
**BACK TO THE FUTURE:
TRIAL WITNESS STATEMENTS IN THE BUSINESS AND PROPERTY COURTS
AFTER 6 APRIL 2021**

Introduction

1. Once upon a time, before the advent of the Civil Procedure Rules 1999, a party in civil litigation would extract evidence from their witnesses in support of their case by oral examination in chief.
2. With the Woolf Reforms, witness statements became the rule rather than the exception, and for many of us, have been a feature of our professional lives from the outset. However, for some time, the judiciary has been concerned about the direction of travel in relation to witness statements. As the then Chancellor, now Master of the Rolls, Sir Geoffrey Vos put it towards the end of 2019¹:

“Abolishing evidence in chief in favour of witness statements was regarded by many as a revolution. It turned out to be a mixed blessing, because witness statements became gargantuan and costly, and did not stick to the main evidential points in issue, but began over time to range far and wide over the entire history of the relationship between the parties. They were drafted by lawyers and often moved miles away from the ipsissima verba (precise words) of the witnesses. Moreover in some cases, the opportunity to hear a party’s own account of what happened gave a judge a better insight into who was telling the truth than any number of lawyer drafted documents...”

3. Piecemeal changes (e.g. the introduction of the ability to order oral evidence of particular parts of a witness’s account, declarations as to method of preparation of the statement, requirements to draft in the witness’s own language) clearly did not lead to the desired change in overall approach. However, the work done by the Witness Evidence Working Group has now generated a much more fundamental adjustment in practice, which directly affects the preparation of witness statements for trial in the Business and Property Courts.

PD57AC – A Return to the Fundamentals

4. **If there is one thing which all litigators, including solicitors and counsel, who are involved in disputes before the Business and Property Courts need to read in the next month, it is PD57AC.**² The new practice direction comes into force on 6 April 2021, and it introduces major changes to the preparation of trial witness statements, which will need to be carefully considered before embarking on that process. What follows is a short takeaway menu, but there can be no substitute for reading it in full.

¹ <https://www.judiciary.uk/wp-content/uploads/2019/10/LawSocietyLitigationConference.9thOctober2019.f-1.pdf>.

² Currently at <https://www.justice.gov.uk/courts/procedure-rules/civil/127-cpr-update.pdf> from p. 63 onwards.

Point 1: The Legal Representative has to certify compliance with PD57AC

5. The certificate of compliance is required to be given in the following form unless an application is made for permission to depart from it (paras 4.3 and 4.4):

“I hereby certify that:

1. I am the relevant legal representative within the meaning of Practice Direction 57AC.

2. I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to [name of witness].

3. I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.

Name:

Position:

Date:”

6. The relevant legal representative is defined as “a legal representative authorised to conduct litigation who has had responsibility for ensuring that the purpose and proper content of trial witness statements and proper practice in relation to their preparation have been explained to and understood by the witness” (para 1.2).
7. Therefore, **this is likely to be the responsibility of a Partner, Senior Associate, or in some cases direct access counsel.** A modified form of the certificate of compliance may need to be considered by counsel acting *pro bono* via Advocate.

Point 2: PD57AC applies to Trial witness statements signed on or after 6 April 2021 for use at trials in the Business and Property Courts

8. PD57AC applies to trial witness statements, but only those signed on or after 6 April 2021, and only those for use in trials in the Business and Property Courts. The change does not affect affidavit evidence, witness statements other than a trial witness statement, or the powers of the court to control, exclude or limit factual witness evidence (para 1.1).
9. The further definitions of trial and trial witness statement are as follows (para 1.2)

“trial” means a final trial hearing, whether of all issues or of only one or some particular issues, in proceedings (except as provided in paragraph 1.3 below) in any of the Business and Property Courts under CPR Part 7 or Part 8 or upon an unfair prejudice petition under section 994 of the Companies Act 2006 or a contributory’s just and equitable winding up petition under section 122(1)(g) of the Insolvency Act 1986,

“trial witness statement” means a witness statement that is served pursuant to an order made under rule 32.4(2), or pursuant to rule 8.5 or an order made under rule 8.6(1)(b), or that is prepared for the trial of an unfair prejudice petition or a contributory’s just and equitable winding up petition, including supplemental or reply witness statements where allowed by the court

10. However, there are presumptive exclusions (subject to contrary order) for particular types of specialist proceedings (para 1.3).

