

The new regime for trial witness statements: what to watch out for

Practice Direction 57AC will apply to witness statements for use at trials in most proceedings in the Business and Property Courts. It comes into force on 6 April 2021. Some of the more notable provisions of PD57AC are set out below. These will be the focus of discussion at the **LIDW21 member-hosted event being hosted by Herbert Smith Freehills and One Essex Court on Wednesday, 12 May 2021 at 9am BST.**

Best Practice

PD57AC 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...”

Documents seen by the witness

PD 57AC 3.2: “A trial witness statement... 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.”

Appendix 3.4: “Particular caution should be exercised before or when showing a witness **any document they did not create or see** while the facts evidenced or referred to in the document were **fresh in their mind.**”

Appendix 3.5: “...**Privileged documents** may be identified by **category or general description.**”

Strength of witness’s recollection

Appendix 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.**”

PD 57AC 4.1: Witness’s confirmation of compliance must include: “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..”

Witness interviews

Appendix 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 [i.e. other than by reference to **documents the witness created or saw** when the facts were fresh in their mind].”

Appendix 3.10: “Wherever practicable –

(1) a trial witness statement should be based upon a record or notes made by the relevant party’s legal representative of evidence they obtained from the witness,

(2) any such record should be **made from, and if possible during, an interview** ...

Appendix 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.”

Appendix 2.4: “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.”

Drafting the statement

Appendix 3.13: “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, but in that case the content should be taken from, and **should not go beyond, the content of the record or notes [of the interview]**.”

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.**”

Appendix 3.8: “The preparation of a trial witness statement should involve **as few drafts as practicable.**”

PD 57AC 4.1: Witness’s confirmation of compliance must include: “This witness statement sets out only my personal knowledge and recollection, **in my own words.**”

Content of statement

PD 57AC 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.”

Appendix 3.4: “A trial witness statement should **refer to documents, if at all, only where necessary.**”

Appendix 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..., or
- (4) include **commentary on other evidence** in the case (either documents or the evidence of other witnesses)...”

Witness’s confirmation of compliance

PD 57AC 4.1:

“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.”

Legal representative’s certificate of compliance

PD 57AC 4.3:

“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.”

Sanctions

PD 57AC 5: “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, **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.**”