



Skills Training: Witness Statements

For HLPAs

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Nicholas Nicol

[Nicholas Nicol](#) has been a barrister since 1986, specialising in Social Welfare Law, particularly Housing. He has appeared in all levels of court and tribunal in England, up to and including the House of Lords and the Supreme Court. He was formerly a law centre worker and Director of Policy and Research at the Public Law Project. He is a judge of the First Tier Tribunal Property Chamber and an accredited mediator. He has written or contributed to a number of books and articles on housing, human rights and fuel rights.

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Witness Statements

Introduction

32.2—Evidence of witnesses – general rule

- (1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved –
- (a) at trial, by their oral evidence given in public; and
 - (b) at any other hearing, by their evidence in writing.

32.4—Requirement to serve witness statements for use at trial

- (1) A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally.

32.5—Use at trial of witness statements which have been served

- (1) If—
- (a) a party has served a witness statement; and
 - (b) he wishes to rely at trial on the evidence of the witness who made the statement,
- he must call the witness to give oral evidence unless the court orders otherwise or he puts in the statement as hearsay evidence.
- (2) Where a witness is called to give oral evidence under paragraph (1), his witness statement shall stand as his evidence in chief unless the court orders otherwise.

Unfortunately, rules, practice directions and guidance as to the content of witness statements ~~appear to be~~ were habitually ignored by practitioners. Periodically, the Court of Appeal and individual trial judges have criticised lawyers for overloading witness statements with material that should not be included. – White Book 32.4.5

Tugendhat J in *Cummings v MoJ* [2013] EWHC 48 (QB):

8. The disclosure of witness statements which include matters which ought not to be included has a strong tendency to increase costs and delay. This is the opposite of what was intended when the requirement to serve witness statements was introduced as part of the Woolf reforms.

9. Before the Woolf reforms it was the duty of an advocate to distinguish between instructions as to what a particular witness might say, and the evidence in chief that the advocate should elicit from that witness. As a result, evidence in chief would, if skilfully adduced, be short, and cross-examination would be confined to the issues. One effect of disclosing witness statements that do not distinguish between matters which are relevant to the issues, and matters which are irrelevant, or relevant only to which points that may arise during the trial, is that matters arise at trial which would not otherwise arise. Thus the time saved by adducing evidence in chief in the form of written statements is lost (and often exceeded) by the time taken on submissions as

to what is and is not relevant, and in cross-examination on matters which are of little or no assistance to the court.

In the Business and Property Courts, a new practice direction, PD 57AC, was introduced in order to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument – see *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC) [27-38]. Its more stringent requirements are not covered in this handout.

The Purpose of Witness Statements

Review of Civil Litigation Costs: Final Report (“the Jackson Report”):

- 2.1 ... witness statements serve a number of purposes, including
- (a) reducing the length of the trial (by largely doing away with the need for anything more than short examination-in-chief);
 - (b) enabling the parties to know in advance of the trial what the factual issues are;
 - (c) enabling opposing parties to prepare in advance for cross-examination;
 - (d) encouraging the early settlement of actions.
 - (e) providing useful and relevant information to the court to enable it to adjudicate upon the case in an efficient manner.

Formal Requirements – CPR PD32 paras 17-25

Getting it right is important because, as well as potentially damaging your client’s case, there are consequences:

- 25.1 Where—
- (1) an affidavit,
 - (2) a witness statement, or
 - (3) an exhibit to either an affidavit or a witness statement,

does not comply with Part 32 or this practice direction in relation to its form, the court may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation.

Witness statements must have the title of the proceedings (17.1) but also, in the top right hand corner (17.2):

- (1) The party on whose behalf it is made,
- (2) The initials and surname of the witness,

- (3) The number of the statement in relation to that witness,
- (4) The identifying initials and number of each exhibit referred to,
- (5) The date when the statement was made; and
- (6) The date of any translation.

The statement must be

- in the intended witness's own words,
- drafted in their own language,
- expressed in the first person,

and state (18.1):

- (1) The full name of the witness,
- (2) The witness's place of residence **or**, if they are making the statement in their professional, business or other occupational capacity, the address at which they work, the position they hold and the name of their firm or employer,
- (3) Their occupation or, if they have none, their description,
- (4) The fact that they are a party to the proceedings or are the employee of such a party, if either applies, and
- (5) The process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter.

Witness statements must indicate (18.2):

- (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.

