Tips and Guidance on Witness evidence and Witness Statements.

**INTRODUCTION**

In order to win a case, it is not enough to believe that you are right and that the law is on your side, or even to know that that is so. You have to prove it to the court or tribunal in question. Or you need to persuade your opponent that you will prove your case so he settles the dispute in a way that is acceptable to you. One of the most important ways of doing this is by use of evidence (sometimes called “testimony”) from witnesses. This guide is intended to assist you in making effective use of evidence from witnesses.

1. An important point at the start. What is required or allowed or best practice in a witness statement will depend on the country you are in and the tribunal you are before. Each of these has its own rules and practices. Where possible consult a lawyer or expert in local procedure before making a witness statement. The points made below are general ones and subject to local practice and procedure in the tribunal concerned.
2. There are two basic types of witness. These are factual witnesses and expert witnesses. This note is about factual witnesses. These are people who have seen or heard or are otherwise aware of some relevant fact. Expert witnesses may often give an opinion based on facts, such as what chemical was found on analysis in soil or the value of a piece of land. Sometimes a witness can give factual and expert opinion evidence but this guide concentrates on factual witnesses.
3. A witness may give evidence in one or both of two basic forms. One is written evidence, usually in the form of a written statement. The other is oral evidence where the witness actually speaks to describe what has happened and may be “cross examined” or cross questioned by other parties to the court action. Sometimes a witness can give oral evidence by video link or Skype or some other technical means without being present in the court.
4. Usually even if the witness is to give oral evidence in court he or she has to prepare a witness statement first setting out the substance of what he or she has to say.
5. At the end of this guide are imaginary examples of two witness statements. They are both versions of a witness describing the same facts or attempting to do so. However one is intended to illustrate good practice in preparing a witness statements, and the other is intended to illustrate common errors or weaknesses. These are intended to take into account (or show the dangers of ignoring) the points set out below.

**PREPARATION**

1. This will vary with time and resources available to you and the time and the circumstances of witness. You may only have a few minutes’ notice to get something written on a scrap of paper or videoed. You may have a long preparation time.
2. The litigator’s “tools” will include
   1. Documents. Of course it may be that the witness interview will enable you to get documents from the witness, but in addition you need to prepare in advance a hard copy or electronic version file of documents already available – whether from the party you represent, from the opponent on disclosure, from third parties who may assist, or as obtained by compulsion under a right to information (cross refer to R2I module)
   2. A Computer/phone/tape recorder
   3. Camera/phone
   4. Ideally a portable printer
   5. Pen and paper
   6. (if necessary) an interpreter/translator
3. It is often impractical to have contact with a witness before meeting. However if practical and if security/confidentiality concerns allow you may wish to send to the witness copies of
   1. Key contemporaneous documents, pleading and submissions in the case and statements by other witnesses
   2. A list of questions. These should be as short and simple as possible and phrased neutrally, rather than suggesting the answer
4. The location or setting for interviewing a witness is important. You may have to make the best of difficult circumstances
   1. “Face to Face” interviews are best. A Skype rf telephone call may be all that is possible.
   2. Interviews usually take longer than expected. Proper time is not just a luxury, but an essential if full and accurate evidence is to be obtained
   3. The location needs if possible to be where the witness can concentrate, without distractions or external pressures. Taking statements in large groups of people is generally a bad idea. Ideally the interview is best in a one to one situation in a separate room but this is subject to gender/security/cultural issues – in many cases it would for example be seen as inappropriate for a man to interview a woman alone (or vice versa)
   4. An interview which takes place at the witness’ home or workplace may facilitate the witness’ production of material for exhibits (documents/pictures) or taking of photographs.
   5. The role of the interpreter is key. The interpreter should if possible be completely independent of the witness – and not someone who is also involved in the facts of th case or who knows the witness. It is of course often difficult to know either what a witness says to the interpreter or vice versa, but it is very important that the interpreter limits his or her role to translating the questions and the answers.

