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Witness evidence reform: evolution not revolution?

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Introduction

The Witness Evidence Working Group's recommendations for witness evidence reform focus on the more consistent enforcement of existing rules with some limited new measures.

Concern that current practice in relation to factual witness evidence does not achieve the best evidence at proportionate cost prompted the creation of the group to consider how the current practice could be improved in the business and property courts. The group (consisting of judges, practitioners and court users) has rejected some radical options and focused on ensuring compliance with existing obligations, bolstered by some additional guidance.

Problems with current practice – basis for revolutionary change?

Following a survey of lawyers and judges, the group identified some key problems.

Reliability
The courts have cautioned against any wholesale rejection of witness evidence on the basis of the general fallibility of memory and it is well recognised that giving oral evidence is the best way of ensuring that witnesses provide a genuine recollection of events.(1) The process of producing witness statements can corrupt the witness's memory as they repeat their story and they may be led into recalling a particular version of events which is partially inaccurate. Despite this, oral examination-in-chief is rarely used as an alternative to witness statements due to practitioners' limited experience thereof.

Irrelevance
Witness statements often cover irrelevant material and opinion. While the courts take a dim view of this practice, there are limited efforts to prevent such material being included. The Commercial Court frequently permits the mandatory page limit for witness statements to be exceeded, which can encourage the inclusion of irrelevant material.

Weakness of cross-examination
Lawyers often challenge the detailed contents of a witness statement in cross examination, rather than test the core aspects of the witness's recollection. This takes up considerable time at trial and causes solicitors to draft witness statements in a way which reduces their susceptibility to being unpicked. This inevitably reduces the extent to which the statement is in the witness's own words.

Time and costs
The preparation of witness statements is a notoriously costly exercise, which increases the lead in time to trial.

Revolutionary solutions

Although the group identified numerous problems with the process for producing witness statements, it ultimately rejected radical proposals for overhauling it. There was considerable resistance to reliance on oral examination-in-chief as the primary method of obtaining witness evidence and to US style depositions. It was felt that too much would then hinge on how the witness performed on the day.

Faced with overwhelming opposition by survey participants, the group also declined to propose that privilege should be lifted in respect of the production of witness statements. This would have required witness-lawyer communications and draft statements to be provided to the opposing party, a wholesale change that would present a myriad of practical difficulties.

Evolutionary approach

The group clearly favoured enhancements to the existing framework that emphasised the enforcement of and compliance with the current rules.

Improved guidance
While different courts may legitimately have their own specific requirements for

witness statements, common principles could and should be promoted. The group has recommended that:

- an authoritative statement of best practice in relation to the preparation of witness statements should be produced; and
- court guides should be harmonised in respect of the content and drafting of witness statements.

Encouraging enforcement of existing rules
In order to address the challenge that the rules relating to witness evidence are not usually so stringently enforced, the group has proposed that:

- an extension to the page limit for witness statements should rarely be granted, unless a judge has had the chance to scrutinise their contents; and
- costs sanctions and judicial criticism should be more readily applied for non-compliance with the rules regarding witness evidence.

Promoting compliance
One of the most effective ways to ensure that a point is taken on board is to oblige witnesses and solicitors to expressly acknowledge it. On that basis, the group has recommended that:

- witness statements contain a statement of truth in which the witness confirms that they have had explained to them and understand the objective of a witness statement and the appropriate practice regarding its drafting; and
- solicitors responsible for drafting the witness statement should sign a solicitor's certificate of compliance with the rules and the relevant court guide.

Reducing issues subject to written factual evidence
In an attempt to narrow the scope of witness statements, the group has recommended that the courts consider a requirement that parties produce a pre-trial statement of facts, setting out their factual case, to be exchanged at the same time as witness statements. The courts should also consider whether oral examination-in-chief should be ordered for specific issues.

The future – a quiet revolution?

The various recommendations are to be welcomed as a pragmatic response to the inherent difficulties in capturing and recording reliable witness evidence. They aim to evolve the guidance and rules without fundamentally altering the existing framework.

In advance of the implementation, judges may feel emboldened to enforce the existing rules and impose penalties for non-compliance. It seems likely that this will, as the group seems to hope, lead to a quiet revolution in the legal profession and the production of compliant witness statements without judicial intervention.

For further information on this topic please contact Simon Hart or Emma West at RPC by telephone (+44 20 3060 6000) or email (simon.hart@rpc.co.uk or emma.west@rpc.co.uk). The RPC website can be accessed at www.rpc.co.uk.

Endnotes

(1) *Julia Kogan v Nicholas Martin* ([2019] EWCA Civ 1645).

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