Moment of truth

Chris Bushell and **Maura McIntosh** explain the new trial witness statement regime

A new Practice Direction (PD) 57AC has been introduced from 6 April 2021 and will apply to witness statements signed on or after that date that are intended for use at trial in the Business and Property Courts. The new PD provides that witness statements should be prepared in accordance with the Statement of Best Practice appended to it.

In many respects, the new PD and Appendix merely summarise what practitioners are (or should be) doing already when they prepare witness evidence. But in some respects they go beyond current practice – best or otherwise – and introduce significant changes.

Failure to comply with these provisions can result in severe sanctions being imposed by the court, including cost penalties and the possibility of non-compliant witness statements being struck out in full or in part. Any parties litigating in the Business and Property Courts, and those representing them, will need to be familiar with the new requirements and ensure they are complied with.

BACKGROUND TO THE REFORMS

The reforms stem from the recommendations of the Witness Evidence Working Group, which was set up in 2018 to consider how practice could be improved in light of concerns that had been expressed by judges and practitioners.

The group's report was published in December 2019, following an online survey of court users. It highlighted various advantages that witness statements bring, including identifying each party's evidential case at a relatively early stage, thereby facilitating the provision of informed advice on the merits and (of course) promoting settlement. However, it also identified a number of concerns, including as to a perceived 'disconnect' between the contents of a statement and the witness's best evidence. This was said to be in part because the process of polishing numerous drafts of a statement can result in the final version being far from the witness's own original account. The report also noted a concern that witness statements frequently cover matters of marginal relevance, including lengthy recitation of background, and can stray into comment and 'spin', even if blatant argument is avoided.

The report did not propose radical change, but made a number of recommendations for improvement. These included developing an authoritative Statement of Best Practice, beefing up the statement of truth required to be included in witness statements, and introducing a solicitors' certificate of compliance. The new PD 57AC is the vehicle for implementing these recommendations, although the original intention of a revised statement of truth has given way to a separate statement of compliance from the witness.

As outlined below, the new provisions aim to improve witness evidence both by reducing the potential for the witness's recollections to be influenced or overwritten by the process of taking the statement itself, and by refocusing witness evidence on the areas where it is actually needed and stripping out irrelevant or inadmissible material.

MEASURES TO REINFORCE COMPLIANCE

PD 57AC contains two measures to help focus minds on the necessary change of practice. These are the legal representative's certificate (where the litigant is legally represented) and the witness's statement of compliance.

The legal representative's certificate must confirm that the relevant practitioner: (i) is satisfied that the requirements for the preparation of witness statements, including the witness's confirmation of compliance, have been discussed with and explained to the witness; and (ii) believes that the statement complies with PD 57AC and the Statement of Best Practice. In practice, this means that the process of taking a witness statement will need to be planned from the outset and directed by the partner (or other senior lawyer) who will be signing the certificate, so that they can have sufficient confidence to certify the relevant matters.

The witness's statement of compliance must confirm various matters, including that the statement sets out only the witness's personal knowledge and recollection, in their own words, and that they have not been asked or encouraged by anyone to include in the statement anything that is not their own account of the relevant matters. The focus is on what the witness has been 'asked or encouraged' to include in the statement, not merely what has in fact been included. So a witness will not be able to give this confirmation if there has been an attempt improperly to influence their evidence, even if that attempt was resisted. The requirement to confirm that the statement is in the witness's own words is also notable. There has long been a requirement contained in PD 32 that a witness statement 'must, if practicable, be in the intended witness's own words', but the new statement of compliance contains no reference to practicability.

> The new PD and Appendix can improve witness statements, by stripping out extraneous material and focusing on areas where factual witness evidence is really needed

Parties can apply without notice to vary or depart from these requirements, but it is not clear what information a party will need to provide to support such an application, nor in what circumstances it is likely to be granted.

TRANSPARENCY AND STRENGTH OF RECOLLECTION

The PD and Appendix include new requirements aimed at promoting transparency as to the strength of the witness's recollection and the extent to which it may have been influenced by reviewing documents. These require the trial witness statement to include:

(i) a list of documents that the witness has referred to, or been referred to, for the purpose of providing the evidence set out in the statement; and

(ii) on important disputed matters of fact, if practicable, a statement in

the witness's own words of how well they recall the relevant matter, and a statement of whether (and if so how and when) that recollection has been refreshed by documents (if so, identifying the documents).

The Appendix also notes that 'particular caution should be used' in showing a witness documents they did not see at the time of the events in question.

The requirement to list documents (at (i) above) is perhaps the most controversial of the reforms, and was the one area on which the working group was divided. In the view of some members, this requirement strikes an appropriate balance between transparency regarding the interactions with the witness, on the one hand, and party autonomy in presenting the evidence, on the other, and gives the judge important information to help assess the weight to be attached to the witness's evidence. Others, however, believe the requirement goes too far, particularly when considering large, complex commercial cases where the relevant events may have taken place some years before, and a witness may need some assistance to bring their mind back to the events in question.

One concern is the possibility of judges drawing adverse, and potentially unjustified, inferences as to the quality of the witness's evidence where the witness has reviewed a large number of documents. Another is the obvious difficulty regarding the witness who is also the client, and will therefore have to review documents in the course of giving instructions. A further concern with the draft PD and Appendix related to the potential need to list privileged documents, but this has been addressed in the final versions, which clarify that privileged documents may be identified 'by category or general description' rather than individually.

