International Arbitration in Practice

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Edited by

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Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: lrs-sales@wolterskluwer.com
Website: www.wolterskluwer.com/en/solutions/kluwerlawinternational

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
920 Links Avenue
Landisville, PA 17538
United States of America
E-mail: customer.service@wolterskluwer.com

ISBN 978-94-035-4387-1

e-Book: ISBN 978-94-035-4397-0
web-PDF: ISBN 978-94-035-4407-6

Printed in the Netherlands.

We have benefitted from an excellent education in the field of international arbitration both inside and outside of the classroom and hope to impart some of what we have learned here with the help of friends, colleagues, peers, and even those who have taken the role of courtroom adversaries.

For that reason, this book is dedicated to 'the teachers'.

Editors

Courtney Lotfi Recognized as one of her generation's leaders in international arbitration, Courtney acts as counsel and arbitrator in common and civil law disputes across all sectors with particular emphasis on energy, life sciences, construction and industrial engineering matters. Her corporate work extends to post-M&A, joint venture and shareholder disputes. Courtney's disputes-related experience has reached five continents (so far), including North and South America, Europe, Africa and Asia.

Courtney began her arbitration practice at Freshfields Bruckhaus Deringer, the then-leading international arbitration practice (as ranked by GAR), where she successfully represented a European energy company in a series of market-leading arbitrations, including a first-of-its-kind price review resulting in the tribunal rewriting the purchase price formula under a long-term, large-volume natural gas supply contract to include hub indexation and a contentious take-or-pay arbitration involving EU competition law that was eventually brought before the Austrian Supreme Court.

Her recent counsel work includes representing the contractor in an arbitration related to the construction of an LNG re-gasification plant, the sellers of a coal-fired power plant in a post-M&A arbitration, and a joint venture partner in a dispute regarding company management and accounting. She has also recently advised on disputes related to Russian sanctions and counter-sanctions.

Courtney was a member of the ICC's Task Force on Disability Inclusion, is a member of the VIAC's energy expert focus group, and a co-founder of the Berlin Dispute Resolution Days.

Courtney is an enthusiastic supporter of developing young legal talent and lectures at the International Dispute Resolution Master's program at the Humboldt University of Berlin and at the undergraduate level at the University of Bonn.

Courtney's work has been recognized by Who's Who Legal (Most Highly Regarded, Future Leaders, Germany), the Legal 500 (DACH Powerlist, Rising Star), the Global Arbitration Review, Best Lawyers (Litigation, Mediation and Arbitration), Handelsblatt, and the Virginia Bar Association (Pro Bono Honour Roll). She is licensed to practice in the USA (Virginia) and as a registered foreign lawyer in Germany (Frankfurt).

Alicja Zielińska-Eisen is a highly respected Polish attorney, arbitrator, and educator, recognized as a Thought Leader – Global Elite in the 2025 Lexology Arbitration ranking. She has over a decade of experience representing clients in both court and arbitration proceedings. Having developed her skills first at a Magic Circle firm and now as Counsel at Queritius, Alicja acts as an arbitrator and counsel helping businesses prevent, manage, and resolve disputes at every stage, from contract negotiation and mediation to contentious proceedings and cross-border enforcement.

Alicja's expertise in international arbitration is underpinned by hands-on experience, including investment arbitrations, having successfully represented both foreign investors and the state. In recent years, her practice has expanded to include more commercial disputes, private international law, and ESG issues, with a focus on post-M&A disputes and infrastructure projects, notably in the energy and transportation sectors.

She combines her legal practice with an academic career as a lecturer for the advanced International Dispute Resolution (IDR) LL.M. at Humboldt University of Berlin. Until recently, she also served as the Academic Coordinator for the IDR LL.M.

Alicja is a member of the ICC Poland Arbitration Committee and a former ICC YAAF Representative (2021-2024), responsible for initiatives in Poland, the Czech Republic, Slovakia, and Hungary. She is a passionate supporter of initiatives for students, and young professionals, regularly speaking at seminars and conferences on communication and soft skills, arbitration, and other ADR-related topics. She acts as a mentor in the Mentor-Mentee program run by the global organization Moot Alumni Association (MAA).

