

Surveyors acting as expert witnesses

A guide to best practice

3rd edition



Surveyors acting as expert witnesses

RICS practice statement and guidance note

3rd edition



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Surveyors acting as expert witnesses

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This is a practice statement (PS). There may be disciplinary consequences for RICS members for a failure to comply with a PS.

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In the opinion of RICS, if RICS members conform to the requirements of this PS they should have at least a partial defence to an allegation of negligence by virtue of having followed those practices.

Where RICS members depart from the practice required by this PS, they should do so only for good reason and the client must be informed in writing of the fact of and the reasons for the departure. In the event of litigation, the court may require you to explain why you decided to act as you did. Also, an RICS member who has not followed this PS and whose actions are called into question in an RICS disciplinary case, may be asked to justify the steps he or she took.

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Although RICS cannot undertake to respond personally to each such communication, if you have any comments or feedback on any aspect of this publication, please feel free to write to:

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Surveyors acting as expert witnesses: practice statement

Preamble

Whilst in general this text is gender neutral, on occasions where masculine terms only are used (such as in legislation quotes) these should be taken as also referring to the feminine (e.g. 'she', 'her'), and to 'they' or 'it' (in the case of a corporate body), as the context so requires.

References to the singular also include the plural and vice versa where the context so requires. Unless otherwise specified, references to 'you', 'member', 'surveyor' or to 'expert witness surveyor' are to members of RICS of any class of membership, save for Honorary Members. References to 'PS' denote 'practice statement'.

Where you are acting as an Assessor, Valuation Officer, Listing Officer, District Valuer or Commissioner of Valuation (or as an authorised representative thereof) in local taxation matters and are acting in pursuit of a statutory duty, you will not usually be operating in a client/adviser framework and will generally not have a direct client.

There are variations in terminology, legislation and case law references pertinent to expert witness practice across the different legal jurisdictions within the UK. Not all of these are exhaustively referenced below but where it is felt appropriate some are highlighted.

For the purposes of this PS, the generic expression 'tribunal' means any body whose function it is to determine disputes. This therefore includes:

- **courts and tribunals (including Lands Tribunals and Agricultural Land Tribunals; Leasehold Valuation Tribunals; Residential Property Tribunals; Valuation Tribunals);**
- **arbitrators/arbiters or arbitral panels/tribunals;**
- **adjudicators (including those operating under the *Housing Grants, Construction and Regeneration Act 1996*);**
- **committees (including Rent Assessment Committees, Valuation Appeal Committees);**
- **inspectors, commissioners and reporters (e.g. in planning proceedings, including Inquiries, Hearings, Examinations in Public – independent panels; Independent Examination and proceedings of the Infrastructure Planning Commission, and Planning and Water Appeals Commissions); and**
- **independent experts.**

Note: It is expected that once provisions of the *Tribunals, Courts and Enforcement Act 2007* are implemented, some of the tribunals listed above will take on a different designation, but at the time of publication this is not in place.

Principal message

As a surveyor actively involved in a dispute that may come before a tribunal, you may find yourself carrying out one or more roles, including that of an expert witness. Your primary duty as an expert witness (sometimes referred to as a 'skilled witness' in Scotland) is not to a client but to the tribunal. You will need to follow the requirements of *Surveyors acting as expert witnesses*: RICS practice statement. Your primary duty to the tribunal is to ensure that the expert evidence provided by you:

- **must be, and must be seen to be, your independent and unbiased product, and fall within your expertise, experience and knowledge;**
- **must state the main facts and assumptions it is based upon, and not omit material facts that might be relevant to your conclusions; and**
- **must be impartial and uninfluenced by those instructing or paying you to give the evidence.**

It is imperative that you do not stray from the duties of an expert witness by acting in a partial, misleading or untruthful manner. In those instances when you may adopt a dual role of surveyor-advocate and expert witness, it is also imperative that you differentiate at all times clearly between the two roles (see PS 9).

PS 1 Application of practice statement

- 1.1 The start date of application of this PS is 1 January 2009. This PS applies to any RICS member (usually described hereafter as 'the expert witness surveyor' or 'you') who provides expert evidence, whether oral or written, to the proceedings of any tribunal in the United Kingdom, except for criminal proceedings.
- 1.2 This PS does not apply to you when acting in any capacity other than as an expert witness (for example, in the capacity of a witness of fact). In cases where you are using your professional experience, knowledge and expertise in the role of surveyor-advocate, *Surveyors acting as advocates*: RICS practice statement will apply.
- 1.3 You give expert evidence when you draw upon your professional experience, knowledge and expertise to provide evidence to a tribunal, such evidence being distinct from:
 - (a) advice not given for the purpose of a tribunal's proceedings;
 - (b) evidence of fact; and
 - (c) advocacy of a case.
- 1.4 Since this PS only applies to the provision of expert evidence by you when appointed as an expert witness, it does not apply for the purpose of assisting your client to decide whether to initiate or defend proceedings to be heard by a tribunal. However, where you are giving advice in writing to your client and consider that you may be required to give expert evidence in such proceedings, you must advise your client in writing if your advice or investigations would fall short of that necessary to enable expert evidence complying with this PS to be provided.

- 1.5 Where you act as an expert witness and consider that there are special circumstances which render it inappropriate or impractical for the assignment to be undertaken wholly in accordance with this PS, the fact of, and reasons for, the departure must as soon as reasonably practical be given in writing to your client, and must also be contained in any expert report prepared; alternatively you may wish to decline instructions or withdraw from a case. Where you depart from the PS you may be required to justify to RICS the reasons for the departure. RICS is entitled to take disciplinary measures if it is not satisfied with the reasons given and/or the manner in which the departure has been notified or evidenced. In the event of litigation, a court may require you to explain why you decided to act as you did.
- 1.6 The *Civil Procedure Rules* (CPR), together with associated Practice Directions, Forms, Protocols, and court guides, all apply to the procedure of the Supreme Court and the County Court in England and Wales; other rules and procedures may apply elsewhere. Surveyors proposing to act as expert witnesses are, as a matter of professional conduct, expected to make themselves aware of the need to comply with the CPR, or other rules and procedures, and to comply with these in those circumstances when they apply.

PS 2 Duty in providing expert evidence

- 2.1 Your overriding duty as an expert witness surveyor is to the tribunal to whom the expert evidence is given. This duty overrides the contractual duty to your client. The duty to the tribunal is to set out the facts fully and give truthful, impartial and independent opinions, covering all relevant matters, whether or not they favour your client. This applies irrespective of whether or not the evidence is given either on oath or affirmation. Special care must be taken to ensure that expert evidence is not biased towards those who are responsible for instructing or paying you. The duty endures for the whole assignment. Opinions should not be exaggerated or seek to obscure alternative views or other schools of thought, but should instead recognise and, where appropriate, address them.
- 2.2 Where, for any reason, you are unable to comply with any order or direction of the tribunal you must as soon as practicable:
- (a) prepare a written record of the reason for such non-compliance; and
 - (b) give copies of that record to your client and to the tribunal.
- 2.3 The duty to the tribunal set out at PS 2.1 applies whether your expert evidence is given orally or in writing.
- 2.4 As an expert witness surveyor you must be able to show that you have full knowledge of the duties relating to the role of an expert witness when giving evidence.
- 2.5 You are entitled to accept instructions from your employer to give expert evidence on behalf of that employer. Prior to accepting such instructions, you must satisfy yourself that your employer understands that your primary duty in giving evidence is to the tribunal and that this may mean that your evidence will conflict with your employer's view of the matter or the way in which your employer would prefer to see matters put.

- 2.6 Where you are acting – or have previously acted – for a party on a matter (in the course of, for instance, negotiations) and the matter requires, or may in the future require, the giving of expert evidence, you must throughout consider, and then decide, whether you can fully satisfy the overriding duty to the tribunal to provide evidence that is truthful, independent, impartial, and complete as to coverage of relevant matters.
- 2.7 As an expert witness surveyor you must not malign the professional competence of another expert witness. If you feel that expressing doubts about the competence of another expert witness is both justified and necessary in order for you to present a full picture to the tribunal, you may bring to its attention where you consider the experience, knowledge and expertise of another expert witness is lacking, inappropriate or exaggerated, or where you consider evidence is biased, explaining why. Comments should be focused on the facts, interpretation of data and analysis of opinion.

PS 3 Acting as an expert witness, and instructions

- 3.1 You must only act as an expert witness and give expert evidence where you have:
- (a) the ability to act impartially in the assignment;
 - (b) the experience, knowledge and expertise appropriate for the assignment; and
 - (c) the resources to complete the assignment within the required timescales and to the required standard.
- 3.2 If you have any doubt as to whether you should accept instructions to act as an expert witness, you must advise your prospective client accordingly. If you consider that the tribunal might attach less or no weight to your evidence as a result of particular circumstances, you have a duty to advise your prospective client accordingly.
- 3.3 Prior to accepting instructions to act as an expert witness, you must:
- (a) advise your prospective client in writing that this PS and, where appropriate, the CPR, or other rules, will apply;
 - (b) make a written offer to your prospective client to supply a copy of the PS; and notify your prospective client that your firm's Complaints Handling Procedure (CHP) (if the firm is an RICS-regulated firm) will not apply to your engagement as expert witness;
 - (c) ensure without delay that you advise your prospective client in writing of the nature and scope of your obligations under the CPR, or other rules that might apply, and of your general obligations, in particular that the overriding duty of the expert witness in giving evidence is to the tribunal;
 - (d) ensure that there is a written record, held by you and sent to (or received from) your prospective client, as to the matters on which expert evidence is required, whether such record is upon the initiative of yourself or those instructing you, and confirm in writing if you propose that any part of the assignment is likely to be undertaken by a person other than yourself;
 - (e) carry out a check to satisfy yourself that no conflict of interest arises (see also PS 2.5–2.6). If you have any doubt whatsoever in this respect, any potential or actual conflict must be reported to those offering instructions

as soon as it becomes apparent. If you consider that the tribunal might attach less or no weight to your evidence as a result of such circumstances, you must advise your prospective client accordingly.

