WESTERN AUSTRALIAN BAR ASSOCIATION

BEST PRACTICE GUIDE

01/2009-2011

PREPARING WITNESS STATEMENTS FOR USE IN CIVIL CASES

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Introduction

The Best Practice Guides

1. This Best Practice Guide on Preparing Witness Statements for use in Civil Cases is the first in a series of guides to be developed and published by the Western Australian Bar Association on topics of civil litigation practice and procedure in Western Australia. The Guides seek to reflect best civil litigation practice in the Supreme Court of Western Australia, although many of the principles expressed in the Guides will be of more general application.

2. The purpose of each Guide is to improve civil litigation practice by expressing a clear and concise statement of the practices that should be followed in a particular skill area. The Guides will emphasise the ethical obligations of lawyers as officers of the court:

   - to ensure that they are not a mere mouthpiece for their clients;
   - to confine a dispute to the issues of importance that will determine the outcome in a case
   - to plead a case for which there is a proper foundation;
   - to refrain from advancing a case for a collateral purpose;
   - to provide disclosure of relevant material; and
   - to present evidence that is frank and free from influence.

3. In modern civil litigation with complex issues, the possibility of alternative causes of action, numerous documents, detailed expert testimony and witness statements where evidence in chief is marshalled outside the courtroom the integrity of the litigation process depends to a great degree upon lawyers adhering to proper standards. Proper administration of justice requires that parties not be allowed oppress by claim or defence to force a settlement by reason of mounting costs rather than by assessment of merit. This can only be achieved by lawyers fulfilling their duties as officers of the court by using interlocutory processes only where necessary to understand the opponent's case and to present a proper case for their client. The rights of parties depend upon lawyers on both sides performing their duties to the court assiduously.

4. The duties of lawyers are often stated as general principles. The Best Practice Guides will seek to give content to those duties in the context of the particular issues that arise from day to day in civil litigation practice.

5. Before publication, this Guide was subjected to scrutiny and discussion at a forum attended by judges and experienced barristers and solicitors.

Oral Evidence in Chief

6. In past practice in civil cases in the Supreme Court, when oral evidence was led from a witness it was usual for a "proof of evidence" to be prepared stating the evidence that a witness was expected to give in order to assist counsel in leading oral evidence in chief. The proof remained confidential to the party and was not

tendered in evidence. Oral testimony was elicited from the witness by a series of non-leading questions. Counsel was not permitted to put words in the mouth of the witness.

7. It was relatively common for the oral testimony of the witness to diverge from the proof of evidence. In some cases this was because of anxiety by the witness. In some cases it was due to the way in which questions were asked by counsel. However, in many instances it was because the proof was not recorded in the language of the witness or overstated the evidence of the witness or the clarity of the recollection of the witness. The proof recorded more hope than genuine expectation as to the evidence in chief of the witness.

Witness Statements

8. It is now common practice for the Supreme Court in civil matters to require the exchange of witness statements and for orders to be made that the statements stand as the evidence in chief of the witnesses. The past requirement for the witness to give oral evidence in chief meant that there was close scrutiny of the extent of the actual recollection of the witness. The modern process whereby statements of evidence in chief are prepared outside the scrutiny of the courts means that it is especially important that lawyers observe their duties in the preparation of the statements and ensure that they are a true and proper record of the testimony of the witness. The cross examiner should not have to undertake the task of trying to disentangle the true recollection of the witness from the vocabulary, reconstruction and argumentation of the lawyer who prepared the statement.

9. The practice of requiring witness statements to be disclosed before trial on the basis that they may stand as the evidence in chief of the witness takes the court back to early Chancery court practice.

10. Originally statements of oral testimony were taken before Chancery officials in affidavit form prior to a hearing. Later the practice developed whereby affidavits were prepared by lawyers and filed in the court. With the introduction of the Judicature Acts the courts of Chancery followed the common law courts and received oral evidence at trial which resulted in long delays in hearings.

11. The return to witness statements to record the evidence of a witness means that it is important that witness statements record testimony that would otherwise be given orally. They are not proofs of evidence. They are written statements of testimony and must be prepared as such.

Statements as an Efficiency Measure

12. The objective of witness statements has been expressed as being "to improve the efficiency of trials"[1]. They have been characterised as the "most far-reaching innovation as regards the leading of evidence"[2]. The innovation has been introduced without much debate about the effect of evidence in chief being given, in effect, in legal offices rather than in open court. No doubt it saves court

[1] *Wang v Consortium Land Pty Ltd* [2000] WASC 265 at [15].

[2] Ipp, "Judicial Intervention in the Trial Process" (1995) 69 ALJ 365 at 379.

time if statements are prepared properly and ethically. However, there is the potential for considerable additional cost to litigants if statements are prepared that contain material that is inadmissible. There is also the potential for considerable unfairness if statements are prepared by lawyers without a proper eye to their ethical obligations as court officers.

13. If witness statements are to be a benefit to the efficiency of the trial process rather than a burden then it is important that lawyers are aware of their obligations when preparing statements and are skilled in the process of reducing the relevant testimony of a witness to a written statement.

Statements as part of Disclosure

14. In an adversarial system there are carefully formulated rules for pleading and discovery to ensure that by the time of trial each party is fully prepared and no party is taken by surprise. There is an obligation upon each party to "come to trial with cards upon the table"[3]. A trial is not an ambush or guerrilla warfare. In modern parlance, there is a duty of disclosure that requires each party to articulate its case clearly and precisely and to provide access to the materials in its possession that are relevant to the case of each party (even if they do not assist the party giving access).

15. It has been held that pleadings should be approached today "in a rather more robust manner" because modern processes including the exchange of statements well prior to trial "leave very little opportunity for surprise or ambush at trial"[4]. However, these statements should be seen as referring to the obligation to disclose the case to be put, not to provide discovery of adverse oral testimony. There is, as yet, no procedure for deposition of another party's witnesses. For these reasons, the accompanying Guide on witness statements proceeds on the basis that a statement must not be misleading, but otherwise need not disclose all of the information known to the witness concerning the issues at trial.

The Powers of the Court concerning Written Testimony

16. Subject to the Rules themselves and the *Evidence Act 1906* (WA), the Supreme Court Rules require facts to be proven by witnesses examined orally and in open court[5]. The Rules provide for certain matters to proceed on affidavit[6].The Rules also confer upon the court power to direct that a party serve on the other parties a signed written statement of the proposed evidence in chief of each witness to be called by that party and to direct that the statement stand as the evidence in chief of the witness[7].

17. Section 167(1)(o) of the *Supreme Court Act 1935* (WA) confers power on the Supreme Court to prescribe matters relating to evidence by rules requiring the

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[3] Hoffman, "Changing Perspectives on Civil Litigation" (1993) 56 MLR 297 at 304.

[4] *Barclay Mowlem Construction Ltd v Dampier Port Authority* (2006) 33 WAR 82 at [5]-[6], cp. *Wainter Pty Ltd ACN 008 725 586 v Freehills (A Firm)* [2008] FCA 562 at [4].

[5] SCR, O 32 r 1.

[6] SCR, O 32 r 2.