Alicja's experience, along with her thought leadership, make her a respected and insightful voice in the dispute resolution community. For her pro bono work, she received the 1st Honourable Mention in the Female Advocate of the Year in 2023, a nationwide competition held by the Polish Bar Council.

Alicja graduated from the University of Silesia (Poland) and holds an LL.M. from Humboldt University of Berlin, as well as a Postgraduate Diploma in Negotiation, Mediation, and other ADR from the Centre for Dispute and Conflict Resolution at the University of Warsaw.

Verónica Sandler Obregón Among the most well-known and experienced practitioners of international arbitration of her generation in Latin America, Verónica boasts a blend of practical and academic experience in alternative conflict resolution. She has dedicated her career to promoting the growth of international arbitration by combining her passion for teaching and research with many years of arbitration experience, as well as an ample background in the corporate sector as principal and counsel.

Verónica has acted as arbitrator, party counsel, and secretary in domestic and international commercial and investor-state arbitrations under the rules of virtually all the principal arbitration centres of the world.

She is a prolific author, having published on subjects as varied as international arbitration, commercial and corporate law, entertainment law, and international public and private law. She is regularly invited to lecture on arbitration and participates as a

speaker frequently at international events. She teaches arbitration and corporate law at the graduate and postgraduate levels at various Argentine universities.

She is well-known for having organized what has become the world's premier Spanish-speaking commercial arbitration competition held every year throughout Latin America, now in its 17th edition.

Verónica has been a member of the ITA Task Force on Legal Representation of American States in Investment Arbitration and was on the Drafting Committee that prepared the Guide on ICC Disability Inclusion in International Arbitration. She is a co-founder of Women Way in Arbitration (WWA), an NGO which promotes greater participation and visibility of women in international arbitration. She is a Delegate to the ICC Commission on Arbitration and ADR as one of the representatives of Argentina.

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CHAPTER 28
Factual Witness Preparation

Lorraine de Germiny & Teresa Queirós[*]

Testifying at a hearing is the culmination of someone's role as a fact witness. This chapter is a practical guide to preparing fact witnesses for this critical moment, which can materially impact the outcome of the case. It reflects modern arbitral practice and considers the most crucial issues for counsel to keep in mind to ensure this step goes as smoothly as possible.

A WHY PREPARE FACT WITNESSES TO GIVE EVIDENCE?

Most international arbitration proceedings will involve an evidentiary hearing at which the parties will typically proffer their witnesses for examination and cross-examine the opposing witnesses.

For most people, especially non-lawyers, giving evidence at such a hearing will be a once-in-a-lifetime experience and something they might be anxious about. Aspects of giving evidence, which will be obvious to arbitration practitioners, may be new and potentially unsettling for a witness. It is counsel's responsibility to mitigate the risks of the witness passing out the morning of their testimony, hiding in the restroom or generally not performing well due to stress and lack of preparation. With the right preparation, counsel can maximize the chances of the witness feeling at least calm and confident, if not eager, to appear on the stand.

1 What Do We Mean by Witness Preparation?

It is now standard practice in international arbitration for witnesses to be familiarized with the process of giving evidence at a hearing. While different jurisdictions have

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The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

different approaches (as the next section will discuss), it is commonly accepted that counsel may be in contact with witnesses about their evidence.[1]

In international arbitration, this might involve interviewing a witness and discussing their prospective testimony with them,[2] as the 2020 International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules) in Article 4(3) acknowledge: 'It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.'[3]

The possibility of counsel meeting with witnesses to prepare their testimony is also addressed in Guideline 24 of the 2013 International Bar Association Guidelines on Party Representation in International Arbitration (IBA Guidelines).[4] The commentary to IBA Guideline 24 addresses the preparation of testimony for a hearing head-on and states that 'a Party Representative may assist a Witness in preparing for their testimony in direct and cross-examination, including through practise questions and answers'. The commentary also specifies that:

> This preparation may include a review of the procedures through which testimony will be elicited and preparation of both direct testimony and cross-examination. Such contacts should however not alter the genuineness of the Witness or Expert evidence, which should always reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion.

