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Preparing for witness evidence at trial

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Topics Covered

- Practice Direction 57AC
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(All assuming ordinary civil proceedings in this jurisdiction.)

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Practice Direction 57AC

This relatively new practice direction applies for witness statements for use at trial (not interim matters), and applies in the Business and Property Courts. By default it does not, however, apply in any of the kinds of proceedings specified at para 1.3. These include much of the work that comes before ICC Judges and Part 57 proceedings (probate) and Part 64 proceedings (administration of trusts and estates).

It requires a thoroughly different approach to be taken to what was often the norm. It has always been the case that the witness' own words should be used, but the new practice direction seeks to reinforce that principle. The witness statement should not be constructed and refined over many iterations, with the aid of all the documents and lawyerly drafting. It requires a much greater focus on what the witness can actually remember (when asked) about things they themselves perceived.

The appended Statement of Best Practice is essential reading.

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Practice Direction 57AC

1. Especially for centrally important witnesses, the best approach is to make time for an interview to go through everything that needs to be covered. To minimise the need for following up and to make revisions, thorough preparation is needed.

2. Be aware of the requirement to include a list of documents, and keep careful track of what documents the witness is referring to. (In general, try to minimise showing the witness documents unless it is especially important for the witness to address them.)

3. The old way wasn't all bad. Consider having a non-witness statement that sets out the narrative by reference to documents.

4. My personal view is that if you make serious efforts to follow the intended approach you are likely to end up with a witness statement that is less polished but more resilient against cross-examination.

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Miscellaneous rules about statements

CPR PD 32 para 18 specifies a number of points a witness statement should include, particularly the following two important points that are often overlooked:

- The witness statement should state *"the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter"*.

- The witness statement must state (1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and (2) the source for any matters of information or belief.

There are numerous rules about the formatting of witness statements and exhibits, set out in CPR PD 32 and PD 5A.

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Attacking witness evidence before trial

The Court has general powers to control evidence including by excluding otherwise admissible evidence (CPR r.32.1(2)) and exclude issues from consideration (CPR r.3.1(2)(k)). These powers are to be exercised in accordance with the overriding objective.

There are specific powers in CPR PD 57AC paras 5.2 and 5.3 to sanction parties for non-compliance with that practice direction including (1) striking out all or part of the witness statement, (2) requiring that the witness statement be redrafted and (3) requiring that the witness give some or all of their evidence in chief orally.

The obvious occasion to ask the Court to exercise these powers is the PTR.

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Witness summaries

What happens if you want a witness to give oral evidence at the trial but you cannot get a witness statement from them? This can happen if (1) they wish to co-operate but are prevented from doing so because, for instance, of a confidentiality obligation or (2) they do not wish to co-operate.

(Or you might not really want them to give evidence, but be concerned about an adverse inference being drawn; see *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 and many others.)

You must apply for permission to serve a witness summary instead of a witness statement; see CPR r.32.9. This can be done without notice, and will generally not require a hearing. Explain why permission is needed and have the intended witness summary ready.

The summary must set out (a) the evidence, if known, which would otherwise be included in a witness statement; or (b) if the evidence is not known, the matters about which questions are proposed to be asked.

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Hearsay notices

In civil proceedings, hearsay evidence is ultimately governed by the Civil Evidence Act 1995.

Section 1 provides that hearsay evidence is *"a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated"* and it is generally admissible.

There is a requirement to give notice; see CPR r.33.2. The deadline is the witness statement deadline. There are three ways of giving notice:

1. If the hearsay is in a statement of a witness who is going to be giving oral evidence, serving the statement as directed is sufficient.
2. For statements where the witness is not to be called, this must also be indicated and the reason given.
3. Otherwise, the notice must identify the hearsay evidence, indicate that it will be relied on, and give the reason for not calling the witness.

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Hearsay notices (exceptions)

There are exceptions to the requirement for a notice:

1. Evidence at hearings other than trials.
2. Affidavits/witness statements not containing any hearsay evidence.
3. In probate proceedings, statements by the deceased.
4. Any other instance where a practice direction excludes the requirement.

The requirement can also be waived or excluded by agreement; see section 2(3) of the Act.

Remember the rule which applies when agreeing the contents of the trial bundle. The default is that the documents agreed for inclusion in the trial bundle are admissible as evidence of their contents (CPR PD 32 para 27.2). Parties are also encouraged to agree documents are authentic and admissible as evidence generally (para 27.12).

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Hearsay notices (the other side)

What are the options open to the other party on receiving a hearsay notice?:

1. They can apply for the person who made the original statement (which is being tendered as hearsay evidence) to give oral evidence including cross-examination; see section 3 of the Act. This must be done within 14 days of the service of the notice of intention; see CPR r.33.4.

2. More unusually, they can give notice of an intention to call evidence to attack the credibility of the evidence.

Of course, it is also possible to leave the evidence as it is and make submissions at trial as to its weight; see the convenient list of factors at section 4 of the Act.

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Challenging the authenticity of documents

The key principle is the 'cards on the table' approach, which means not taking the other side by surprise. Apart from anything else there is a practical impediment to challenging the authenticity of documents successfully at a late stage: the only version present at trial may be a copy and it may not be practical to access the original.

A disclosed document is deemed to be admitted to be authentic unless notice is served; see CPR r.32.19.

The time limit is the witness statement deadline, or 7 days from disclosure if that is later.

The court retains control and can consider the circumstances. You are more likely to get away with omitting an actual notice under the rule if it has already been made sufficiently clear that authenticity is challenged (such as in a statement of case); see for example *McGann v Bisping* [2017] EWHC 2951 (Comm).

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