- 3.4 (a) Courts of law will only in exceptional circumstances accept evidence from an expert witness acting under a conditional fee arrangement. There are a number of court protocols and practice directions, and case law, which make the impermissibility of such a fee arrangement clear. Even where such evidence is admitted, the courts may well give it little weight.
- (b) Where the fee arrangement for your instructions is intended to be a conditional fee, you must, prior to accepting instructions to act as an expert witness, advise your prospective client in writing of the risk that the tribunal may view evidence given under a conditional fee arrangement as being tainted by bias, and may attach less weight to it; it may even refuse to admit it at all, or find the whole conditional fee arrangement void. You must only proceed to act on a conditional fee arrangement where the client has so consented expressly in writing. You are required by PS 5.1(j)(iii) to make a declaration to the tribunal in respect of conditional fee arrangements.
- 3.5 You must confirm to your prospective client in writing and in good time whether or not you accept the prospective client's instructions. Your acceptance should cover your terms of engagement (including the basis upon which your fees will be charged) and any specific mandates given as to important or contentious matters. You must then ensure that all such documents, together with communications from your client, are kept by you as a proper record of your instructions. Any change or supplement to the terms that may be made from time to time should be added to your records.
- 3.6 Any potential or actual conflict arising after instructions have been accepted must be notified immediately to your client. In such circumstances the same reporting procedures and considerations as per PS 3.3(e) above should apply. This paragraph (PS 3.6) does not apply to Single Joint Experts (see instead PS 8.7).

PS 4 Inspections

- 4.1 Where any inspection of any property/facility is, in your view, required, it must always, where reasonably possible, be carried out to the extent necessary to produce an opinion that is professionally competent. This should have regard to its purpose and the circumstances of the case.

PS 5 Reports and oral evidence

Note: In certain tribunals or circumstances, terminology other than 'reports' may be used; for example, in planning appeals. If produced as evidence for planning inquiries, they would be called 'proofs of evidence' in England and Wales, and Northern Ireland, and 'precognitions' in Scotland; and if produced for hearings or exchanges of written representations they would be called 'statements'.

- 5.1 In providing a written report to be lodged before a tribunal, you must comply with any rules, orders or directions of the tribunal to which the report is to be presented. You must:

- (a) Give details of your qualifications, and relevant experience, knowledge and expertise (commensurate in detail with the nature and complexity of the case).
- (b) State the substance of all material instructions (whether written or oral). The statement should summarise the facts and instructions given to you that are material to the opinions expressed in the report or upon which those opinions are based. The omission of 'off-the-record' oral instructions is not permitted.
- (c) Give details of any literature or other material which you have relied upon in making the report, including the opinions of others.
- (d) State who carried out any test, experiment or survey which you have used for the report, the methodology and nature thereof, and whether or not the test, experiment or survey has been carried out under your supervision.
- (e) Give the qualifications and relevant experience, knowledge and expertise of the person who carried out any such test, experiment or survey.
- (f) Consider all matters material to the instruction. You must state clearly all assumptions and facts upon which your opinion and reasoning is based, distinguishing between those facts that you believe to be true and those you have assumed (specifying those you have been instructed to assume). Where facts are known to be in dispute you must state separate opinions on each hypothesis put forward. A view in favour of one or other disputed set of facts should not be expressed unless, solely due to your particular experience, knowledge and expertise, you consider one set of facts to be improbable or less probable, in which case a view can be expressed with appropriate reasons. You must indicate where, in what way and why, an opinion is provisional, if you consider that further information is required or if, for whatever reason, you believe a final and unqualified opinion cannot be expressed.
- (g) Where there are ranges of opinion on the matters dealt with in the report:
 - (i) summarise the ranges of opinion and their sources; and
 - (ii) give reasons for your own opinion.
- (h) Include a summary of the conclusions reached.
- (i) Verify the report with a Statement of Truth. In cases where the CPR apply, the wording stipulated by the CPR for the Statement of Truth must always be used – see CPR Practice Direction 35 and the *Protocol for the Instruction of Experts to give Evidence in Civil Claims*. The form of wording to be used in relation to non-CPR cases must follow the rules or requirements of the particular tribunal concerned. Where no specific wording for a Statement of Truth is specified by a tribunal's rules or requirements, the following default wording (that of the CPR's Statement of Truth) must be used:

‘I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.’

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- (j) Include all the following declarations at the end of the report:

(i) ‘I confirm that my report includes all facts which I regard as being relevant to the opinions which I have expressed and that attention has been drawn to any matter which would affect the validity of those opinions.’

(ii) **A** – ‘I confirm that my duty to [*specify the tribunal**] as an expert witness overrides any duty to those instructing or paying me, that I have understood this duty and complied with it in giving my evidence impartially and objectively, and that I will continue to comply with that duty as required.’ (*The reference used may vary, as appropriate to the particular forum.)

This declaration (PS 5.1(j)(ii)A) should be used in relation to the proceedings of all tribunals **except those in Scotland**, for which the declaration immediately below (PS 5.1(j)(ii)B) should be adopted instead:

B – ‘I confirm that in preparing this report I have assumed the same duty which would apply to me when giving my expert opinions in a court of law under oath or affirmation. I confirm that this duty overrides any duty to those instructing or paying me, that I have understood this duty and complied with it in giving my opinions impartially and objectively, and that I will continue to comply with that duty as required.’

(iii) ‘I confirm that I am not instructed under any conditional fee arrangement.’

Where however you are instructed under a conditional fee arrangement, PS 10.1 mandates that you must disclose that fact by making this declaration to the tribunal: ‘I confirm that I am instructed under a conditional fee arrangement.’

(iv) ‘I confirm that I have no conflicts of interest of any kind other than those already disclosed in my report.’

(v) ‘I confirm that my report complies with the requirements of the Royal Institution of Chartered Surveyors (RICS), as set down in *Surveyors acting as expert witnesses*: RICS practice statement.’

(k) Personally sign and date the report.

5.2 The scope of PS 5.1 covers written reports. In relation to expert evidence to be given orally where no written report has been lodged or submitted to the tribunal, you must at the outset declare to the tribunal that the expert evidence you give complies with the requirements of the Royal Institution of Chartered Surveyors (RICS), as set down in *Surveyors acting as expert witnesses*: RICS practice statement; or, in the event, any departure from the requirements of the PS should be outlined to the tribunal. You must also declare to the tribunal whether you are instructed under a conditional fee arrangement.

PS 6 Amendment of the contents of written reports

6.1 If after disclosure of your report you identify a material inaccuracy or omission, or have a change of opinion on any matter, you must without delay and in writing notify any intention to make changes, and the reasons for such changes, to:

(a) those instructing you;

- (b) other parties to the dispute (through legal representatives, if any); and
- (c) where appropriate, the tribunal.

6.2 You may be invited to amend or expand a report to ensure accuracy, consistency, completeness, relevance and clarity. You must disregard any suggestions or alterations that do not accord with your true opinions, or distort them.

PS 7 Agreeing facts and resolving differences

7.1 As an expert witness, you may be instructed by your client to communicate with the other party in an attempt to agree facts, and to clarify, narrow and resolve the differences between parties. You may in any event be ordered to do this by the tribunal; you must follow any lawful order or direction of the tribunal, notwithstanding any directive by a client to the contrary.

7.2 Where, for any reason, you are unable to comply with any order or direction of the tribunal concerning the matters set out in PS 7.1, you must as soon as practicable:

- (a) prepare a written record of the reason for such non-compliance; and
- (b) give copies of that record to your client and to the tribunal.

7.3 Even where you have not been instructed by your client to communicate with the other party or so ordered by the tribunal, or where the tribunal does not specify any requirements in regard to the manner or scope of such communications, you must raise with your client the possible advantages, disadvantages and appropriateness of:

- (a) making such communications at as early a stage as possible;
- (b) identifying with counterpart experts the issues in dispute, the reasons for any differences of opinion and the actions that might be taken to resolve outstanding issues between parties;
- (c) preparing a statement for the tribunal showing:
 - (i) those facts and issues which are agreed;
 - (ii) those facts and issues which have not been agreed and the reasons for any disagreement on any issue.

PS 8 Single Joint Expert (SJE)

8.1 As an SJE you are appointed pursuant to an order by a court of law (CPR 35.7) and then treated by the court as being appointed jointly by parties to the dispute. You should be clear as to the following points, and if necessary, you should require the parties to clarify them:

- (a) the subject matter of your instructions;
- (b) the need for expert evidence;
- (c) the issues to be addressed;
- (d) the method of presentation of the evidence (written or oral);
- (e) the release of the expert evidence to the parties; and
- (f) the need to limit your opinions to your core fields of expertise.

- 8.2** As an SJE you must recognise that you will owe equal duties to all parties to the dispute and must remain independent and transparent in your dealings. You should keep the parties informed of material steps you are taking.
- 8.3** If you have previously given advice to a party you must only accept an appointment as an SJE (whether in the same case or otherwise) where all parties have been fully informed of all relevant information about your prior involvement.
- 8.4** As an SJE, if you have not received instructions from your clients, you must give notice to them of a deadline for the receipt by you of instructions. If you do not receive those instructions, you should apply to the court for directions under CPR 35.14.
- 8.5** Irrespective of whether you have received instructions containing conflicting facts and/or allegations, you should provide a single report.
- 8.6** Where a difficulty arises that appears to lead to incompatibility with your duties as an SJE, you must carefully consider whether to resign the appointment. You should first discuss with those instructing you the particular difficulties experienced and request that they attempt to resolve the matter where possible. You should, as a last resort, consider whether it would be more appropriate to make a written request to the court for directions. In the event of resignation of your appointment, you should notify those instructing you in writing, serving a statement of your reasons.
- 8.7** Where a potential or actual conflict of interest arises after acceptance of instructions as an SJE, it must be notified immediately to those instructing you. If you consider that the tribunal might attach less or no weight to your evidence as a result of such circumstances, you must advise those instructing you accordingly.

