

## **PRACTICE DIRECTION – ADMISSIONS, EVIDENCE AND DEPOSITIONS**

*This practice direction supplements Part 14 of the Court of Protection Rules 2007*

### **PRACTICE DIRECTION A – WRITTEN EVIDENCE**

#### **Affidavits**

##### *Deponent*

1. A deponent is a person who gives evidence by affidavit or affirmation.

##### *Heading*

2. The affidavit should be headed with the title of the proceedings, including the case number (if known) and the full name of the person to whom the proceedings relate (unless an order to the contrary pursuant to rule 19 has been made).
3. At the top right hand corner of the first page (and on the back-sheet) there should be clearly written:
  - (a) the party on whose behalf it is made (unless an order to the contrary pursuant to rule 19 has been made);
  - (b) the initials and surname of the deponent;
  - (c) the number of the affidavit in relation to that deponent; and
  - (d) the date sworn.

##### *Body of affidavit*

4. The affidavit must, if practicable, be in the deponent's own words. It should be expressed in the first person, and the deponent should:
  - (a) commence "I (full name) of (address) state on oath...";
  - (b) if giving evidence in his professional, business or other occupational capacity, give the address at which he works in (a) above, the position he holds and the name of his firm or employer;
  - (c) give his occupation or, if he has none, his description; and
  - (d) state if he is a party to the proceedings or employed by a party to the proceedings.
5. An affidavit must indicate:

- (a) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
- (b) the source for any matters of information or belief.

6. Where a deponent:

- (a) refers to an exhibit or exhibits, he should state "there is now produced and shown to me marked "... the (*description of exhibit*)"; and
- (b) makes more than one affidavit (to which there are exhibits) in the same proceedings, the numbering of the exhibits should run consecutively throughout and not start again with each affidavit.

#### *Jurat*

7. The jurat of an affidavit is a statement set out at the end of the document which authenticates the affidavit.

8. It must:

- (a) be signed by all deponents;
- (b) be completed and signed by the person before whom the affidavit was sworn whose name and qualifications must be printed beneath his signature;
- (c) contain the full address of the person before whom the affidavit was sworn; and
- (d) follow immediately on from the text and not be put on a separate page.

#### *Format of affidavits*

9. An affidavit should:

- (a) be produced on durable quality A4 paper with a 3.5 centimetre margin;
- (b) be fully legible and should normally be typed on one side of the paper only;
- (c) where possible, be bound securely in a manner which would not hamper filing;
- (d) have the pages numbered consecutively as a separate document;
- (e) be divided into numbered paragraphs; and
- (f) have all numbers, including dates, expressed in figures.

10. It is usually convenient for an affidavit to follow the chronological sequence of events or matters dealt with. Each paragraph of an affidavit should as far as possible be confined to a distinct portion of the subject.

11. An affidavit must be included in, or attached to, a COP25 form.

*Inability of deponent to read or sign affidavit*

12. Where an affidavit is sworn by a person who is unable to read or sign it, the person before whom the affidavit is sworn must certify in the jurat that:

- (a) he read the affidavit to the deponent;
- (b) the deponent appeared to understand it; and
- (c) the deponent signed, or made his mark, in his presence.

13. If that certificate is not included in the jurat, the affidavit may not be used in evidence unless the court is satisfied that it was read to the deponent and that he appeared to understand it. Two versions of the form of the jurat with the certificate are set out in Annex 1 to this practice direction.

*Alterations to affidavits*

14. Any alteration to an affidavit must be initialled by both the deponent and the person before whom the affidavit was sworn.

15. An affidavit which contains an alteration that has not been initialled may be filed or used in evidence only with the permission of the court.

*Who may administer oaths*

16. Only the following may administer oaths:

- (a) Commissioners for Oaths;<sup>1</sup>
- (b) practising solicitors;<sup>2</sup>
- (c) other persons specified by statute;<sup>3</sup>
- (d) certain officials of the Supreme Court;<sup>4</sup>
- (e) a circuit judge or district judge;<sup>5</sup>
- (f) any justice of the peace;<sup>6</sup> and
- (g) certain officials of any county court appointed by the judge of that court for the purpose.<sup>7</sup>

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<sup>1</sup> Commissioner for Oaths Act 1889 and 1891.

<sup>2</sup> Section 81 of the Solicitors Act 1974.

<sup>3</sup> Section 65 of the Administration of Justice Act 1985; s.113 of the Courts and Legal Services Act 1990 and the Commissioners for Oaths (Prescribed Bodies) Regulations 1994 and 1995.