[7] SCR, O 29 r 2(l) & (m).

disclosure by statements of the nature and substance of evidence to be given and provide for the admission of the statements as evidence.

18. The Court has issued a practice direction to the effect that ordinarily witness statement orders will be made[8]. The usual practice of the court is to require witness statements to be filed and for the witness statement to be ordered to stand as the evidence in chief of the witness.

[8] Consolidated Practice Directions, PD 4.5, para 3.

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Preparing Witness Statements for Use in Civil Cases

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Preparing Witness Statements for Use in Civil Cases

The purpose of directing an exchange of witness statements and having the statements stand as the evidence-in-chief of the witness, is to facilitate the trial of the action. The objective is to improve the efficiency of trials, to reduce the cost of trials and to facilitate the adjudication of disputes. These objectives cannot be achieved unless solicitors bring a reasonable degree of skill and diligence to the task of preparing witness statements: Wang v Consortium Land Pty Ltd [2000] WASC 265 at [15], per Anderson J.

1. What is a witness statement?

1.1 A witness statement is a formal written statement of the testimony of a witness to be exchanged with other parties to court proceedings that may stand as the evidence in chief of the witness.

2. When should a witness statement be prepared?

2.1 A party is only obliged to prepare a witness statement when ordered to do so. However, it is now the usual practice in civil cases for an order to be made requiring witness statements. A case should be prepared from the outset in the expectation that witness statements will be required.

A continuous process

2.2 The important task of preparing witness statements should not be left until an order requiring them is made by the court. The preparation of final witness statements should be the culmination of a continuous process in the conduct of proceedings.

2.3 Details of the testimony that might be given by particular witnesses are obtained by lawyers at various stages in the conduct of proceedings. A careful record of the testimony should be maintained and updated as the matter proceeds. The record need not take the form of a detailed draft statement. It is sufficient to keep a note of the key pieces of testimony as instructions are received.

2.4 In undertaking the task of keeping a record of expected testimony, it is important to distinguish between general instructions (which may cover many facts about which the client cannot testify personally) and the oral testimony that a particular person might give at trial. The record to be maintained is of the evidence that can be given by a witness, not everything that is discussed with a person about the case in the course of its preparation.

2.5 To illustrate, after an initial conference a note may be kept of the instructions from the client. Once that has been done, the particular matters that the client can give evidence about should be extracted from the note. This process will identify gaps in the available evidence and lead to inquiries of other prospective witnesses. As preparation proceeds there may be requests for further particulars of the claim, for an item of damages to be quantified or other information leading to further inquiries. As each piece of additional information is received a short note should be kept in the form of the testimony that can be given by a particular witness on the issue and added to the collection of notes for each witness.

2.6 In the course of this process, it is prudent for notes on key issues such as the content of oral representations or the state of knowledge of a person at a particular time to be recorded and then checked with the witness as the information is received.

2.7 Throughout the process, it is important to keep in mind that each communication with a prospective witness should be treated in the same way as a meeting for the purpose of taking a witness statement. Witnesses should not be coached or influenced. The evidence of witnesses should not be discussed in the presence of other witnesses as to the same facts. Third party witnesses should not be discouraged from giving evidence. The witness statement should be recorded in the language of the witness and confined to relevant matters. All these obligations are dealt with in more detail elsewhere in this Guide.

2.8 A system of continuous preparation has the following advantages:

- it causes the lawyer with the conduct of the matter to continually consider whether there is evidence to support the claims being made in the proceedings;
- it results in recollections being recorded sooner rather than later (it is not in the interests of the parties for the collection of the evidence of witnesses to be deferred until just before trial);
- it enables counsel to be briefed at any stage with notes as to the evidence that it is expected will be given at trial by copying the notes relating to each witness and including them in the brief;
- it improves the communication of information when the conduct of a particular matter passes from one lawyer to another;
- in more complex cases, it enables a record of information collected by different lawyers from different witnesses at different times to be marshalled in a meaningful way;
- it reduces the prospect of speaking to the same witness about the same issues on numerous occasions; and
- it provides a valuable record to assist in preparing witness statements when required.

The final witness statement

2.9 The final process of preparing a witness statement involves much more than simply collecting together in a single document all of the notes that have been made along the way of the evidence that the witness might give at trial. The final witness statement must be refined to ensure that it addresses only the issues that are to be tried in the case. It is to be expected that the course of preparation for trial will focus the issues and the statement should be able to be simplified. If the preliminary work has been undertaken then the back will have been broken on much of the work of preparing the witness statements for use at trial and close attention can be paid to the areas that are likely to be of key importance at trial.

2.10 The final statement should be logical and concise. It should be expressed in admissible form so that it can stand as the evidence in chief of the witness. These matters are dealt with in more detail elsewhere in this Guide.[9]

3. **Are there cases where witness statements should not be ordered?**

3.1 Ordinarily, orders will be made requiring witness statements[10]. The mere fact that the issues in a case give rise to credibility disputes will not prevent witness statement orders from being made, although the existence of credibility disputes will be a factor to be borne in mind by the court when deciding whether the circumstances of the case warrant the making of an order for witness statements. Costs may be a relevant consideration. Witness statements may not be ordered where self-represented litigants are involved due to the complexities of preparing witness statements. In such cases, it may be fairer and more efficient for evidence in chief to be given orally.

3.2 If an order for witness statements is to be opposed then consideration should be given to the two functions served by witness statements, namely disclosure and efficiency in the conduct of evidence in chief. Even if witness statements are not to be ordered to stand as evidence in chief, it may be appropriate for an order requiring summaries of the evidence that is expected to be given to be filed so as to provide disclosure.

4. **Should witness statements be prepared before the book of documents?**

4.1 Best practice requires that the most efficient method be used for preparing witness statements. If a trial bundle has not been prepared before witness statements then it is necessary to attach copies of documents referred to by the witness to statements or identify them as exhibits or to use some other method of identifying the document (such as discovery numbers).

4.2 There are a number of advantages to preparing the book of trial documents before witness statements, including:

[9] See Section 11 "How should a witness statement be written?"

[10] Consolidated Practice Directions, PD 4.5, para 3.

- in most modern civil trials the documents assume great significance and preparing a chronological set of documents that the parties intend to rely upon at trial is necessary to focus conduct of the matter generally and preparation of witness statements in particular;
- without a single set of documents for use by all parties it is likely that witnesses will refer to duplicate versions of documents thereby multiplying the documents to be tendered at trial (and unnecessarily complicating the work of the trial judge in preparing reasons);
- early preparation of the trial documents removes considerable duplication in work as document numbers in witness statements are cross-referenced to trial document numbers (and there is no need to attach documents to statements in order to be precise about the document being referred to by the witness); and
- the preparation of the trial bundle is an important task for the efficient conduct of the trial and until it has been done the parties are not ready for trial and the case should not be listed. Much trial time is wasted if a trial bundle is not properly prepared.

4.3 Generally, the parties should seek directions for the preparation of the trial bundle prior to the preparation of statements and prior to entry for trial. In the commercial and managed cases list in the Supreme Court, there is a practice direction to the effect that "directions will be made for the early preparation of the trial bundle"[11]. The usual orders in civil cases provide for a book of documents to be prepared first and then for witness statements to refer to the book of documents.[12]

5. When should witness statements be required to be served?

5.1 Where possible witness statements should be required to be served well before trial dates. Late delivery of witness statements encourages poor preparation, increases the prospect of late amendments and in cases where

[11] Consolidated Practice Directions, PD 4.1.2, para 15.