Witness statements should (19.1):

- a. Be produced on durable quality A4 paper with a 3.5cm margin,
- b. Be fully legible,
- c. "Normally" be typed on one side of paper only,
- d. Where possible, bound securely, in a manner which would not hamper filing, or otherwise each page should be endorsed with the case number and bear the witness's initials,
- e. Have pages numbered consecutively,
- f. Be divided into numbered paragraphs,
- g. Have all numbers, including dates, expressed in figures,
- h. Give the reference to any document or documents mentioned either in the margin or in bold text, and

- i. Be drafted in the witness's own language.

It is "usually convenient" for witness statements to follow the chronological sequence, with each paragraph confined to a distinct portion of the subject (19.2).

The witness statement must be verified with a statement of truth, in the witness's own language, which reads (20.1 and 20.2),

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Any alterations must be initialled (22.1). If they aren't, the court's permission is needed to use the statement (22.2).

Exhibits

There is a number of rules which apply specifically to exhibits:

- a. Each exhibit must be verified and identified by the witness (18.3). The statement must use the words, "I refer to the [description of exhibit] marked ...". (18.4)
- b. Exhibits must remain separate from the statement itself (18.3).
- c. The first page of each exhibit must, like the first page of the witness statement, have the details in the top right corner (11.3(1)) and also the exhibit mark (11.3(2)).
- d. If the exhibit has more than one document, it should also have a list of the documents in the exhibit (13.3).
- e. If the exhibit is a bundle of correspondence, it should be in chronological order (with the earliest at the top) and the front page should state that it consists of original letters and copies (12.1 and 12.2).
- f. Photocopies can be used as long as the original documents are available for inspection by the other parties before the hearing and by the judge at the hearing (13.1). The Commercial Court Guide, which applies to the Business and Property Courts, provides that photocopies should be used unless the court orders otherwise (F8.2).
- g. Court documents must not be exhibited because official copies of such documents prove themselves (13.2).
- h. Items other than documents must be clearly marked with an exhibit number or letter which cannot become detached (14.1). Small items can be placed in a clearly-marked container (14.2).

- i. Exhibits with more than one document must be securely fastened in a way that does not hinder the reading of the documents but that method cannot be staples (15.1(1)).
- j. Also, the pages should be numbered consecutively “at bottom centre” (15.1(2)).
- k. Every page of an exhibit must be legible or there must be typed copies of illegible documents paginated with ‘a’ numbers (15.2).
- l. Where a witness makes more than one witness statement, the numbering of exhibits should run consecutively throughout and not start again with each witness statement (18.6).
- m. If there are lots of witness statements and exhibits, they should be put in separate, numbered bundles (15.3).
- n. Where exhibits are so bulky that service on the other party is difficult, directions should be sought from the court as to how to bring them to their attention (15.4).

Further guidance as to form and content of witness statements can be found in:

- CPR PD 57AC
- The Commercial Court Guide, paras F.8 and H.1
- Chancery Guide, Chapter 19
- Administrative Court Judicial Review Guide 2022, Chapter 23
- Technology and Construction Court Guide, Section 12

Notable points:

- a. Witnesses are expected to have re-read their witness statements shortly before they are called to give evidence. (Chancery Guide 19.9)
- b. If, to assist reference to the documents, the documents referred to are exhibited to the witness statement, they should nevertheless not be included in trial bundles in that form. If (as is normally preferable) the documents referred to in the witness statement are not exhibited, care should be taken in identifying them, for example by reference to the lists of documents exchanged on disclosure. In preparation for trial, it will be necessary to insert cross-references to the trial bundles so as to identify the documents. (Chancery Guide 19.16)
- c. Unless otherwise directed by the court, witness statements should *not* have annexed to them copies of other documents, save where a specific document needs to be annexed to the statement in order to make that statement reasonably intelligible. (Technology and Construction Court Guide, para 12.1.3)

Statements sometimes end with a large area of blank page before the Statement of Truth appears on the next, separate page. It raises the inference that the signer of the Statement of Truth signed a separate document which was then attached to the statement which the signer may or may not have seen. The Statement of Truth should always follow directly on from the text that it is affirming the truth of.

The costs allowed for witness statements (and summaries) should reflect the fact that they are not intended to be elaborate documents (*Interim Report*, pp.179–180). This is reinforced by the rule that where an affidavit is used where a witness statement would suffice there may be a costs penalty (r.32.15(2)). The court should make it clear that it is not prepared to tolerate extravagance in the preparation of witness statements (*Interim Report*, *ibid.*).

