

14.10.2005



## Do's and Don'ts in Witness Statement Preparation

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### Assumptions

- There are many forms of witness statements
- I will use the term in the sense of ...
  - Written and signed declarations of a person
  - Drafted and discussed together with counsel
  - Treated as "direct examination"
    - Submitted by a party as evidence
    - Basis for cross-examination, re-direct, re-cross and questions from the Tribunal during hearing
- Beware: Applicable rules vary

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## Types of Witnesses

- Witnesses of Fact → first-hand knowledge
  - What has happened (and witness was involved)
- Expert Witnesses → expert experience
  - What has happened
  - What has happened elsewhere
  - What should have happened
  - What could have happened
  - What may happen in the future

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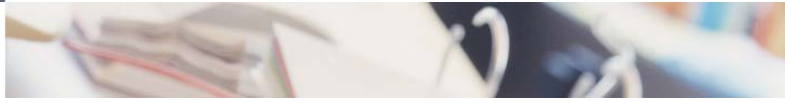


## Four Phases

- Phase 1: Evaluation of witnesses
- Phase 2: Preparation of statements
- Phase 3: Testing
- Phase 4: Pre-hearing
  
- Witness statements will be submitted after phase 2 or 3 (depending on available time)
  
- Not covered here: Rebuttal witness statements

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## Phase 1: Evaluation I

- Start thinking about witness statement needs once you have your "story" ready
- A witness statement can serve many purposes
  - Make up for specific evidentiary gaps
  - Provide the broad picture, convey your story
  - Add credibility to a party's story|themes
  - Refute evidence of opposing party
  - Support factual conclusions or speculation
  - Explain complex factual issues

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## Phase 1: Evaluation II

- Get a party "insider" to assist witness selection
  - But: Keep control over the process|outcome
- Interview potential witnesses face-to-face
  - Do so after studying the file (documents, e-mails, etc.), but before writing your submissions
  - Let them tell their personal view of the story
  - Get a feeling of their knowledge, bias, interests, credibility|honesty, responsiveness, eloquence
  - Beware of hidden agendas, "unguided missiles"

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## Phase 1: Evaluation III

- Lists help you keep track of witness testimony needs, potential witnesses and the creation of witness statements
  - List contact details for each witness
  - List witness availability (holidays, etc.)
  - List subjects and purpose of testimony
  - Additional information as needed (e.g., status info, timing|deadlines, the responsible lawyer, remarks, document and cross references)

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## Phase 2: Preparation I

- Start preparation once you have a first draft of your submission (i.e., Statement of Claim, etc.)
- Prepare a template for each witness
  - Fill in personal information|standard elements
  - Create a title for each fact theme to be covered
  - Under each title, add (non-leading) questions
    - Examples: "In your experience, how did the defect XY manifest itself?", "When and how did you bring the defect to AB's attention?", "What was the reaction of AB?"
  - Explain questions to witness, if necessary

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## Phase 2: Preparation II

- Witness should complete your template within 1-2 weeks (provide for clear deadlines)
  - Don't give too much time for initial draft
  - For each question, ask witness to provide you related documents (or other evidence)
  - If you have been instructed and have prepared well, there should be no surprises
- Option for top executives: Walk through questions orally, tape-record interview

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## Phase 2: Preparation III

- Scrutinize the witness' responses closely
  - Don't trust blindly; check for inconsistencies
- Edit initial draft provided by the witness
  - Editing is admissible if approved by the witness
  - Editing is often indispensable to correctly and efficiently convey the witness' testimony
  - Limit the scope of the testimony, if necessary (if statement serves as direct examination)

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## Phase 2: Preparation IV

- Discuss proposed revision with the witness
  - Don't pressure witness on making statements he/she doesn't feel fully comfortable with
  - Don't accept indifferent behaviour, either
- Additional rounds may be necessary
- Expect to need 4-8 weeks (witnesses of fact)
- Be aware: Witness may be examined on this

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## Phase 2: Preparation V

- Form, content → Procedural Order No. 1
  - Cf. also Art. 4 IBA Rules, Art. 25 Swiss Rules
- Personal information
  - Name, position, full address
  - Languages (interpreter needed?)
  - Qualification, training and experience
  - Background (CV), including career history
  - Past/current relationships with any of the parties
  - Job description

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## Phase 2: Preparation VI

- Standard elements
  - Identification of case and witness statement
  - Party on behalf of which statement is made
  - Affirmation of the truth of witness statement
  - Offer to testify during a hearing
  - Signature of witness with its place and date
  - Exhibits

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## Phase 2: Preparation VII

- Full and detailed description of the facts
  - Define scope (and purpose, if necessary)
  - Use "I", avoid "we"
  - Use common, straight-forward language
  - Be authentic (give examples, provide vivid details including dates, names, places)
  - Be precise (or state why it is not possible)
  - Be concise and use illustrations (if possible)
  - Disclose sources and information relied upon

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## Phase 2: Preparation VIII

- Typical mistakes
  - Hearsay (including hearsay from counsel)
  - Inconsistencies, contradiction (internal, external)
  - Statements witness is not convinced of
  - Statements outside field of expertise or role
  - Reliance on questionable assumptions|evidence
  - Passion, polemics, sarcasm, jokes
  - Too much technical language (→ use experts)
  - Legal conclusions (except "historical" view)

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## Phase 3: Testing

- Most witnesses have never testified in their life
- Many witnesses believe testifying is easy
- Some don't take their task serious enough
- A brief cross-examination will motivate them
  - Cross-examine one-on-one; no listeners
  - Let them walk in your traps and "feel the heat"
  - Also helps identifying pitfalls|gaps in their story
- Revise statement if necessary (and possible)

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## Phase 4: Pre-Hearing

- Make the file available to the witness
- Inform witness on hearing rules and procedure
- Identify witness statement corrections, if any
- Discuss obligations and rights of the witness
- Provide witness with insights on basic cross-examination techniques (and reactions)
- Walk through statement, practice questions
- Know the witness' position on debated issues

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## Some Words on Expert Witnesses

- Find highly qualified experts and listen to them
  - Ask them to find arguments|solutions, but don't require them to support unreasonable positions
  - Look for earnest experts, practical experience and communication skills; avoid "stars", techies
  - Keep organizational control over the process
- Findings should be easy to understand, but other experts should be able to duplicate them

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## Final Comments

- Witness testimonies: Not only about evidence, but also about the credibility of your story
  - Witness statements lay the foundation
- Start early with planning and preparing your witness statements – you will need the time
- Cross-examination: It works, so be prepared
  - True, honest and role adequate statements pay
  - Work closely with the witness; on the stand the witness will be on his|her own

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## Q&A

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Thank you  
for your attention.

