

PRACTICE DIRECTION – TRIAL WITNESS STATEMENTS IN CIVIL DIVISION

CASES

1. General

1.1 This Practice Direction supplements Rule 8.8 of the Rules of the High Court of Justice 2009. It concerns witness statements for use at trials in the Isle of Man Courts and applies to new and existing Civil Division proceedings allocated to the Summary, Ordinary or Chancery procedures, but only to trial witness statements signed on or after the date of commencement. 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 8.1, to control, exclude or limit factual witness evidence.

(Rule 8.6 provides for evidence in proceedings other than at trial; Rule 8.14 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 guidance document or Practice Direction issued by the Isle of Man Courts that is applicable to the proceedings,

“relevant advocate” means, in relation to a trial witness statement, an Advocate 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,

“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” means a rule within the Rules of the High Court of Justice 2009,

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

“trial witness statement” means a witness statement that is served pursuant to an order made under rule 8.4(2)

(Rule 8.4(2) requires the court to order service of witness statements for use at trials)

1.3 If a rule requires some matter to be stated in a witness statement that will be a trial witness statement, that requirement still applies.

1.4 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 8.2(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 8.4(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 1.2.)

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 8.5(2) did not apply.

(Rule 8.5(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 15(1) and 15(2) of Schedule 8.1, 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 15 of Schedule 8.1 requires a trial witness statement to be in the witness's own words, if practicable, and to be drafted in the first person; paragraphs 15(1)(a) to (d) and 15(2) set out further requirements; paragraph 20 of Schedule 8.1 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 8.8 and Schedule 8.2 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.”

(Rule 8.69 provides that the statement of truth is to be signed by the witness; paragraph 18 of Schedule 8.1 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 advocate, 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 advocate within the meaning of Practice Direction 01/2024
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 01/2024, have been discussed with and explained to [full name of witness].
3. I believe this trial witness statement complies with Practice Direction 01/2024 and paragraphs 15(1) and 15(2) of Schedule 8.1 and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 01/2024”

Full name of advocate: [full name]

Name of advocate's firm: [insert name of firm]

Date: [insert 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 only acting in person when their statement was signed in order to avoid the application of paragraph 4.3 above to the statement.

MADE this 9th day of April 2024



**His Honour the Deemster Corlett
First Deemster**



**His Honour the Deemster Needham
Second Deemster**

Appendix 1 to Practice Direction

(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 01/2024 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 advocate (if the party is represented) believe the witness would give if

- (1) rule 8.5(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 Trials under the Chancery and Ordinary Procedures, sometimes do not require witness evidence, either because matters of fact 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 01/2024) 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 01/2024, 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 01/2024 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 save, where necessary, to detail the factual context of the documents, 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).
- (5) The parties have liberty to apply to the court to dispense with the requirements of this paragraph 3.6 where any party considers that the requirements of paragraph 3.6 would not be compatible with the matter in question and would not further the overriding objective.

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 advocate 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 01/2024.

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, web chat 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).

3.13 The Advocate 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) of this Appendix 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 01/2024, before any draft of 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 facts 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.