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Practice Direction 57AC: Combatting 'Over-Lawyered' Witness Statements

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Introduction

The dawn of the Civil Procedure Rules and the Woolf Reforms conferred the primary role for setting out a witness's factual evidence in civil litigation upon witness statements, in place of oral examination-in-chief.

The judiciary's intention was to encourage a "*cards on the table*" approach, whereby the parties' evidential case was established at an early stage in proceedings. The hope, at least theoretically, was that such an approach would avoid the need for the time consuming examination-in-chief of witnesses, facilitate (amongst other things) earlier settlement, improve the quality of expert evidence, and increase the efficiency of cross-examination.

However, the ever-increasing length, argumentative (i.e. rather than strictly factual) content and, above all, "over-lawyering" of witness statements has pulled the tide of judicial opinion to question whether witness statements are the optimal method for obtaining the "best evidence". These concerns led to the creation of the Witness Evidence Working Group (the "Working Group"), whose purpose was to investigate the appropriate means of combatting over-lawyered witness statements.

The Working Group published its findings in a December 2019 report (the "Report"), which, in turn, formed the basis of the newly enacted Practice Direction 57AC: Trial Witness Statements in the Business and Property Courts ("BPCs") of England and Wales ("PD 57AC"). PD 57AC applies to trial witness statements signed on or after 6 April 2021. Note that it does not apply to witness statements used in interim/interlocutory applications.

In this article, we consider the genesis of PD 57AC, the key points to be aware of when preparing witness statements under the new regime, and what the changes introduced are likely to mean in practice.

Background to PD 57AC

Judicial criticism of witness evidence has certainly not been uncommon:

- In *Moore v Moore* [2016] EWHC 2202 (Ch), the approach to evidence was criticised for its lack of brevity, repetition of documentary evidence, argumentative nature, and attempts to introduce expert evidence and inadmissible opinion evidence. The Court observed that inappropriate and verbose witness evidence would only serve to weaken a witness's credibility and the relevance of their testimony.

- In the long running Post Office Group Litigation [2019] EWHC 3408 (QB), the Court expressed a number of concerns as to the preparation of factual witness evidence. In one such example, the witness's cross examination led to a "*far greater understanding*" of the critical issues in the case, which had either been obscured or left out of the relevant witness statement. The Court commented that the written evidence was "*extraordinarily one-sided*" and that "*[making] statements that are the exact opposite of the facts is never helpful, to put it at its mildest. It is also the opposite of what witness statements are supposed to be*".

The Report established the following five inherent drawbacks to the present approach to witness statements:

1. **Over-lawyering**: witness statements in civil litigation have typically been the subject of multiple iterations and thick layers of legal-polish, with the result that the final product is "*an aspirational version of what [the witness] may be able to recall*". A central criticism of the Report was that the varnish applied to witness statements may in fact "*corrupt the memory and render the final product less reliable*", something that oral evidence can avoid.

2. **No experience of oral evidence-in-chief**: the majority of current practitioners have little, or no, experience of civil litigation when oral examination-in-chief was the standard means by which factual witness evidence was delivered. Accordingly, the Commercial Court Guide's statement that "*the function of a witness statement is to set out in writing the evidence-in-chief of the witness*" is not practically applicable, in circumstances where—for many years now—most lawyers have no real experience of oral evidence-in-chief.

3. **Irrelevance**: the Report noted that witness statements often strayed far beyond relevant factual material, and in doing so, beyond the remit of what the relevant witness can actually speak to. There is a common custom for witness statements to rehearse the entire factual background of a case and recite at length from the documentary evidence. However, the focus of a witness statement should instead be on the key points of factual dispute that the relevant witness can speak to.

4. **Cross-examination**: under the present system, cross-examination (both preparation and in trial) typically takes much longer than with oral examination-in-chief. This is a product of the dense factual content of most trial witness statements, which counsel feel it must know inside out and, therefore, cover every corner. This leads to the witness statement being challenged, rather than the critical facts in issue.

5. **Pre-trial process**: the preparation of witness statements is ordinarily one of the most time-consuming and therefore costly parts of the pre-trial process.

Only 6% of the Working Group's participants were of the opinion that the current system fully achieved the aim of procuring the best witness evidence possible. The overall sentiment from the participants focused mainly on the over-lawyered nature of the final products, which was "*lawyer-led, rather than witness-led*".

A further, but perhaps less prescient, concern identified by the working group was the divergence between the various court guides within the BPCs (including the Commercial Court Guide, the Chancery Guide, and the Technology and Construction Court Guide) (the "Court Guides"). Whilst a certain degree of disparity is inevitable in view of the differing nature of cases between the various divisions within the BPCs, the Working Group stated that it would be desirable for the Court Guides to be harmonised as much as possible, particularly insofar as matters of general applicability were concerned.

