



Witness evidence

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Introduction

This note provides general guidance on the preparation of witness statements of fact for use in civil litigation. It sets out what they should and should not contain as well as providing practical guidance aimed at ensuring witnesses know what is expected of them at trial.

What is a witness statement and why are they necessary?

Witness evidence is crucial in any litigation as it provides the factual evidence on which your case stands or falls. A witness statement is a written statement signed by a person (a company cannot give a witness statement) which contains all the evidence which that person would be allowed to give orally. The text of the statement should be in the witness' own words and be written from his view point.

The witness statement will stand as the witness' evidence when it comes to giving evidence in court (his "Evidence in Chief"). However, the witness will still be required to attend the trial, where he will be asked to confirm the truth and accuracy of his statement and will be cross-examined on the evidence set out in his witness statement (see below).

As it is the statement itself which is the witness' Evidence in Chief, it should be comprehensive and contain all of the admissible evidence that the witness can give. You should not rely on the court's discretion to allow the witness to amplify on the evidence contained in his statement at the trial.

How will the witness statement be prepared?

Generally, the witness statement will be prepared by a lawyer in conjunction with the witness. The lawyer will meet with the witness and ask the witness to give a careful and detailed account of his recollection of the events giving rise to the dispute. If the events happened some time ago, the witness will be able to refresh his memory by referring to the documents which he sent or received at the time.

Content of the witness statement

The statement will usually address the issues chronologically and, so far as possible, should be in the witness' own words. It is after all the witness' own statement and not the lawyer's.

The witness statement should be confined, so far as possible, to factual matters that are in the direct knowledge of the witness making the statement. The statement should

contain an absolute minimum amount of opinion. It is the job of an expert witness to give opinion evidence based on the factual evidence of the (factual) witnesses. Where the witness statement contains matters of opinion, this must be clearly indicated in the witness statement.

Additionally, the court may also limit the issues a witness may deal with and impose a maximum length to the statement.

The man on the bus told me ...

A witness who is merely repeating what he has heard from someone else will not be as compelling as a witness who was directly involved in the events in question. If the witness is not the maker of the original statement, his evidence will be classed as "hearsay" evidence.

The court, in deciding what weight (if any) should be given to hearsay evidence, may have regard to any circumstances from which any inference can reasonably be drawn as to the reliability of the hearsay evidence. This includes:

- > whether it was reasonably practicable for the maker of the original statement to have been called as a witness;
- > whether the original statement was made contemporaneously with the events in question;
- > whether the evidence involves multiple hearsay;
- > whether any person involved had any motive to conceal or misrepresent matters;
- > whether the original statement was an edited account or was made for another purpose; and
- > whether the circumstances in which the evidence is adduced are such to suggest an attempt to prevent proper evaluation of its weight.

Care should be taken when adducing hearsay evidence to ensure that, so far as possible, the court will not be able to draw any adverse inferences. If at all possible, it is best to avoid hearsay evidence. Wherever possible, witness statements should be obtained from

those people with direct knowledge of the facts. However, it is recognised that, sometimes, it will not be possible to avoid giving hearsay evidence, for example where the original witness may have disappeared, left the country or even died.

Rose tinted glasses

There is an obligation on each party to disclose documents that are both helpful to their case and those that adversely affect their case. The same is not true in relation to witness statements which, so long as the statements are true, can be more one sided. This enables a party to put its case in the best light possible.

However, the content of the statement may well be challenged by cross examination at trial. As a result, the witness must be prepared to deal with an alternative view of events. Your lawyer should discuss with you whether to be up front in the witness statement in relation to difficult issues or whether they should not be addressed in the witness statement, at least for the time being.

The good, the bad and the ugly

To ensure that your lawyer can fully advise you as to the true merits of your claim, it is important that your lawyer has all the facts.

For this reason, when your lawyer meets with one of the witnesses, it is vital that the discussion should be full and frank. If a witness tries to skip over the bad bits, or misses out any facts which he feels may show him in a bad light, this may well backfire on you and end up harming your case. It may be that the points which a witness believes are "bad" are not in fact bad at all or not as bad as the witness fears. In addition, it is more than likely that any "bad" points will come up in cross-examination and so it is essential that your lawyer is fully aware of them, so that a fully informed decision can be made how and when to deal with them.

The first draft of the witness statement should include the "bad" points as well as the "good" points, hearsay evidence and opinion. It should also include the kitchen sink. No detail however small should be omitted. This is sometimes

called a "proof of evidence". Once the witness has given a full and detailed account of his version of events, the witness statement can be amended as necessary and adapted ready for service on the other party. You should not be concerned that earlier drafts of the witness statement will have to be disclosed to the other side. They do not. They are and will remain privileged.