What should be in a witness statement

The practice of drafting of witness statements and their substitution for evidence in chief makes evaluation of witnesses' evidence on the issue of credibility more difficult: *per* HHJ Simon Brown QC in *Earles v Barclays Bank plc* [2009] EWHC 2500 (Mercantile); [2009] 6 Costs LR 906.

Nicol's Golden Rules of Witness Statements:

- Inherent credibility
- Internal consistency

Lord Bingham of Cornhill in a paper headed "The Judge as Juror: The Judicial Determination of Factual Issues"¹:

The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:

- (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
- (2) the internal consistency of the witness's evidence;
- (3) consistency with what the witness has said or deposed on other occasions;
- (4) the credit of the witness in relation to matters not germane to the litigation;
- (5) the demeanour of the witness.

¹ Published in *The Business of Judging*, Oxford 2000, where it was reprinted from *Current Legal Problems*, vol. 38, 1985 p. 1-27

The Appendix to PD 57AC at 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.

Be careful not to miss things out. The witness statement should cover everything that is in the statement of case. On the other hand, the witness statement should not read like the pleading with just the third person changed for the first person.

Using their own words

Aquarius Financial Enterprises Inc v Lloyd's Underwriters (The Delphine) (2001) per Toulson J:

The Law Society's Guide to the Professional Conduct of Solicitors provides guidance on the taking of witness statements. It requires a high degree of skill and professional integrity. The object is to elicit that which the witness is truthfully able to say about relevant matters from his or her own knowledge or recollection, uninfluenced by what the statement taker would like him or her to say.

It is normal for a deponent of a witness statement not to remember every detail in their statement and for opposing counsel to exploit that in cross-examination when a typical question will be, "Did you actually read this statement before you signed it?" As well as having the witness re-read the statement to themselves before giving evidence, the best defence against this is for the statement to be in the witness's own words.

Whilst it can sometimes be the case that witness statements are drafted by solicitors, they will always endeavour to speak to the witnesses first and put down their evidence in their own words: *per* HHJ Coulson QC in *Assi v Dina Foods Ltd* [2005] EWHC 1099 (QB) at para 33.

Avoid legal arguments – Brooke LJ in *Alex Lawrie Factors Ltd v Morgan* [2001] CPR 2:

... grave dangers ... may occur when lawyers put into witnesses' mouths, in the affidavits which they settle for them, sophisticated legal arguments which

in effect represent the lawyer's arguments in the case to which the witnesses themselves would not be readily able to speak if cross-examined on their affidavits. Affidavits are there for the witness to say in his or her own words what the relevant evidence is and are not to be used as a vehicle for complex legal argument. Those considerations apply just as much to statements of truth under the Civil Procedure Rules as they do to affidavits.

Similarly, avoid legal jargon or just lawyerly language, e.g.:

- I am the **above named** person
- I **reside** in the above **accommodation**
- **In respect to** the police **disclosure**

It is not necessarily wrong if a solicitor makes a witness statement instead of the client but it is nearly always preferable that it comes from the client. See *Bracken Partners Ltd v Gutteridge* (2001) per Stanley Burnton J at pp.31-32.

What should *not* be in a witness statement

- (1) Recitation of facts based on the documents
- (2) Commentary on those documents
- (3) Argument: "One reason for unnecessary length is that many witness statements contain extensive argument. Such evidence is inadmissible and adds to the costs."²
- (4) Submissions
- (5) Expressions of opinion

JD Wetherspoon plc v Harris Practice Note [2013] EWHC 1088 (Ch); [2013] 1 WLR 3296 set out the general principles applicable to factual witness statements at [38]-[41]. *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC) [25] summarised these as follows:

- (i) they should contain evidence that the maker would be allowed to give orally as provided in CPR 32.4;
- (ii) they should cover those issues, but only those issues, on which the party serving the witness statement wished the witness to give evidence in-chief;
- (iii) they should not provide a commentary on the documents in the trial bundle, nor set out quotations from such documents, nor engage in matters of argument;

² Jackson Final Report, Chapter 38 para 2.2

- (iv) they should not deal with other matters merely because they may arise in the course of the trial;
- (v) they should not include opinion evidence, save where it is necessary as part of the witness's account of admissible factual evidence in order to provide a full and coherent explanation and account; but
- (vi) the rules as to witness statements and their contents are not rigid statutes and it is conceivable that in particular circumstances they may properly be relaxed in order to achieve the overriding objective of dealing with cases justly.