**THE WITNESS STATEMENT**

*Language*

1. It is best practice to take a statement in the witness’ native language (if possible) and then translate this if necessary into the language of the court proceedings

*Witnesses who cannot read or write*

1. This may require special measures; for example a separate declaration by a third party that they have read the statement to the witness and he/she has declared agreement to it. A conventional signature may have to be replaced by a thumbprint

*Witnesses under disability/minors*

1. Again special considerations may apply to young witnesses or those who lack mental capacity. In some jurisdictions women are restricted in their ability to give evidence (legally as well as culturally)

*The role of the witness and of lawyers and paralegals*

1. A statement as finalised and served and used should be orderly, easily understandable, and contain all relevant but only relevant material
2. Often it is necessary to start with a long version based on notes or a tape recording which sets out everything the witness says and then is edited to put in the best order and cut out irrelevant material or inadmissible material (that is material that the court will not allow as evidence – what that is is a matter for specialist local advice) .
3. It is normally a rule of best practice as well as (in many cases) a court requirement that a statement is not only accurate but complete and balanced, in the sense of not omitting anything which makes it misleading. Often what a witness says is in part helpful and in part unhelpful to the party who want to use the evidence. It is a matter of professional skill and judgment as to what may properly be omitted from a statement without making it misleading .

*Structure*

1. A witness statement should be divided into relatively short numbered paragraphs. Sub-paragraphs (such as paragraph 3(1)(b)(ii)) should be avoided.
2. A statement can often be split into different sections with their own headings
3. A statement should have a logical order – sometimes chronological or by issue or a mixture of both
4. A statement should be signed (or provide some other valid means of authentication), and dated. It may also be necessary in some cases to have a more formal requirement for evidence such as the “swearing” of an affidavit or notarisation

*Style*

1. The statement need not generally be a transcript of what the witness says. The witness’ own words should be used, although in a form which is grammatically correct and so that the meaning is clear. Formal legal language and style should be avoided.
2. Short clear sentences are good.

*Fact/Opinion/Speculation*

1. The most important parts of a witness statement are descriptions of facts and events. Statement of opinion should usually be avoided as they may be inadmissible . Sometimes it is difficult to separate fact from opinion (for example “the car was travelling very fast, too fast to stop in time”). Speculation should be avoided

*Be precise not vague*

1. Who, when, where, what, how
2. (Possibly how and why, but not if speculation)

*Detail – enough but not too much*

1. For fact and credibility. Thus for example the relevant piece of evidence maybe that on 2 September A’s house was flattened by a bulldozer. Normally it is irrelevant what make or colour the bulldozer was, and if witnesses give too much detail it risks inconsistency between their evidence and that of others and/or undermines credibility if they claim to remember more detail than would be expected. But sometimes detail adds credibility and if for example the defendant owns a fleet of yellow Z505 bulldozers, the fact that the house was flattened by a yellow Z505 bulldozer may be evidence of the defendant’s involvement.

*Cross-references*

1. In preparation of a statement, when interviewing a witness, cross-refer as appropriate to other documents. Ultimately the witness must say what he or she recalls, but if it is inconsistent with other documents it will lose credibility.
2. In the statement make reference to and where appropriate exhibit others documents, photos etc to reinforce or illustrate the evidence

*Hearsay*

1. Some legal systems allow “direct” or “first hand” evidence only of what a witness did or saw (I saw X hit Y). Others may allow statements of second hand or “hearsay” evidence ( A told me that he had seen X hit Y) although it will never be as good evidence as direct testimony

**EXAMPLE A – This example contains many example of *bad practice or weakness [the comments in bold identify what is wrong]***

Statement of Mr. A.B. Claimant

This is about the time **[vague]** they came **[vague]** and did a lot of bad things to us **[vague]** . I am sure it was the President behind it **[speculation]**. He is corrupt and his wife is greedy **[irrelevant and opinion]**. They had guns and were shouting.

My neighbour told them to go away so they **[vague]** hit him and set fire to his house.

Then the big guy was screaming at us. We said it was our home but he said it now the land was being farmed for soya beans and it was official and we had to leave. They forced me out

We cannot go back and things are really bad for us now. I’ve heard **[unattributable hearsay]** that it’s a company from Canada that is involved.

It had happened once before but not so bad because when we told them to go away they did **[Vague and out of order – no structure]**.