PD 57AC: what should you know?

The findings and recommendations of the Report gave rise to PD 57AC, which now codifies best practice in the preparation of witness statements. Importantly, PD 57AC does not supersede existing requirements regarding the preparation and content of witness statements, such as those set out in Practice Direction 32 or the Court Guides. Instead, the purpose of PD 57AC is to supplement existing rules, albeit that its provisions will prevail in the event of any inconsistencies.

Whilst PD 57AC does not itself usher in any radical change, the more seminal changes are found in the "Statement of Best Practice" appended to it (the "SOBP"). Underpinning the sentiment of PD 57AC is paragraph 1.3 of the SOBP, and the premise that human memory is malleable and subject to influence. PD 57AC seeks to recognise such cognitive vulnerabilities and minimise the intervention of legal representatives in the space between memory and paper.

The scope of PD 57AC

PD 57AC applies to all "trial witness statements" signed on or after 6 April 2021, in cases before the BPCs, both new and existing, with certain limited exceptions. A "Trial witness statement" is a 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*".

Preparation and interviews

Where, as is often the case, witnesses are preparing their witness statements with the benefit of legal advice, there is now a greater onus on the legal representative to explain the purpose and proper content of a witness statement and to ensure compliance with judicial expectations.[1]

Whilst it is still expected that legal representatives will take carriage of drafting witness statements, the lawyer's influence or potential influence over the substantive content of the statement should be minimised. Wherever possible, a witness statement should be based on records or notes obtained directly from the witness during the conduct of an interview. In this regard, the interview should be recorded as fully and accurately as possible, by contemporaneous note or other durable record, dated, and retained by the legal representatives.[2]

Interviewers should avoid asking leading questions[3] as much as possible, particularly where critical points of fact are concerned. Instead, open questions should be used as much as possible and closed "yes/no" questions should be limited to points of clarification.

Where further clarification outside of the interview(s) is required, this should be sought by non-leading questions for the witness to answer in their own words, without suggesting the drafting in advance of a response.

The use of other means of obtaining witness evidence (for example by way of written questionnaire), whilst not prohibited, is clearly discouraged. If a trial witness statement is not based upon evidence obtained by means of an interview (or interviews), this should be confirmed in writing at the beginning of the witness statement and the process that has been used should be described (to the extent possible without waiver of privilege).[4]

Finally, the preparation of a trial witness statement should involve as few drafts as possible.[5] This provision arises directly from comments made in the Report, which stated that the re-telling of the same story over and over again "*is a process which may corrupt memory and render the final product less reliable than the first "unvarnished" recollection*".

Documents

PD57AC heralds a move away from narrative recitation of documentary evidence. Instead, a trial witness statement should only refer to documents only where absolutely necessary. It will generally only be necessary where a witness is required to:

1. prove or disprove the content, date or authenticity of a document;
2. explain that they understood a document, or particular words or phrases, in a certain way when sending, receiving, or otherwise encountering a document in the past; or
3. confirm that they saw or did not see the document at a relevant time.[6]

All documents that have been shown to the witness during preparation of their statement (i.e. even if not actually referred to in the statement) or that are referred to in the statement must be set out by way of a list enclosed with the witness statement.[7] The list should identify or describe the documents in such a way that they may be located easily, but where documents are privileged, they can be identified by category or general description, while maintaining privilege.[8]

In a radical departure from the historic practice of exhibiting documents to witness statements, referenced documents are not to be exhibited to a witness statement, unless they have not already been produced or disclosed in the proceedings.[9]

Form and Content of trial witness statements

PD 57AC makes abundantly clear that a witness statement should only address matters of fact: (i) that are within the witness's own personal knowledge; (ii) that are not common ground; and (iii) in respect of which the witness can add substance beyond the documentary evidence.[10] The content must be in the witness's own words[11] and, as far as practicable, be transposed or lifted from the contemporaneous record of witness interviews.

Paragraphs 3.3, 3.6 and 3.7 of the SOBP provide that witness statements:

1. should be as concise as possible without omitting anything of significance;
2. should not quote at length from any document;
3. should not seek to argue the case;
4. should not take the court through the documents in the case or set out a narrative derived from the documents (those being matters for argument);
5. should not include any matters of belief, opinion or argument; and
6. should record how well the witness recalls the relevant events, and whether their recollection has been refreshed by any documents, particularly on important disputed matters.