PS 9 Advocacy and expert witness roles

- 9.1** In certain circumstances surveyors can act in the same case (but not at the same time) both as surveyor-advocate and as expert witness (see also *Surveyors acting as advocates*: RICS practice statement). This is known as acting ‘in a dual role’. You should only act in a dual role where:
- (a) neither the rules nor the customs of the particular tribunal prohibit you from so acting; and
 - (b) other relevant factors make it appropriate (e.g. the disproportionality of retaining two persons in separate roles).
- 9.2** Where however you intend, or are invited, to act in a dual role as surveyor-advocate and as expert witness you must:
- (a) having regard to 9.1 above, consider both whether it is permissible to do so (see also PS 3.1) and also whether it is appropriate; and
 - (b) promptly communicate to your client the results of such considerations, setting out in writing the likely advantages and disadvantages, as you see them, of acting in a dual role in the particular circumstances of the case, so as to enable the client to decide whether you should indeed act in such a dual role. In such communication you must detail:

- (i) the possible impact on your impartiality as expert witness, and any possible impact in terms of the perception of that impartiality by others; and any possible impact on your advocacy submissions;
- (ii) whether or not you will be able to fulfill both roles properly at all times; and
- (iii) whether or not it would be disproportionate in all the circumstances, or otherwise in the client's best interests, for a separate person to be retained to undertake one of the roles.

9.3 Having complied with PS 9.2 above, you may only act in both roles if the client instructs you so to act.

9.4 Where you confirm instructions to act in such a dual role, you must clearly distinguish between those two roles at all times, whether in oral hearings or in written presentations.

PS 10 Conditional fees

10.1 Where you are instructed to give expert evidence under a conditional fee arrangement (see also PS 3.4), you must declare the existence of such a conditional fee arrangement to the tribunal (see PS 5.1(j)(iii)), so that its effect can be taken into account. For the avoidance of doubt, PS 10.1 also applies to your expert witness role where you are to act in the same case in a dual role (i.e. both as expert witness and surveyor-advocate – see also *Surveyors acting as advocates*: PS 3.6).

Surveyors acting as expert witnesses

RICS guidance notes

This is a guidance note (GN). It provides advice to members of RICS on aspects of the profession. Where procedures are recommended for specific professional tasks, these are intended to embody 'best practice', that is, procedures which in the opinion of RICS meet a high standard of professional competence.

RICS members are not required to follow the advice and recommendations contained in the GN. They should however note the following points.

When an allegation of professional negligence is made against an RICS member, the court is likely to take account of the contents of any relevant GN published by RICS in deciding whether or not the member had acted with reasonable competence.

In the opinion of RICS, if RICS members conform to the practices recommended in this GN they should have at least a partial defence to an allegation of negligence by virtue of having followed those practices. However, RICS members have the responsibility of deciding when it is inappropriate to follow the guidance.

On the other hand, it does not follow that RICS members will be adjudged negligent if they have not followed the practices recommended in this GN. It is for each surveyor to decide on the appropriate procedure to follow in any professional task. However, where RICS members depart from the good practice recommended in this GN, they should do so only for good reason. In the event of litigation, a court may require an RICS member to explain why he or she decided not to adopt the recommended practice. Also, an RICS member who has not followed this GN, and whose actions are called into question in a RICS disciplinary case, may be asked to justify the steps he or she took and this may be taken into account.

In addition, guidance notes are relevant to professional competence in that every RICS member should be up to date and should have informed him or herself of guidance notes within a reasonable time of their promulgation.

Surveyors acting as expert witnesses: guidance note

Preamble

Whilst in general this text is gender neutral, on occasions where masculine terms only are used (such as in legislation quotes), these should be taken as also referring to the feminine (e.g. 'she', 'her'), and to 'they' or 'it' (in the case of a corporate body), as the context so requires.

References to the singular also include the plural and vice versa where the context so requires. Unless otherwise specified, references to 'you', 'member', 'surveyor' or to 'expert witness surveyor' are to members of RICS of any class of membership, save for Honorary Members. References to 'PS' denote 'practice statement', and those to 'GN' denote 'guidance note'.

Where you are acting as an Assessor, Valuation Officer, Listing Officer, District Valuer or Commissioner of Valuation (or as an authorised representative thereof) in local taxation-related matters and are acting in pursuit of a statutory duty, you are unlikely to be operating in a client/adviser framework and will generally not have a direct client.

There are variations in terminology, legislation and case law references pertinent to expert witness practice that can be found across the different legal jurisdictions within the UK. These are not exhaustively referenced below, but where felt appropriate are suitably highlighted.

For the purposes of this GN, the generic expression 'tribunal' means any body whose function it is to determine disputes. This therefore includes:

- **courts and tribunals (including Lands Tribunals and Agricultural Land Tribunals; Leasehold Valuation Tribunals; Residential Property Tribunals; Valuation Tribunals);**
- **arbitrators/arbiters or arbitral panels/tribunals;**
- **adjudicators (including those operating under the *Housing Grants, Construction and Regeneration Act 1996*);**
- **Committees (including Rent Assessment Committees, Valuation Appeal Committees);**
- **inspectors, commissioners and reporters (e.g. in planning proceedings, including Inquiries, Hearings, Examinations in Public – independent panels; Independent Examination and proceedings of the Infrastructure Planning Commission, and Planning and Water Appeals Commissions);**
- **independent experts.**

Note: It is expected that once provisions of the *Tribunals, Courts and Enforcement Act 2007* are implemented, some of the tribunals listed above will take on a different designation, but at the time of publication this is not yet in place.

GN 1 Application of guidance note and introduction

- 1.1
- (a) The start date of application of this guidance note is 1 January 2009. This guidance note (GN) applies where any RICS member (usually described hereafter as ‘the expert witness surveyor’ or ‘you’) provides expert evidence, whether oral or written, to the proceedings of any tribunal in the United Kingdom, except for criminal proceedings. It is recommended the GN be considered in conjunction with the foregoing practice statement (PS).
 - (b) The GN provides information on good practice considered to be appropriate where you are required to give expert evidence (including acting as a Single Joint Expert under the *Civil Procedure Rules* (CPR)). The CPR do not apply in Scotland or Northern Ireland. Some tribunals have their own specific rules, which make provisions for expert evidence (for example – not an exhaustive list – Valuation Tribunals, Lands Tribunals; in Northern Ireland, see the Commercial List Practice Directions). Furthermore, the main provisions of CPR do not specifically apply to arbitration proceedings under the *Arbitration Act 1996* (which have party autonomy as a key characteristic) or to any other proceedings outside the County Court or the Supreme Court of England and Wales.
- 1.2
- As a surveyor actively involved in a dispute that may come before a tribunal, you may find yourself carrying out one (or more) of the roles identified below.
- (a) **Surveyor-advocate** – in this capacity you will act to put a party’s case and interests to a tribunal. You will need to follow the requirements of, and have regard to, *Surveyors acting as advocates*: RICS practice statement and guidance note. Your primary duty will be to your client, but it is also subject to some important duties to the tribunal that place limits on what it is proper to do in pursuit of your client’s interests.
 - (b) **Adviser** – in this capacity, you will be retained to give advice to a client. Frequently this will be by a report or assessment of the merits of a case. In this capacity it is not contemplated that a tribunal will be asked to place reliance on such advice. Your advice is not for the purpose of a tribunal’s proceedings (see also GN 3.1 and GN 22.4).
 - (c) **Expert witness (and as a Single Joint Expert (SJE), see PS 8 and GN 17)** – your primary duty as an expert witness, including as an SJE, will be not to those instructing or paying you but to the tribunal. In this instance you will need to follow the requirements of, and have regard to *Surveyors acting as expert witnesses*: RICS practice statement and guidance note.
 - (d) **Negotiator** – in this capacity you will be acting to negotiate a resolution to certain matters as best you may, in the interests of a party. In such a role you will have no involvement with a tribunal, except insofar as you or others may perceive a possibility that a failed negotiation may then necessitate a reference to a tribunal; at which point you or another professional person may be engaged to act as an advocate or provide expert evidence as an expert witness. It is possible that some negotiators may not find it possible to act as an expert witness as their impartiality may be damaged, or may be perceived to be damaged, by the prior or continuing role of negotiator. It is recommended that you be alert to this.
 - (e) **Case manager** – in this capacity you will be acting on behalf of a party and will be responsible for the general conduct, management and

administration of its case, marshalling and coordinating that party's team of representatives/advisers (if any) and liaising, as appropriate, with the tribunal and the opposing party.

- (f) **Witness of fact** – in this capacity you will normally have been asked to provide testimony on oath or on affirmation as to something you saw, heard, experienced, said or did (i.e. evidence of fact). This includes the evidence which surveyors sometimes give, in addition to their opinion evidence, as to measurements they have made or examinations which they have carried out.

See also PS 1.2.

- 1.3 The PS emphasises and distinguishes the roles that a surveyor can adopt, in particular as an advocate or expert witness (or in a dual role in the same case, albeit at different times). The PS will apply whenever you express an opinion in your role as expert witness. The need for you to act as an expert witness and follow all the requirements of the PS will be determined by the rules of the relevant tribunal, by prevailing custom and the nature of the dispute: you, your client and any agreement or contract with the opposing party can influence whether you are obliged to comply with the requirements of the PS or not. A common misunderstanding is that it is always mandatory to act as an expert witness in proceedings before an independent expert (in an expert determination process). Whether the role of expert witness or surveyor-advocate is adopted will depend on the powers conferred upon the independent expert under a lease or other instrument, on the relationship between the parties' surveyors and upon any agreement between them and the independent expert. Nothing in the PS or this GN should be construed as suggesting that an independent expert has powers to mandate that presentations made to him or her **must** be in the form of expert evidence, as opposed to advocacy submissions. However, if, in the light of all circumstances, a surveyor **agrees** to present expert evidence rather than advocacy submissions, conformity with the expert witness PS is required.
- 1.4 The GN has been prepared against the background of comment emanating primarily from UK courts regarding the duties and responsibilities of expert witnesses (sometimes called 'skilled witnesses' in Scotland). Those duties and responsibilities are now referenced in, for example, the CPR, including their Practice Directions, Protocols, Forms, and court guides. It should be noted that in cases to which the CPR apply there may be additional and/or different requirements for surveyors acting as expert witnesses over and above those which apply in non-CPR cases and vice versa (e.g. an arbitrator might impose requirements over and above those required by the CPR).
- 1.5 (a) All surveyors are, as a matter of professional conduct, expected to comply with the applicable rules of tribunals, including the CPR, in those circumstances in which they apply, and to make themselves aware of the need to comply. The requirements of the CPR relating to expert witnesses are currently principally set out in the following:
- CPR Part 35 and its Practice Direction *Experts and Assessors*, including the *Protocol for the Instruction of Experts to give Evidence in Civil Claims*, produced by the Civil Justice Council (CJC);
 - CPR Part 22 and its Practice Direction (Statements of Truth);

- any relevant Pre-Action Protocols.

