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Preparing Company Witnesses

MARK SOLON
Managing Director & Solicitor, Bond Solon, UK

As witness familiarisation becomes commonplace among the litigation departments of leading City law firms there is a strong argument that it should automatically be part of the consideration of all in-house counsel when faced with big ticket litigation and all the reputational risk that entails. Mark Solon reports.

Risk assessment and compliance are increasingly an integral part of in-house counsels' day-to-day remit as the definition is expanded to encompass corporate governance and advising on the impact of ever-changing regulation and legislation.

Depending on both the type and size of an organisation, legal departments are evolving to either drive or contribute to the risk management programme, with some voices in the profession maintaining that it is up to the general counsel to instil a top-down governance culture.

While senior in-house legal roles vary significantly between companies, what is uniformly beyond doubt is that in-house lawyers are in a unique position to flag up a number of legal pitfalls for the business, including those that have the potential to damage brand and reputation, and few could be more aware of the risks attached to litigation.

While even corporate counsel themselves may not have seen the inside of a courtroom, they will all be familiar with the adversarial system in which barristers are paid thousands of pounds to discredit their opposing side's witnesses. Once in a trial setting, months of preparation can lead to nought if the witnesses are discredited or the judge simply prefers the evidence of the opposition.

Former Mishcon de Reya litigation partner Dan Morrison, now senior partner of high-end commercial litigation boutique Grosvenor Law said: "Witnesses need to be prepared to answer difficult and hostile questions from barristers who are paid thousands of pounds to take you down. Why wouldn't you make sure your witness was fully prepared?

"If you take a piece of litigation worth millions of pounds, often the issue of who wins comes down to who does the judge believes at the end of the day."

Only around 10% of large commercial litigation ends up at trial, but so great is the perceived risk that witnesses who are not familiar with the court setting will underperform, particularly in cross examination, that witness familiarisation is in private practice fast becoming regarded as an integral part of the late stage litigation process.

Morrison said: "We use witness familiarisation all the time. In civil litigation lawyers spend a significant amount of time preparing the evidence and reviewing documents but then the witness must explain that evidence and those documents in a stressful environment and preparing them for court is standard work for an experienced litigator."

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Tim Hardy, head of CMS Cameron McKenna's litigation department added: "Where there is a lot of money at stake it makes sense to spend a few hundred pounds preparing your witness and we would always invite them to undertake familiarisation."

While no-one is suggesting that in-house counsel or their company directors should be sued for failing to build witness familiarisation into the company's risk programme, there is a strong argument that all corporates should build it in as an automatic consideration when facing litigation of any value at all. Clifford Chance arbitration partner Audley Sheppard said: "It is one of those things in-house counsel should have on their minds to help their people prepare for the hearing and not let inexperience or nervousness or infamiliarity with the process get in the way of getting their evidence across."

In-house counsel faced with increasingly restricted budgets are often required to undertake costs-benefit analysis but private practice lawyers observe that the cost is increasingly being seen as money well spent: "Everything costs but it is a very small cost when faced with significant legal costs so that is probably not a factor," Sheppard observed.

Morrison added: "Where a client is spending hundreds of thousands of pounds on litigation, it makes obvious sense to spend time with the witness who will be the mouthpiece and need to deal with cross examination and still sound credible."

In-house counsel have not only a responsibility to help protect the reputation of the company but need to consider their own reputation as chief co-ordinator of the litigation. Tim Hardy said: "[In-house counsel] are as vulnerable external counsel to criticism for a witness losing a case and thoroughly good cases can be lost by witnesses who are not prepared. It makes sense to undertake the necessary preparation."

What is Witness Familiarisation?

Witness familiarisation provides witnesses with a comprehensive understanding of the theory, practice and procedure of giving evidence and what is expected of them when they are required to give evidence. It spans all legal platforms, including arbitrations, civil and criminal courts, depositions, employment tribunals, inquiries, select committees, coroner's courts, tribunals and professional conduct hearings. The training includes familiarising the witness with the layout of the legal forum, the likely sequence of events when the witness will be giving evidence, and a balanced appraisal of the different responsibilities of the various people at the hearing.

How Witness Familiarisation Works	**Mock Cross-Examination**
The procedure for giving evidence, the order of events, roles of different people at the hearing and the techniques lawyers use in cross-examination to disconcert and discredit witnesses will be explained including: • The practice, procedure and etiquette of giving factual evidence; • How the adversarial system works; • The layout and roles of various people at the hearing; • Whom to speak to and how to address them; • Personal preparation; • Taking the oath or affirmation with confidence; • Techniques lawyers use in cross examination; • Problems that arise in cross-examination and how to handle them • Giving coherent, sequential testimony under difficult cross-examination.	If witnesses are required to give evidence for longer than a day or if counsel have specific concerns it is recommended that they attend a cross-examination session, in addition to a witness familiarisation session. Witnesses are prepared to: • Deal with in depth cross-examination; • Gain mastery of delivering oral evidence; • Get to the essence of a complex case; • Communicate clearly with the decision maker • Assess their own videoed performance

In our professional lives we prepare for every meeting and eventuality and there is a strong argument that witnesses should not be disadvantaged by the ignorance of the process or taken by surprise at the way in which the hearing works.