In *Bar-On v Newlon Housing Trust* (County Court at Clerkenwell & Shoreditch) 4th June 2018, unreported, DJ Rand struck out the statement of the Housing Trust's principal witness for similar reasons. She commented that the witness statement was not unlike many others she had seen and, in all her time in practice and on the bench, she had never seen such an application to strike out for these kinds of flaws but mused that perhaps it should be done more. She said she saw nothing in the CPR, practice directions or guidance which would allow the witness statement to stand. She said it was more like a skeleton argument than a witness statement and suggested to counsel for the Housing Trust that perhaps he could use it that way in due course.

Other problems:

- Putting the other side's case – there might be circumstances where it is useful in a witness statement to summarise an allegation before refuting it, but such situations are rare. The witness statement is an opportunity to remind the judge of your case, not that of the other party.
- Commenting extensively on the expert report. The expert report should speak for itself. In contrast, the witness statement should support the expert report by giving the witness's view of the issue and its consequences.
- "My solicitor advised me ..." This phrasing might deprive your advice of the protection of legal privilege.

Receiving a defective witness statement

Under CPR 32.1, the court has general powers to control how evidence is placed before the court. This can include striking out passages in a witness statement. If a

witness statement has not been admitted, the witness should not be permitted to give evidence: *Stampfer v Avon Ground Rents Ltd* (2022) UKUT 68 (LC).

Mann J in *Wilkinson v West Coast Capital* [2005] EWHC 1606 (Ch) at para 5:

However, desirable though the power to control evidence obviously is, particular care must in my view be taken when it is sought to exercise the power before a trial. It is noteworthy that the two cases which I have referred to above were both cases in which the issues as to evidence arose during the course of trials. By the time that the issue arises in that context, the judge is likely to have a much fuller overall picture of the issues in the case and of the evidence which is going to be adduced in support of them. In a large number of cases, he or she is likely to be in a better position to make judgments which turn on the real value of the line of evidence in question and its proportionality, and in very many cases its admissibility. A court which is asked to approach these questions at the interlocutory stage is much less likely to have that picture, and should be that much more careful in forming a view that the evidence is going to be irrelevant, or if relevant, unhelpful and/or disproportionate. One must also bear in mind the extent to which it is desirable to consider these matters at all at an interlocutory stage. One must be on one's guard, in applications such as this, not to allow case management in relation to witness statements to give rise to significant time- and cost-wasting applications; those should not be encouraged. In my view, I should only strike out the parts of the witness statements which I am currently considering if it is quite plain to me that, no matter how the proceedings look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it. With evidence of this nature, that is likely to be quite a heavy burden.

Under the more comprehensive regime of PD57AC, the White Book says at 2AA-38:

Non-compliance may be visited by sanctions: see *Mansion Place* at [38]. Material will not, however, be struck out where it is not reasonably necessary to do so: *Blue Manchester Ltd v Bug-Alu Technic GmbH* [2021] EWHC 3095 (TCC) at [10]. In *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC) at [31]–[37] the court withdrew permission for the use of existing witness statements and gave a short period for compliant statements to be redrafted. Where parties make oppressive or disproportionate applications for sanctions, particularly strike out sanctions, they are at risk of adverse costs being awarded on an indemnity basis. When assessing what steps to take in respect of alleged non-compliance by another party, common sense and proportionality should guide parties: *Curtiss v Zurich Insurance Plc* [2022] EWHC 1514 (TCC) at [19]–[21].

Although the judges in these cases were considering PD 57AC, it is arguable that similar principles should be applied when considering witness statements not covered by PD 57AC.

Examples of bad practice

- Never mentioning the witness's personal involvement but instead setting out what can be taken from the documents
- H reported me to the social services because of spite [*followed by several paragraphs about H – client suspected H is the source of allegations against her but other party has disclosed no document which supports this and is not relying on him as witness*]
- at a party I do admit that I had 3 lines of crack [*drug use had not been mentioned at any time in any document in this case until this sentence in the witness statement*]
- he must have been feeding me cocaine in my tea or food [*inherently improbable*]
- When I found the camera hidden [*no previous mention of camera or any hint of such activity*]
- Referring to “the landlord” standing outside the client’s door when the landlord is a company
- Client says the Council’s EHO was “stunned” at the disrepair [*characterising someone’s state of mind when there is unlikely to be any supporting evidence*]