Various court guides contain commentary on expert witness matters (e.g. *The Admiralty and Commercial Courts Guide*, section H2 and Appendix 11; the *Chancery Guide*, Chapter 4; the *Queen’s Bench Guide*, section 7.9; the *Technology and Construction Court (TCC) Guide*, section 13).

- (b) This GN is not intended to provide a commentary on the CPR in particular, though it may serve as an aid to the interpretation of some of its provisions. The CPR, the Practice Directions, Forms, Protocols and the various court guides are subject to amendment, and to interpretation by the courts. Amendments are generally published from time to time online.
- (c) If you are acting as an expert witness in a case, you are advised to make yourself aware of the existence and effect of changes to the rules of the relevant tribunal.

1.6 (a) Impartiality of expert witnesses is of the utmost importance. By emphasising the expert witness’s overriding and primary duty to the tribunal when acting as an expert witness (see the **Principal message** in the *Preamble* of the PS, PS 2.1 and PS 2.3), the PS aims to assist in ensuring the independence and impartiality of the evidence given by the expert witness.

- (b) As regards the position of the expert witness in Scotland, although the characteristic of impartiality is not always expressed judicially in as strong terms as it is in other jurisdictions, any expert report prepared for the purpose of Scottish proceedings is required to be impartial, independent, truthful and complete as to coverage of relevant matters. An expert report lodged in a court, and assuming its content is not agreed, will not become the evidence in chief of the witness or otherwise serve as a substitute for oral testimony. Tribunals that do not follow the strict rules of evidence adopted by the higher Scottish courts may adopt a different approach. If you are acting in Scottish proceedings and are unfamiliar with Scottish practice and the approach to evidence in that jurisdiction, you are advised to seek further guidance from any client (or its legal adviser) and/or the tribunal in question, including as to applicable procedural requirements.

1.7 The obligation imposed upon you to make the existence of the practice statement known to the client when accepting instructions to act as expert witness (PS 3.3(b)) is intended to help reduce misunderstandings and remove pressures upon you as an expert witness to support your client’s case irrespective of your honest professional opinions. The obligation imposed on you by PS 5.1(i) to make a Statement of Truth, and the specified declarations of PS 5.1(j), are intended to assist in this respect.

1.8 A leading case setting out the duties and responsibilities of expert witnesses is *National Justice Compania Naviera SA v Prudential Assurance Co. Ltd* (The Ikarian Reefer) (1993) 2 Lloyd’s Rep 68. Though a case from the jurisdiction of England and Wales, the principles enunciated have, within the appropriate context, been followed or broadly endorsed in other UK jurisdictions (including Scotland). In the case Cresswell J said:

‘The duties and responsibilities of expert witnesses in civil cases include the following:

- a) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v Jordan* [1981] 1 WLR 246 at p 256 per Lord Wilberforce).
- b) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial Union Assurance Co. Plc* [1987] 1 Lloyd's Rep 379 at p 386 per Garland J and *Re J* [1990] FCR 193 per Cazalet J). An expert witness in the High Court should never assume the role of an advocate.
- c) An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup.).
- d) An expert witness should make it clear when a particular question or issue falls outside his expertise.
- e) If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that his opinion is no more than a provisional one (*Re J* sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth, without some qualification, the qualification should be stated within the report (*Derby & Co. Ltd and Others v Weldon and Others*, (No. 9) *Times*, 9 November 1990 per Staughton LJ).
- f) If, after exchange of reports an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and, when appropriate, to the court.
- g) Where expert evidence refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the *Guide to Commercial Court Practice*).

1.9 The PS and this GN apply the above principles and also much of the approach to expert evidence which underlies the relevant parts of the CPR. Those acting as expert witnesses in Scotland are recommended also to acquaint themselves with a number of Scottish court cases:

- *Davie v Magistrates of Edinburgh* [1953] SC 34
- *Elf Caledonia Ltd v London Bridge Engineering Ltd* [1997] ScotCS 1
- *Dingley v Chief Constable Strathclyde Police* [1998] SC 548
- *Karling v Purdue* [2004] ScotCS 221
- *McTear v Imperial Tobacco* [2005] 2 SC 1 (see paras 5.1–5.19 of opinion)
- *Amy Whitehead's Legal Representative v Graeme John Douglas & Anor* [2006] ScotCS CSOH 178.

1.10 Where relevant, surveyors would be expected to take proper account of other practice statements, guidance notes and codes produced by RICS when giving expert evidence in relation to any matter. For example, surveyors involved in

dilapidations disputes are recommended to be familiar with the guidance note *Dilapidations*; surveyors involved in boundary disputes are advised to have regard to the forthcoming second edition of the guidance note *Boundaries: Guide to Procedure for Boundary Identification, Demarcation and Disputes in England and Wales*, once it is published; and surveyors involved in rating matters are advised to have regard to the *Rating Consultancy Code of Practice* and *Rating Appeals* guidance note.

GN 2 General duties

- 2.1** The various tasks that may be undertaken as an expert are to:
- (a) assist a party to establish the facts and to assess the merits of a case and help with its preparation;
 - (b) define and agree issues between the parties;
 - (c) help quantify or assess the amount of any sum in dispute and identify an appropriate basis on which a case might be settled;
 - (d) give expert (opinion) evidence to the tribunal (which may be based upon and incorporate evidence of fact), where opinion evidence apart from that of an expert witness would not be admissible; and
 - (e) conduct enquiries on behalf of the tribunal and report to that body as to findings (this would not normally apply in Scotland where an expert is normally instructed by one of the parties to an action).
- 2.2** Upon accepting an instruction to act as an expert witness, you assume a responsibility to the tribunal and to RICS to provide truthful, impartial and independent opinions, complete as to coverage of relevant matters. To that end it is recommended that you be satisfied, prior to accepting the instruction, that you have the experience, knowledge, expertise and resources to fulfill the task specified within any allocated time span.
- 2.3** If you cannot fulfill the criteria in PS 3.1, PS 3 makes it clear the instruction should be declined. Where appropriate, it is recommended that you advise the client of the possible need to employ additional expertise and make the client aware of the advantages and disadvantages of acting in such circumstances.
- 2.4** It is imperative that you fully understand and accept that, while an instruction to provide expert evidence may originate from a particular client, your duty to the tribunal overrides any duty to the client. PS 3.3(c) makes it obligatory to bring this to the client's attention.
- 2.5** You are entitled to give expert evidence on behalf of your employer (see PS 2.5). The difficulty that you can face is that it may be said that less weight should be attached to your evidence because you have a conflict of interest arising out of your employment. In order to address this risk, if you wish to act as an expert witness in these circumstances, it is recommended that you are in a position to satisfy the tribunal that you have a proper understanding of the requirements imposed upon an expert witness giving evidence, and that your employer understands that your overriding duty is to the tribunal. How this is done is a matter for you and your employer. It is recommended that the nature of the employee's duty when acting as an expert witness is recorded in writing by you and acknowledged in writing by the employer. Nothing in this paragraph, or the PS, should be construed as implying that an employed

surveyor giving expert evidence on the instructions of his or her employer is not capable of giving unbiased, truthful expert evidence.

- 2.6 Where you are acting, or have previously acted, on a matter (e.g. in the course of negotiations, and/or as advocate), the implications of your duties to the tribunal as an expert witness may not be acceptable to the client and in such instances it would be advisable to consider declining instructions.
- 2.7 Failure to comply with the directions or orders of a tribunal, or applicable rules, or any excessive delay attributable to the expert witness, may result in your client being penalised in costs or being prevented from putting the expert evidence before the tribunal. Some courts have made orders for costs directly against expert witnesses who cause significant expense to be incurred, if doing so in reckless and blatant disregard of their duties to the court. See also GN 22.5.
- 2.8 In a construction dispute that proceeds to a reference to a tribunal, you may provide as evidence an interim valuation or final account or other documentation that you have prepared as a part of a previous negotiation. That evidence may include your own opinion as to rates and prices or other matters. For the avoidance of doubt, you are subject to the requirements of the PS where such evidence of opinion is placed before the tribunal.
- 2.9 PS 3.3(b) requires you to make a written offer to supply a copy of the practice statement to a prospective client. For this purpose a stand-alone version of the practice statement is available to members to download from www.rics.org.

GN 3 Advice and disclosure

- 3.1 Surveyors, as experts in their field, may be asked to provide initial advice (e.g. to assist in the identification and scoping of, or limitation to, any claim) to a client prior to being instructed to provide evidence as an expert witness for presentation to a tribunal. A variety of situations exists where a party may seek advice from you before a dispute has arisen or before litigation is contemplated, or even during litigation. Generally, where a party has engaged you for purposes other than the giving or preparation of expert evidence and it is not intended that you may later be instructed to do so, you may be referred to as an 'adviser' rather than an 'expert witness'. Generally, all such initial advice is given within the normal client/professional adviser relationship, rather than within the markedly different relationship that exists if you are acting as an expert witness.
- 3.2 If such initial advice is in relation to a dispute that might have to be resolved by a tribunal, then you need to be aware that the advice may be liable to disclosure in proceedings and might prejudice the interests of the client. Simply copying or delivering the advice to the client's solicitor or lawyer advocate (where it has one) is unlikely of itself to be sufficient to prevent such disclosure. If in doubt, it is recommended that legal advice be sought on the question of disclosure. Before accepting instructions to act as an expert witness, it is recommended that you advise the client (where that party is not an instructing lawyer) that communications generated between the client and yourself as surveyor may not be protected by litigation privilege and subsequently may have to be disclosed to the opposing party. Disclosure *per se* does not exist in Scotland,

however, in some cases rules do allow for a party to apply for ‘commission and diligence’ (i.e. disclosure) of documents that are deemed to be relevant to the dispute. Therefore, care should also be taken in such instances when generating communications between you as surveyor and the client (where the latter is not an instructing lawyer acting in a professional capacity).

- 3.3** In cases to which the CPR apply, there is a specific rule that the duty of each expert witness is to help the court on the matters within his or her expertise, such duty overriding any obligation to the person from whom they have received instructions or by whom they are paid (CPR 35.3). The PS contains a similar requirement (PS 2.1) (which also applies in non-CPR cases); expert witnesses may therefore be obliged to make statements to a tribunal, or even in ‘without prejudice’ meetings of expert witnesses, which might be prejudicial to a client’s case.