<sup>4</sup> Section 2 of the Commissioners for Oaths Act 1889.

<sup>5</sup> Section 58 of the County Courts Act 1984.

<sup>6</sup> Section 58 as above.

<sup>7</sup> Section 58 as above.

17. An affidavit must be sworn before a person independent of the parties or their representatives.

#### *Filing of affidavits*

18. If the court directs that an affidavit is to be filed, it must be filed in the court office.

19. Where an affidavit is in a foreign language:

- (a) the party wishing to rely on it:
  - (i) must have it translated, and
  - (ii) must file the foreign language affidavit with the court; and
- (b) the translator must make and file with the court an affidavit verifying the translation and exhibiting both the translation and a copy of the foreign language affidavit.

#### **Exhibits**

##### *Manner of exhibiting documents*

20. A document used in conjunction with an affidavit should be:

- (a) produced to and verified by the deponent, and remain separate from the affidavit; and
- (b) identified by a declaration of the person before whom the affidavit was sworn.

21. The declaration should be headed with the name of the proceedings in the same way as the affidavit.

22. The first page of each exhibit should be marked:

- (a) as in paragraph 3 above; and
- (b) with the exhibit mark referred to in the affidavit.

##### *Letters*

23. Copies of individual letters should be collected together and exhibited in a bundle or bundles. The letters should be arranged in chronological order with the earliest at the top, and firmly secured.

24. When a bundle of correspondence is exhibited it should be arranged and secured as above and numbered consecutively.

### *Other documents*

25. Photocopies instead of original documents may be exhibited provided the originals are made available for inspection by other parties before the hearing and by the judge at the hearing.
26. Court documents must not be exhibited (official copies of such documents prove themselves).

### *Exhibits other than documents*

27. Items other than documents should be clearly marked with an exhibit number or letter in such a manner that the mark cannot become detached from the exhibit.
28. Small items may be placed in a container and the container appropriately marked.

### *General provisions*

29. Where an exhibit contains more than one document:
  - (a) the bundle should not be stapled but should be securely fastened in a way that does not hinder the reading of the documents; and
  - (b) the pages should be numbered consecutively at the bottom centre.
30. Every page of an exhibit should be clearly legible. Typed copies of illegible documents should be included, paginated with "a" etc numbers.
31. Where on account of their bulk the service of copies of exhibits on the other parties would be difficult or impracticable, the directions of the court should be sought as to the arrangements for bringing the exhibits to the attention of the other parties and as to their custody pending the final hearing.

### **Affirmations**

32. All provisions in this or any other practice direction relating to affidavits apply to affirmations with the following exceptions:
  - (a) the deponent should commence "I (*name*) of (*address*) do solemnly and sincerely affirm..."; and
  - (b) in the jurat the word "sworn" is replaced by the word "affirmed".

## **Witness statements**

### *Heading*

33. The witness statements should be headed with the title of the proceedings; including the case number (if known) and the full name of the person to whom the proceedings relate (unless an order to the contrary pursuant to rule 19 has been made).
34. At the top right hand corner of the first page there should be clearly written:
- (a) the party on whose behalf it is made (unless an order to the contrary pursuant to rule 19 has been made);
  - (b) the initials and surname of the witness;
  - (c) the number of the statement in relation to that witness; and
  - (d) the date the statement was made.

### *Body of witness statement*

35. The witness statement must, if practicable, be in the intended witness's own words. The statement should be expressed in the first person and should also state:
- (a) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer;
  - (b) his occupation, or if he has none, his description; and
  - (c) if he is a party to the proceedings or employed by a party to the proceedings.
36. A witness statement must indicate:
- (a) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief; and
  - (b) the source for any matters of information or belief.
37. An exhibit used in conjunction with a witness statement should be verified and identified by the witness and remain separate from the witness statement.
38. Where a witness refers to an exhibit or exhibits, he should state: "I refer to the (*description of exhibit*) marked '...'".

39. The provisions of paragraphs 22 to 31 apply similarly to witness statements as they do to affidavits, where appropriate.

40. Where a witness makes more than one witness statement to which there are exhibits, the numbering of the exhibits should run consecutively throughout and not start again with each witness statement.

*Format of witness statement*

41. A witness statement should adhere to the format specified in paragraph 9 for affidavits.

42. It is usually convenient for a witness statement to follow the chronological sequence of the events or matters dealt with and each paragraph of a witness statement should, as far as possible, be confined to a distinct portion of the subject.