An obvious implication of these requirements is that parties, and practitioners, will need to exercise greater control over the documents the witness has seen. This is both because any documents that the witness has referred to (or been referred to) for the purpose of providing their evidence will need to be listed, and because the statement will need to identify, for important disputed matters, the extent to which the witness's recollection has been refreshed by seeing documents.

In many cases, it may be wise to avoid the witness seeing any documents in advance of the interview, so as to obtain their unaided recollection, but that may not always be practicable. A witness may need some reminder of the relevant context, particularly if the events in question were some time ago, or they may have limited time available. Where a decision is taken to provide documents in advance, ideally these should be by way of background and should not touch on controversial matters where the witness's recollection will be important.

THE WITNESS INTERVIEW

A witness interview is not the only way a witness's evidence can be obtained, but that is the encouraged method, whether the interview is conducted face-to-face or (perhaps more usually in current circumstances) by video or telephone call, or even (as the Appendix notes) by webchat or instant messaging. If the statement is based on evidence obtained from the witness by other means (for example by the exchange of emails or the witness preparing their own draft statement) the guidance set out should still be followed so far as possible, and modified as necessary. (And note that the process used will need to be described at the beginning of the statement, as this is a requirement of PD 32.)

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There is a general requirement 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 witness's recollection, other than refreshing their memory by reference to documents they created or saw while the facts were fresh in their mind. This must obviously be kept in mind during any interactions with the witness, including during the interview.

More specifically, and with the same aim, the Appendix states that a witness interview should avoid leading questions where practicable, and should not use leading questions in relation to important contentious matters. In general, the focus should be on open questions, limiting closed questions to requests for clarification or additional detail.

A witness interview should be recorded 'as fully and accurately as possible, by contemporaneous note or other durable record, dated and retained by the legal representatives'. Any such note will of course be covered by litigation privilege, and (helpfully) the Appendix states expressly that nothing it contains removes or limits any privilege that would otherwise attach. However, it is not clear to what extent parties may start to come under pressure to waive privilege, particularly if issues arise as to how a statement was prepared.

DRAFTING THE STATEMENT

The Appendix to PD 57AC states that the legal representatives should assist the witness as to the structure, layout and scope of the statement, and may take primary responsibility for drafting it. However, the content should not go beyond what was said at interview. So it is clear that there can be no practice of preparing and sending to the witness a first draft of the statement, based on what is in the documentary record, in advance of interviewing the witness. (And in any event, a witness statement should not set out a narrative derived from the documents, as noted below.)

The Appendix goes on to state that, if the legal representatives wish to indicate in a draft statement that further evidence is sought from the witness to clarify or complete the statement, that should be done by non-leading questions for the witness to answer in their own words. It should not be done by proposing content for approval, amendment or rejection. In any event, there should be as few drafts as possible, as: 'Any process of repeatedly revisiting a draft statement may corrupt rather than improve recollection.'

In this context, it is also important to remember that the witness statement will need to confirm (as noted above) that the statement sets out only the witness's personal knowledge and recollection, in their own words. So in drafting the statement, it will be important not to stray too far from the language the witness has used – though inevitably there will be some difference between spoken and written language, for example because in answering a question a witness may leave out needed context.

THE CONTENTS OF THE STATEMENT

PD 57AC provides that a trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case. It should be 'as concise as possible without omitting anything of significance'. Reference to documents is generally discouraged and, importantly, the Appendix provides that witness statements should not: quote at any length from documents; set out a narrative derived from the documents; include commentary on documents or other witness evidence; or seek to argue the case.

Unlike with some other aspects of the new rules, it will be obvious on the face of the statement whether or not there has been compliance with

the content requirements. And it may be that – particularly in the early days of the new regime – judges will be looking to make an example of those who breach the rules in order to deter other would-be offenders. In any event, it is difficult to see how a legal representative will be able to sign off on the required certificate of compliance if these requirements are not met.

An important point for practitioners to consider will be how best to draw the court's attention to the documentary evidence which, it is now very clear, is not to be summarised in the witness statements. To some extent, such material may be included in skeleton arguments / written openings, but there is a risk of criticism if such documents become overly long. It seems likely that, particularly in document heavy cases, we will see more directions for the preparation of (potentially agreed) chronologies or factual narratives based on the documents, and parties may wish to suggest this in appropriate cases.

CONCLUSION

As with any significant change in practice, the new PD and Appendix present a number of challenges for parties and practitioners, particularly as they bed down over the coming months. But they also represent an opportunity to improve witness statements, by stripping out extraneous material and focusing on areas where factual witness evidence is really needed. And, so far as possible, by minimising any interference with the witness's own independent recollection of events.

An obvious question is what impact the new provisions will have on costs. Views differ on this point, with some seeing scope for dramatic savings while others believe the new requirements will result in significant further costs, for example because additional time will need to be spent determining what documents the witness is to receive and conducting the witness interview (or interviews) with minimal reference to documents. Overall, while there may be some cost reduction as witness statements become shorter and more focused, it seems likely that any savings will be offset, and perhaps outweighed, by the need for more time to be spent in other areas.

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