GN 4 Duties to the tribunal

- 4.1** If you are not entirely confident that any of the duties referred to in PS 2 can, for whatever reason, be properly fulfilled (or, having been instructed, that any such duty can continue to be properly fulfilled) you would normally be advised to decline instructions to act as an expert witness, or cease acting, having first discussed the matter with your client.

GN 5 Instructions and inspections

- 5.1** (a) When you initially receive instructions, or at any later stage, it is recommended that you notify those instructing you as soon as possible where:
- (i) instructions may not be acceptable (e.g. where deadlines are unrealistic or instructions are unclear);
 - (ii) instructions are, or become, insufficient for the completion of your task;
 - (iii) you become aware you may not be able to fulfill one or more of the terms of your engagement; or
 - (iv) you consider that your instructions and/or work are likely to have placed you in conflict with your duties as an expert witness.
- It is advisable that you seek appropriate variations, additional resources and information in these circumstances, wherever possible.
- (b) Prior to acceptance of instructions, you are recommended to:
- (i) check that the instructions contain basic relevant information (e.g. names, contact details, dates of incidents, etc.), including the identity of the parties to the dispute;
 - (ii) ascertain the name of the party you are to be instructed by;
 - (iii) ascertain the identity of the tribunal;
 - (iv) identify the type and purpose of evidence likely to be required and be satisfied that you have the necessary experience, knowledge and expertise to carry out the task;

- (v) check that a reasonable attempt has been made to identify the significant issues in the case and whether dates of any hearings/conferences are set out; and
- (vi) consider and decide whether any conflicts of interest would arise, or might be perceived to arise, if you were to be instructed.

5.2 A conflict of interest may arise, or be perceived to arise, out of a previous or current involvement with, for example, any party, dispute, or property, such that it would cause you to be unable – or be seen by a reasonable and disinterested observer to be unable – to fulfill your responsibility to be independent and to be able to act impartially.

A conflict of interest could be of any kind, including:

- a financial interest (e.g. other management fees or financial benefits that you or your firm gain from contracts in place);
- a personal connection; an obligation (e.g. as a member or officer of some other organisation);
- links to a business in competition with one of the parties to the dispute.

It is not possible to prescribe in advance a list of all such circumstances. Particular care should be taken where you have an established business, social or personal relationship with someone who might be affected by, or otherwise involved in, the dispute.

Where a conflict or potential conflict of interest arises, PS 3.3(e), PS 3.6 and – in the case of an SJE – PS 8.7 specify actions that are to be taken.

5.3 For details of the requirements to establish clear instructions and for terms of engagement, see PS 3. If standard terms of engagement are used, it is recommended they are attached to the acceptance of instructions. If in a particular case your standard terms are varied, it is advisable such variations be explained at the time. *Appendix A: Sample Terms of Engagement* serves as a guide and may be adapted for personal use (see also the copyright notice on page 1).

5.4 Circumstances may exist or arise where you may consider that part of your instruction may require, or necessitate assistance from, another person. In such circumstances it is recommended that you notify the client in a timely manner and give the name of the individual recommended to be engaged, together with information as to that person's experience, qualifications and expertise (see PS 3.3(d)).

5.5 In cases to which the CPR apply, you may file a written request to the court for directions to assist you in carrying out your function as an expert witness (CPR 35.14). You are recommended to give due consideration to making reference in your terms of engagement to the possibility of such an application and, when contemplating making an application to the court for directions, to any costs implications/possible judicial penalties. It is normally advisable for such a request to the court to be discussed with the client in advance. Care is advised to be taken to ensure that privileged or 'without prejudice' material is not disclosed during such an application (see Chancery Guide para 4.19; and Queen's Bench Guide at para 7.9.10). Unless the court orders otherwise, a request for directions will be copied to the client at least seven days before filing any request and to all other parties at least four days before filing it. The

court, when it gives directions, may direct that a party be served with a copy of the directions (see CPR 35.14(3)). It is recommended that the client be made aware, before instructions are accepted, of the expert witness's rights under such provisions.

5.6 In cases to which the CPR apply, an expert witness instructed by one party may have written questions about the expert's report put to him or her by another party (see GN 9). It is recommended that the client be informed, before instructions are accepted, of the effect of this part of the CPR, and that you make it clear that you would be under a professional duty to reply to such questions unless it is not reasonable for you to do so.

5.7 You are recommended to indicate a likely reporting programme to the client. This programme will vary according to the assignment, but might follow three phases:

- (a) Initial report: you may provide a report setting out relevant opinions relating to the assignment. If your opinions are not accepted, assuming that the report is competent and researched, you may wish to consider withdrawing from the assignment.
- (b) Proof of evidence: this may also involve supplemental proofs or counter-proofs together with joint meetings of experts. This is often likely to take the form of an additional or extended report(s) in Scotland where witness statements are not normally lodged with the tribunal or exchanged with other parties to the proceedings.
- (c) Giving evidence orally to a tribunal.

All three phases may involve conferences with advocates or meetings with solicitors; advice given by you, whilst ancillary to the expert witness role, may not be given as an expert witness. For example, the person appointed may be asked by the advocate to advise on questions for a matching expert witness's cross-examination or to comment upon matters raised in matching evidence. In such circumstances you are not giving evidence, nor acting as a surveyor-advocate yourself, but instead giving professional advice to help another in advocacy.

5.8 PS 5.1(b) mandates that your report states the substance of all material instructions, whether written or oral. In cases to which CPR apply, those instructions are not privileged against disclosure. However, the court will not, in relation to those instructions, order disclosure of any specific document or permit any questioning in court other than by the party who instructed the expert, unless it is satisfied there are reasonable grounds to consider the statement of instructions given to be inaccurate or incomplete, or unless the party who gave the instructions consents to it. If this is the case, the court will allow cross-examination where it appears to be in the interests of justice to do so (see generally CPR 35.10 and the Practice Direction to Part 35). Subject to CPR 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings (CPR 31.14(2)). Such a right does not exist in that form in Scottish court proceedings where inspection will instead turn on the extent to which the document is founded upon in the pleadings, or otherwise is established as being relevant to the matters in dispute. You are advised to inform those instructing you of these matters, should they arise, in a timely manner.

- 5.9 Where your instructions are, or may be perceived to be, in conflict with your duties (e.g. because of a conflict or perceived conflict with your duty to the tribunal, through incompleteness of instructions or information being supplied), it is recommended that you consider withdrawing from the case. If proceedings have already been commenced, you may first wish to consider whether it would be more appropriate to make a written request for directions regarding the matter from the tribunal.
- 5.10 PS 4 concerns any inspection of property/facility related to the subject of the dispute. However nothing in PS 4 precludes you from providing an appropriately qualified opinion in the event that access to the property is impractical, or severely limited, after all reasonable efforts have been made by you (or on your behalf) to secure such access. It is recommended that you state the date or dates upon which a property was inspected and clearly state the extent of such access as was obtained.

GN 6 Purpose of expert evidence

- 6.1 The purpose of expert evidence is to assist or enable the tribunal to form its own independent judgment in respect of a particular matter. Therefore, the expert evidence given must provide all necessary detail from which your opinions and conclusions have been drawn in order to enable the tribunal to judge the appropriateness of those conclusions based upon the facts submitted.

GN 7 Evidence of fact

- 7.1 You may be required to assist the tribunal in establishing, clarifying and ordering logically, relevant facts. Insofar as you provide such assistance you are acting in the role of witness of fact, and this role does not include the expression of opinion, which is the domain of the expert witness. You should fully understand this fundamental distinction and are advised to ensure you recognise each role's distinctiveness. In addressing questions of fact and opinion, you should keep the two separate and discrete.
- 7.2 The duty to the tribunal (that is most emphatically spelt out in the CPR in England and Wales) takes precedence over any contractual, professional or other duty and this may, on occasions, conflict with confidentiality agreements. Evidence subject to confidentiality agreements cannot be ignored simply by virtue of the existence or assumed existence of such an agreement; advice should be sought before disclosing confidential information.
- 7.3 It is usual for those instructing expert witnesses to provide them with facts, literature or other material, which the expert witness may adopt if relevant to the matters with which he or she is dealing. As the PS indicates, these, and any other facts, literature or material which you establish for yourself and to which you have regard in forming any opinion, are to be set out in the report either fully, or by cross-reference to other documents which will be made available to the tribunal. Accordingly, it is advisable that any written report to be lodged before a tribunal includes a full schedule of the documents upon which you have relied and, where necessary, copies of such documents or the relevant portions thereof. The originals of all documents relied upon need to be available for inspection by other parties to the dispute and, unless agreed by the parties, by the tribunal. It is recommended therefore that you be sufficiently

aware of the holders of all such documents. As indicated previously, reference to such documentation in any report prepared in relation to court proceedings in Scotland will not alter the normal rules relating to the recovery or disclosure of such material. There is no automatic requirement in such court proceedings for such material to be made available for inspection by other parties to the dispute or by the tribunal. Within the report you should give the source of factual information relied upon (see PS 5.1(c) and (d)).

- 7.4 Expert witnesses would be expected to carry out such factual research as they consider necessary to fully discharge their obligation to the tribunal including, where appropriate, inspection of any property/facility involved.
- 7.5 It is recommended that you give sufficient explanation of what you have done in ascertaining and checking facts to enable the tribunal to be satisfied that you have fully discharged your obligations.
- 7.6 (a) Where ordered by a tribunal to communicate with the other expert in order to attempt to agree facts and clarify, narrow or resolve the issues in dispute (see PS 7.1), you are recommended to request from your client a copy of any order or direction relating to such requirements (see also CPR Practice Direction 35 *Experts and Assessors*, para. 6A).
- (b) The purpose of PS 7.3 is to encourage you – particularly in the absence of specific instructions from your client – to raise the issues specified in PS 7.3 with your client, with a view to facilitating a speedier resolution of the dispute. Factors you may wish to take into account when fulfilling PS 7.3’s mandate may include (but might not be limited to):
- (i) the commercial interests of your client in advancing or retarding the outcome of the dispute;
 - (ii) the likely costs of taking the steps in question at an early stage, compared to the costs at a later stage when the matter may have become more (or less) contentious;
 - (iii) the tactical advantage of being seen to have a well prepared case; and
 - (iv) the role that early discussions may have to play in prompting a settlement with the other party.
- 7.7 If you are in doubt about the admissibility (e.g. possibly because it is privileged) of any fact or statement upon which you are relying, it is recommended that you seek legal advice. Hearsay evidence is admissible in civil proceedings, provided that certain rules are followed (see *Appendix B: Hearsay evidence*). If you are in any doubt about use of hearsay evidence it may prove valuable to seek legal advice.

