

Trial Witness Statements – no more ‘over-lawyering’



A look at the changes introduced by Practice Direction 57AC

April 6 2021 saw the introduction of Practice Direction 57AC ('New PD') into the Civil Procedure Rules, governing the preparation of witness statement evidence within the Business & Property Courts.

The New PD has been three years in the making – its origin can be traced back to meetings of Commercial Court Judges in late 2017 where the issue of whether factual witness statements were effective in achieving the core function of presenting best evidence at trial was first raised. Despite each of the Commercial Court, TCC and Chancery Division Guides providing (in terms) that a witness statement should comprise the 'evidence which a witness would be allowed to give orally' it was felt that, currently, witness statements suffer from 'counterproductive over-lawyering' leading to a disconnect between the contents of a statement and the witness's best evidence.

A Working Group was established in 2018 to review the suitability of the existing rules and whether they were being properly enforced. A consultation held in late 2018 saw 54% of respondents conclude that the current system 'fully' or 'substantially' achieved the aim of producing the best evidence possible. That said, 64% of respondents concluded Courts were failing to enforce the existing rules leading to statements being too long, straying into legal argument and containing many irrelevancies.

The New PD

(i) Contents of Trial Statements

Adopting many of the recommendations of the Working Group, the New PD prescribes that trial witness statements (subject to certain excluded proceedings and as distinct from those statements prepared for interim applications) should contain evidence (i) only as to matters of fact that need to be proved at trial, (ii) which the witness would give in chief if they were called to give oral evidence

at trial, (iii) of matters of which the witness has personal knowledge, and (iv) in the witness's own words (and in the witness's own language).

The New PD itself contains an appendix recording the hazards associated with capturing an individual's recollections. It notes that Courts considering witness statements take the approach that human memory *'is not a simple mental record of a witnessed event fixed at the time of the experience'*. The Court appreciates that such memory is fluid and is susceptible *'to being altered by a range of influences such that the individual may not be conscious of the alteration taking place'*.

(ii) Statement of Best Practice

The appendix also has a Statement of Best Practice setting out the do's and don'ts of the statement preparation process. Trial statements should be as concise as possible without omitting anything of significance. They should refer to documents only where necessary unless, for example, the witness is required to prove (or disprove) the content of a document or to explain how the witness understood words or phrases within it. Best practice also requires that care should be taken to *'avoid any practice that might alter or influence the recollection of a witness'*. As such, caution should be exercised during the preparation of statements when showing documents to witnesses that they did not create or see when the subject events took place.

Notably, best practice dictates that trial statements should not quote at length from other documents, set out legal argument, develop any form of narrative of the documents in evidence nor seek to comment on documents or evidence of other parties. The Working Group had noted a propensity for witnesses to introduce extrinsic issues to set the dispute in (the witness's view of what amounts to) context – this will no longer be permitted.

(iii) Obtaining a statement (where the party is legally represented)

Given the introduction of the New PD, legal advisors are obliged, ideally before the evidence gathering process is commenced, to explain to witnesses the purpose and proper content of the statement they are (to be) asked to provide – to include ensuring the witness reads (or has read to them) the New PD.

The statement should be prepared using a record or notes obtained directly from the witness. During such interview, leading questions should be avoided wherever possible, instead open questions should be used – with closed questions being limited to seeking clarification or additional detail only. Legal advisors can assist with structure, scope and layout of statements, but should limit drafting to notes obtained during the witness meetings – the clear message being that advisors should no longer introduce their narrative/understanding of events into evidence in place of that of the witness.

(iv) Compliance

In addition to the Statement of Truth (as to the belief in the truthfulness of the contents), a witness is now required to sign to confirm that the statement has been prepared in their own words, reflects their personal knowledge and recollection, records the nature of their recollection (and whether it has been refreshed by considering any documents – if so, when) and that they were not asked or encouraged by anyone to include in the statement anything that is not their own account.

In a departure from existing procedural rules, the legal advisor will also be obliged to endorse the statement to affirm that the purpose and content of the New PD (to include as to Best Practice) has been explained to the witness and that the statement has been prepared in accordance with, and complies with the requirements of, the New PD. Legal advisors will be able, in limited instances, to apply without notice for permission to vary the wording of the affirmation.

(v) Sanctions

There exist a number of case management powers enabling the Courts to restrict or manage witness evidence but, as noted by 64% of respondents to the Working Party's survey, the rules of evidence are rarely enforced by the Courts, with non-compliant witness statements rarely (if ever) being adversely commented upon, let alone the offending party being punished.

Whilst restating the availability of the Courts' inherent case management powers, the New PD provides an array of sanctions for non-compliance ranging from refusing a party permission to rely on a trial statement, ordering a trial statement to be redrafted in accordance with the New PD's provisions, making an adverse costs order or requiring a witness to give part or all of their evidence in chief.

Consequences for Professional Indemnity Insurers

In many ways, the New PD is no different to any number of the previous updates made to the CPR. The Courts retain their over-arching jurisdiction to ensure compliance with the rules of evidence and to require that trial witness statements adhere to the various Court guides. In that sense, insurers' risk ought to be no different than it has been since the CPR was introduced.

Whilst for other aspects of evidence the Courts retain an entitlement to strike out offending text (in whole or part), the listing of specific sanctions for non-compliance with the New PD changes the entire landscape for practitioners and their insurers alike. Where, in the past, witnesses may have been 'invited' to 'set the scene' or to place some particular 'spin' on past events, such a (calculated) departure from the narrow constraints of the New PD's requirements in the future could see a party being prevented from relying upon the statement at all, losing the ability to recover, as against their opponent, the costs of preparing the statement and/or paying adverse costs. Where clients place pressure upon their legal team to incorporate a (self-serving) narrative into trial statements, there is a real prospect of the legal advisor(s) being unable to sign the affirmation of compliance – placing them in direct conflict with the clients and, potentially, causing deadlines for exchange to be missed – necessitating an Application for relief from sanctions!

In instances such as those, it is not too difficult to see how disgruntled clients, facing a liability for adverse costs, the loss of their own costs of preparing a statement and needing to incur additional outlay to obtain relief from sanctions may seek recompense for such unexpected outlay from their advisors and their PI insurers. Moreover, legal advisors who endorse affirmations *may* become subject to regulatory scrutiny where the basis for the provision of that signature is later questioned.

CPB Comment

The rules of evidence prescribed prior to 6 April set out to manage the nature and breadth of witness evidence presented at trial. However, it is clear that statements have increasingly departed from their principal purpose and, in the absence of the Courts admonishing non-compliance, their length and scope have reached a tipping point.

Whilst the general pronouncements that witnesses should 'stick to the facts' and present evidence in their own words are nothing new, the affirming statements to be completed by witnesses and legal advisor(s) should assist to focus minds on the task at hand.

With the prospect of trial statements being struck out or witnesses being required to give evidence in chief, non-compliance with the new requirements will have clear and immediate consequences. The knock-on effect of a party's evidence being restricted in such manner will (possibly) see the case being lost at trial or, at the very least, having to be compromised on adverse terms. The New PD will, initially at least, require a change in approach from practitioners and clients alike – woe betide those who fail to comply!

Any questions?

If you have any questions regarding the issues highlighted in this article or any other litigation-related topics, please get in touch with either [Mark](#) or [Simon](#).

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