Confirmation of compliance

Tying the salient threads of PD 57AC together is the newly mandated statement that a witness must sign together with the usual statement of truth, as follows:

> 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.

In addition, the relevant legal representative must endorse the witness statement with a certificate of compliance confirming that the witness statement has been produced in a manner compliant with PD 57AC and Practice Direction 32:

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

Sanctions

Whilst the sanctions for non-compliance with the existing rules on witness statements set out under PD 57AC were previously and already available to the court, the codification of such sanctions serves as a stark warning that the court may be taking a stricter approach towards compliance.

The sanctions include:

1. refusing permission to rely on the evidence;
2. striking out part, or all, of a trial witness statement;
3. ordering that the trial witness statement be re-drafted;
4. making an adverse costs order against the non-complying party; and
5. ordering the witness to give some or all of their evidence in chief orally.[12]

What does this all mean?

In short, and at least in theory, the intention of PD 57AC is to improve the authenticity of witness statements by encouraging an oral evidence-in-chief-style approach to preparation, whilst maintaining the efficiencies of "cards on the table" litigation generated by pre-prepared witness statements.

If followed to the letter, the intention of PD 57AC is to lighten significantly the burden of witness statement preparation. However, old habits die hard, and meticulous lawyers will inevitably struggle to submit statements that have not been pored over with no stone left unturned—with one eye on

the inevitable that the witness will almost certainly be subject to detailed forensic cross-examination in due course. It is exactly that which practitioners need to grapple with: learning to accept that witness statements are a reflection of the salient facts in the case, not an opportunity for legal jousting, nor an opportunity to prepare for and indirectly try to "enamel" the witness against the risk of hostile cross-examination.

Practitioners should welcome the break from factual eulogies, rehearsing documentary narratives, and the burden of preparing voluminous exhibits. Third party witnesses who have agreed to give evidence by such witness statements may be less welcoming of the changes—particularly if they feel unprepared for trial.

Practically speaking, the most significant change for practitioners is likely to be the interview phase, which can no longer be predicated upon a chronological run through of documents. Interviews will have to be event-led, rather than document-led. Accordingly, they will need to be carefully orchestrated using open questions that enable the witness to offer their best evidence, without, to the fullest extent possible, having to rely on contemporaneous documents. Whilst more than a single interview is allowed, particularly where there is significant ground to cover, practitioners should be cautioned from going over the same set of facts, and, in doing so, "corrupt" the witness's actual recollection of events.

The selection of documents to show the witness will likely prove a difficult balancing act between ensuring that the witness is able to give their best evidence, without producing an extensive list of documents, which may call the witness's credibility into question, and potentially draw attention to adverse documents not previously in the spotlight.

It may also be that interview recordings will be commonplace, in a pseudo-U.S.-deposition manner, given the obligation to keep careful records of the interviews, as well as, more fundamentally, the requirements to draft the witness statement on the basis of what is said during interview.

What next?

Only time will tell as to whether the intentions of PD 57AC feed into practice. Whilst the changes are not radical, the practical effect could be substantial, not least given the more pronounced onus on lawyers and witnesses alike to make concerted efforts to aim for concision, fact, and relevance. If sanctions are applied with 'Woolfian' rigour, PD 57AC could mark a significant change in approach.

One of the additional measures proposed in the Report was the introduction of a pre-trial statement of facts to bring together all of the documentary and factual witness evidence in a narrative summary. The idea is that this would provide an outlet for parties to feel comfortable that their full factual narrative had been captured, meaning that witness statements could actually be reserved for only the critical facts. However, the concern was that an additional layer of pre-trial steps would simply increase costs, and lead to pre-trial delay. Accordingly, the general view from the Working Group was that such a statement could be an option to introduce at the case management conference for cases that genuinely need it – so we will have to watch this space.

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[1] Paragraph 3.9 of the SOBP

[2] Paragraph 3.11 of the SOBP

[3] A "leading question" means a question that expressly, or by implication, suggests a desired answer or puts words into the mouth, or information into the mind, of a witness (Paragraph 1.2 of the SOBP)

[4] Paragraph 3.12 of the SOBP

[5] Paragraph 3.8 of the SOBP

[6] Paragraph 3.4 of the SOBP

[7] Paragraph 3.2 of PD 57AC

[8] Paragraph 3.5 of the SOBP

[9] Paragraph 3.4 of the SOBP

[10] Paragraph 4.1 of PD 57AC (confirmation of compliance)

[11] Paragraph 3.7 of the SOBP and paragraph 18.1 of Practice Direction 32.

[12] Paragraph 5 of PD 57AC