One of the features of international arbitration is that it brings together legal practitioners from different traditions. The next section illustrates how some of these different traditions deal with the issue of witness preparation in their own way. Differences aside, these various traditions have a common aim: to ensure that witnesses give truthful, complete evidence that has not been inappropriately influenced.[5]

1. As the ICC Report on the Accuracy of Fact Witness Memory in International Arbitration notes, 'In some jurisdictions, it is both permissible and deemed desirable for party counsel to prepare witnesses for the hearing on how to respond to the anticipated topics for questioning. In other jurisdictions, advocates are not permitted to confer with the witnesses regarding their testimony in advance of the hearing and "preparing" a witness may be a breach of professional conduct rules.' ICC Commission on ADR and Arbitration, *The Accuracy of Fact Witness Memory in International Arbitration: Current Issues and Possible Solutions* (2020), para. 5.29.
2. Nigel Blackaby, *Witness Preparation: A Key to Effective Advocacy in International Arbitration*, in *ICCA Congress Series No. 15 (Rio 2010): Arbitration Advocacy in Changing Times* 118 (Albert Jan van den Berg ed., ICCA Congress Series, Volume 15, 2011).
3. Article 4(3) IBA Rules.
4. Guideline 24 IBA Guidelines, 'A Party Representative may, consistent with the principle that the evidence given should reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.'
5. Care can 'be taken to avoid memory contamination in the course of preparing a witness ahead of a hearing'. ICC Commission on ADR and Arbitration, *The Accuracy of Fact Witness Memory in International Arbitration: Current Issues and Possible Solutions* (2020), para. 5.30.

2 Different Jurisdictions, Different Rules? A Comparison of France, the UK, and the US

That different legal traditions have different approaches to witness preparation is something which the arbitration community has considered (and at times agonized over) repeatedly over the years.[6] While some consider the differences may be exaggerated at times,[7] as noted in Chapter 15 on Examination of Witnesses, practitioners should check the rules applicable to them to determine whether (and what type of) witness preparation is permitted. At this point, it is important to emphasize, and without wanting to state the obvious, that in no jurisdiction is it acceptable for counsel to put forward witness evidence which they and the witness know to be untrue.[8]

As an illustration of the possible differences between jurisdictions, here is a flavour of the different approaches to the ethics of witness preparation in three different jurisdictions – France, the UK and the US:

- *France*: the approach of the Paris Bar is to simply state that, in the context of international arbitrations (whether seated in France or elsewhere), witness preparation by counsel prior to a hearing where the witness will be cross-examined is not contrary to the essential principles of the legal profession.[9]
- *England*: the English courts recognize a 'dramatic distinction' between 'witness training or coaching, and witness familiarisation', with the latter being permissible.[10] While witnesses can and should be familiarized with the proceedings (including how the hearing room may look, the various participants, sequence of events, general pointers on how to give evidence, etc.), it is not appropriate to coach witnesses (i.e., rehearsing or practising any of the evidence to be given). The English Bar Standard Board's Handbook Rule provides that barristers 'must not encourage a witness to give evidence which is misleading or untruthful' and 'must not rehearse, practise with or coach a witness in respect of their evidence'.[11] There is currently no carve out for international arbitration. Furthermore, while the Solicitor Regulation Authority Code of Conduct (applicable to English solicitors) does not address witness preparation directly, it states solicitors should 'not seek to influence the

6. Nigel Blackaby, *Witness Preparation: A Key to Effective Advocacy in International Arbitration*, in *ICCA Congress Series No. 15 (Rio 2010): Arbitration Advocacy in Changing Times* 123 (Albert Jan van den Berg ed., ICCA Congress Series, Volume 15, 2011).
7. *Ibid.*, p. 124.
8. Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (7th ed. 2023), para. 6.129. *See also* IBA Guidelines 23, 'A Party Representative should not invite or encourage a Witness to give false evidence'.
9. Resolution as published in the *Le Bulletin du Barreau de Paris No. 9* (4 March 2008), p. 46 https://dl.avocatparis.org/com/bulletins_en_pdf/Bulletins_2008/Bulletin_09.pdf.
10. *R v. Momodou and Another*, [2005] EWCA Crim 177, [61]. We note this decision was issued in a criminal law context, and there is no authority on this issue in relation to civil (or specifically arbitration) proceedings. The approach is therefore to assume that the principles laid out in this case apply more generally.
11. *See* Rules C9.3 and C9.4. *See also The Bar Council's Ethics Committee's Guidance on Witness Preparation* (1 October 2005, last reviewed on 1 September 2023), https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Witness-preparation-September-2023.pdf.