GN 8 Expert (opinion) evidence

- 8.1 Where an opinion has been formed based on incomplete knowledge of facts, then PS 5.1(f) expects such limitations to be stated fully in the evidence.
- 8.2 Differences of opinion between expert witnesses often occur due to the detail of facts and to the assumptions upon which they are relying being different; such differences need to be set out for the tribunal (see PS 5.1(f) and (g)).

- 8.3 It is recommended that you do not express, as your own opinion, an interpretation of statute or case law unless qualified to do so. You may, however, state an understanding of the point of law as a basis on which your conclusions on other questions are provided.

GN 9 Questions to expert witnesses and answers

- 9.1 In cases to which the CPR apply, a party may put written questions to an expert witness instructed by another party, or to a Single Joint Expert (see also GN 17). Unless the court gives permission, or the other party agrees, such questions:
- (a) may be put once only;
 - (b) must be put within 28 days of service of the expert's report; and
 - (c) must be for the purpose only of clarification of the report.
- (See CPR 35.6; Practice Direction 35, paras 5.1 and 5.2.)
- 9.2 An expert witness's answers to the questions will be treated as part of the expert witness's evidence, and the PS and GN will continue to apply to such work by the expert witness. It is recommended that you copy your answers to your own client and be aware that your general duties will apply to your provision of answers.
- 9.3 Your client must pay any fees charged by you for answering the questions. However, this does not affect any decision of the tribunal as to the party who is ultimately to bear your costs.
- 9.4
- (a) It is recommended that you send any questions you receive from the other party to your client and, if appropriate, ask for further instructions. Where you are of the view that a question put to you is not aimed at clarification of your report, is disproportionate or has been put out of time, it is recommended that you refer to your client, giving reasons for not answering the question(s). If the client fails to resolve the problem or fails to approach the court for directions, you can consider the option to make a written request to the court for directions (see CPR 35.14 and para. 16.4 of the *Protocol for the Instruction of Experts to give Evidence in Civil Claims*).
 - (b) Where you do not answer the questions put to you without good cause, you should be aware that the tribunal may order either that the party who instructed you may not rely on your evidence, or that the party may not recover your fees and expenses from any other party, or it may make both orders.
- 9.5 It is recommended that the possibility of requesting directions from the tribunal (see also PS 8.4 and 8.6, and GN 5.5 and 17.5) ought only to be exercised where the tribunal's involvement is strictly necessary. A party's expert witness may not agree to more than one exchange of questions and answers, unless believed to be absolutely necessary, since a tribunal may subsequently consider whether such further exchanges and the party's conduct (and that of its expert witness) were justified, and may exercise its discretion on costs accordingly.

- 9.6** A request to the tribunal for directions by letter would normally, for CPR cases, be on written notice of at least seven days to the client and at least four days to the other party. The request would normally contain:
- (a) the title of the claim;
 - (b) the reference of the claim (claim no.);
 - (c) the full name of the expert witness;
 - (d) details of why directions are being sought; and
 - (e) copies of any relevant documents.

GN 10 Documents

- 10.1** Any evidence given by you will, almost invariably, be based upon documents either provided to, or held by, you. If when acting as an expert witness you are passed papers or materials expressed to be ‘privileged’ and it is not clearly indicated that the client has decided that privilege has been waived therein, it is recommended that you either (whichever is more appropriate) immediately verify the status of the materials without reading the papers, or return the papers unread with an explanation for their return. The position is somewhat different in Scotland where the provision of such documentation will not alter the normal rules relating to the recovery or disclosure of such material; it is therefore suggested that you discuss the status of such materials with the client and any legal adviser rather than simply returning them, as expert witnesses will often receive copies of precognition statements which, although privileged, are provided so as to enable the expert witness to understand the factual basis upon which they are being asked to opine.
- 10.2** When accepting instructions, it is recommended that you request details of all relevant documents and, if you consider it necessary, ask to inspect the client’s files to satisfy yourself that these have been supplied.
- 10.3** Documents from your own resources often provide useful factual information upon which to rely. Such documents might include text, published material, photographs, plans, the opinion of others, codes of practice; and RICS practice statements, guidance notes, codes and information papers.
- 10.4** During the course of your enquiries you may be made aware that other documents exist which might be of relevance but not be available. In such circumstances, where applicable, it may be necessary for you to consider taking advantage of the provisions of CPR 35.14 and CPR 35.9, and/or to seek legal advice regarding the procurement of such documents.

GN 11 Oral evidence

- 11.1** In many instances where you are required to give oral evidence, such evidence will be given under oath or affirmation but, whether or not such oath or affirmation is required, oral evidence must always be impartial, independent and your truthful and honest opinion (PS 2.1). If you do not know the answer to a particular question, it is recommended that you say so rather than endeavour to give an answer that might prove to be incorrect or misleading.
- 11.2** Preparation is important and it is recommended that you:
- (a) ensure that appropriate arrangements have been made so that all documents necessary for proving your evidence are available;

- (b) remind yourself of the detail of any written evidence which you have previously presented, and also of the detail of the contents of files, as specific points may need to be addressed before and during the hearing, including while giving evidence.
- 11.3 You should bear in mind that if you refer to documents or notes whilst giving evidence, the advocate or the tribunal can request sight of those documents or notes. This includes annotations on such documents or notes.
- 11.4 Where you have to refer to bulky material in your evidence, or to video, film or other screen-based material, it is your responsibility to ensure that appropriate arrangements have been made in a timely manner to enable such material to be communicated to the tribunal.
- 11.5 When giving evidence, you will be questioned by advocates. However, all answers are expected to be addressed to the tribunal. Concise answers are preferable, but you should not let advocates prevent a full answer being given.
- 11.6 Adjournments of the hearing (whether for lunch, overnight or longer periods) can sometimes occur. While you are under oath or affirmation you are not permitted to discuss the case with anyone during those adjournments, i.e. the expert is in seclusion. This restriction includes your client and client's advisers, advocates, fellow experts and colleagues. Adjournments between hearing dates can be lengthy, and in such instances you are advised to be alert to requesting that you be released from the restriction immediately before the hearing is so adjourned.

GN 12 Advising advocates

- 12.1 As an expert, you may be required to advise advocates.
- 12.2 Immediately prior to any hearing it is not uncommon for advocates of opposing parties to discuss between themselves aspects of the case, including possible compromise solutions. Expert advice is often needed during such negotiations and you therefore need to ensure that you are available well before the hearing is due to begin. Such advice is not expert evidence.
- 12.3 During the hearing the advocate may wish to consult with you, the expert witness, while other witnesses are giving evidence, especially during cross-examination. It is important that you establish whether the advocate wishes you to be available for such consultation. The expert is often asked to sit immediately behind the advocate in order that he or she can be consulted directly during the proceedings.
- 12.4 Expert witnesses not under oath or affirmation are commonly required to discuss other matters relating to the case with advocates during adjournments. An expert witness should not expect to have free time during adjournments (except to another day).

GN 13 Expert witnesses' written reports

- 13.1 It is recommended that your report be addressed to the tribunal and not the party from whom your instructions originate. Your written report as an expert

witness surveyor should ideally be presented in an organised, concise and referenced way, distinguishing (where possible) between matters of plain fact, observations upon those facts, and inferences drawn from them. It is recommended that you use plain language and, wherever use of technical terms is necessary, explain such terms to aid the understanding of the tribunal. It is advisable not to use words, terms, and/or a form of presentation with the deliberate intention of limiting the ability of readers from checking the correctness of any statement, calculation or opinion given. As regards your summary of conclusions, there may be circumstances where it would be beneficial to the tribunal to place a short summary at the start of the report while giving full conclusions at its end. The tribunal may find it easier to understand the flow of the report's logic if an executive summary of the report has been provided at the outset.

- 13.2 In PS 5.1 the Statement of Truth (PS 5.1(i)) and declaration that the expert witness understands his or her duty to the tribunal (PS 5.1(j)(ii)) can follow each other or be combined into a sole declaration if desired.
- 13.3 The requirement in PS 5.1(g) is directed primarily to issues of practice or principle on which there exists a known and acknowledged range of opinion between experts in the field, or different schools of thought (e.g. in the valuation arena, on the use of All Risks Yield valuation methodology compared with Discounted Cash Flow methodology). It does not mean that on every occasion on which you think that another expert witness might disagree with you, you are specifically required to say so and go on to say what view another expert witness might hold and why the expert witness takes the view he or she does. Nonetheless, your duty to the tribunal requires you to put forward a fair and balanced assessment. This includes identifying any points that can fairly be made against the expert witness and saying why they do not cause you to change views.
- 13.4 It should be noted that the requirements in PS 5.1 may be varied or supplemented by, for example, various court guides or the rules or directions of a particular tribunal.
- 13.5 It is recommended that you keep matters of fact and opinion separate and discrete.
- 13.6 If you have relied upon extensive documents, it is recommended that a chronological schedule of these, incorporating a summary of their content, be placed in an appendix to assist readers. It is advisable that copies of key documents are cross-referenced to relevant parts in the report and annexed to the report if practicable or required.
- 13.7 If after disclosure of your report you identify a material inaccuracy, omission or have a change of opinion on any matter, it is recommended that (where possible) you consult your client before taking further action. Where you have changed your opinions and are to amend your report, a simple signed memorandum/addendum to that effect will usually suffice.

GN 14 Form and content of an expert witness's written report

- 14.1 This section gives guidance on the structure and scope of the content of a typical report by an expert witness. It is usually helpful to tribunals if

paragraphs and pages within the report are numbered. It is recommended that any documents or supporting materials on which you rely be listed in any report you prepare and adequate reference should be given to enable them to be identified. Where appropriate, regard should be had to any specific report requirements of particular tribunals. Some variations to this structure will be appropriate on occasion, to take account of:

- (a) any prior agreement between the parties as to the order in which the various issues are to be addressed (and possibly determined);
- (b) any direction of the tribunal as to the procedure or as to the order in which the issues are to be considered; and
- (c) any statutory material or official guidance as to the procedure applicable in particular types of proceedings.