[12] Consolidated Practice Directions, PD 4.1.2.2, usual order 39(e).

the statements are poorly prepared creates considerable additional cost and unfairness.

5.2 If witness statements are to provide disclosure and improve the efficiency of the conduct of the trial then they must be prepared properly and well in advance of the trial.

6. Should orders be made for the simultaneous exchange of statements?

6.1 In the Supreme Court, the usual order provides for the party who will open to go first in serving witness statements as to any issue on which that party carries the burden of proof. The defendant then serves statements as to any issue on which it carries the burden of proof. There is then a single date for exchange of purely responsive material[13]. However, the relevant practice direction states that ordinarily where credibility disputes exist the orders will provide for simultaneous exchange of statements[14].

6.2 There are problems with the simultaneous exchange of witness statements because:

- if statements are served sequentially (or evidence in chief is given orally) then the evidence of subsequent witnesses is only given to the extent necessary having regard to the evidence of earlier witnesses. In contrast, if there is an exchange, many facts that may not be contentious will be dealt with in the statements of both parties.
- witness statements of the defendant will have to try and anticipate the topics to be covered by the plaintiff in a way that would not occur if the statements were sequential (or evidence in chief was given orally).
- if there is an order for simultaneous exchange then the defendant need only exchange evidence concerning the matters on which it carries the burden of proof. In most instances the burden will be on the plaintiff. Therefore, the key evidence of the defendant concerning what was said

[13] Common Forms, Form 79, Non-Expert Evidence Order.

[14] Consolidated Practice Directions, PD 4.5, para 5.

will be filed as a responsive statement often prompting the plaintiff to then file a further responsive statement.

- the justification for simultaneous exchange appears to be to avoid the evidence of one witness being affected by having access to the witness statement of another witness. The logic appears to be that evidence in chief recorded in the witness statement is given as if there was an order for witnesses out of court. However, usually orders for witnesses out of court are sought to expose inconsistencies between the evidence of witnesses called by the same party not opposing parties. The risk of collusion or coaching is better avoided by ensuring that a witness is never shown the witness statement of another witness (as explained elsewhere in this Guide).

- orders for exchange of witness statements tend to encourage argumentative and lengthy responsive statements with the result that the evidence in chief of a witness is not presented in a logical and concise way.

6.3 Orders for simultaneous exchange of witness statements are inefficient. If the court is concerned that an order for witness statements may compromise its ability to adjudicate upon credibility then there should be no order for witness statements. Otherwise, a practice to the effect that a witness statement not be disclosed to another witness is an appropriate protection against concerns that the evidence of one witness might be shaped by the evidence of another.[15]

7. What if the witness will not be interviewed or will not sign the statement?

7.1 Ordinarily, signed statements are required[16]. The usual order requires the service of a "signed and dated written statement of the proposed evidence in chief of each witness"[17]. If the usual order has been made then unless and until it has been varied there is an obligation to provide signed witness

[15] See Section 22, "Should a witness be shown the witness statement of another witness?"

[16] Consolidated Practice Directions, PD 4.5, para 8.

[17] Common Forms, Form 79, Non-Expert Evidence Order.

statements for all the witnesses of a party. If there are difficulties then an appropriate order must be sought to allow an unsigned statement or a disclosure of the substance of the testimony that the witness is expected to give.

7.2 In such cases, it is important to distinguish between the two purposes that may be served by requiring witness statements. The first is to provide disclosure of the case to be advanced at trial by a party. The second is to facilitate the efficient conduct of the trial by preparing a statement that can stand as the evidence in chief of the witness at trial. The second function can only be properly fulfilled if the content of the statement records the evidence in chief of the witness. It is not appropriate for an unsigned statement or a statement disclosing the evidence that a witness is expected to give be adopted as the evidence in chief of the witness even if the witness subsequently reads the statement and answers in the affirmative to a question such as "is the content of the statement true and correct". To do so would be to lead the witness in a manner that would not occur in the course of the proper preparation of a witness statement.

7.3 In the case of a signed witness statement prepared voluntarily and under the supervision of a lawyer the court can expect that the proper obligations (expressed elsewhere in this Guide) have been followed. The same cannot be said of an unsigned statement unless the failure to sign the statement was due solely to logistical reasons. Further, there is doubt as to whether an unsigned statement or record of the substance of the evidence a witness is expected to give is a "witness statement" that the Supreme Court may order be admitted as the evidence of the witness[18].

7.4 Therefore, in cases where there is no signed witness statement (properly prepared to stand as the evidence in chief of the witness), best practice requires the evidence in chief of the witness to be given orally.

8. What should be done if witness statements are exchanged that are grossly deficient?

[18] *Supreme Court Act 1935* (WA), s167(1)(o).

8.1 The usual order for witness statements requires statements to be filed of the evidence of a witness that may be ordered to stand as the evidence in chief of the witness. A document in which much of the material is irrelevant or objectionable does not comply with an order requiring such statements to be filed. In such cases, a considerable and unjust burden is placed upon the opposing party. Many objections must be taken and dealt with by conferral or ruling at considerable cost. The additional costs may be recovered if the opposing party is ultimately successful, but are otherwise unlikely to be recovered by a separate costs order. It is difficult to prepare responsive statements to grossly deficient witness statements. The alternative of allowing the objectionable material to stand gives rise to difficulties in determining how to approach cross-examination when the evidence-in-chief has not been given properly. Also, grossly deficient witness statements often reflect poor identification of the proper evidentiary issues making the task for the trial judge in adjudicating at trial and writing the judgment more difficult.

8.2 As to these issues, the High Court has said in one case[19]:

> *"A striking feature of the evidence at trial, and of the reasoning of the learned primary judge, is the attention that was given to largely irrelevant information...Written statements of evidence, no doubt prepared by lawyers, were received as evidence in chief. Those statements contained a deal of inadmissible material that was received without objection. The uncritical reception of inadmissible evidence, often in written form and prepared in advance of the hearing is to be strongly discouraged. It tends to distract attention from the real issues, give rise to pointless cross-examination and cause problems on appeal where it may be difficult to know the extent to which the inadmissible material influenced the judgment at first instance"*

8.3 Accordingly, instead of the opposing party being subjected to the costs and delay involved in preparing detailed objections and conferring concerning those objections (rather than working on its own case) the appropriate course is for the opposing party to seek an order for proper compliance with the order for witness statements. On such an application the court need not consider every objection that may be raised. Rather, a global assessment may be made as to whether the statements generally comply with the order. If

[19] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [35].

they are grossly deficient then an order can be made for proper statements to be filed and the opposing party (and the court) is relieved of the considerable burden that would arise if the trial were to proceed on the basis of the deficient statements. Orders of this kind encourage proper preparation of statements. If such an application was successful it would be expected that the court would order that the costs of preparing the deficient witness statements could not be recovered.

