**Case management: witnesses (script)**

[Diagram showing 'people' in relation to dispute resolution, and pointing to 'experts', 'opponent', 'witnesses' and 'client'. 'Opponent' is then linked to 'opponent's solicitors'. 'Client' is linked to 'directors', 'executive team' and 'legal team'. 'witnesses' is highlighted]

As mentioned in a previous element, when we think about the people who are involved in a dispute we commonly think about the client and the opponent. But witnesses (who may or may not be the client or part of the client's organisation) are also very important. This element focuses on witnesses.

Each witness is an individual with their own priorities and concerns. When you consider who to use as a witnesses, in addition to the knowledge they hold, keep in mind their personal circumstances, personality and availability. Will they be a good witness? If currently employed by the client, will they still be employed by the client by the time of trial, and if not, what implications (if any) does this have for their willingness or ability to give evidence?

Let's consider some of the issues relevant to witnesses over the life of a claim.

**An early consideration is how are you going to prove your client’s case in relation to disputed facts? By witness evidence?**

Identifying necessary and available witness evidence is a crucial part of case analysis.

- consider not only which issues require witness evidence and who could provide the evidence, but who would make the most effective witness.

- who will be strongest witness (or witnesses) for a corporate client? It could be a managing director or someone senior who can comment on various aspects of the business and strategic decisions taken. However, it could be someone much lower in the organisational hierarchy who was heavily involved in the matters in dispute, and they may make a stronger witness.

**Does the location of witnesses impact on where proceedings should be issued?**

Once you have identified potential witnesses, you should consider where they are based. In many cases it will be necessary and preferable for a witness to attend a trial in person (rather than by video, for example). If this is the case, then the location of witnesses may have an impact on where within the jurisdiction you wish to issue proceedings or possibly even justify pursuing proceedings in a different jurisdiction, although it is only in exceptional circumstances that this likely to be a weighty factor in choice of jurisdiction.

**What steps should you take to record a potential witness’s evidence, and when?**

Typically, you will wish to take formal proofs of evidence from witnesses at the outset of a matter (often a job for junior fee earners in respect of less crucial witnesses). This should be a detailed record of the witness’s full account, including matters which might be privileged or which you might not want to include in the final witness statements. While these proofs of evidence will not be used at trial, they form an important part of piecing together your client's case and understanding the merits of the claim. They form the basis of the witness statements drafted at a later stage, and understanding the witness evidence early and thoroughly should avoid nasty surprises during cross examination at trial.

As you will learn later in this knowledge stream, the court is increasingly concerned to ensure that the process followed with witnesses does not distort their recollection of events or allow for inappropriate influence (perhaps inadvertently) by solicitors. Witness evidence must be approached with care, as you will study in more detail later in this course.

**What information / documents should be shown to someone who might be a witness? What documents can be received from a potential witness?**

As part of the initial discussions with witnesses, you will want to explore with them whether they have documents which are relevant to your client’s case. Remember, however, that any documents received from third party witnesses may need to be disclosed (even if unhelpful) as they will become under your client’s control. (There are limited exceptions to this rule which are beyond this element and can be risky to rely on.)

An equally important consideration is what documents to show to a witness. Again, you will explore this in more detail later in this knowledge stream. However, broadly speaking, a balance must be struck. On the one hand, providing documents to a witness may be necessary to enable the witness to comment on a document, or to assist a witness in recalling important matters. However, a witness's recollection of events can be distorted or influenced by documents, particularly those they were not aware of at the time of the events. A court may give less weight to a witness's evidence if it considers that the witness's recollection has been substantially formed or influenced by reference to documents.

**Directions questionnaire:**

- **Who are the witnesses?**

- **Witness to which facts?**

- **Availability for trial?**

By the time you are required to file a directions questionnaire, you will need to be able to identify in that questionnaire:

a. which witnesses of fact your client intends to call at trial;

b. in broad terms, which facts each witness is witness to. So, for example, a sales director may be a witness to how a contract was negotiated and formed, whereas a client's finance director may explain the losses that a client has suffered; and

c. if there are any days within the next 12 months when an essential witness will not be able to attend court for trial.