14.2 It is advisable that the front sheet reveal, not obscure, the name of the expert witness, and reference the proceedings and tribunal; the nature of the evidence; the instructing party and client; the subject/title of the report; and the date of the report. It would usually be entitled 'Report', or where appropriate 'Supplemental Report', 'Amended Report', or 'Further Amended Report'.

14.3 Thereafter, the report often takes the following form:

(a) **Introductory material**

- (i) a brief résumé of the experience, qualifications and expertise of the expert witness (commensurate in detail with the nature and complexity of the case). A fuller description/CV can be attached as an appendix;
- (ii) the names of the persons to be referred to in the report, together with a short description of their respective roles;
- (iii) a brief outline of the nature of the dispute;
- (iv) all material instructions;
- (v) chronology as to the expert's involvement in the case and a chronology of relevant events, where such a history exists; and
- (vi) the issues that the expert proposes to address in the report (you may wish to number them) and an executive summary of the main report.

No opinions are expressed in this section. As regards the statement/description of experience and qualifications (including by way of any CV attached), it is important you check that all such description and text is accurate and up to date.

(b) **Enquiries made by the expert witness and the facts upon which the expert witness's opinion is based**

For example, this section (which is factual only) might include a description of inspections or surveys carried out, a note of those present, and the findings reached. The description is usually given in itemised subparagraphs, with subheadings as appropriate.

This section of the report would also:

- (i) distinguish between facts which the expert witness has been told to assume, those provided which the expert witness has chosen to assume, and those the expert witness has established for him or herself (or those others acting on his or her behalf have established);

- (ii) identify the various sources of facts and material provided to and derived by the expert witness; and
- (iii) list the documents upon which the expert witness relies in the report, and provide references to enable their identification.

Where the parties have also agreed a statement of facts, the opportunity may be taken to highlight those facts which could not be agreed, but which are important enough to be mentioned.

Where asked to make an assumption, it is advisable to indicate your belief that it is unreasonable or improbable (i.e. qualify the point as necessary) as the case may be.

(c) **Opinions and conclusions**

This would give the expert witness's opinion on each issue (in particular the expert's response to any specific questions asked by the client) and the reasons in full on each of them in turn. It may be helpful on occasion to place a short summary of conclusions at the beginning of the report, with full conclusions at the end.

(d) **Statement of Truth, declarations, and signature**

The Statement of Truth and declarations must be included as per the stipulations in the practice statement (see PS 5.1(i) and (j)), along with the signature of the writer and the date (PS 5.1(k)).

(e) **Appendices**

Appendices may include, for example, CVs, plans, photographs and other materials. It is recommended that you do not annex more than is reasonably necessary to support the opinions given in your report.

GN 15 Meetings between the expert witness and the lawyer

- 15.1 The bringing together of the lawyer and the expert witness as early as possible is to be encouraged. This enables the strengths and weaknesses of your report, and the client's case, to be evaluated. It may result in you wishing to make changes to the report, and/or the client wishing to settle the matter.
- 15.2 You must remember the duty in providing expert evidence is that it is your truthful, independent and impartial opinion being put forth, and not the views of the client, lawyer or a collegiate approach of those involved in preparing the case.

GN 16 Narrowing differences and meetings between experts

- 16.1 (a) PS 7 aims to facilitate earlier settlement and reduction of costs by mandating a proactive and cooperative approach amongst opposing surveyor expert witnesses. An obvious way to achieve this is to hold a meeting with your counterpart, in order to achieve a greater understanding, and resolution, of issues in dispute. Such meetings offer the opportunity to pool relevant technical information, to identify areas of disagreement, and to see how those areas may be narrowed or eliminated altogether. Points of disagreement may usefully be presented

by means of a *Scott Schedule* (see *Appendix D: Definitions*). Even if this process does not result in a settlement of the dispute, it may well lead to shorter, clearer reports, and save time, thereby reducing costs. It can also be useful for combined meetings to take place that include expert witnesses for each side from various disciplines.

- (b) It is generally best if such meetings occur before reports intended for disclosure are written, as expert witnesses can tend to be slow to alter opinions thereafter and time can be wasted. An exchange of skeletal reports before such meetings may assist the process. It is recommended that you approach experts' meetings with a willingness to listen, and be cooperative and constructive, otherwise the worth of such meetings can be devalued. In a court context, it is generally expected that the claimant's expert witness is the convenor of such meetings (or of the first such meeting at least). Neutral territory (or 'on-site') may be preferred venues. It is useful to pre-agree a broad agenda – identifying any relevant material you intend to introduce or rely on in discussions – and to agree and jointly sign minutes after the meeting, to avoid misunderstandings later. You are reminded of the obligation upon you under PS 2.7 to avoid maligning the professional competence of your opposite number.

- 16.2 In some circumstances, such experts' discussions and meetings may be required by the tribunal (and indeed the CPR expressly provide for this). An expert witness in the courts in England and Wales is expected to be aware of the overriding objective that courts deal with cases justly, taking into account proportionality, expeditiousness and fairness (CPR 1.1) and it is advisable to bear this in mind in terms of the arrangements for experts' meetings. In the field of town and country planning, there is a statutory requirement (by virtue of the appropriate *Inquiries Procedure Rules*) for the opposing parties to prepare and agree a *Statement of Common Ground* on a statutory timetable ahead of any public inquiry, such statement containing agreed factual information about the proposal which is the subject of the inquiry.
- 16.3 In cases to which the CPR apply, parties' lawyers will not usually be present at such meetings unless all parties agree, or the court so directs (see para. 18.8 of the *Protocol for the Instruction of Experts to give Evidence in Civil Claims*, and, for example, the TCC guide, para. 13.5.2).
- 16.4 The discussions between the experts at such meetings will ordinarily be 'without prejudice' (although it is advisable to confirm this beforehand), and may not therefore be referred to subsequently in the absence of agreement. In the context of court proceedings in England and Wales, such agreement between experts does not bind the parties unless they expressly agree to be bound by it (see CPR 35.12(4)). It should be noted that such provisions may be varied or supplemented by the rules and directions of a tribunal. It is recommended that, in advance of any such discussion or meeting taking place, the expert witness discuss with the client and any legal adviser the purpose of the discussion or meeting, having regard to the terms of any order or direction by a tribunal, where available.
- 16.5 It is usually desirable that at the end of any 'without prejudice' meeting between expert witnesses, irrespective of whether a tribunal has so ordered, a

statement be prepared setting out those issues agreed and those not, and the underlying reasons, as well as a list of new issues arising or further actions to be taken or recommended.

- 16.6** With the consent of your client, you may step outside the expert witness remit to conduct ‘without prejudice’ meetings to explore and possibly settle differences as to facts and opinions.

GN 17 Single Joint Expert

- 17.1** In cases to which the CPR apply, where parties wish to submit expert evidence on a particular issue the court may direct that evidence on that issue is to be given by a Single Joint Expert (SJE). In general terms, the matter is one for the court’s discretion having regard to all circumstances. The duties and responsibilities to the tribunal of a surveyor acting as a Single Joint Expert (SJE) are, in general, largely the same as for any other surveyor acting as an expert witness. Where the instructing parties cannot agree who should be the SJE, the court may either select the SJE from a list prepared or identified by those parties, or specify that the SJE be selected in such other manner as the court may direct. Each party may give instructions to the SJE but should, at the same time, send a copy of the instructions to the other instructing parties (see also CPR 35.8). Court rules in Scotland do not provide for the appointment of SJE as such. However, a court can appoint its own expert witness to examine reports or other evidence, and in such circumstances, the expert’s primary duty will be to the court. That expert’s duties otherwise will be similar to those of the SJE as detailed in PS 8.
- 17.2** The court may give directions about the payment of the SJE’s fees and expenses, and any inspection, examination or experiments which the SJE wishes to carry out. The court may, before the SJE is instructed, limit the amount that can be paid to the SJE by way of fees and expenses, and direct that the instructing parties pay that amount to the court. Unless the court otherwise directs, the instructing parties are jointly and severally liable for the SJE’s fees and expenses.
- 17.3** There is no specific deadline by which an SJE must be appointed, but it is likely that any appointment, if made, will be fairly early on in the life of the proceedings, especially in less complex cases.
- 17.4** In order to give competent instructions to an SJE, and/or to put pertinent written questions to him or her (see GN 9.1), it will be necessary for the parties to have a clear idea of the case they wish to establish or defend. This may involve taking separate advice from their own expert witnesses prior to instructing, or putting questions to, the SJE.
- 17.5** As an SJE you are recommended to ensure that you are clear as to what you are instructed to do and the issues you are to address. You are recommended to ask the parties for a copy of any court order under which your appointment is being made. You are also recommended to act even-handedly in your dealings with the parties and to keep them all informed of material steps being taken by, for example, copying correspondence to the parties. It is prudent to minimise or avoid telephone contact with the parties and rely instead on written communications that can more easily be copied to all parties at the same time.

If there is any uncertainty, or your instructions conflict in a material respect, it is advisable to seek clarification with the parties. If they are unable to agree, it is recommended that you consider an application to the court for directions. It is also recommended that you give due consideration to making reference in your terms of engagement to the possibility of such an application and, when contemplating making an application to the court for directions, to any costs implications/possible judicial penalties.

- 17.6 An SJE is an expert witness for the purposes of the provisions of the CPR relating to expert witnesses. It follows that, for example, your report must comply with the requirements of the CPR; the parties may put written questions to the SJE; and the SJE may ask the court for directions. Any meeting or conference attended would normally be a joint one with all instructing parties (unless the parties have agreed otherwise or the court has so directed).
- 17.7 An SJE's answers to questions put will be treated as part of the expert witness evidence, and are covered by the Statement of Truth.
- 17.8 Inasmuch as conflicting instructions may lead to different opinions, your report will need to contain multiple opinions on any issue, taking account of different assumptions of fact.