substance of evidence, including generating false evidence or persuading witnesses to change their evidence'.[12]

- *US*: the US is traditionally seen as a jurisdiction where witness coaching can be acceptable and where not doing so can be deemed an ethical violation.[13] Witness preparation may include: 'discussing probable lines of hostile cross-examination that the witness should be prepared to meet', 'rehearsal of testimony' and 'a lawyer may suggest choice of words that might be employed to make the witness's meaning clear', although counsel cannot assist a witness to give false evidence.[14]

Bearing in mind the different ethical rules and traditions, witness preparation may differ depending on the legal practitioner. In some cases, there may be a mock hearing in which witnesses may be cross-examined (even by their own counsel) on their evidence in the arbitration. In other cases, counsel may simply meet with witnesses to discuss the format of the hearing and provide general tips for giving evidence and the evidence the witnesses have given to date. In addition, external providers are available to deliver witness familiarization courses, which typically explain cross-examination techniques and include a mock hearing based on a fictional scenario.

Irrespective of what ethical rules apply in your jurisdiction, you should bear in mind the consensus in the community that 'over-preparation can undermine the credibility of a witness'.[15] Someone who answers too readily or launches into an exposition of the legal issues in the case is more likely to be seen as perhaps less trustworthy.

B WHERE DOES WITNESS PREPARATION FIT IN THE LIFE OF AN ARBITRATION?

Witness preparation typically takes place after the written submission phase has been completed but prior to the hearing.

In international arbitration, there is no typical hearing. Depending on the size and complexity of the case, a hearing may take one day and involve only short statements from the parties followed by the examination of only one or two witnesses. Alternatively, a hearing may take two weeks, involve opening statements of more than a day, and the examination of multiple witnesses spread over the course of several days. Planning the hearing can easily become the object of – often intense – debate between

12. Section 2.2, *Solicitor Regulation Authority Code of Conduct for Solicitors*, https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/. *See also* sections 1.4, 2.4 and 2.7.
13. Susan R. Martyn et al., *The Law Governing Lawyers, National Rules, Standards, Statutes, and State Lawyer Codes* (2011), §116(1); The American Bar Association Formal Opinion 508, *The Ethics of Witness Preparation* (5 August 2023) notes that 'the failure adequately to prepare a witness would in many situations be classified as an ethical violation'.
14. Susan R. Martyn et al., *The Law Governing Lawyers, National Rules, Standards, Statutes, and State Lawyer Codes* (2011), comment to §116.
15. Roman Mikhailovich Khodykin et al., *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019), para. 7.38.

the parties: which witnesses will be heard, in what order, for how long, and what will be the scope of the direct and cross-examination. These questions of scope and timing of witness examinations can greatly impact the manner in which witnesses should be prepared. If the parties are aware of who is very likely to be called as a witness, it may be prudent to inform them of the hearing timetable as soon as possible to allow them to plan to attend the hearing in good time.

Typically, there are several days or weeks – depending mainly on the complexity of the case – between the completion of the phase of written submissions and the hearing. This is the time to prepare for the hearing. Counsel may sometimes be tempted to focus on their own upcoming performance, i.e., opening statements and the cross-examination of the opposing party's witnesses, but it is extremely important to take as much time as possible to prepare one's own witnesses for their cross-examination by the opposing party.

While some hearing preparation may take place in parallel with the preparation of the written submissions, focused hearing preparation cannot take place in earnest until the completion of that prior phase and the crystallization of the issues, arguments, claims and defences. It is, however, good practice during the phase of written submissions to notify the client and fact witnesses that there will be preparation work prior to the hearing and to pencil in early on dates for that preparation. Keeping a witness advised of all relevant dates in advance is important – everyone has busy lives and schedules, so making everything as seamless as possible is key.

While some preparatory work may be done by videoconference, in-person meetings can make the exercise more real for the witness. They also help to build a rapport with the witness and allow counsel to see the witness' demeanour and body language. Witnesses can, for instance, lean back in their chair, slouch or doodle or adopt other potentially disruptive body language not visible over videoconferencing.