Point 3: PD57AC does not disapply existing requirements as to the contents of witness statements, but it and the Statement of Best Practice prevail if there are other inconsistencies

11. As far as substantive content requirements are concerned, PD57AC does not disapply them if they would otherwise apply to a trial witness statement (para 1.4). However, if there is another type of inconsistency with a different Practice Direction, then PD57AC prevails (para 1.5).
12. Witness statements are expressly required to be prepared in accordance with the Statement of Best Practice (“**SBP**”) which is appended to PD57AC, as well as any Court Guide, but again, if there is an inconsistency, the SBP is to prevail (para 3.4).
13. There may be, therefore, points of tension between the new approach and the relevant Court Guides which also apply, but unlike the previous approach, practitioners will need to be aware that the Court Guide in question may not be the final word, particularly when the certificate of compliance requires confirmation from the legal representative that the SBP has been followed.

Point 4: Bringing the content of the statement closer to the evidence which would be elicited by oral examination in chief

14. PD57AC makes very clear that the intention is to generate witness statements in a streamlined form which properly reflects what would otherwise have been the product of examination in chief (see e.g. paras 2.1, 3.1(2); SBP para 2.1).
15. That means that a witness statement should be limited to:
 - a. matters of fact which need to be proved at trial (para 3.1(1));
 - b. which are within the witness’ personal knowledge (para 3.2);
 - c. the witness’ own language (including a language in which the witness could fluently give oral evidence) (para 3.3, cross referring to PD 32, paras 18 and 32)
16. In addition, the witness “*must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement. The requirement to identify documents the witness has referred to or been referred to does not affect any privilege that may exist in relation to any of those documents.*” (para 3.2).
17. Those requirements are amplified by the SBP.
18. As far as the contents of the witness statement itself is concerned:

- a. SBP para 2.3 provides that:

“(1) a matter will have been witnessed personally by a witness only if it was experienced by one of their primary senses (sight, hearing, smell, touch or taste), or if it was a matter internal to their mind (for example, what they thought about something at some time in the past or why they took some past decision or action), (2) for the avoidance of doubt, factual witness testimony may include evidence of things said to a witness, since the witness can testify to the statement made to them, if (a) the fact that the statement was made to the witness

is itself relevant to an issue to be determined at trial or (b) the truth of what was said to the witness is relevant to such an issue and the statement made to the witness is to be relied on as hearsay evidence.”

b. SBP para 3.6 provides that:

“Trial witness statements should not –

(1) quote at any length from any document to which reference is made,

(2) seek to argue the case, either generally or on particular points,

(3) take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument, or

(4) include commentary on other evidence in the case (either documents or the evidence of other witnesses), that is to say set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence (save as set out at paragraph 3.4 above).”

c. SBP para 3.7 provides that:

“On important disputed matters of fact, a trial witness statement should, if practicable –

(1) state in the witness’s own words how well they recall the matters addressed,

(2) state whether, and if so how and when, the witness’s recollection in relation to those matters has been refreshed by reference to documents, identifying those documents.”

19. As far as the document list is concerned, SBP para 3.5 provides that:

“The document list to comply with paragraph 3.2 of Practice Direction 57AC should identify or describe the documents in such a way that they may be located easily at trial. Documents disclosed in the proceedings may be listed by disclosure reference. Privileged documents may be identified by category or general description.”

20. Each witness is also required to confirm their own compliance with the approach mandated in PD57AC in the following terms unless an application has been made to depart from it (paras 4.1 and 4.2)

“I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.