Go directly to jail, do not pass go, do not collect £200

At the end of the witness statement will be a 'Statement of Truth'. This is a statement by the witness that he believes that the facts in the witness statement are true. Once the statement has been finalised, the witness will be asked to sign this statement of truth and date the witness statement.

If the witness makes, or causes to be made, a false statement without an honest belief in its truth, he may be in contempt of court. If a witness is held to be in contempt of court, the court can fine or jail the witness. The names Jeffery Archer and Jonathan Aitken spring to mind. It is therefore extremely important that the witness has carefully read the final version of his witness statement and is fully satisfied that it is truthful.

Exchange of witness statements

Each party is required to exchange their witness statements with the other party prior to the trial. The court will set a date for exchange of witness statements. After the statements have been exchanged and you (and your legal team) have had an opportunity to review the other party's evidence, it may be necessary to prepare supplemental statements to deal with any new issues raised in the other party's statements or to deal with the other party's alternative version of events.

If a witness statement is not served on the other party by the deadline set by the court, you will only be able to call that witness to give evidence if the court gives its permission. Therefore it is vital that all witness statements you wish to rely on are prepared and finalised in good time. As a result, witnesses will need to set sufficient

time aside to help the lawyer prepare their statements.

Care should be taken to ensure that you only serve witness statements of those witnesses who you intend to call to give evidence at trial. If you serve a witness statement but do not call that witness to give evidence, the other party may seek to introduce the witness statement as hearsay evidence. The judge has a discretion whether to permit use of the statement.

Once served, witness statements may be used only for the purposes of the proceedings in which they are served, unless the witness or court gives consent. The restriction is lifted if the witness statement is put in evidence at a public hearing, which includes most trials.

Can I receive some extra coaching?

As the date for the trial draws closer, the witnesses inevitably become nervous. That is understandable. The thought of being cross-examined by some so called clever lawyer dressed in a wig is hardly an appealing prospect. The witness may ask for some extra coaching and for a dummy run at being cross-examined. While any dummy run cannot be based on the facts of the case itself, there are certain things that the lawyers can suggest to the witness to try to put his mind at rest.

One option may be to take him to the court, show him around the court room, where he will stand when he gives evidence, where the Judge will sit, etc. In addition, the lawyer may do a mock cross-examination, simply asking the witness questions about issues which are familiar to the witness but which are totally unconnected to the case. The reason that the mock cross-examination cannot be based on the witness' actual evidence is that the court has laid down clear guidelines that a witness' evidence should not be rehearsed and polished. It should be the raw truth.

What happens at trial?

At the trial the witness will be asked, usually before he is called, whether he wishes to swear (on one of the holy scriptures) or affirm. A witness should

choose depending on whether he considers it “an oath which the witness himself considers to be binding upon his conscience”. Therefore it is best not to reply “I don’t mind”!

When called to give evidence, and after swearing or affirming, the witness’ Evidence in Chief is ordinarily adduced by the witness confirming the truth and accuracy of his previously served witness statement. The court may then allow a limited number of supplementary oral questions in order to give the witness an opportunity to become familiar with the procedure and to cover points omitted by mistake from the witness statement or which have arisen subsequent to it having been served.

The other party’s lawyer will then be given the opportunity to cross-examine the witness followed by an opportunity for your lawyer to re-examine the witness, if necessary.

The truth, the whole truth and nothing but the truth

When giving evidence at trial the witness should remember the wording of the oath or affirmation – they are there to tell “the truth, the whole truth and nothing but the truth”. So long as the witness tells the truth, the witness should have nothing to fear.

When answering a question, witnesses should normally try to confine their answers to the question and give a straightforward, simple, and always truthful, response. Witnesses should not try to “second guess” the other party’s lawyer by attempting to pre-empt questions or answering questions that were not asked.

If your lawyer has already been made

aware of all the issues, there should be no nasty surprises in cross-examination and your lawyer will be ready to deal with any potentially negative points, to try to reduce their impact, during re-examination

Practical tips

- > Availability of your potential witnesses is a key consideration. Each party is required to give an indication to the court of who it intends to call to give evidence as witnesses and also any periods when witnesses are not available. Therefore, once you have decided (in conjunction with your lawyer) who your potential witnesses should be, you should check on their availability. This is not just for the trial itself but also for the period leading up to the trial and the date for service of their witness statement. Witness statements will have to be prepared and exchanged some time before the trial and the witness will need sufficient time to be able to meet with the lawyer and review and comment on any drafts, to ensure they are fully happy with their final witness statement.
- > Ensure that witnesses are absolutely familiar with their statement and all and any documents referred to in their witness statement.
- > A witness may ask to have their expenses reimbursed. While it is acceptable to reimburse the witness for any expenses incurred, such as travel expenses and a basic food and accommodation allowance together with loss of earnings for the time taken in preparing the

statement and attending trial, it is not permissible to pay a witness to give evidence. There are set rates for the recovery of these expenses.

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