three principles, which the learned judge classified as "rules of thumb" that should not be applied "mechanistically".[91] It was pointed out by the writer that "ultimately, the outcome of evidential assessment (being 'a fact-sensitive issue') must depend on the particular circumstances of the case".[92] However, lawyers who prepare witnesses for trial must not assume that they can avoid ethical accountability if they ignore the Court of Appeal's statement of principles. Having declared what is the proper practice in witness preparation, a lawyer who fails to adhere to these principles may be in breach of his duty to the court, the administration of justice and his client by failing to meet the standards of practice that have been set by the Judiciary. Such a failure may constitute conduct unbefitting an advocate and solicitor pursuant to s 83(2)(*h*) of the LPA. And if the

89 See para 17 above.
90 See paras 18–19 above.
91 See para 17 above.
92 See para 20 above.

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failure is egregious, disciplinary proceedings under s 83(2)(*b*) may ensue. As pointed out earlier, the disciplinary tribunal interpreted the Court of Appeal's three rules as "[not] necessarily ethical rules, a breach of which will inevitably entail professional sanctions" and that they "should be taken as a working guide for all lawyers going forward".[93] Although the disciplinary tribunal also pointed out that "future cases of alleged malpractices in witness preparations will have to be guided by the [the three] rules enunciated by the Court of Appeal",[94] as far as ethical liability is concerned, those three rules must be read in the context of the LP(PC)R 2015, which provide the primary source of ethical regulation in Singapore. However, as the Court of Appeal was not concerned with ethical accountability in the case before it, and as the LP(PC)R 2015 do not include a comprehensive rule on the parameters of legitimate witness preparation,[95] ideally a new and comprehensive statutory rule governing witness preparation ought to be included in the LP(PC)R 2015 in the interest of clarity and certainty in this critical area of moral advocacy.

VII. Attorney-General's reference

43 The circumstances in which the Attorney-General referred "information touching upon the conduct of a regulated legal practitioner" to the Law Society under s 85(3) of the LPA are unclear. First, according to the disciplinary tribunal's report, the Registrar of the Supreme Court referred the findings and observations of the judge in *Compania* (HC) to the AGC so that it would take such action as it saw fit. The judge could have referred the matter pursuant to s 85(3) read with s 85(3A) of the LPA but there is no indication that the Judge was directly involved in the reference. It is not obvious why the Registry of the Supreme Court thought it fit to leave the decision to make the reference to the AGC. After all, as the matter concerned circumstances that arose during the trial, the judge would have been in the best position to consider whether a reference should be made. Secondly, in its reference to the Law Society, although the AGC referred to the judge's observations on the manner in which the Respondents had conducted the witness preparation sessions as constituting a basis for ethical liability,[96] the AGC appears not to have taken into account the judge's clear statements that he did not find that the Respondents had breached any rules of ethics. As the disciplinary tribunal pointed out:[97]

93 Disciplinary Tribunal's Report at para 8.12.6.
94 Disciplinary Tribunal's Report at para 8.13.
95 See paras 18–19 above.
96 See Disciplinary Tribunal's Report at para 1.5.
97 See Disciplinary Tribunal's Report at para 6.1.2.

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> … the decision of the Judge in relation to the law of witness preparation does not result in an adverse ruling against the Respondents in these proceedings. First, the Judge found that witness preparation sessions *per se* were not objectionable (at [283]), and accepted that the Respondents did not actively encourage the Witnesses to provide false or misleading evidence (at [285]). Second, the Judge's opinion on witness preparation was made with the objective of determining the credibility of witnesses so as to determine the civil dispute between the parties in the Suit and not in the present context of determining the liability of the Respondents under the LPA, so the Judge cannot be said to have fully considered the implications of his opinion on the law of 'witness coaching' with regard to the Respondents. Third, until the Judge made his remarks about the principles in *Momodou* applying to civil cases, this was not the law in Singapore, just as it was not the law in England.

44 Thirdly, it is perplexing that the AGC requested that the matter be referred to a disciplinary tribunal pursuant to s 85(3)(*b*) of the LPA rather than let the Council of the Law Society refer it to the chairman of the inquiry panel under s 85(3)(*a*) of the LPA for investigation. If, as the judge in *Compania* (HC) pointed out, "[t]he extent to which witnesses in a civil case may properly discuss their evidence with one another or the solicitors of the party that had called them as witnesses before it amounts to impermissible preparation has not been directly addressed by the Singapore courts",[98] should not such a critical issue be specifically addressed before charges are laid? Even the Law Society, which was obliged to prosecute the Respondents once the matter was referred to it, did not rely on the AGC's position which was that the Respondents "have crossed the permissible bounds of witness familiarisation, and ventured into the realm of witness coaching".[99] Indeed, the Law Society's case rested on the risk of contamination that allegedly arose from the manner of witness preparation rather than any specific intention to cause the witnesses to "sing the same tune"[100] (which the disciplinary tribunal regarded "as an unfortunate slur on the 1st and 2nd Respondents").[101] Apart from not being able to provide a definition of "witness coaching" in response to the disciplinary tribunal's enquiry, the Law Society's position that witness preparation singly or in a group is perfectly legitimate[102] – despite the High Court's

98 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [283].

99 See Disciplinary Tribunal's Report at para 1.5.

100 *Compañia De Navegación Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [284].

101 See Disciplinary Tribunal's Report at para 6.1.4.

102 Subject to necessary cautionary measures to avoid contamination of evidence. As the disciplinary tribunal pointed out, the Law Society, in its closing submissions, took the position that the respondents failed to issue cautionary warning to their client and the witnesses not to change their evidence as a result of hearing the

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determination that the preparation of witnesses in a group is not acceptable[103] – compromised the integrity of the disciplinary proceedings.[104] The writer's purpose in raising these points is to show that the case should have been referred to the Law Society so that an inquiry committee could comprehensively investigate the issues and decide what, if any, charge(s) to prefer against the Respondents.[105] The disciplinary tribunal's report strongly suggests that an inquiry committee would have recommended that the complaint be dismissed.

45 While proceedings before a disciplinary tribunal are governed by strict rules of evidence, an inquiry committee enjoys a great deal of flexibility in gathering information.[106] Although none of the witnesses involved in the preparation sessions gave evidence before the disciplinary tribunal, they may have been willing to provide information in writing to an inquiry committee. After a thorough investigation, an inquiry committee would have been in an ideal position to determine and recommend to the Council whether the matter should go before a disciplinary tribunal, whether the case should be dismissed or whether a financial penalty should be imposed and/or a reprimand or warning should be issued or given.[107] Proceeding in this manner would very likely have saved expense and time for all concerned and avoided the anxiety, indignity and humiliation unnecessarily and unjustifiably suffered by the Respondents over a period of nine months.[108]

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practice testimonies of the other witnesses. See Disciplinary Tribunal's Report at para 6.1.1, and para 5 above.

103 See paras 10–15 above.

104 As these proceedings were brought pursuant to the High Court's judgment.

105 See s 86(7)(*a*) of the Legal Profession Act (Cap 161, 2009 Rev Ed).

106 See s 86 of the Legal Profession Act (Cap 161, 2009 Rev Ed).

107 See s 86(7) of the Legal Profession Act (Cap 161, 2009 Rev Ed).

108 The Notice of Disciplinary Tribunal Proceedings was served on the Respondents on 24 August 2017. The trial was conducted 24–26 January 2018. The disciplinary tribunal issued its judgment on 21 May 2018.

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