The courtroom is an entirely alien environment and – as perhaps most recently and vividly demonstrated by the Leveson enquiry – even the most successful and high profile businessmen can do themselves a complete disservice if they are unprepared for a style of questioning that they come across in no other part of their business life.

Nervousness is something that can undermine the evidence of even the most confident chief executive, dimming their recollection of facts that they know extremely well. Sheppard said: "Sometimes you have a witness where you have heard them explain the matter five times and they have always been articulate, given the right amount of detail, reliable and consistent with the documents but under cross examination they go off the rails and give a completely different account because they are not thinking straight.

"If you've done it before you might still be nervous but you know what you have to do to get you through those nerves."

Bond Solon recently prepared Chelsea football club owner and former owner of Russian oil producer Sibneft, Roman Abramovich, for his defence against a £3bn claim in damages claim by exiled Russian businessman Boris Berezovsky. It was a surprise to some following the case when Abramovich volunteered at the outset to Judge Mrs Justice Gloster that he gets nervous speaking in public and he commented: "They [Bond Solon] told us that you need to breathe slowly, that you have to look at the judge, there is a certain etiquette that you have to comply with." In fact, despite his nervousness Abramovich' evidence, given through a translator, was widely reported to be assured.

As was the case in the Abramovich trial, many disputes centre on events - be it an incident, document or email - that arose years ago and the intricate details of which have long since been forgotten. Barristers armed with a fearsome knowledge of the evidence will relentlessly press witnesses on their recollection of the facts, which for the unprepared witness can be extremely disconcerting and de-stabilising.

Morrison said: "In English High Court proceedings witness statements often run to hundreds of pages, even though the Judges are increasingly asking for more concise documents, and the witness is cross examined on every line and paragraph.

"Witnesses rarely like giving evidence. It is an ordeal for most. You are being asked questions by a very bright QC who sole aim is to discredit or embarrass the witness, about events many years ago when witnesses often can't remember what happened yesterday, questions may be directed about the meaning email sent five years ago. Often litigation involves a breakdown of relationships and the amount of pressure and stress is huge. Familiarisation by witnesses of the rules of giving evidence can help dealing with an otherwise stressful situation and enables the witness to be more relaxed and to provide better evidence as a result."

However, private practice partners also cite examples of where familiarisation has helped over-confident and impatient clients to become more calm and thoughtful witnesses. Sheppard said: "I remember a very confident CEO who though that he would be able to outwit the opposition's counsel until a day of familiarisation. In my view there was a notable change and he came across as a very thoughtful and helpful witness."

Tim Hardy added: "I can't say I've seen a chief executive change their fundamental characteristics but I have seen nervous people become more relaxed and confident going into it."

Roman Abramovich Trial
• Claim for breach of contract – Mr Berezovsky claimed £3bn in damages, alleging that Roman Abramovich intimidated him into selling his shares in Russian oil producer Sibneft for a mere £1.3bn, said by Berezovsky to be a fraction of their worth • Abramovich told the court: "I never made any public statements, at least I tried never to make any public statements. I know I don't do it well, I become very nervous, I forget what it is that I mean to say, I can't really convey my logic and my thought to the journalists, so I decided this is not my thing, I really shouldn't be doing it." • Advice given by Mary Malecka, a barrister at Bond Solon who put Abramovich through his paces: "It is fundamental that you tell the truth. When you are nervous, it can be difficult to listen to the questions, so you have to make sure you understand what is being asked and think before you speak. If you don't know something, say so – don't speculate as you would sitting round a dinner table."*

While coaching a witness is prohibited and lawyers are not allowed to prepare witnesses on what they should or should not say in court, or attempt to persuade the witness into changing their evidence, familiarisation is in fact encouraged by both the Bar Council and the Court of Appeal.

Counsel must be careful if considering familiarising their own staff for court as the Bar Council guidelines suggest that in civil matters it is prudent to follow the outright ban by the Court of Appeal in R v Momodou [2005] in criminal proceedings on anyone conducting a familiarisation session who has personal knowledge of the case.

In any event, it is difficult to recreate the pressure of court room cross examination internally, either because of familiarity or that, from a relationship point of view, the cross examiner is unable to undertake a line of sustained questioning that would make his target truly uncomfortable. Sheppard said: "I think you might be able to do three to four questions but I think it is quite hard to do it on a courtroom basis for a whole morning or even an hour because if you want to get aggressive the client-witness who knows you well will usually comment or laugh, which they tend not to do with someone unfamiliar."

