
Preparation of Lay Witness Statements

Dr Donald Charrett BARRISTER

On occasion, inhouse counsel will be involved with the preparation of lay witness statements. Such witness statements are standard practice in civil litigation in many courts and in arbitration proceedings. As a statement of the background facts related to particular issues, they are often an essential prerequisite to a decision on whether there are sufficient facts to sustain commercial litigation with a reasonable prospect of success.

At the very least, the input of lawyers will always be required before any such statements are finalised. In many situations, lay witness statements are taken by lawyers, based on an “examination in chief” of the witness, the lawyer ensuring that the evidence is in permissible form, it covers all of the relevant issues, and it refers to all the necessary and appropriate documents. In situations where the documentation is extensive, it is hard to find, or the subject matter is detailed and/or very technical, the involvement of lawyers for the whole process can be an expensive exercise.

Given the nature of lay evidence required to record a person’s knowledge of events, and their familiarity with the relevant documents, in some cases it may be possible for a lay witness to prepare a first draft of their witness statement independently. This paper provides some guidelines that inhouse counsel could use as part of the briefing material for such a lay witness. Properly used, such a procedure has the potential to save money, particularly where the ultimate responsibility for the lay witness statements is with outside lawyers engaged by the company. In what follows, it is assumed that the statement is being prepared in connection with a dispute, even if an actual dispute has not yet crystallised.

The brief to the witness

Inhouse counsel will have identified a potential witness by knowledge or enquiry as to the personnel with relevant knowledge of the cogent events. Knowing the purpose for which the lay witness statement is required, and the general nature of relevant evidence that may be available, counsel can provide a “brief” for the lay witness. Such a brief may be verbal or in writing; a written brief is clearly preferable to provide a record of what has been requested, both for counsel’s records and the witness.

Depending on the extent of evidence required, the “brief” may indeed be very brief. It should contain, in

neutral language, a listing of the events, documents etc about which evidence is required. Such a brief is likely to be prepared after a conference with the witness, to elicit the extent of first-hand knowledge of the facts in issue. Such conferences are also likely to identify other potential witnesses.

Inhouse counsel will normally also take the opportunity of any such conference with a lay witness to provide sufficient background material for the witness to understand the reasons for which the witness statement is being sought, and the importance of confining the evidence to the facts of which the witness has personal knowledge.

The following brief notes may provide a useful aide memoire for the lay witness in preparing the first draft of their witness statement.

Background to the preparation of a lay witness statement

Much of the relevant evidence will probably be in the form of existing documents that will be classified in any court proceedings as “business documents”. Provided such a document is properly introduced into evidence by a person with knowledge of its provenance, it will “speak for itself”, ie the words in it will generally be accepted at face value as proof of the facts asserted in the document.

However, to make it easier for a person to understand the relevant facts and the documents in a way that is appropriate to the issues that may arise in the dispute, it is necessary for sufficient lay witnesses (witnesses of fact) to prepare witness statements that “tell the story”.

The initial draft of the witness statements is required to provide the instructions needed by lawyers to form a considered view on the legal consequences of the events under consideration, in connection with a dispute or possible dispute.

Although over 90 per cent of litigation commenced in court is ultimately settled before the matter gets to trial, preparation of evidence and other documents in connection with litigation or arbitration should have due regard to the possibility that the matter may end up in court or an arbitration hearing. Even though a witness statement may subsequently require further “polishing” to ensure

Inhouse Counsel

that all the evidence contained in it is admissible, relevant and coherent, the initial draft should endeavour to be as complete as possible.

Lay witness statements are frequently prepared with the assistance of a lawyer who will question the witness to elicit the facts that the lawyer considers will be necessary to prove his/her client's case in court. This process can be time consuming, particularly if the relevant documents are not immediately to hand.

However, there is no reason why a lay witness cannot prepare the first draft of a witness statement without the assistance of a lawyer, providing he/she knows what is required. Such an initial draft may need refinement following legal review, however the extent of subsequent legal input will be dependent on the admissibility, relevance and coherence of the "story" told by the witness in the statement.

The following guidance is provided to assist such a witness who is asked to provide a witness statement without the assistance of a lawyer in the first instance, other than an initial briefing which includes the scope of the lay evidence required.

Requirements of a lay witness statement

A lay witness gives evidence of facts known to him/her by his/her own senses — what he/she saw or heard or otherwise perceived.

A lay witness generally does not give evidence of his/her opinions, as these are not facts.

Evidence must be relevant to the issues involved in the dispute.

The first paragraphs of the witness statement should introduce the witness — name, address, position in the company and length of service. It is usually appropriate for a technical lay witness to refer to and attach a CV with details of experience, as this is often relevant to his/her understanding of their observations and communications. This introduction should include a brief description of the person's job in the company.

A witness statement should be logically structured to detail the relevant facts in a way that aids understanding of "the story". This generally involves dealing with issues in chronological sequence, although in complex matters this may need to be done separately under separate headings for discrete issues.

Although documents prepared by persons other than the witness are strictly hearsay, they will generally be admissible if they are business records, and satisfy certain criteria. It is usually necessary to refer comprehensively to all such relevant documents, such as letters, emails, diary notes etc. Any reference to such a document should unambiguously identify the document, eg email dated 25 June 2011, sent at 6:11PM from John

Smith of the XYZ Company to David Brown of the ABC Company, headed "Supply of Equipment — Revision C". It will then generally be necessary to summarise the reason why the document is relevant to "the story", eg "This email specified a change in the specified requirements for the equipment to be supplied to the XYZ Company". It may be simpler or more accurate to provide the relevant fact by directly quoting a section or the entirety of the document.

Some of the facts known to a witness may have been revealed in discussion, or in a telephone conversation. If the witness considers them to be relevant, they should initially be included in the witness statement, even if they are required to be excised later as non-admissible hearsay. The witness should identify the person who made the statement, the telephone conversation or meeting in which the statement was made, and the date or approximate date ("on or about ...") on which the statement was made. A witness should be careful not to attribute exact words said by a third person unless he/she has an exact recollection of the words used. If the recollection of the words used, or the gist of the words, has been aided by a diary or other written note, this should be referred to and quoted as a document.

If a lay witness follows these guidelines in preparing a witness statement, it will considerably reduce the time that he/she may need to spend with a lawyer. Provided that it is completed in the required timeframe, it is likely to be a more efficient use of a person's time than an uninterrupted period of time committed to speaking with a lawyer and simultaneously finding the relevant documents.

Tips for inhouse counsel

In summary:

- Get lay witnesses to prepare the first draft of their witness statement themselves in order to achieve economies.
- Provide lay witnesses with a clear brief on the scope of their evidence.
- Use the aide memoire in this article to give to lay witnesses to help them understand the process.



Dr Donald Charrett
Barrister, Arbitrator & Mediator
Melbourne TEC Chambers
d.charrett@me.com