



Drafting of Witness Statements in International Arbitration

Overview

- I. What is a witness statement?
- II. Is there a conflict with ethical rules for attorneys?
- III. How may this conflict be overcome?
- IV. What are the best tactics and strategies?

I. What Is a Witness Statement?

- Definition: «A full and detailed description of the facts, and the source of the witness' information as to those facts, sufficient to serve as that witness' evidence in the matter in dispute.»
(Art.4(5)(b) IBA Rules on Evidence)
- Purpose: Witness statement serves as «examination-in-chief» of the witness' testimony.
- Who drafts witness statements: The witness in close collaboration with the parties' counsel.

II. Is There a Conflict with Ethical Rules for Attorneys?

- Common Law Approach: Contact with and preparation of witnesses by the parties' counsel is permissible and expected. *Hence, there is no conflict.*
- Civil Law Approach: Contact with and preparation of witnesses by the parties or their counsel is prohibited by procedural and ethical rules. *Hence, there is a conflict.*
- Result: Inequality of powers and rights depending on the parties' background.

III. How May this Conflict Be Overcome?

- On the level of ethical rules: A party's counsel does not breach the ethical rules if it remains within the boundaries established in international arbitration.
- On the level of the procedural rules applicable to a party:
 - Ideally, this issue is addressed explicitly in the Terms of Reference or in a Procedural Order.
 - Example found in practice (para. 67, PO1): *«It shall not be improper for the Parties' counsel to meet or interact with fact witnesses to discuss and prepare their prospective testimony and to assist them in the preparation of their witness statements. The Parties' counsel must ensure that the witness statements reflect the witnesses' own account of relevant facts, events and circumstances.»*

III. How May this Conflict Be Overcome?

- Alternatively, by referring to established rules:
 - Article 4(3) IBA Rules on Evidence: «*It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses and to discuss their prospective testimony with them.*»
 - IBA Guidelines on Party Representation: «*A Party Representative may assist Witnesses in the preparation of Witness Statements [...]*» (Guideline No. 20); «*A Party Representative may, consistent with the principle that the evidence given should reflect the Witness' own account of relevant facts, events or circumstances, [...] meet or interact with Witnesses [...] in order to discuss and prepare their prospective testimony.*» (Guideline No. 24).

IV. What Are the Best Tactics and Strategies?

- Interview with the Witness:
 - Ask the witness to tell you the complete truth;
 - Be the «devil's advocat», i.e. ask the witness the questions that the opposing party's counsel surely will;
 - In case of «difficult topics / statements»:
 - Has the witness told you everything?
 - Is there a different angle / view on the issue?

IV. What Are the Best Tactics and Strategies?

- Drafting of the Witness Statement:
 - Who makes the first draft?
 - Witness?
 - Counsel?
 - Middle-Way?
 - How much editing?
 - Witness statement should be authentic;
 - Be sure not to «copy-paste» from submission / other witness statements;
 - Rule of thumb: As long as the content is clear, don't edit;

IV. What Are the Best Tactics and Strategies?

- Drafting of the Witness Statement:
 - What about «difficult topics / unfavorable statements»?
 - Witness statement must not be untrue / misleading;
 - If the respective facts cannot, on the basis of a good faith assessment, be separated by objective factors (e.g. topic, time, place etc.), they must be either stated in full or be fully omitted.

Thank you for your attention!



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