8.4 If, as stated elsewhere in this Guide, a trial date is not sought or allocated until there had been proper compliance with witness statement orders then there would be the opportunity to seek orders requiring proper preparation of statements in appropriate cases. If grossly deficient witness statements are provided close to trial then it may be necessary for the court to proceed on oral evidence, rather than burden a party with the costs of laborious objection. An issue will then arise as to whether cost orders should reflect the inefficiency of having to proceed with oral evidence.

9. Does a witness statement have to include adverse evidence?

9.1 It is not unusual for a witness to know some facts that support the case of a particular party and other facts that are unhelpful to the party. In such instances a question arises as to whether the witness statement must include both parts of the evidence that the witness can give – the favourable and the unfavourable.

9.2 A related issue arises where one side is aware of the existence of evidence that a witness can give on a separate topic that is favourable to an opponent of which it is believed that the opponent is ignorant. In such instances is there a duty to disclose the evidence to the opponent[20]?

9.3 A witness statement must be complete and truthful as to the topics that it addresses. A witness statement should not contain a half truth or be misleading in any respect[21]. For example, if a witness statement records

[20] The question is posed in Shepherd "Communications with Witnesses Before and During their Evidence" (1987) 3 Aust Bar Rev 28 at 36.

[21] *Rajasooria v Disciplinary Committee* [1955] 1 WLR 405 at 413, *Myers v Elman* [1940] AC 282 at 322 and *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56 at 60.

evidence as to what was said and there was a qualification to the statement or it was expressed in a context that is relevant to understanding the meaning of the statement then the qualification or context must be included in the statement. Any witness must tell the whole truth as to the matters on which the witness gives evidence. As a witness statement is exchanged on the basis that it may stand as the evidence in chief of the witness then the same obligation applies when preparing a witness statement[22].

9.4 As to the duty to disclose adverse evidence on other topics, modern practice is to view witness statements as part of the disclosure of a party's case[23]. It has long been established that discovery of documents requires a party to produce all documents that are relevant, whether they are favourable or not. In the past, extensive interrogatories may have been administered to obtain admissions of facts known to other parties that would assist the case of the interrogating party. It is now difficult to obtain orders for interrogatories. In other jurisdictions, there is a right to take depositions of the evidence of the witnesses of other parties. Where a witness is "in the camp" of one party it is likely that the witness will not speak to lawyers acting for other parties. These are all reasons why there may be support for an obligation to provide statements of the evidence of a witness concerning the issues in the case that include matters that are adverse to the interests of the party calling the witness. However, there is presently no requirement for witness statements to do so.

9.5 If there is a topic on which the witness may be able to give evidence that is discrete from the topics addressed in the statement then that evidence need not be included. Further, in civil proceedings, there is no general obligation to inform an opposing party of oral testimony that may assist the opposing case.

9.6 Nevertheless, the obligation to state the whole truth on any topic that is addressed in the statement is an important one. It is especially important that

[22] *ERS Engines Pty Ltd v Wilson* (1994) 35 NSWLR 193 at 196-7.

[23] *Barclay Mowlem Construction Ltd v Dampier Port Authority* (2006) 33 WAR 82 at [5]-[7]. Parties should come to trial "with cards on the table and not take the other party by surprise" and this extends to the exchange of witness statements; Hoffman "Changing Perspectives on Civil Litigation" (1993) 56 MLR 297 at 304-5.

it be adhered to with rigour where the statement is to stand as the evidence in chief. Where evidence is led from a witness orally there is no ability to confine the evidence of a witness in response to a particular question. Once a question is asked the witness is obliged to answer the question truthfully and fully. On the other hand, when a witness statement is prepared, it is possible to provide a selective statement on a particular topic. The lawyer preparing a statement should never take up that opportunity. Where a particular topic is addressed it must be addressed completely so that the witness statement does not take the form, in effect, of a partial answer to a question.

9.7 Material thought to be damaging or prejudicial to a particular party, but irrelevant to the issues, should never be included in a witness statement[24].

10. **Should leading questions be asked in the course of preparing a witness statement?**

10.1 When evidence in chief is elicited orally, a party must not ask questions that have the tendency to suggest the answer, particularly where the topic is contentious. Generally speaking, the same principles should be followed when preparing a witness statement. The witness should not be directed as to the evidence. During the course of an interview to prepare a witness statement, the witness should be asked questions like "What was said at the meeting?", "What else was said?", "Is there any reason why you did that?", "What happened after that?", "How do you know that?", "Did you see or hear that yourself?", "Is there anything else that you think I need to know about that?", "Is that something you know yourself or did someone tell you that?".

10.2 Of course, it is appropriate to direct the attention of the witness to a particular issue, such as by asking whether a particular topic was discussed at a meeting. The important obligation is to ensure that it is the testimony of the witness that is being recorded and not a false recollection encouraged by the lawyer.

10.3 The practice of requiring witness statements was introduced to improve the efficiency in the conduct of the trial, not to provide an opportunity for

[24] *Klein v New South Wales Bar Association* (1960) 104 CLR 186.

obtaining favourable testimony from suggestible witnesses or to coach a witness as to the testimony that might be included in the statement. The practice relies upon lawyers fulfilling their duty to refrain from influencing the testimony of a witness. A helpful way to ensure these obligations are fulfilled is to imagine the presence of a judicial officer during communications with a prospective witness.

11. **To what extent can a witness be assisted in preparing a witness statement?**

11.1 A witness can be assisted in recalling matters known to the witness by being taken to contemporaneous documents or by working through the recollection of the witness of the sequence of events. A witness can be asked to consider documents that appear to be inconsistent with the statements being made by the witness. If an answer seems illogical or inconsistent with other facts that are independently established then those matters can be put to the witness.

11.2 However, a witness should not be told what another witness has said to the lawyer. For example, it would be wrong to say to a witness "I have spoken to Paul Smith and he says that you were told by the supervisor to work on the platform". Instead the information could be used to frame questions for the witness in a proper way. For example, "Did you speak to anyone about working on the platform?", "Who gave you instructions about where you should work?" and "Do you remember being given any instructions about working on the platform?"

11.3 A witness should not be taken through a version of events and asked whether the witness agrees with that version. For example, it is improper to ask a prospective witness "Didn't it happen like this...?" or "You must have been there because isn't that what you always did?"

11.4 Importantly, as explained elsewhere in this Guide, a witness should not be shown the witness statement of another witness (or sent copies for comment)[25].

[25] See Section 22 "Should a witness be shown the witness statement of another witness?"

11.5 Various professional conduct rules emphasise the importance of lawyers maintaining the integrity of evidence[26]. They prohibit:

- suggesting to a witness the evidence that should be given;
- conferring with more than one lay witness at the same time about any contentious issue relevant to evidence to be given by any of those witnesses;
- conferring with a witness whilst under cross examination without the consent of the cross-examiner;
- seeking to prevent or discourage witnesses from conferring with lawyers for other parties.

11.6 Lawyers should not explain to a witness the legal significance of particular evidence[27]. For example, there may be an issue in a particular case as to whether the plaintiff relied upon a representation. The witness should not be told that unless the plaintiff relied upon the statement in some way by taking some action then the claim will not succeed[28]. The witness should be asked what he or she would have done if the true position had been known at the time.