If the witness will be testifying remotely (and not in person), it may still be useful to meet with them in person, depending on the witness' role, demeanour, and the importance of their evidence to the case. An in-person meeting with the lawyers (and possibly the client if the witness is not part of the client team) can cause the witness to measure the importance of the exercise and what is involved. The preparation will likely also be more effective if done in person than by video.

C ISSUES TO BE COVERED IN WITNESS PREPARATION

1 Logistics

Irrespective of the jurisdiction, all counsel must consider the logistics of a witness giving evidence when familiarizing a witness with the process. A witness who knows their statements inside out but who does not show up to a hearing does not help a party's case!

Some of the key issues to discuss and plan with the witnesses are:

- *On which day(s) they should attend the hearing*: fact witnesses are often not allowed to attend a hearing prior to their own examination for reasons of due

process; there are, however, some exceptions to this rule. It is thus important to discuss with each witness when they can and should attend the hearing, including on any days after they have testified.

- *When and how will they travel from their home city to the hearing location*: do they have time to recover from any jetlag, and are they well rested and acclimatized to and comfortable with their new surrounding? These questions are especially important if they are coming to a country that they do not know and where they may not speak the language.
- *On which day(s) they may visit the hearing venue in advance of their own testimony*: in some cases, it may be possible to show witnesses the hearing venue in advance and specifically the room in which they will testify. This can help to psychologically prepare them for the examination.
- *Where they will be staying*: book hotel rooms for witnesses well in advance. They should feel comfortable in conveniently located accommodation (ideally, within walking distance to the hearing location). In principle, they should also be staying at the same hotel as the other witnesses (or, if the hearing is in the city where the legal team is located, close to their offices). The legal team will meet with the witnesses in the days before the hearing and, to some extent, throughout the hearing (subject to the rules on witness sequestration). This is a very busy period for counsel, so it is advisable to minimize the potential for extra work in coordinating with witnesses by arranging their accommodation close to the hearing venue or counsel's offices or hotels. Managing witnesses can quickly become a nightmare for counsel if they are located in different hotels and/or far away from the hearing venue. This can also negatively impact the witness' preparation and stress levels.
- *When and how they will travel from their hotel to the hearing venue*: a witness may be extremely flustered and disoriented if they are late to their own examination due to traffic or a taxi that never arrived, and the impact on that party can be detrimental.
- *Visas, health care and insurance, meals and other costs*: discuss in advance the possible need for visas to travel to the hearing and the steps to secure the visa; what will happen in case of medical issues in the hearing country and whether witnesses need to take out health insurance of some sort; the hotel environment and where they may wish to eat their meals during their stay; finally, which costs will be reimbursed by the client (e.g., hotel, meals and taxis), when, and how.
- *Dress code*: counsel should discuss the dress code for the hearing with the witness. While witnesses are generally expected to wear professional attire, this may not always be the case, and what is deemed 'professional' will vary from one culture and one person to another. For instance, someone who has never worn a suit in their lifetime may not feel comfortable in a suit and may not need to wear one. It is also generally not advisable to wear to a hearing an

outfit or shoes being worn for the first time, but rather to favour the outfit and shoes that the person is already used to and is comfortable with (but do find out what this might be beforehand to avoid any surprises).

- *Virtual hearing/giving of evidence remotely*: while virtual hearings may no longer be as essential as they were during the pandemic, allowing witnesses to give evidence remotely via an online platform is unlikely to go away and can pose several logistical challenges. For example, do the witnesses have a good internet connection? How will documents be shown to a witness, and will this mean they need two screens? Who will the witnesses be able to see on screen – the tribunal? The cross-examiner? All this will most likely be subject to some discussion between the parties and governed by a specific and detailed procedural order,[16] but a test of the equipment and tech prior to the hearing is a good idea.
- *Contact during witness examination*: witnesses should be told in advance that they will not be able to discuss their evidence with anyone while they are testifying. This may mean that the witness will be told not to speak to the legal team at all (and, for example, will need to have their own breakout room for any breaks or meals). If giving evidence remotely, the witness could be asked to give a 360° view of the room they are testifying from to ensure there are no unauthorized people or other aids present in that room.

