

NEW REQUIREMENTS FOR WITNESS STATEMENTS

By [Natasha Jackson](#)



From 6 April 2021, a new regime for witness statements in the Business and Property Courts will come into force. [Practice Direction 57AC](#) will introduce significantly tighter requirements that will apply to all trial witness statements signed on or after 6 April 2021, including those in claims that have already been issued.

Purpose of the new regime

PD 57AC and its accompanying [Appendix: Statement of Best Practice in relation to Trial Witness Statements](#) intend to draw a clearer line between evidence of fact and matters for submission. It is hoped that this will achieve greater uniformity in approach to witness evidence between individual Courts.

Para 2.1 of PD 57AC defines the purpose of witness statements to be: *“to set out in writing the evidence in chief that a witness of fact would give if they were allowed to give oral evidence at trial without having provided the statement.”*

The new regime restricts the practice of presenting argument and commentary as testimony of fact and limits the contents of statements to the witness's personal recollection and account. It also seeks to minimise practices that might alter or influence the witness's recollection, requiring legal representatives to be conscious of their obligations long before putting pen to paper.

Application of PD 57AC

PD 57AC applies to all witness statements for use at trials in the Business and Property Courts where the claim has been issued from 6 April 2021, or in existing proceedings where the witness statements are signed on or after this date.

The PD defines “trial” as a final trial hearing, whether of all issues or of only one or some particular issues, in proceedings 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. Paragraph 1.3 sets out the exceptions to which PD 57AC does not apply.

The new requirements

Witness statements must now be prepared in accordance with the Appendix and any relevant

court guide, with the Appendix taking precedence in the event of any inconsistency (para 3.4).

The PD and Appendix distinguish between provisions applicable to represented parties and to litigants in person, the former of which are the focus here. For the latter specifically, see paras 3.14 to 3.16.

Pre-preparation

Before starting to prepare or consider any witness statement, legal representatives are required to explain to the witness the (i) **purpose** and (ii) **proper content** of such a statement, (iii) the **proper practice in relation to its preparation**, and (iv) ensure they have **read the confirmation of compliance statement** at PD 57AC para 4.1 (Appendix, para 3.9).

Witnesses are all expected to understand the Court's approach to witness evidence when providing a trial witness statement, which is in essence that it is sceptical as to the reliability of human memory (Appendix, para 1.3).

Preparation

Lawyers must avoid doing anything to alter or to influence a witness's recollection beyond refreshing the witness's memory from documents they had themselves created or seen at the time (Appendix, para 3.2; para 2.6). Particular caution should be exercised before showing a witness any document they did not create or see at or around the relevant time (Appendix, 3.4).

Legal representatives are encouraged to base witness statements on notes from an interview where possible (Appendix, para 3.10). If this has not been possible, this must be stated at the beginning of the statement and the process used instead should be described (insofar as this does not waive privilege) (Appendix, para 3.12).

In terms of the conduct of the interview, statement-takers are told to use open questions where practicable (Appendix, para 3.11(1)), and should not use leading questions when taking evidence on important contentious matters (Appendix, para 3.11(2)). Interviews should also be

recorded as fully and accurately as possible (Appendix, para 3.11(3)).

The Appendix also stipulates that preparation should involve as few drafts as practicable, to avoid corrupting recollection through repeated revisions (Appendix, para 3.8). So the common practice of iterative drafting will no longer be appropriate under the new rules.

Contents

The PD and Appendix require that witness statements should be as "*as concise as possible without omitting anything of significance*" (Appendix, para 3.3).

The content of the witness statement should be limited to the evidence the witness would have given under the old-style evidence in chief. The role of witnesses of fact is to provide the court with testimony on matters within their personal knowledge (Appendix, para 2.3). This is not an opportunity for the witness to argue the case.

Under the new Appendix, the witness is also required to state how well they recall the events of which they speak, and record whether and how their memory has been refreshed by reference to documents (Appendix, para 3.7).

Witnesses are now required to provide a list of documents that they have had reference to in preparing the statement (PD 57AC, para 3.2). This must be done in such a way that they can be easily located at trial (Appendix, para 3.5). Note that privilege is not waived by the inclusion of a document on this list.

Otherwise, Appendix para 3.4 requires that documents should now only be referred to where necessary, where they are required to:

1. Prove or disprove the content, date or authenticity of the document;
2. Explain that the witness understood a document, or particular words or phrases, in a certain way when encountering the document at the relevant time; or
3. Confirm that the witness saw or did not see the document at the relevant time.

Documents, if referred to at all, should not be narrated, commented on inappropriately or quoted from at length (Appendix, para 3.6).

The Appendix permits legal representatives to assist the witness as to structure, layout and scope. They may also take primary responsibility for drafting the statement, but should not go beyond the content of the relevant record or notes when doing so (Appendix, para 3.13). If there are points where further evidence is sought for clarification or completion of the statement, the legal advisor may pose non-leading questions for the witness to answer in their own words. Importantly, they may not propose content for approval, amendment or rejection (Appendix, para 3.13).

Compliance requirements

All trial witness statements must now include the Confirmation of Compliance statement set out in PD 57AC para 4.1, unless the court orders otherwise. This is in addition to verification by a statement of truth.

Where a party is legally represented at the time of signing the statement, it must also be endorsed with the Certificate of Compliance at PD 57AC para 4.3, signed by the relevant legal representative, unless the Court orders otherwise. Failure to do so may lead to strike out (PD 57AC para 5.3).



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Sanctions

The consequences for failing to comply with PD 57AC are strict. In addition to the full range of case management powers and sanctions available to the Court, para 5.2 sets out that it may further:

1. Refuse to give or withdraw permission to rely on, or strike out, part or all of a trial witness statement;
2. Order that a trial witness statement be re-drafted in accordance with the PD or as may be directed by the court;
3. Make an adverse costs order against the non-complying party;
4. Order a witness to give some or all of their evidence in chief orally.

Conclusion

The new Practice Direction heralds a significant change in culture and practice for trial litigation in the Business and Property Courts. It will no doubt create practical issues in document-heavy cases that the courts will need to navigate. Whether viewed as a welcome clarification or a practical minefield, the changes will no doubt give parties something new to argue about when they come into force.

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