11.7 Obviously, in the case of the witness statement of a party (or an officer of a party), it will be necessary to give legal advice to the party. Wherever possible, the advice should be given after instructions have been taken as to the facts. Preferably, a note of the evidence should been taken. If the witness is not a client then there is no reason to discuss the legal significance of the evidence with the witness at all.

12. **Can a witness be discouraged from providing a witness statement?**

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[26] Western Australian Bar Association Conduct Rules, rules 43 to 48 and

[27] cp *Craig v Troy* unreported decision of Ipp J delivered 24 February 1995. It is submitted that the observations of his honour concerning witness preparation rely too heavily upon the United States practice.

[28] Sheppard, "Communications with Witnesses Before and During their Evidence" (1987) 3 Aust Bar Rev 28 at 35.

12.1 No prospective witness is obliged to provide a witness statement. A witness who seeks legal advice about whether there is an obligation to speak to a lawyer acting for a party in court proceedings or to provide a witness statement may be told that there is no obligation to do so. A lawyer acting for a party may provide advice to officers and employees that they are not obliged to speak to lawyers for other parties because such advice would be given as part of the general retainer to act in the matter. Such persons may have an obligation to keep confidential any information known to them in their capacity as officers or employees concerning matters in issue in court proceedings[29].

12.2 It is generally recognised that a lawyer may tell a prospective witness that the witness need not agree to confer or be interviewed[30]. However, a lawyer should take great care in telling a third party witness of fact that the witness is not obliged to speak to the lawyers for another party. A lawyer should not provide advice to a third party witness about such matters when acting for a party in the proceedings. More importantly, a lawyer as an officer of the court must uphold the integrity of the trial process. A lawyer should take no action to discourage a third party witness from speaking to other lawyers about the issues in the case. It is improper for a lawyer to seek to advance the interests of a party for whom the lawyer acts by making any statement (however subtle) to a third party witness that might cause the witness not to speak to lawyers for an opposing party.

12.3 A statement that the witness is not obliged to speak to the lawyers for another party should never be made. The lawyer should only state the position generally by saying words to the effect that the witness is not obliged to agree to be interviewed by any party. A statement that the witness is not bound to speak to a particular party is likely to discourage the witness from doing so. It is a fundamental breach of the lawyer's duties to seek to

[29] *A G Australia Holdings Limited v Burton* (2002) 58 NSWLR 464 at [168]-[172].

[30] Western Australian Bar Association Conduct Rules, rule 49.

gain access to a third party witness of fact whilst at the same time encouraging the witness to decline to speak to the lawyers for another party.

13. **Can a witness statement be taken from any person?**

13.1 Before taking a statement from a witness a lawyer should consider whether there is any reason why it would be inappropriate to take the statement. Reasons why it may be inappropriate include:

- the statement is being taken from an officer or employee of a company for whom the lawyer acts, but the statement may record matters that could give rise to personal liability on the part of the officer or employee (and the officer or employee has not obtained legal advice);
- the person is one of the other parties to the proceedings or an officer or employee of another party;
- the person is represented by another lawyer.

14. **What should the witness be told about the reason for the statement?**

14.1 A lawyer should disclose to a third party witness or prospective witness the name of the party that the lawyer is acting for and, in general terms, the reason why the lawyer wants to speak to the witness. This is part of the duty of honesty and candour of the lawyer as an officer of the court.

14.2 At an appropriate stage, the witness should be told about the trial process in general terms. The witness should be told to think carefully about what is said in a witness statement and that it may be challenged by cross-examination.

14.3 A witness should be told not to discuss the evidence with any other witness until the case has been concluded.

15. **Can a witness be asked about communications with lawyers for other parties?**

15.1 A witness should not be asked about confidential communications with lawyers for other parties. Legal professional privilege applies to protect confidential communications between lawyers for a party to litigation and a

third party witness[31]. Communications have been held to be confidential and privileged where the lawyer when speaking to the witness intended the communications to remain private and that was apparent to the witness[32].

15.2 The privilege extends to what the lawyer asked the witness and what the witness said to the lawyer. It also applies to written communications and any witness statement prepared by the other lawyer.

15.3 The privilege does not prevent the witness from being interviewed by other lawyers to obtain all relevant information concerning the issues in the proceedings. However, the privileged communications with other lawyers should not be discussed.

15.4 If a statement of the evidence of a witness that has been prepared by other lawyers is proffered to a lawyer then the lawyer should decline to read the document or take a copy. To do otherwise would be to participate in the disclosure of confidential information, conduct that could be restrained by injunction[33].

16. **What if a lawyer becomes aware that a witness statement is untrue?**

16.1 Reliance cannot be placed upon a witness statement that is known to be false. A lawyer must not permit a false statement to be used in court proceedings[34].

17. **What if a lawyer finds out something that casts doubt on the accuracy of a statement?**

17.1 If, after preparing and serving a witness statement, a lawyer is put on inquiry as to the truth of the facts recorded in the statement then the practitioner should, to the extent possible, check whether those facts are true. If the

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[31] *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd* [2007] WASCA 151 at [31].

[32] *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd* [2007] WASCA 151 at [35].

[33] *Prince Jefri Bolikiah v KPMG* [1999] 2 WLR 215 at 225 and *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357 at 362-3. As to restraint of use of confidential information obtained innocently be a third party; see *Wheatley v Bell* [1982] 2 NSWLR 544 at 549.

[34] *Linwood v Andrews* (1888) 58 LT 612 and *Kyle v Practitioners Complaints Committee* (1999) 21 WAR 56 at 60.

lawyer then discovers that the statement is incorrect the lawyer must inform the other parties immediately and must not use the false statement in the conduct of the proceedings[35].

17.2 If a witness wishes to correct a statement then the lawyer should ensure that the other parties are informed of the correction to be made by the witness. The correction should then be made by supplementary statement or by the witness when giving oral testimony.

18. **Should the evidence of the witness be checked before being included in a statement?**

18.1 A lawyer should exercise caution in accepting at face value the narrative of events by a witness. Where serious or improbable statements are made the lawyer should consider whether steps could be taken to verify the statement.

18.2 Often witnesses will draw inferences or conclusions that are not supported by the knowledge of the witness. It is very important that the lawyer taking the statement review the evidence of the witness critically to ensure that the statement is based upon direct knowledge rather than inference. It is for the court to draw inferences. These matters are addressed in more detail in the next section of this Guide.

18.3 It is important for witnesses to be asked key questions, including difficult questions. The process of preparing a statement cannot be used to fill gaps where a witness glosses over certain events or provides vague answers. It is important for the lawyer to persist in obtaining, as best as possible, the precise recollection of the witness as to the key issues for trial.

19. **How should a witness statement be written?**

19.1 A witness statement should be a clear, concise and logical statement of the relevant testimony that a witness can give, expressed in the language of the witness. The "author" of the content of a witness statement is the witness, not the lawyer. In this respect witness statements are unlike other documents prepared for use in court proceedings such as pleadings,

[35] *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56 at 60.

submissions, chronologies and the like. A lawyer preparing a witness statement must adopt a fundamentally different approach to that which might be used in preparing other documents.

