

Witness statement rules

Georgia Haughney explores how practice direction changes will affect preparation of statements for the business and property courts



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Many practitioners will be aware that Practice Direction 57AC came into force on 6 April 2021, imposing a number of new requirements in respect of trial witness statements in the business and property courts.

It is important that litigators are aware of how these changes to the practice direction and statement of best practice comprising the appendix to the practice direction are likely to impact the drafting of statements.

WHEN DOES THE PRACTICE DIRECTION APPLY?

The practice direction generally applies to all trial witness statements in the business and property courts signed on or after 6 April 2021.

A trial witness statement is defined at paragraph 1.2 of the practice direction as: “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”.

There are some general exceptions, including affidavit evidence; anything not a trial witness statement (for example, statements made in respect of interim applications); and any instances where the court has ordered the practice direction should not apply.

Specific exceptions are also detailed at paragraph 1.3, including:

- Certain applications under the Financial Service and Markets Act 2000;
- Most applications under the Insolvency Act 1986;
- Proceedings under Civil Procedure Rules (CPR) Part 57; and
- Proceedings under CPR Part 64.

However, practitioners should be aware that even where the practice direction does not apply automatically, the court can order compliance.

IMPACT ON DRAFTING

While the appendix is annexed to the practice direction and does not form

part of the main body of the practice direction itself, it is mandatory and therefore must be complied with.

Further, there are a number of requirements in both the practice direction and the appendix which affect the drafting of witness statements – from the taking of evidence to the execution of the statement itself.

TAKING OF EVIDENCE

While witness statements can be drafted by a legal representative on behalf of a witness, the statement should be based on interviews with the witness. The appendix mandates interviews should be recorded as fully and as accurately as possible, so they can be cross referenced and checked against the statement if necessary.

FACTUAL CONTENT

Paragraph 3.1 dictates witness statements must only contain:

- Evidence of fact that need proving by witnesses; and
- Evidence as to such matters that the witness would be asked or allowed to give in evidence in chief, if they were giving oral evidence.

All comments in the statement should therefore be limited to the facts in dispute.

As such, witness statements are likely to become much shorter and more disjointed, dealing with disparate issues rather than containing long narratives, as they were prone to in the past.

This may result in lengthier narratives migrating to other mediums, such as counsel’s submissions or a detailed chronology of events.

It is also worth noting the statement must only contain facts of which the witness has personal knowledge and that are relevant to the case.

“Personal knowledge” is defined as being something that must have been witnessed personally or be a matter internal to the witness’ mind.

The statement can, therefore, only include recollections of events, they personally witnessed, ie. with one of their five senses or a witness’ thoughts and views on a matter.

DRAFTING THE STATEMENT

The appendix requires witness statements be as concise as possible (paragraph 3.3) and only refer to documents where necessary (paragraph 3.4). This is to emphasise and enforce the point that statements should be limited to the facts in dispute and should only contain those facts of which the witness has personal knowledge.

Witnesses must also state how well they recall the matters addressed (paragraph 3.7(1)) and whether their memory has been refreshed by reference to documents (paragraph 3.7(2)) and, if so, how and when.

Emphasis is on ensuring the statement is based on personal recollections and experience as much as possible. This appears to be in response to an underlying concern that an extensive review of documents may influence the witness’ own recollection.

In a similar vein, the appendix also requires witness statements involve as few drafts as possible. Again, the emphasis appears to be on ensuring the statement is as organic and as close to the witness’ own words as possible

FORMAL REQUIREMENTS AND EXECUTION

The practice direction and appendix impose a number of formal structural requirements.

Among the most notable of these is a requirement the witness statement “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” (paragraph 3.2).

Again, there appears to be an underlying concern that an extensive review of documents may influence recollection.

It will be interesting to see, in practice, if any inference is drawn from the list of documents and whether the length of the list and number of documents involved has any reflection on witnesses’ credibility or accuracy.

Another interesting point is that any party to the litigation is likely to have recently reviewed a large number of the documents relevant to the case, simply by virtue of conducting litigation. It is unclear whether these also need to be listed or if this requirement is limited to documents specifically referred to for the purpose of drafting the statement.

A second formality imposed by the practice direction is that both the witness and the legal representative drafting the statement (unless the witness is a litigant in person) need to confirm the statement is compliant with the practice direction.



Paragraph 4.1 contains the confirmation of compliance from the witness themselves, which needs to be added beneath the usual statement of truth and signed by the witness. Paragraph 4.3 details the certificate of compliance to be signed by the legal representative.

SANCTIONS

The court has wide ranging powers to impose sanctions under paragraph 5.2. These include:

- Preventing a party from being able to rely on all or part of the statement;
- Causing all or part of the statement to be struck out;
- Ordering the statement to be re-drafted in accordance with the practice direction, or otherwise as directed by the court;
- Making an adverse costs order against a non-compliant party; or
- Ordering a witness to give some or all of their evidence in chief orally.

It remains to be seen how strictly the court will enforce these requirements and what sanctions they will prefer in practice.

PRACTICE POINTS

It is important litigators in the business and property courts are aware of the practice direction and its new requirements or else risk last-minute re-drafts, adverse costs orders or the prospect of a witness having to give their evidence orally.

Careful consideration needs to be given to the requirements throughout the process, from the taking of instructions to the execution of the statement.



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