**EXAMPLE B**

Statement of Mr. D.E. Claimant

Introduction

1. I am Mr. D... E.. Claimant. My date of birth is 3 May 1976. I live at 23 Post St. Chantown 2134. Until 14 June 2104 I lived at my house in Donchuk Village, Shri Province on land I owned (“ my land”).
2. The house does not have a name or address. However I can describe it. It is 100m East of the village square. It is about 0.5 hectares in area and a rectangle shape. There are four mango trees, one at each corner. My father planted them when he inherited the land in 1996. That was the year my grandfather died. I remember it because it was the year the war ended.
3. I have a photograph (Exhibit 1) of my family in about 2005. My Father is there, with my brother A.B. Claimant. You can see the trees that mark the boundary. I have also been given a print out of a Google Earth Map and I have marked the boundary in red (Exhibit 2).
4. I and my family have always farmed on my land. We grew cashew nuts and bananas. I inherited it as the eldest son when my Father died in 2008. His death certificate is at Exhibit 3. A.B. also lives there but I am the owner. I have never had a certificate of ownership as I never needed one.
5. I lived in a house on my land. That was built by my Father. In June 2014 I lived there with my wife and two children. A.B. had another smaller house next to ours. He lived on his own.

Incident in 2013

1. Until 2013 nobody interfered with me or my family. In August 2013 I received a letter from the Ministry of Planning, dated 8 August. It was addressed to me. A copy is at Exhibit 4. It said that the village was in a zone created for special economic development. It said that this would enable the land to be more productive and that we would be told about the benefits in a later letter. I was worried about the letter. I talked about it with my neighbours who had also received a copy. But we did not do anything.
2. One day in November I was visited by a stranger who said he was from the Lucky Star Palm Company. I do not recall the date but it must have been a Tuesday because he came just after when I got back from Chinto market where I always go on Tuesdays. I remember the name Lucky Star Palm as I remember thinking after I spoke to him that it did not sound very lucky for me. He had with him a man from the regional governor’s office. He translated because the man spoke French and I speak only a little French.
3. The man offered to buy my land for 1,000 Wanzes. He said to me his company wanted to grow palm oil, He said it was a good price and that lots of my neighbours were going to sell. I said that that I did not want to sell. The main said I was foolish and that if I did not sell the government would give him the land anyway. After he left I spoke with P.Q and R.S. , my neighbours. They both told me that they had also been asked to sell and had refused.
4. On 10 December the man came back. I know the date because although I do not have a phone or camera my neighbour S.T does. He recorded a short video when he saw strangers coming in uniform, which I have exhibited as Exhibit 5. S.T. told me that it was short because his phone ran out of battery. The man had four of five people in uniform with them. When they came to my house they told me that I had to leave in a month. The one speaking was the tall man in the green uniform you can see in the video. I said that it was my house and land and that I would not leave. He said that it was government and that the government needed it. He said that there would be bad consequences if I did not obey. Then he left.

The events of 14 June 2014

1. I was very worried. The village council had a meeting in May 2014 with the regional governor. K.L, who is on the village council told me that at the meeting the governor said that the land had been allocated to the Lucky Star company by the central government and that there was nothing that could be done about it.
2. On 14 June more men arrived in pickup trucks together with a lorry full of soldiers. The men did not this time have any uniforms. One of them said that we were trespassing as this was now land that had been granted by the government for development. At first my neighbours and I refused to move. However one of the soldiers shot one of my cows. He then pointed the gun at me and said that if I did not move I would be next. Another solder hit my neighbour S.T. on his back with a stick. We moved off over to the other side of the village. Some of the men who were not in uniform set fire to the houses on the east side of the village. I exhibit some photographs at Exhibit 6 that I took later that day which shows them in ashes and still smoking. The soldiers and the men left.
3. The next day the soldiers came back with a different group of men in lorries. The men put up a wire fence round a large area which I have marked on the map. One of the soldiers said that we had to keep out of the area that had been fenced off. We have not been allowed back since. Someone comes every week in a pick up to check. A month later people who said they were from Lucky Star came and started clearing the ground that had been fenced off.

Events since June 2014

1. Since then I have not been able to go back on the land. It is fenced and locked and we had been told by the soldiers that we will be arrested if we go on it. My family and I have had to stay with my cousin who lives on the other side of the village.

The effect on me and my family

1. I have lost my house and my land. We used to grow all our own food and in addition make an income of about 700 Wanzes a year from selling crops.
2. Now I have no job and no income apart from occasional work helping one of my neighbours.
3. I want to have back the land that has taken from me as well as compensation for what has happened.
4. I do not read or write. Mr. Z has read me the statement in the Phong language and I agree that it is true and accurate.