Counsel typically prepares a witness information pack covering these logistical points. Table 28.1 is an example index of a pack that might be sent to a witness ahead of an in-person hearing.

Table 28.1 Sample Witness Information Pack

No.	*Topic*	*Typical Content*
1	Hearing details	– Hearing address, venue phone number and any logistics on how to enter the building. – For witnesses who have never given evidence before, consider sending a photo or image of the layout of the hearing room so they can familiarize themselves with it. – Hearing dates and detailed schedule, explaining when the witnesses should make themselves available.

16. To ensure that any relevant points are raised with a witness ahead of time, it may be helpful to also review a guideline like the ICC Checklist for a Protocol on Virtual Hearings, https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-checklist-cyber-protocol-and-clauses-orders-virtual-hearings-english.pdf.

No.	*Topic*	*Typical Content*
2.	Hotel information and brochure	Offer witnesses a few options of places to stay near the hearing venue.
		You may not want to have witnesses stay in the same hotel as the legal team, but you would not want them to be far.
		Include a map showing both the hotel and hearing location so that witnesses can get a feel for how far they will have to travel. The essential part of witness preparation is that your witness actually makes it to the hearing.
3.	Contact list	Give witnesses a port of call if they have any questions, get lost, cannot get into the hearing room, are late, etc.
		Consider designating at least two members of the team per witness and providing the witness with both email addresses and mobile phone numbers of contact persons.
4.	List of hearing participants	Have a list of everyone who will be at the hearing and their role (arbitral tribunal, counsel for the other side, court reporter, etc.).
		Put together a lookbook with photos of the tribunal members, secretary and opposing counsel.

2 The Giving of Evidence

Witnesses should refresh their memory of the evidence they have given in the arbitration before being cross-examined. As a rule, witnesses should be provided in good time with all documents relevant to their testimony. This will include their witness statements and documents exhibited to their statements, as well as possibly documents which they are known to have received (e.g., any emails or letters where they are the authors or recipients) that are part of the record.

Once a witness has had a chance to read their statements afresh, they may spot items they wish to correct or clarify (e.g., their statement includes a wrong date or incorrect financial figure). It is important to discuss these issues in advance, so that the witness knows how to make the correction or clarification during direct examination. In some cases, it also may be appropriate to discuss issues not covered by the statement in direct examination (e.g., a witness may be asked about an event which took place after their witness statements were filed). If a witness' evidence will be simultaneously interpreted, it is important to familiarize the witness with this aspect of the process as it may be the first time a witness uses translation headsets.

While many lawyers will not be able to coach a witness, they should be able to provide general guidance on giving evidence. This will typically be included in the witness pack, an example of which is in Table 28.2.

Table 28.2 Sample Guidance on Giving Evidence

Tell the truth at all times.
Listen carefully to the question.
Take your time when answering a question.
Answer the question asked.
Direct your answers to the Tribunal.
Avoid being aggressive and confrontational.
If you do not know the answer, say so.
If you do not remember the answer, say so.

General guidance like the above is designed to give witnesses a better understanding of the process and their role in it. The aim is to put them at ease with their role at the hearing, which is to assist the tribunal.

D THE BEST CHANCE FOR FULL, ACCURATE EVIDENCE

While different jurisdictions have different approaches to preparing witnesses for a hearing, it is always advisable to prepare the witness for what is most likely a once-in-a-lifetime event, which some (if not most) will approach with some trepidation.

It is also important to prepare the witness for what the hearing will not be: it will not be a conversation with the tribunal, and it will not be an opportunity to tell the witness' story or at least not without interruption. On the contrary, it is a question-and-answer exercise and one where the witness must answer (and not pose) the questions in a succinct, direct manner. The hearing will also not be like in American TV shows, with a jury, multiple objections, lawyers pacing while they make arguments and pose questions, and emotions flying. Most arbitration hearings are much less dramatic and more civil.

Familiarizing a witness with the hearing process, the participants, likely schedule, will demystify the process and help the witness develop the confidence required to give evidence truthfully and effectively based on their knowledge and/or recollection of the facts. Preparing someone effectively for their five minutes of arbitration fame will help your clients put their best foot forward.