43. A witness statement must be included in, or attached to, a COP24 form.

*Statement of truth*

44. A witness statement is the equivalent of oral evidence which the witness would, if called, give in evidence. It must be verified by a statement of truth in the following terms:

“I believe that the facts stated in this witness statement are true.”

(Practice direction B accompanying Part 4 sets out more detailed requirements for statements of truth.)

45. Attention is drawn to rule 14 which sets out the consequences of verifying a witness statement containing a false statement without an honest belief in its truth.

*Alterations to witness statements*

46. Any alteration to a witness statement must be initialled by the person making the statement or by the authorised person where appropriate.

47. A witness statement which contains an alteration that has not been initialled may only be used in evidence with the permission of the court.

### *Filing of witness statements*

48. Where a witness statement is in a foreign language:

- (a) the party wishing to rely on it must:
  - (i) have it translated, and
  - (ii) file the foreign language witness statement with the court; and
- (b) the translator must make and file with the court an affidavit verifying the translation and exhibiting both the translation and a copy of the foreign language witness statement.

### *Defects in affidavits, witness statements and exhibits*

49. Where:

- (a) an affidavit;
  - (b) a witness statement; or
  - (c) an exhibit to either an affidavit or a witness statement,
- does not comply with Part 14 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.

50. However, the court may allow a person to file a defective affidavit or witness statement or to use a defective exhibit.

### **Agreed bundles for hearings**

51. The court may give directions requiring the parties to use their best endeavours to agree a bundle or bundles of documents for use at any hearing.

52. All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –

- (a) the court orders otherwise; or
- (b) a party gives written notice of objection to the admissibility of particular documents.

### **Evidence by video link**

53. Guidance on the use of video conferencing is set out at Annex 2 to this practice direction.

## Information

54. The court may direct a party with access to information which is not reasonably available to another party to serve on that other party a document which records the information.<sup>8</sup> The document served must include sufficient details of all the facts, tests, experiments and assumptions which underlie any part of the information to enable the party on whom it is served to make, or to obtain, a proper interpretation of the information and an assessment of its significance.

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<sup>8</sup> Rule 107.

## **ANNEX 1**

### **Certificate to be used where a deponent to an affidavit is unable to read or sign it**

Sworn at...this...day of... Before me, I having first read over the contents of this affidavit to the deponent [if there are exhibits, add “and explained the nature and effect of the exhibits referred to in it”] who appeared to understand it and approved its contents as accurate, and made his mark on the affidavit in my presence.

*Or (after, Before me) the witness to the mark of the deponent having first sworn that he had read over etc. (as above) and that he saw him make his mark on the affidavit. (Witness must sign).*

### **Certificate to be used where a deponent to an affirmation is unable to read or sign it**

Affirmed at...this...day of... Before me, I having first read over the contents of this affirmation to the deponent [if there are exhibits, add “and explained the nature and effect of the exhibits referred to in it”] who appeared to understand it and approved its content as accurate, and made his mark on the affirmation in my presence.

*Or (after, Before me) the witness to the mark of the deponent having been first sworn that he had read over etc (as above) and that he saw him make his mark on the affirmation. (Witness must sign).*

## **ANNEX 2**

### **Guidance on the use of video conferencing**

1. This guidance is for the use of video conferencing (VC) to provide evidence in the Court of Protection. It is in part based upon the VC guidance contained in the practice direction that supplements Part 32 of the Civil Procedure Rules.
2. Rule 98 of the Court of Protection Rules provides that the court may allow a witness to give evidence through a video link or by other means. It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use. Consideration should be given in each case as to whether its use is likely to be beneficial to the efficient, fair and economic disposal of the proceedings.
3. For VC purposes, the location at which the judge sits is referred to as the 'local site'. The local site may be either a courtroom with VC equipment either permanently or temporarily installed, or another venue such as a studio or conference room set-up for VC. The other site or sites to and from which transmission is made are referred to as 'the remote site'.

### **Preliminary arrangements**

4. The court's permission is required for any part of any proceedings to be dealt with by means of VC. Before seeking a direction, the applicant should notify the appropriate court officer of the intention to seek it, and should enquire as to the availability of the court's VC equipment for the duration of the proposed VC. The application for a direction should be made to the court by filing a COP9 application notice in accordance with the Part 10 procedure.
5. If a witness at a remote site is to give evidence by an interpreter, consideration should be given at this stage as to whether the interpreter should be at the local site or the remote site.
6. Where the VC process is to be used to take evidence from a person in a foreign jurisdiction, the parties should consider whether that is permissible under local law.

