

## **Practice Direction 57AC (Witness Evidence at Trial)**

### **1. General**

1.1 This Practice Direction is made under rule 57A.3. It concerns witness statements for use at trials in the Business and Property Courts and applies to new and existing proceedings, but only to trial witness statements signed on or after 6 April 2021. For the avoidance of doubt, nothing in this Practice Direction affects—

- (1) affidavit evidence,
- (2) evidence in a witness statement other than a trial witness statement, or
- (3) the general powers of the court under rule 32.1, to control, exclude or limit factual witness evidence.

(Rule 32.6 provides for evidence in proceedings other than at trial; rule 32.15 provides where evidence may or must be given in the form of an affidavit.)

1.2 In this Practice Direction (including the Appendix) –

“relevant court guide” means any of the court guides referred to by paragraph 1.7 of Practice Direction 57AA that is applicable to the proceedings,

“relevant legal representative” means, in relation to a trial witness statement, a legal representative authorised to conduct litigation who has had responsibility for ensuring that the purpose and proper content of trial witness statements and proper practice in relation to their preparation have been explained to and understood by the witness (and “legal representative” has the meaning given in rule 2.3),

“trial” means a final trial hearing, whether of all issues or of only one or some particular issues, in proceedings (except as provided in paragraph 1.3 below) 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,

“trial witness statement” means a witness statement that is served pursuant to an order made under rule 32.4(2), or pursuant to rule 8.5 or an order made under rule 8.6(1)(b), or that is prepared for the trial of an unfair prejudice petition or a contributory’s just and equitable winding up petition, including supplemental or reply witness statements where allowed by the court, and

“relevant party” means the party by or on behalf of whom the witness statement is served (and for the avoidance of doubt includes a party who is also a witness, as regards their own trial witness statement).

(Rule 32.4(2) requires the court to order service of witness statements for use at trials; rules 8.5 and 8.6 provide for the service and use of written witness evidence in proceedings under Part 8.)

1.3 This Practice Direction does not apply to the following proceedings, unless the court at any stage directs that it is to apply:

- (1) an application under Part VII of the Financial Service and Markets Act 2000 for an order sanctioning an insurance business transfer scheme, a banking business transfer scheme, a reclaim fund business transfer scheme or a ring-fencing transfer scheme;
- (2) an application under Part XXV of the Financial Services and Markets Act 2000 for an injunction or restitution in connection with contravention of relevant requirements, as defined in that Act;
- (3) an application for an order under the Insolvency Act 1986 (other than a contributory’s just and equitable winding up petition under s.122(1)(g) of that Act), under the Insolvency (England and Wales) Rules 2016, under any enactment or statutory instrument providing for a special insolvency or administration regime, and under Schedule 2 to The Cross-Border Insolvency Regulations 2006;
- (4) a claim made under the Companies Act 2006 listed in Part II of Practice Direction 49A of the Civil Procedure Rules (whether in relation to limited companies or limited liability partnerships), an application for an order under Part 26A of that Act, a claim to restore a company to the register under section 1029 of that Act and a claim under Council Regulation (EC) No 2157/2001 listed in Part III of Practice Direction 49A;
- (5) an application under Part II of The Companies (Cross-Border Mergers) Regulations 2007;
- (6) proceedings falling within CPR Part 57, which applies to probate claims, claims for the rectification of wills, claims to substitute or remove a personal representative,

- and claims under the Inheritance (Provision for Family Dependents) Act 1975, the Presumption of Death Act 2013 and the Guardianship (Missing Persons) Act 2017;
- (7) proceedings in the Intellectual Property Enterprise Court falling within Section V of Practice Direction 63;
  - (8) proceedings under CPR Part 64, which applies to certain claims relating to the administration of estates of deceased persons or trusts (Section I of Part 64), and to charity proceedings (Section II of Part 64);
  - (9) proceedings in the Technology and Construction Court relating to adjudication awards under Section 9 of the TCC Guide.

- 1.4 If a rule or other Practice Direction requires some matter to be stated in a witness statement that will be a trial witness statement, that requirement still applies
- 1.5 In the event of inconsistency between this Practice Direction and any other Practice Direction the provisions of this Practice Direction shall prevail.

## **2. The purpose of a trial witness statement**

- 2.1 The purpose of a trial witness statement is 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.

(Rule 32.2(1)(a) provides that in general any fact which needs to be proved at trial by the evidence of witnesses is to be proved by their oral evidence given in public, and rule 32.4(1) defines a witness statement as a signed statement containing the evidence the witness would be allowed to give orally.)

- 2.2 Trial witness statements are important in informing the parties and the court of the evidence a party intends to rely on at trial. Their use promotes the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial.

(The overriding objective is defined in rule 1.1.)

### **3. The content of witness statements**

#### **3.1 A trial witness statement must contain only –**

- (1) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and
- (2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial and rule 32.5(2) did not apply.

(Rule 32.5(2) provides that where a witness is called to give oral evidence at trial, their witness statement shall stand as their evidence in chief unless the court orders otherwise.)