19.2 A number of points flow from these general observations.

An organised, logical structure

19.3 Before preparing a witness statement, careful consideration should be given to the matters that are of importance to the case that can be addressed by the witness. An overall structure for the statement should be planned. The plan should be informed by the audience for the statement, namely the trial judge.

19.4 Before embarking on a long narrative, it is important to consider the main events in the chronology and give them sign posts. For example, in a case where the witness will be giving evidence about statements made at a series of meetings then it is appropriate to sign post the evidence by a statement such as "I attended three meetings at which the turnover of the business was discussed. The first meeting was held at the Athena Coffee Shop on 10 July 2006". Then proceed to describe the relevant events at the first meeting known to the witness. Then state "The second meeting was held at my office on 25 or 26 August 2006".

19.5 Usually, a witness statement should be arranged as a chronological narrative. It should tell a story as a series of events from the personal experience of the witness. Usually these events will comprise:

- something the witness saw;
- something the witness said or heard first hand;
- something the witness did;
- the preparation, sending or receipt of a document;
- an opinion that the witness is qualified to make.

19.6 The testimony of the witness replays for the court events in which the witness was involved and enables the court to see, hear and experience the events through the eyes of the witness. The witness cannot assist the court in

this process unless the evidence in the statement is confined to the personal experience of the witness.

19.7 Unless there is a particular reason why the state of mind of the witness is relevant in the case (as to which see below), the witness statement should be an objective retelling of events known personally to the witness. There should be no commentary. Explanations of the evidence or its significance are a matter for separate submission.

19.8 Usually, it is better to introduce the characters into the narrative as the story unfolds rather than identifying everyone at the outset. It is confusing to be given the names of all of the participants at the beginning. It is much easier to follow a story if the characters are introduced as they have a role to play in the story. Defining all the participants at the beginning of a statement is an unnatural and uncomfortable way for the testimony of a witness to be expressed.

19.9 In cases where the evidence does not concern a sequence of events, then the statement should be organised topically. For example, a case may concern the factors affecting the value of a property at a particular point in time. The statement may be arranged so that each aspect of the market known to the witness is addressed separately. It is important that the statement be given a structure that assists the judge to follow the evidence.

A first person account in the language of the witness

19.10 A witness statement should not use legal terminology. It should use the idioms and vocabulary of the witness. The statement is a record of the evidence that the witness would otherwise give as evidence in chief. Wherever possible, shorthand references to people, places, events and the like when used in a witness statement should reflect the expressions used by the witness rather than the lawyer.

19.11 The statement should use "I" and "me" rather than "we" or "us". It should not refer to companies or other legal entities as doing things. Companies act by their officers who give evidence of what they did and what their

responsibilities were within the company. Express the testimony in the first person using the active voice.

19.12 Although the statement is expressed in the language of the witness, the lawyer plays an important role in arranging the order and sequence of the evidence. The witness statement should be logical in order.

Be specific and relevant

19.13 The witness statement should not contain extraneous material. It should be as concise as circumstances allow. It is not necessary for every witness to say everything that the witness knows about all the events that have some connection to the case. The statement should be prepared after careful analysis of the issues in the case and should be confined to material that is relevant to the resolution of those issues.

19.14 A statement should never be repetitive. Emphasis of particular testimony and its importance is solely a matter for submissions. Repetition often results in slightly different versions of evidence about the same events. In such cases, either the witness is unsure as to the events or the lawyer has not accurately recorded the evidence. In either case the work of preparing the statement should focus upon recording a clear statement of the testimony rather than repetition.

19.15 The statement must not contain irrelevant material. Lawyers should take great care to ensure they do not introduce evidence or issues that will unnecessarily lengthen the duration of proceedings.

19.16 Lawyers should not "overdraft" a witness statement. As observed by Lord Wolff in the Access to Justice Report in the United Kingdom:

> "*Witness statements have ceased to be the authentic account of the lay witness; instead they have become an elaborate, costly branch of legal drafting."*[36]

A witness statement that has been properly prepared should not be able to be subjected to any such criticism.

[36] Wolff "Access to Justice Report" para 55.

Evidence, not a transcript of a meeting with the witness

19.17 Usually, an initial note of the evidence that a witness can give should be taken by hand when speaking to the witness. In an appropriate case it may be prudent to make a recording of an interview with a witness to assist with later preparation of a witness statement.

19.18 A witness statement should never be prepared as a transcript of a meeting with a witness. A witness statement is not a verbatim record of a conversation with a witness on a particular occasion well after the events known to the witness occurred. The task is to extract from the conversation the pieces of relevant, admissible material and to express that material in a concise and logical way.

Evidence, not argument or commentary

19.19 Unfortunately, there is a tendency in modern practice to include argument in many different forms in witness statements. Examples include:

- providing explanations or commentary;
- expressing a view as to the interpretation of documents;
- outlining the legal propositions to be advanced in support of a case;
- explaining why a particular version of events is plausible or implausible.

19.20 Material of this kind must not be included in witness statements. There must be a sharp delineation between the submissions and arguments to be advanced based upon the evidence of a witness on the one hand and the testimony of the witness on the other. If there are points to be made about how the evidence fits within the submissions to be made at trial then those points should be recorded in a separate document to be provided to counsel for use in preparing submissions and understanding points for cross examination.

19.21 Statements about the significance of particular testimony, the legal result that flows from particular testimony, the interpretation of the meaning or significance of words used or the effect upon other versions of the events are

all examples of argumentative material that has no place in a witness statement.

19.22 Statements such as "I could not have been at the meeting because I was in Melbourne" or "I would not have said something like that because it is not written in my diary" should not be included in a witness statement. Instead, say "I was in Melbourne on 14 July 2008" or "I always take my diary with me when I meet with a client. My practice during any meeting with a client is to write in my diary any statements that I make to a client about the investments they should make". It is then a matter for argument as to the conclusions or inferences that might be drawn from this evidence and its effect upon the credibility of accounts given by other witnesses.

19.23 Usually observations about the meaning of words used in a document or a conversation should not be included in a statement. If the meaning as understood by the author (or speaker) or the recipient (or listener) is relevant then that may be stated, but not otherwise.

Evidence, not conclusions or summaries

19.24 A common problem with witness statements is that they are summaries of what happened instead of a statement of the evidence that the particular witness can give. A statement that "At the meeting we both agreed that the price for railway sleepers would be 30% off the list price..." is a summary. Instead, the statement should say "At the meeting I spoke to Brian Jones about buying timber from Jones Hardware. I do not remember the precise words, but I recall the main parts of the conversation. I asked him what he would charge for a large quantity of railway sleepers. He told me that the price would be 30% off the list price for a decent quantity. I said I would ring the next day and place an order. He told me to tell the order clerk that we had spoken about the price and the price would be 30% off list".

19.25 Another problem is expressing a conclusion like "I saw the accident. The bloke in the blue car caused the collision". Instead, the statement should describe the events in as much detail as the witness can recall. It is for the court to draw inferences and conclusions about causation, not the witness.

