

Witness Statement Reforms from 6 April 2021

23 February 2021

On 1 February 2021, the [127th Practice Direction Update](#) was published. This Practice Direction (“PD”) Update includes new PD 57AC and an Appendix (Statement of Best Practice in relation to Trial Witness Statements).

As discussed in our article [Witness Statements: Caution from the Courts](#), there has been a recent theme of judicial criticism about the use of witness evidence for the purpose of arguing a party’s case. The [Report of the Witness Evidence Working Group](#) (2019) regarding factual witness evidence in trials before the Business and Property Courts highlighted concerns about “*over-lawyered*” witness statements. The Report provided recommendations for reform, and the Witness Evidence Working Group was directed to work on how to implement the recommendations. Drafts were subsequently produced for a proposed PD 57AC and Appendix. The new PD 57AC and Appendix, now finalised, will introduce significant witness evidence reforms.

The new PD applies to trial witness statements (as defined in the new PD) in the Business and Property Courts signed on or after 6 April 2021 (and applies to new and existing proceedings). The new PD does not apply to particular proceedings as specified in the new PD, unless the court directs that it is to apply.

Furthermore, while trial witness statements should be prepared in accordance with the Statement of Best Practice in the Appendix to the new PD and any relevant court guide, if there is any inconsistency, the new PD provides that the Statement of Best Practice will take precedence over any court guide.

Key points to note in the new PD 57AC and Appendix include the following:

Preservation of the Witness’s Recollection

A notable theme of the Appendix is preservation of the witness’s recollection. For example, paragraph 3.2 of the Appendix provides that: “*Any trial witness statement should be prepared in such a way as to avoid so far as possible any practice that might alter*

or influence the recollection of the witness other than by refreshment of memory as described in paragraph 2.6 above.”

The Appendix also provides that, in relation to important disputed matters of fact, a trial witness statement should, if practicable, state: (i) the strength of the witness’s recollection of matters addressed in the witness’s own words; and (ii) whether the witness’s recollection in respect of those matters has been refreshed by reference to documents, with specific details (Appendix, paragraph 3.7).

Witness Statement Preparation

The Appendix provides detail about how trial witness statements should be prepared. One example is paragraph 3.8 of the Appendix, which provides that the preparation of a trial witness statement should involve as few drafts as practicable. The rationale for this is explained in paragraph 3.8: *“Any process of repeatedly revisiting a draft statement may corrupt rather than improve recollection.”*

The means by which evidence is obtained from the witness for the purpose of preparing the trial witness statement is also important. In respect of represented parties, the Appendix provides that, wherever practicable, *“a trial witness statement should be based upon a record or notes made by the relevant party’s legal representatives of evidence they obtained from the witness”* (Appendix, paragraph 3.10(1)), and *“any such record or notes should be made from, and if possible during, an interview or interviews”* (Appendix, paragraph 3.10(2)).

Confirmation of Compliance

In addition to verifying a trial witness statement with a statement of truth, witnesses are now also required to provide a statement confirming compliance pursuant to paragraph 4.1 of PD 57AC. It is significant that the statement requires confirmation from the witness that: *“This witness statement sets out only my personal knowledge and recollection, in my own words.”* This represents a departure from paragraph 18.1 of PD 32, which requires the witness statement to be *“if practicable”* in *“the intended witness’s own words”*.

The confirmation of compliance is:

“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.”

A trial witness statement is now also required to be endorsed with a certificate of compliance signed by the relevant legal representative (unless it is signed when the relevant party is a litigant in person or where the court orders otherwise). The wording for the certificate of compliance is set out in paragraph 4.3 of PD 57AC, and requires the legal representative to certify that they believe that the witness statement complies with PD 57AC and paragraphs 18.1 and 18.2 of PD 32, and that it has been prepared in accordance with the Statement of Best Practice in the Appendix.

Document List

Perhaps the most contentious reform is that at paragraph 3.2 of PD 57AC, which requires a trial witness statement to identify by list any documents the witness has referred to, or been referred to, for the purpose of providing their witness statement evidence. Paragraph 3.5 of the Appendix requires such documents to be identified or described in a manner so that they can be easily located at trial. Disclosed documents can be listed by disclosure reference.

Concerns about this reform were raised in the [Implementation Report of the Witness Evidence Working Group](#) (July 2020). There were concerns about the possibility of adverse inferences being drawn if a trial witness statement document list signals that a witness has been shown considerable numbers of documents, and that the risk of such inferences could lead to a reluctance to show witnesses relevant documents. This has clear potential to be problematic in cases where the size and nature of a dispute may well make it difficult to curtail the number of documents that a witness may need to be shown.

Concerns were also raised by the Witness Evidence Working Group as to the practicability of the reform. Legal representatives should ensure that detailed records are kept of all documents that have been seen by a witness for the purpose of providing their witness statement evidence. This may prove to be a particularly lengthy exercise in circumstances where the witness is also the client and will have seen a number of documents in preparation for the case. Although there were also questions raised about the identification of privileged documents, detail about this has been included in paragraph 3.5 of the Appendix, which provides that: “*Privileged documents may be identified by category or general description.*”

Future Implications

It will be interesting to see the full impact of these reforms from 6 April 2021, in particular how the reforms are received by the judiciary. A key area to watch will be the effects of the new document list requirement. Undoubtedly, the reforms will have significant implications for practitioners involved in preparing witness evidence for trials in the Business and Property Courts.

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Please do not hesitate to contact us with any questions.

LONDON



Christopher Boyne
cboyne@debevoise.com



Emily Lodge
elodge@debevoise.com



Emily Mackenzie
emackenzie@debevoise.com

Alice McCartney
amccartney@debevoise.com