#### **3.2 A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement. The requirement to identify documents the witness has referred to or been referred to does not affect any privilege that may exist in relation to any of those documents.**

#### **3.3 A trial witness statement must comply with paragraphs 18.1 and 18.2 of Practice Direction 32, and for that purpose a witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence (including under cross-examination) if required, and is not limited to a witness's first or native language.**

(Paragraph 18.1 of Practice Direction 32 requires a trial witness statement to be in the witness's own words, if practicable, and to be drafted in the witness's own language and in the first person; paragraphs 18.1(1) to (5) and 18.2 set out further requirements; paragraph 23 of Practice Direction 32 provides that a party who relies on a witness statement in a foreign language must also file a translation.)

#### **3.4 Trial witness statements should be prepared in accordance with –**

- (1) the Statement of Best Practice contained in the Appendix to this Practice Direction, and
- (2) any relevant court guide,

for which purpose, in the event of any inconsistency, the Statement of Best Practice takes precedence over any court guide.

#### **4. Confirmation of compliance**

- 4.1 A trial witness statement must be verified by a statement of truth as required by rule 22.1(c) and paragraph 20.2 of Practice Direction 32 and, unless the court otherwise orders, must also include the following confirmation, signed by the witness:

“ 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. ”

(Paragraph 3.2 of Practice Direction 22 provides that the statement of truth is to be signed by the witness; paragraph 3A of that Practice Direction applies if the witness is unable to read or sign a witness statement other than by reason of language alone.)

- 4.2 Any application for permission to vary or depart from the requirement to include the statement set out in paragraph 4.1 above may be made, and generally should be made, without notice, for determination without a hearing.

- 4.3 A trial witness statement must be endorsed with a certificate of compliance in the following form, signed by the relevant legal representative, unless the statement is signed when the relevant party is a litigant in person or the court orders otherwise:

“I hereby certify that:

1. I am the relevant legal representative within the meaning of Practice Direction 57AC.
2. I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to **[name of witness]**.
3. I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.

Name: .....

Position: .....

Date: .....”

4.4 Any application to dispense with the certificate of compliance referred to in paragraph 4.3 above, or for permission to vary or depart from the form for it there set out, may be made, and generally should be made, without notice, for determination without a hearing.

## **5. Sanctions**

5.1 The court retains its full powers of case management and the full range of sanctions available to it and nothing in paragraph 5.2 or paragraph 5.3 below confines either.

5.2 If a party fails to comply with any part of this Practice Direction, the court may, upon application by any other party or of its own motion, do one or more of the following –

- (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 this Practice Direction 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.

5.3 The court may, upon application by any other party or of its own motion, strike out a trial witness statement not endorsed with a certificate of compliance pursuant to paragraph 4.3 above if there is reason to consider that the relevant party was acting in person when it was signed in order to avoid the application of paragraph 4.3 above to the statement.

## Appendix to Practice Direction 57AC

### (Statement of Best Practice in relation to Trial Witness Statements)

#### **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 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 limited to the evidence in chief the relevant party and its legal representatives (if the party is represented) believe the witness would give if

(1) rule 32.5(2) did not apply (so the witness statement would not stand as the evidence in chief of the witness), and

(2) the principles set out in paragraphs 2.2 to 2.6 were followed.

- 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 witness testimony adds nothing of substance to 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 of which they have personal knowledge, including their recollection of matters they witnessed personally, where such testimony is relevant to issues of fact to be determined at trial, and:
- (1) 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),
  - (2) 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 matters known personally to them (including, if relevant to the issues in the case, what they recall as to matters witnessed personally by them or what they would or would not have done or thought if the facts, or their understanding of them, had been different). 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 ability and 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 permitted by the court).
- 2.6 During evidence in chief given otherwise than by witness statement, the witness's memory 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 3.8 below apply to all trial witness statements. Paragraphs 3.9 to 3.13 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 3.14 to 3.16 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 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 3.7 below applies or the witness's evidence is 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 sending, receiving or otherwise encountering a document in the past; or
  - (3) confirm that the witness saw or 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 The document list to comply with paragraph 3.2 of Practice Direction 57AC should identify or describe the documents in such a way that they may be located easily at trial. Documents disclosed in the proceedings may be listed by disclosure reference. Privileged documents may be identified by category or general description.
- 3.6 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,
  - (3) take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument, or
  - (4) 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).
- 3.7 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, and if so how and when, the witness's recollection in relation to those matters has been refreshed by reference to documents, identifying those documents.
- 3.8 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

- 3.9 Any witness providing a trial witness statement should have explained to them, by the legal representatives of the relevant party, the purpose and proper content of such a statement and proper practice in relation to its preparation, 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). This should include ensuring that

the witness has read, or reading to them, the witness confirmation required by paragraph 4.1 of Practice Direction 57AC.

3.10 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.

3.11 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.

3.12 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.)

3.13 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 3.10(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

- 3.14 Any witness providing a trial witness statement should read and understand the statement set out in paragraph 4.1 of Practice Direction 57AC, 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.
- 3.15 A litigant in person should understand that any trial witness statement must set out only what the witness providing the statement says are known personally to them or says they remember about matters witnessed personally by them. 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.
- 3.16 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, (1) leading questions should be avoided where possible, especially on important points, and (2) 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.