Avoid restating the contents of documents

19.26 In most cases it is not necessary to repeat the contents of documents identified by the witness in the statement. The witness can identify a document, say when it was prepared, when it was sent or received and what was done as a result of the document. The process of collecting together the significant parts of the documents is a matter for a chronology, an outline of argument and opening or closing submissions.

Include evidence of state of mind and opinions only where relevant and admissible

19.27 Usually, the subjective state of mind or intention of a witness will not be relevant. Before including evidence as to state of mind careful consideration should be given to whether the evidence is relevant to the case.

19.28 In most cases, the state of mind of the witness is not relevant. It does not assist the court to determine what occurred by hearing evidence of what the witness was thinking at the time rather than evidence about what the witness saw, said, did or heard. Statements such as "I understood" or "I thought" or "I intended" should be avoided unless state of mind is an issue. If state of mind is in issue then care should be taken to separate the evidence as to what the witness saw, heard and did from what the witness thought or intended.

19.29 More fundamentally, evidence about the state of mind of another person cannot be given by a witness. If relevant, a witness can give evidence about what the witness observed about another person from which the court may draw conclusions about the state of mind of that person.

Limit defined terms

19.30 Modern practice in drafting legal documents is to use many defined terms. There are two problems with defined terms in witness statements. Firstly, the definition is usually formulated by the lawyer and as a result there is the prospect that it will be misunderstood by the witness and, therefore, statements using the defined term will not properly express the testimony of the witness. Secondly, defined terms are not used by people in their ordinary language and interrupt the flow of the narrative.

19.31 Defined terms should be kept to a minimum and should reflect the language of the witness.

Use the correct tense

19.32 Most evidence concerns events that occurred in the past. Witness statements should therefore use past and not present tense. For example, in a case concerning a motor vehicle accident the statement should say "at the time of the accident there were bushes alongside the edge of the road" rather than "the corner of the intersection is blocked by bushes".

19.33 Other examples of incorrect use of present tense when past events are in issue are "the company has a standard set of terms and conditions on its order form" and "Smith is the sales manager and deals with all of our new clients". Use of present tense means that the attention of the witness is not being directed to the state of affairs at the relevant time.

Do not use direct speech unless the witness has a word for word recollection[37]

19.34 Rarely, a witness will recall the actual words used in a conversation. Sometimes a threat, or a colourful expression like "You'll kill the pig with this franchise, everyone makes at least $50,000 in the first 6 months" might be remembered. Otherwise, great care must be taken not to reconstruct evidence rather than record the recollection of the witness when it comes to conversations.

19.35 In the case of conversations the obligation is to state the best evidence that the witness can give of the conversation. Therefore, it is first necessary to establish the extent to which the witness has a recollection of the actual words spoken and to record those words. The witness may be assisted in this regard be reference to contemporaneous records. If so, the witness statement should state that fact and identify the documents used by the witness to refresh the memory of the witness.

[37] As to admissibility of evidence of conversations in written statements see generally *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* (2001) 53 NSWLR 31.

19.36 The next step is to identify whether the witness has a more general recollection of the substance of the matters that were discussed and record that evidence. Only where a witness recalls exactly what was said should the statement give the evidence indirect speech. Otherwise, the evidence should be introduced by words describing the nature of the recollection of the witness. For example, "I don't recall exactly what was said but he said something like ..." or "I recall the topics that were discussed and the general thrust of the conversation but not the actual words spoken". These phrases should not be applied as a formula. The statement should describe the nature of the recollection of the witness. A formula such as "He said to me words to the effect that ..." should be avoided unless it is how the witness describes the recollection.

19.37 The next step is to identify the extent to which the witness can recollect in more general terms what was discussed in the conversation and to record that recollection. "We talked about whether I was interested in buying the cattle. We both talked about the price per head. We talked about a price for the cattle that was the same as the sale yard prices the previous week. Having looked at the sale records for that week I recall the price we discussed was $480 per head".

19.38 If neither the actual words nor the substance is remembered then the statement should reflect that position. "I met with Jack Murphy on 11 June 2004 at his business address. I do not recall the actual words used. He told me about the franchise. I asked him a number of questions. One thing I asked him about was about the turnover I could expect to make. In his answer he referred to a figure of $50,000 per month as an amount I could expect to make".

19.39 Great care must be taken to avoid conclusions when preparing statements about conversations. A statement such as "we discussed the turnover and he made it clear to me that I would make $50,000 in the first 6 months" does not state the evidence of the witness. The witness statement should set out the actual discussion. If the witness only has a general recollection then the evidence should make that clear by stating "I recall a conversation with Jack

Murphy in which the topic of the turnover I could expect to make was discussed. I can't recall exactly what was said in the conversation. I recall the figure of $50,000 being discussed at the meeting as the turnover that could be made in the first 6 months of the franchise. I can't recall whether I asked him whether I could expect to make $50,000 in the first 6 months and he agreed or whether he told me that was the amount that I could expect to make. I remember the amount of $50,000 being a number that was mentioned in the meeting as being the likely turnover that could be achieved in the first 6 months".

Use temperate language

19.40 Rude, offensive, sexist or racist language should be avoided in any witness statement. The court room is not the place for offensive or intemperate language. Exceptionally, where relevant to the issues, expletives or other colourful language may be included because it is necessary to state the words that were actually used on a particular occasion or it is necessary in order to properly reflect the language used by the witness. However, to give evidence is a formal occasion and language which the witness would use on such an occasion should be adopted.

20. **Is there specific material that should be excluded?**

20.1 The rules of evidence contain a number of exclusionary rules that should be carefully observed. In particular, material that is subject to legal professional privilege, without prejudice privilege or public interest immunity should not be included in a witness statement. It is improper to include such material on the basis that it is open to the other party to object. Lawyers have an obligation to ensure that material of this kind is not incorporated into witness statements.

20.2 In cases where issues arise as to whether there has been waiver[38] or the scope or extent of the privilege or immunity then a separate witness statement containing the material should be prepared and the reasons to be advanced in support of the admission of the material provided to the other

[38] There can be no waiver in the case of public interest immunity.

party before there is any attempt to refer to the material in court. If the matter cannot be resolved between the lawyers then the issue of the admissibility of the material should be dealt with prior to the witness being asked to confirm in oral testimony the statement containing the material.

21. **How should a witness statement be set out?**

21.1 Use short sentences and short paragraphs (containing one or, at most, a few sentences). Each paragraph should be numbered and should cover a single point. Dividing a witness statement up in this way makes it easier to follow. Also, during the course of any trial it is often necessary to refer to particular parts of a statement. Short paragraphs make it easier to refer the judge or a witness to a particular part of a statement.

21.2 Documents referred to in the statement should be identified or annexed.

Usual Orders

21.3 Many of the above requirements are reflected in the usual orders in civil cases which take the following form :

> "*Each witness statement shall satisfy the following formal requirements:*
>
> *(a) it should be set out in numbered paragraphs;*
>
> *(b) as far as possible, it should be expressed in the witness' own words;*
>
> *(c) it should contain evidence only in admissible form, for example, inadmissible hearsay should be avoided;*
>
> *(d) where the witness statement contains conversations it should, if the witness' recollection permits, be expressed in direct speech. If this is not possible, this fact should be stated and the witness' best recollection or the substance of the conversation may be set out;*
>
> *(e) any documents referred to in the statement should be identified by reference to the number and page of the document in the book of documents. If the document is not contained in the book of documents then it should be annexed to the statement;*
>
> *(f) it should contain at the end of the statement the following verification:*
>
> > *"I have read the contents of this my witness statement and the documents referred to in it and I am satisfied that it is correct and that this is the evidence-in-chief which I wish to give at the trial of the proceeding"*[39]

[39] Consolidated Practice Directions, PD 4.1.2.2, usual order 39.

