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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
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