7. If a VC direction is given, arrangements for the transmission will then need to be made. The court will ordinarily direct that the party seeking permission to use VC is to be responsible for this. That party is hereafter referred to as 'the VC arranging party'.

### **VC arranging party's responsibilities**

8. The VC arranging party must contact the appropriate court officer and make arrangements for the VC transmission.
9. The court has established procedures with Her Majesty's Court Service that enables the witness's nearest local court with VC facilities to be used as the remote site. The VC arranging party must advise the court whether the party wishes to make use of local court facilities for the remote site.
10. If the party is unable to make use of local court VC facilities, then the VC arranging party is responsible for arranging an alternative remote site. This may consist of a solicitor's office or a commercial VC facility, and in some circumstances may require portable VC equipment to be brought to the witness. Details of the remote site, and of the equipment to be used, together with all necessary contact names and telephone numbers, will have to be provided to the court.
11. The VC arranging party must arrange for recording equipment to be provided by the court so that the evidence can be recorded. A court officer will normally be present to operate the recording equipment when the local site is a courtroom. The equipment should be set up and tested before the VC transmission.
12. In rare instances, it may be necessary for the local site to be somewhere other than the courtroom (or other VC facility onsite at the court). If this is the case, the VC arranging party should ensure:
  - (a) that arrangements are made, if practicable, for the royal coat of arms to be placed above the judge's seat at the alternate venue;
  - (b) that the number of microphones is adequate for the speakers;
  - (c) that the panning of the camera for the practitioners' table encompasses all legal representatives so that the viewer can see everyone seated there; and
  - (d) that a court officer is present to operate the recording equipment.

## **Court of Protection responsibilities**

13. If the VC arranging party has advised that the party wishes to utilise local court facilities for the remote site, a court officer will contact the nearest local court (with VC facilities) to the witness and:
- (a) agree and book a mutually convenient date and time for the attendance;
  - (b) advise the local court as to the number and details of those parties attending to give evidence by VC;
  - (c) confirm with the local court the reporting arrangements for the parties attending to give their evidence; and
  - (d) advise the parties by letter of the date, time and arrangements for attending the designated local court to give their evidence by VC.
14. Provided the local site is to be the courtroom (or other VC facility on-site at the court), a court officer will also:
- (a) set-up the courtroom for the VC;
  - (b) establish the VC link with the remote site at the date and time that has been booked; and
  - (c) be available in order to deal with any technical problems during the transmission should they develop.

## **Local court responsibilities**

15. The local court will advise the court staff (London or regional court as applicable) of the number to be called to establish the VC link with the remote site. Where the local court is utilising a third party networked VC service (such as the *Martin Dawes* service utilised by the closed nation-wide prison network), it will be responsible for arranging a bridging link for the date and time agreed.
16. The local court will make arrangements to meet the witness on their arrival at the court, escort them to the room where they are to give evidence by VC, switch on the VC equipment and ensure a link is established with the local site.

## **The hearing**

17. Those involved with VC need to be aware that due to varying technology standards, there may be delays between the receipt of the picture and that of the

accompanying sound. If due allowance is not made for this, there may be a tendency to 'speak over' the witness, whose voice will continue to be heard for a short period after he or she appears on the screen to have finished speaking.

18. Picture quality may also vary, and is generally enhanced if those appearing on VC monitors keep their movements to a minimum.
19. It is recommended that the practitioners and witness should arrive at their respective VC sites about 20 minutes prior to the scheduled commencement of the transmission.
20. Consideration will need to be given in advance to any documents to which the witness is likely to be referred. The parties should endeavour to agree on this. It will usually be most convenient for a bundle of the copy documents to be prepared in advance, which the VC arranging party should then send to the remote site.
21. Additional documents are sometimes quite properly introduced during the course of a witness's evidence. To cater for this, the VC arranging party should ensure that equipment is available to enable documents to be transmitted between sites during the course of the VC transmission. The procedure for conducting the transmission will be determined by the judge. The judge will also determine who is to control the cameras.
22. At the beginning of the transmission, the judge may wish to give directions as to the seating arrangements at the remote site so that those present are visible at the local site during the taking of the evidence.
23. The examination of the witness at the remote site should then follow as closely as possible the practice adopted when a witness is in the courtroom. During examination, cross-examination and re-examination, the witness must be able to see the legal representative asking the question and also any other person (whether another legal representative or the judge) making any statements in regard to the witness's evidence. It will in practice be most convenient if everyone remains seated throughout the transmission.