As long as the material used bears no similarity to the issues and content in the forthcoming proceedings and legal qualified external trainers have no knowledge of the case they will be able to recreate a mock cross examination far closer to the real experience.

Overseas Witnesses

Familiarisation with the adversarial system is particularly important for witnesses from an inquisitorial legal system with little or no knowledge of how our courts work. Hardy points to an "uncomfortable example of a Russian witness for the Claimants in the Fiona Trust super-case litigation in the Commercial Court (*Fiona Trust & Holding Corp & 75 Ors v Yuri Privalov & 28 Ors*/ Intrigue Shipping Inc & ors v H Clarkson & ors, in which Cameron McKenna advised one of the defendants) who insisted on standing throughout his lengthy evidence."

The globalisation of industry means that it is rare that a general counsel of a large corporate will have no international employees to consider, and even for disputes with no London connection the capital is often allocated as the centre for litigation or arbitration.

Morrison said: "London is one of the world's pre-eminent litigation centres. Very often you have companies select London to litigate because the judges are good, the courts are not corrupt and there is proper process. In many cases involving international disputes, the witnesses will be foreign so English will be their second or third language, London will have little to do with the underlying dispute and the sums of money are huge.

"Put yourself in the position of a Russian speaking CEO, they will be nervous and need a basic understanding of the rules of etiquette – where do you stand, do you swear on the Old Testament, how do you address the judge?"

Attitudes are Changing

Attitudes to witness familiarisation have changed and, certainly within private practice, familiarisation is becoming part of standard procedure where a dispute turns into a full-blown trial. For in-house counsel, the risk of reputational damage arising from litigation means that witness familiarisation needs to be something they at least consider as standard procedure in the minority of cases ending up in trial.

As HSBC's general counsel Richard Hennity recently said in one legal publication when discussing risk management: "The risk is residing in the business and if you can't change behaviours within the business then you're not going to prevent the risks arising."

The Bar Standards Board Guidelines on Witness Familiarisation in Civil Proceedings

- Any witness familiarisation process should normally be supervised or conducted by a solicitor or barrister;
- If a witness familiarisation course is conducted by an outside agency:
    - It should, if possible, be an organisation accredited for the purpose by the Bar Council and Law Society;
    - Records should be maintained of all those present and the identity of those responsible for the programme, whenever it takes place;
    - The programme should be retained, together with all the written material (or appropriate copies) used during the sessions.
    - None of the material used should bear any similarity whatever to the issues in the current or forthcoming civil proceedings in which the participants are or are likely to be witnesses.
    - If discussion of the civil proceedings in question begins, it should be stopped.
- Barristers should only approve or take part in a mock examination-in-chief, cross-examination or re-examination of witnesses who are to give oral evidence in the proceedings in question if, and only if:
    - its purpose is simply to give a witness greater familiarity with and confidence in the process of giving oral evidence;
    - there is no risk that it might enable a witness to add a specious quality to his or her evidence;
    - the barrister who is asked to approve or participate in a mock examination-in-chief, cross-examination or re-examination has taken all necessary steps to satisfy himself or herself that the exercise is not based on facts which are the same as or similar to those of any current or impending trial, hearing or proceedings at which a participant is or is likely to be a witness;
    - In conducting any such mock exercises, the barrister does not rehearse, practise or coach a witness in relation to his/her evidence: see para.705(a) of the Code. Where there is any reason to suspect that a mock examination-in-chief, cross-examination or re-examination would or might involve a breach of the Code, a barrister should not approve or take part in it.

Mark Solon is acknowledged as one of the UK's leading experts on expert witnesses, investigatory practice and witness familiarisation. He is a solicitor, a qualified Attorney at Law in California and has an MSc in Shipping Trade and Finance with distinction from the City University. He has been instrumental in improving the standard of expert evidence over the last twenty years and regularly chairs conferences of up to 500 delegates as well as speaking at many conferences. He has written numerous articles relating to evidence and several books. He has in depth knowledge of the legal and evidential issues around forensic science, emergency planning, surveillance and the work of many specialist intelligence and prosecution agencies. He frequently appears on television and radio dealing with evidential issues. He has been described by one senior expert witness under his cross-examination as "the love child of Stephen Hawking and a rottweiler."

Mark founded Bond Solon in 1992 and the company has since grown to become the largest provider of law related training to non-lawyers in the UK.

Bond Solon is a leading legal training consultancy with a successful track record of delivering a range of specialist face to face and web learning training courses and qualifications targeted specifically at non-lawyers who are involved in the legal system. The sole business of Bond Solon is the provision of knowledge and skills based training for those whose roles and responsibilities require them to operate within relevant legislation, regulations, guidance and to industry-specific standards.

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