22. **What arrangements should be made when a witness statement is signed?**

22.1 It is very important that time is spent with a witness going over a witness statement before it is signed. The statement is the evidence of the witness, not the lawyer. It can be frustrating for the lawyer if a witness wants to make alterations after further review of a draft statement especially if the changes are to key parts of the testimony. However, it is an important part of the process.

22.2 Every witness must be given an adequate opportunity to read and consider the contents of the statement. The witness should be asked whether there are any particular parts that the witness does not understand. In some cases it is advisable to read the statement out loud to the witness to provide the witness with the opportunity to hear what it says. This is important where a witness is more familiar with oral rather than written expression or has difficulty reading or concentrating. It is less effective to have a witness read the statement out loud because of the tendency to focus on the process of reading out loud rather than the content of the statement.

22.3 If it is not possible to deal with the witness in person then the witness should be clearly instructed to read the statement carefully to make sure its contents are correct. A statement should never be sent to a witness without giving the witness an opportunity to make corrections before the statement is signed.

22.4 Where the statement refers to documents then the witness should be shown the documents referred to in the statement and they should be identified in some way that removes any uncertainty as to the documents referred to by the witness. As stated elsewhere in this Guide that is most efficiently done by referring to documents in a bundle that has been prepared by the lawyers for the parties. However, if there is no bundle then the documents must be identified by some other means such as discovery numbers or by annexing a copy to the statement.

22.5 The statement as signed should contain a verification at the end of the statement such as:

"*I have read the contents of this my witness statement and the documents referred to in it and I am satisfied that it is correct and that this is the evidence-in-chief which I wish to give at the trial of the proceeding."*[40]

23. **Should a witness be shown the witness statement of another witness?**

23.1 A witness should not be shown the written statement of another witness because:

- providing the witness statement of one witness to another is a means of facilitating collusion concerning the testimony of witnesses;
- providing the witness statement of one witness to another is likely to result in witness coaching by identifying matters with which the witness must agree or disagree;
- a witness does not need to know the evidence of another witness in order to give complete and accurate testimony as to the matters known to that witness;
- it is for the lawyer to identify the matters addressed in other witness statements about which a particular witness may be able to give evidence and for the lawyer to ask the witness proper questions to elicit the testimony that the witness is able to give without collusion or coaching;
- there may be an order for witnesses out of court at trial and the process of requiring witness statements is to facilitate the efficient conduct of the trial, not to otherwise alter the trial process by which the evidence of a witness may be tested.

24. **How should a responsive statement deal with testimony in other statements?**

24.1 A witness statement is not a pleading. It should never adopt the form of responding to particular paragraphs in other statements. The witness should not be told what is in other witness statements. It is the responsibility of the lawyer to identify topics relevant to the issues in the case that have been addressed in other witness statements and to elicit the testimony of the

[40] See Consolidated Practice Directions, PD 4.1.2.2, usual order 39(f) (for cases in the commercial and managed cases list).

witness as to those topics and record the testimony in the statement. As explained elsewhere in this Guide, the testimony should be elicited by open questions that do not direct the witness to give a particular version of events.

24.2 A witness is not called to argue the case or dispute the evidence of other witnesses. A witness is called to give his or her own version of the relevant events. The written statement of the witness is simply recording the testimony of the witness. It may be testimony that is different to that recorded in the statements of other witnesses. Ultimately, that may be a matter for comment and submission by counsel. However, it is not the role or responsibility of a witness to argue for the witness's version of the events. Indeed, it is fundamentally inconsistent with the role of a witness for "evidence" to take the form of a response to the evidence of others.

24.3 At trial, counsel will have an obligation to put an inconsistent version of the facts to a witness when cross examining the witness. However, the evidence in chief of a witness recorded in a statement is the testimony of the witness, preserved as much as possible from any process that will taint the independence of that testimony.

24.4 So, consider a case where one party serves a witness statement of Michael Olivera that says:

1. *I met with Paul Smith at his house on 14 June 2006. Phil Jones was already there.*
2. *We talked about their business.*
3. *I asked Paul what the turnover was for the business and Paul told me that the turnover for the business had been over $1 million per year for the past 3 years.*
4. *I believed the statement about the turnover. It was very important to me when I was deciding to buy the business. It was one of the things I wrote on a list of factors that I prepared before I bought the business..*

24.5 Paul Smith should not be shown the witness statement of Mr Olivera. He could be asked whether he recalls meeting with Mr Olivera at his house on 14 June 2006. If he recalls Mr Olivera being at his house he could be asked

whether he discussed any aspect of the business at the time. He could be asked whether he ever discussed the turnover of the business with Mr Olivera at any time. After obtaining his answers to these inquiries his witness statement might state:

1. *Michael Olivera came to my house in June 2006. I can't remember the date.*
2. *I invited him for a social barbeque lunch to meet my then business partner Phil Jones because they were both from Canada and Michael had just migrated to Australia.*
3. *The barbeque was the only time Michael has ever been to my house. I did not discuss our business with Michael at the barbeque nor did Phil in my presence.*
4. *Some months later, in about September 2006 I gave Michael a document with the turnover figures for our business. I never discussed the document or the turnover figures with Michael at any time.*

24.6 His witness statement should not state anything like:

"I refer to paragraphs 1 to 3 of the statement of Michael Olivera. I categorically deny those paragraphs"

25. **What arrangements should be made for the judge to read the statements?**

25.1 If witness statements are to fulfil their role of improving the efficiency of the conduct of the trial by standing as the evidence in chief of the witness, then arrangements must be made for the trial judge to have time to read the statements before the witness is cross examined. It is very difficult for the trial judge if cross examination proceeds without a proper opportunity to consider the evidence in chief of the witness.

25.2 The stated practice of the Supreme Court is that ordinarily the witness will read the statement from beginning to end after it has been tendered as an exhibit[41]. Some judges follow this practice, others do not. Steps should be taken to raise the matter with the court before the trial and where possible arrangements made for the statements to be provided to the judge to be read

[41] Practice Direction No 4 of 1995, para 10(d).

by the judge prior to the witness giving evidence rather than for the statement to be read out loud by the witness.

Appendix A

Guidelines to how should a witness statement be written

1. Use an organised, logical structure
2. Record a first person account in the language of the witness
3. Be specific and relevant
4. Record evidence, not a transcript of a meeting with the witness
5. Record evidence, not argument or commentary
6. Record evidence, not conclusions or summaries
7. Avoid restating the contents of documents
8. Include evidence of state of mind and opinions only where relevant and admissible
9. Limit defined terms
10. Use the correct tense
11. Do not use direct speech unless the witness has a word for word recollection
12. Use temperate language.