This witness statement sets out only my personal knowledge and recollection, in my own words.

On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.

I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge.”

Point 5: Bringing the process of preparing the statement closer to the approach to oral examination in chief

21. The SBP also sets out a detailed set of requirements in relation to the process of preparing a witness statement which is directed at practitioners.

22. In particular:

- a. It is permissible to refresh a witness's memory by reference to a document created or previously seen by the witness whilst the facts evidenced by it were fresh in their mind, but practices which might alter or influence recollection should be avoided (SBP, paras 2.6, 3.2)
- b. Concision is the aim (SBP, para 3.3)
- c. References to documents should only be made where necessary and are not normally required beyond the list referred to above, albeit that it may be necessary, where relevant, to challenge the content, date or authenticity of documents, show the witness's understanding of the document when sending/receiving or encountering it in the past, or to confirm whether the document was seen or not seen at the relevant time. References to the document should identify the document, not exhibit it, unless the witness is producing/disclosing it for the first time (SBP para 3.4)
- d. The statement should be prepared in way which involves as few drafts as possible (SBP para 3.8)
- e. The legal representative should explain the purpose, proper content and proper practice relating to the preparation of the statement to the witness before preparation or consideration of a draft statement and wherever practicable before evidence is obtained from them, including ensuring the witness has read or is read the witness confirmation (SBP para 3.9)
- f. Wherever practicable, the witness statement should be based on a record or notes made by the legal representatives of the witness's evidence, ideally during an interview, but if done by written questions or correspondence, following the SBP guidance, and that process should be described to the extent possible without waiving privilege (SBP paras 3.10, 3.12)
- g. An interview:
"(1) should avoid leading questions where practicable, and should not use leading questions in relation to important contentious matters,
(2) should use open questions as much as possible, generally limiting closed questions to requests for clarification of or additional detail about prior answers, and
(3) should be recorded as fully and accurately as possible, by contemporaneous note or other durable record, dated and retained by the legal representatives."
(SBP, para 3.11)
- h. Legal representatives may take primary responsibility for drafting and should assist as to structure, layout and scope of the witness statement, but the content should be taken from and not go beyond the record or notes (where they exist). Follow ups for clarification or completion should be elicited by non leading questions not by proposing content for approval/amendment/rejection (SBP, para 3.13)

Point 6: Limited allowances for Litigants in Person

23. The approach is modified slightly for parties who are litigants in person when the statement is prepared and signed. SBP para 3.1 disapplies the requirements set out in SBP paras 3.9 to 3.13, and instead applies SBP paras 3.14 to 3.16.

Point 7: Sanctions for Non Compliance

24. PD57AC does not limit the courts general powers of case management (para 5.1), but particular examples of sanctions for failure to comply with it (on application or the Court's own motion) include:
- a. refusal to give permission to rely upon the witness statement / withdraw permission to rely upon it / strike out all or part of it;
 - b. require it to be redrafted in a compliant manner or as directed;
 - c. adverse costs;
 - d. an order that some or all of the evidence be given orally in chief;
 - e. Strike out a witness statement not endorsed with a certificate of compliance "*if there is reason to consider that the relevant party was acting in person when it was signed in order to avoid*" applying the certificate of compliance.
- (paras 5.2 and 5.3).

Conclusion

25. The introduction of PD57AC represents a fundamental shift in the approach to the preparation of trial witness statements, and certainly in the steps required to be taken by legal representatives in order to demonstrate (and certify) compliance with its requirements. These need to be carefully studied and appreciated by any member of a legal team who proposes to interact with a witness for the purposes of gathering evidence, as well as anyone involved in the drafting process.

RICHARD HOYLE
Essex Court Chambers
19 March 2021

rhoyle@essexcourt.net

This note is provided free of charge as a matter of information only. It is not intended to constitute, nor should it be relied upon as constituting, legal advice, and no responsibility is assumed in relation to the accuracy of the contents of the same as regards anyone choosing to rely upon it.