Take a look at sections F and G of the questionnaire to see where this information should be included.

There is no rule which provides that witness statements can only be served in relation to witnesses who have been named in the directions questionnaire. The court has the power to control which witnesses will give evidence and in relation to which issues (see for example CPR 32.2(3)), but such directions are not routinely given at the case management stage. A common direction on witness evidence is in broader terms, for example, "by 4pm on X date all parties must serve on each other copies of the signed statements of themselves and of all witnesses on whom they intend to rely". The overriding objective requires a party and its representatives to do all that is reasonable to identify the intended witnesses. However, there may be instances when a party is reluctant to name a witness in a directions questionnaire until it has developed its case further. It may limit the information to the number of witnesses it intends to rely on.

**Draft directions: how much time do you need to prepare witness statements?**

Parties should attempt to agree directions and submit draft directions with their directions questionnaires. When preparing proposed directions, a party should consider how much time it requires to prepare witness evidence bearing in mind the issues to be covered and the witnesses' availability. Remember that while it is not routinely done, the court can give directions on the length and format of witness statements, as well as which witnesses can give evidence. A party needs to be prepared to make submissions on those points at the case management conference if necessary. These considerations will require analysis of the evidence a party might want to adduce from a particular witness.

**Budget for all the steps involving witnesses**

At the same time as considering the proposed directions in relation to witnesses, you should also include this workstream in any costs budget. An amount must be included in the budget for drafting witness statements and the budget should include estimated costs of reviewing the opponent's witness statements and undertaking any appropriate investigations (see the guidance notes that accompany Precedent H). Clearly an accurate budget can only be prepared with a detailed understanding of the witness evidence your client intends to rely on and some understanding of the witness evidence the opponent intends to rely on.

**Advise witness of trial dates**

A trial date or trial window may given at the case management conference. Witnesses should be advised of any possible trial date / window immediately and reminded often.

**Special measures for witnesses at trial? Vulnerable witnesses?**

There are a host of measures which may need to be taken in relation to witnesses to ensure a just process. For example, the use of an interpreter at trial for those witnesses for whom giving evidence in English would not be a just process. Another example is the provision of extra time for the preparation of witness evidence and the giving of evidence at trial for a witness with dyslexia. Remember that Practice Direction 1A states that the overriding objective requires that the participation of witnesses is supported as well as the participation of clients.

The first case management conference is often the best time to raise such issues as they may impact on the location and length of the trial which are usually part of the directions made by the court. A party may be asked to comment on these points again in the future, often at a pre-trial review or in the pre-trial checklist, once the case has developed and further details of the trial are established.

**Witness statements for interim applications should be consistent with those for trial**

Care should be taken to ensure that any evidence given in relation to an interim application is consistent with the position that the client wishes to maintain at trial. Note, however, that a party cannot use a witness statement served in relation to an interim application at trial unless notice is given - it would be prudent to serve such notice when witness statements in relation to the main action are served.

**Is your client / you going to be ready on time?**

As the deadline for the exchange of witness statements approaches, a party needs to keep under review whether it is on course to meet that deadline. Pursuant to CPR 32.10 there is an automatic sanction if a witness statement for use at trial is not served by the deadline. The witness may not be called to give oral evidence at trial unless the court gives permission. It is much better to apply for an extension of time for service of witness statements before the deadline than to miss the deadline and be required to apply for relief from sanctions.

**Witness summons? Supplemental witness evidence?**

In the run up to trial you may need to consider whether supplemental evidence is required from any of your client’s witnesses (for example, to respond to developments since the exchange of witness statements) and whether it is necessary to serve a witness summons to secure the witnesses’ attendance at trial.

**Has the witness seen all the documents they should see before giving evidence? Copy of witness statement? Trial bundle?**

Finally, before trial, you should ensure that a witness has seen all the documents they need to see before they give evidence. It is likely that several months will pass between the exchange of witness evidence and trial and so the witness may need to be reminded of the contents of their witness statement. They may also need to see a copy of the trial bundle or relevant parts of it.