Appendix to Practice Direction 57AC (Statement of Best Practice)

1. Introduction

1.1 This Appendix contains the Statement of Best Practice referred to in paragraph 3.4(1) of Practice Direction 57AC that should be followed in relation to the preparation of trial witness statements as defined in paragraph 1.2 of that Practice Direction. For the avoidance of doubt, nothing in this Appendix removes or limits any privilege that would otherwise attach to documents generated by or for the purpose of obtaining evidence for use in litigation.

1.2 In this Appendix –

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.

1.3 Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:

(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but

(2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore

(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.

2. Principles

2.1 The content of any trial witness statement should be the evidence on any matters of fact which need to be proved at trial by the evidence of witnesses that the relevant party and its legal representatives (if the party is represented) believe the witness would give as admissible evidence in chief complying with the principles set out in paragraphs 2.2 to 2.6 below if the witness were called to give oral evidence at trial without providing a witness statement first.

2.2 In trials in the Business and Property Courts, often many matters of fact do not require witness evidence, either because they are common ground or because they can be

proved from the disclosed documents. The fact that there is or may be an issue concerning what the disclosed documents mean or show does not, without more, mean that witness evidence is required.

2.3 Factual witnesses give evidence at trials to provide the court with testimony as to matters they witnessed personally, where such testimony is relevant to issues of fact to be determined at trial. A matter will have been witnessed personally by a witness only if it was experienced by one of their primary senses (sight, hearing, smell, touch or taste) or if it was a matter internal to their mind (for example, what they thought about something at some time in the past or why they took some past decision or action). For the avoidance of doubt, factual witness testimony may include evidence of things said to a witness, since the witness can testify to the statement made to them, if (a) the fact that the statement was made to the witness is itself relevant to an issue to be determined at trial or (b) the truth of what was said to the witness is relevant to such an issue and the statement made to the witness is to be relied on as hearsay evidence.

2.4 The duty of factual witnesses is to give the court an honest account of what they believe they recall as to matters they witnessed personally. It is improper to put pressure of any kind on a witness to give anything other than their own account, to the best of their recollection, of the matters about which the witness is asked to give evidence

2.5 The evidence in chief of a factual witness, if not given by witness statement, must be given to the court without the use of leading questions (except where their use has been agreed by all other parties or permitted by the court).

2.6 For evidence in chief, the memory of a factual witness may be refreshed by being shown a document, but only if the witness created or saw the document while the facts evidenced by or referred to in the document were still fresh in their mind, so that they would have known if they were accurate or inaccurate.

3. Practice

General

3.1 Paragraphs 3.2 to 3.7 below apply to all trial witness statements. Paragraphs 3.8 to 3.12 below do not apply to a trial witness statement where the relevant party (as defined in paragraph 1.2 of Practice Direction 57AC) is a litigant in person when the statement is

prepared and signed. Paragraphs 3.13 to 3.15 below apply only to a trial witness statement where the relevant party is a litigant in person when the statement is prepared and signed.

3.2 No pressure of any kind should be put on a witness to give anything other than their own account, to the best of their recollection. 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.

3.3 Trial witness statements should be as concise as possible without omitting anything of significance.

3.4 A trial witness statement should refer to documents, if at all, only where necessary. It will generally not be necessary for a trial witness statement to refer to documents beyond providing a list to comply with paragraph 3.2 of Practice Direction 57AC, unless paragraph 3.6 below applies or the witness's evidence is required to:

(1) prove the content or authenticity of the document;

(2) explain that the witness 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 the witness did not see the document at the relevant time;

but in the case of (1) to (3) above if (and only if) such evidence is relevant. Particular caution should be exercised before or when showing a witness any document they did not create or see while the facts evidenced by or referred to in the document were fresh in their mind. Where a trial witness statement does refer to a document, it should not exhibit the document but should give a reference enabling it to be identified by the parties, unless it is a document being produced or disclosed by the witness that has not been disclosed in the proceedings.

3.5 Trial witness statements should not –

(1) quote at any length from any document to which reference is made,

(2) seek to argue the case, either generally or on particular points, or

(3) include commentary on other evidence in the case (either documents or the evidence of other witnesses), that is to say set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence (save as set out at paragraph 3.4 above).

3.6 On important disputed matters of fact, a trial witness statement should, if practicable –

(1) state in the witness's own words how well they recall the matters addressed,

(2) state whether the witness's recollection in relation those matters has been refreshed by reference to documents, if so identifying those documents, and

(3) if applicable, state how well the witness recalled matters prior to their recollection being refreshed by considering the documents identified pursuant to (2) above.

3.7 The preparation of a trial witness statement should involve as few drafts as practicable. Any process of repeatedly revisiting a draft statement may corrupt rather than improve recollection.

Represented Parties

3.8 Any witness providing a trial witness statement should have explained to them, by the legal representatives of the relevant party, paragraphs 2 and 3 of Practice Direction 57AC, and the preceding provisions of this Appendix, before they are asked to prepare or consider any draft statement and, wherever practicable, before any evidence is obtained from them (by interview or otherwise).

3.9 Wherever practicable –

(1) 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,

(2) any such record or notes should be made from, and if possible during, an interview or interviews (using any convenient format, for example face to face meeting, video or telephone call or conference, webchat or instant messaging),

If a trial witness statement is based upon evidence obtained from the witness by other means (for example by written answers to a questionnaire or the exchange of emails or other forms of correspondence, or by the witness preparing their own draft statement), the guidance set out in this Appendix should still be followed, so far as possible and modified as necessary.

3.10 An interview to obtain evidence from a witness –

(1) should avoid leading questions where practicable, and should not use leading questions in relation to important contentious matters,

(2) should use open questions as much as possible, generally limiting closed questions to requests for clarification of or additional detail about prior answers, and

(3) should be recorded as fully and accurately as possible, by contemporaneous note or other durable record, dated and retained by the legal representatives.

3.11 If a trial witness statement is not based upon evidence obtained by means of an interview or interviews, that should be stated at the beginning of the statement and the process used instead should be described (to the extent possible without waiver of privilege).

(Paragraph 18.1(5) of Practice Direction 32 provides that any trial witness statement should state the process by which it has been prepared.)

3.12 The legal representatives of the relevant party should assist the witness as to the structure, layout and scope of the statement and may take primary responsibility for drafting it, but in that case the content should be taken from, and should not go beyond, the content of the record or notes referred to in paragraph 3.9(1) above where such a record or such notes exists or exist. If the legal representatives wish to indicate in a draft for a trial witness 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 and not by proposing content for approval, amendment or rejection by the witness.

Litigants in Person

3.13 Any witness providing a trial witness statement should read and understand paragraphs 2 and 3 of Practice Direction 57AC, and paragraphs 1.3, 2.2 to 2.6 and 3.2 to 3.7 of this Appendix, before any draft for the trial witness statement is prepared. That applies to a litigant in person in relation to their own trial witness statement, if there is one, as well as to other witnesses providing statements.

3.14 A litigant in person should understand that any trial witness statement must set out only what the witness providing the statement says that they remember about matters they personally witnessed. That applies to the litigant in person's own trial witness statement, if there is one, as well as to any witness statements provided by other witnesses. Witness statements must not be used to argue the litigant's case.

3.15 A trial witness statement may be prepared by reference to answers provided by the witness to questions posed by the relevant party. Where that is done, a full record should be kept by the relevant party of the questions posed and the answers provided, whatever form the trial witness statement takes. The content of any trial witness statement should be in the witness's own words so far as practicable and no one should suggest to any witness what factual account they should or might wish to give (or not give) in a statement.