GN 18 Expert evidence, advocacy and 'a dual role'

- 18.1 Undertaking the two roles of expert witness and surveyor-advocate before many tribunals is prohibited as surveyors have no general right, by virtue of their status as surveyors, to appear as advocates in such cases (though an individual might be able to act by virtue of legal qualifications and of rights of audience gained under section 27 of the *Courts and Legal Services Act 1990* or similar provisions).
- 18.2 In certain tribunals some surveyors do adopt a dual role, i.e. act in the same case (but not at the same time) as surveyor-advocate and expert witness. PS 9 obliges you to consider the permissibility and appropriateness of undertaking a dual role in the same case.

The principal advantages and disadvantages of the dual role may be summarised as follows:

- (a) The dual role may avoid or limit expense and delay, and therefore be a proportionate response to the circumstances of a case and the needs of the client.
- (b) The weight to be attached to the evidence given by you as an expert witness, and to the submissions you make as surveyor-advocate, may be adversely affected if the dual role of surveyor-advocate and expert witness is undertaken.

It is always imperative to understand the distinction between the two roles and that it is impossible for both roles to be carried out at the same time. The PS obliges you to distinguish at all times which role you are undertaking. On occasions where surveyors undertake the dual role and fall below the necessary standards required of each role, the effect can be adverse, leading to the case being much weakened and often to criticism of the surveyor by the tribunal (which may also then be available to the client by any written decision of the tribunal). For example, if you give expert evidence unsupported by proper

reasons, or omit material facts, the tribunal may form the view that it is in effect little more than advocacy of your client's case, and thus give it little or no weight. Advocacy that mixes expert (opinion) evidence in its submissions is not allowed under *Surveyors acting as advocates*: RICS practice statement. A tribunal will do its best to assess the merits of each party's case: the weight of the opinion evidence and the nature and power of the advocacy submissions are important factors in the formation of any decisions by the tribunal.

- 18.3** PS 9.1 and 9.2 make reference to proportionality as a factor influencing any decision to adopt a dual role. Proportionality considerations encompass the following (which is not necessarily exhaustive):
- (a) whether it is more cost effective to split or to combine the roles from the point of view of your client (whether or not full or partial recovery of costs from any other party may be available);
 - (b) whether it is more expedient to split or combine the roles;
 - (c) whether the general conduct of the case, from the point of view of the tribunal, would be assisted by splitting or combining the roles; and
 - (d) whether it would be prejudicial to the integrity of the tribunal's process to act in both roles.
- 18.4** The presence of one or more of the following factors may be grounds for you to decide not to adopt the dual role:
- (a) the case includes difficult points of law which are material to the decision;
 - (b) one or both of the parties regard the initial hearing as the first step to a decision by a higher tribunal;
 - (c) the other party will be legally represented;
 - (d) the issues of fact and/or opinion are numerous, requiring evidence from several witnesses on each side; or
 - (e) the amount at stake is high.
- 18.5** The dangers and difficulties of acting in a dual role were emphasised in the case of *Multi-Media Productions Ltd v Secretary of State for the Environment and Another* (1988) EGCS 83 (also reported at [1989] JPL 96), following an inspector's dismissal of a planning appeal. The court warned that:
- combining the roles of expert and advocate before a public local enquiry was an undesirable practice; and
 - an expert witness had to give a true and unbiased opinion, the advocate had to do the best for his or her client.

An expert who has also undertaken the role of advocate runs the risk that his or her evidence is later treated with some caution by a tribunal. In another instance, a compensation case before the Lands Tribunal of England and Wales, the expert witness for the claimants was allowed to 'manage' their cases because they were not legally represented. As P. H. Clarke FRICS (formerly of the Lands Tribunal of England and Wales) reports in his book *The Surveyor in Court*, at page 156:

'The tribunal said, after giving a list of his errors (both as advocate and expert) that "this is a classic example, if ever one was needed, of the undesirability of having a valuer attempting to double his role of expert witness with that of advocate." In rating appeals before the Lands Tribunal the valuation officer frequently appears on behalf of himself,

as a litigant in person. This has sometimes produced unfavourable comment from the tribunal. In *W. & R. R. Adam Ltd v Hockin* (VO) (1966) 13 RRC 1, the member said (p.4):

“... the position of an expert is quite distinct from and not always compatible with that of an advocate. It goes without saying that the duty of the advocate is to present his client’s case as best he may on the evidence available whereas the expert witness is there to give the court the benefit of his special training and/or experience in order to help the court come to the right decision. It is important therefore that the expert witness should be consistent in his opinions and should not be, nor appear to be, partisan for his opinions then become of less weight. ...”

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18.6 You are under a duty in the PS to make it clear to the tribunal which role you are fulfilling at all times. The following is worth emphasising:

- (a) As elaborated in *Surveyors acting as advocates*: RICS practice statement and guidance note: when acting as a surveyor-advocate, you have a duty in your role to promote the client’s case; an advocate is someone who speaks on behalf of a party and puts the party’s best case to a tribunal with the purpose of persuading that body of the correctness of the party’s argument. As surveyor-advocate you retain a duty to assist the tribunal and you must not mislead it. You must not make an advocacy submission unless properly arguable, must not mis-state facts and must draw a tribunal’s attention to all relevant legal authority of which you are aware, whether supportive of your client’s case or not. However, and critically, unlike an expert witness, you must not express expert opinion evidence, unless permitted to do so by the tribunal. Your task is simply to advance the argument that you consider best promotes your client’s case. A fuller statement on advocacy, the surveyor-advocate’s role and the principles underlying conduct of that role, can be found in *Surveyors acting as advocates*.
- (b) When acting as an expert witness, the PS makes clear your primary and overriding duty is to the tribunal to which evidence is to be given. The duty is to be truthful as to fact, honest and impartial as to opinion, and complete as to coverage of relevant matters. The PS specifies that special care must be taken to ensure it is not biased towards the party who is responsible for instructing or paying for the evidence. It follows therefore that (unlike an advocate) an expert witness cannot advance a view in which he or she does not believe.
- (c) Expert witness reports would not generally be expected to include reference to questions of admissibility; reference to questions of interpretation of a contract (see GN 8.3) and comments that are in the nature of advocacy submissions about an opposing expert’s evidence. You may find yourself at greater risk of slipping into ‘advocacy mode’ at the rebuttal stage of presentation of evidence, when the focus of your evidence shifts from explanation of your own opinion to a more critical role in dealing with the matching expert witness surveyor’s report.

18.7 It is advisable to decide and agree with those appointing you, at the outset of any reference to a tribunal, what role or roles you are to adopt, and to make

clear the distinctions between, and the limitations of, the roles. *Surveyors acting as advocates* makes it clear that as a surveyor-advocate you are not able, when conducting that role, at any stage to present expert opinion evidence, unless permitted to do so by the tribunal.

- 18.8** PS 9.4 makes it clear that you are required to distinguish the distinct roles of surveyor-advocate and expert witness at all times. In oral hearings it is sometimes convenient for the roles to be distinguished by standing when in one role and sitting when in the other, or giving evidence from a witness stand at the side of the room and making submissions as advocate from a position in front of the tribunal. Where, however, factual evidence is most conveniently interspersed with advocacy, moving from one position to another is disruptive, and standing or sitting may be the most convenient way of distinguishing the roles. It is not expected by the PS that you interrupt the flow of giving evidence at every turn to announce which role you are conducting, but only that you act prudently to avoid any possibility of confusing or misleading the tribunal. If you are acting as surveyor-advocate and expert witness, you should always ensure that you are familiar with the procedures of the relevant tribunal and that the means adopted for distinguishing advocacy from expert evidence are appropriate to those procedures. In the alternative, it should be perfectly possible for you to announce the order of your presentation initially (it is recommended that you do this in any case) and undertake to inform the tribunal when your expert evidence begins, so that it is clear which material can be tested by cross-examination.
- 18.9** The two roles are even more difficult to distinguish where a matter is conducted by written representations. If the distinction is not obvious, it is advisable to place submissions by way of advocacy in one document and expert opinion evidence in another document or, at least, in separate, clearly distinguishable parts of the same document. See GN 3.5 of *Surveyors acting as advocates*.
- 18.10** If undertaking the two roles, you and your client ought to be aware of the severe disadvantage that might arise where, in a hearing, you are giving evidence under oath or affirmation in your capacity as expert witness and an adjournment occurs. Under such circumstances, you would be unable to discuss any aspect of the case with your client during that adjournment, unless leave is granted by the tribunal; leave may be sought.
- 18.11** It is permissible for the expert witness to act as case manager, a role that concerns the procedural aspects of any particular case. However, great care should be taken that your impartiality as an expert witness is not compromised in undertaking such a role.

GN 19 Basis of charging fees

- 19.1** The basis of charging may vary depending upon the nature of your appointment.
- 19.2** When appointed by a party to a dispute, PS 3.5 requires you to set out clearly in writing the scope and the basis of your fees. For example, this might be by reference to the work to be undertaken, and daily or hourly rates or a fixed fee. Provision may also be made for additional payments in respect of:

- (a) travelling time;
- (b) expenses and disbursements;
- (c) attendance at hearings; and
- (d) late notice, cancellation fees or settlement after you have been booked to attend a hearing.

19.3 Levels of fees and expenses payable may be determined by the rules of particular bodies, by summary or other cost assessment and/or statutory provisions. You are recommended to establish or satisfy yourself of the fee basis and amounts payable prior to accepting instructions; you should be aware of the fact that some tribunals, in determining costs or expenses, may treat any advocacy work undertaken as work done by a lay representative.

19.4 Regard should be had to the possibility that the level of fee a successful client may recover from the other party might be subject to revision under the detailed or summary assessment of costs procedures (known as taxation in Scotland). It is considered important for both the basis of fee charging and for possible detailed or summary assessment purposes that careful and detailed time-sheets and records of tasks undertaken are kept. Some tribunals may require adoption of record-keeping broken down into specific units. It is recommended that you check with the tribunal in question.

GN 20 Conditional fees

20.1 The following provisions are worthy of general note in relation to *conditional fee* arrangements (see *Appendix D: Definitions*):

- The Code of Conduct applicable to solicitors in England and Wales states in Rule 11.07 ‘You must not make, or offer to make, payments to a witness dependent upon the nature of the evidence given or upon the outcome of the case.’
- Paragraph 7.6 of the Civil Justice Council *Protocol for the Instruction of Experts to give Evidence in Civil Claims* (annexed to the Practice Direction of Part 35 of the CPR in England and Wales) states that payments that are ‘contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be offered or accepted’. The Protocol states its aim is to give interpretative guidance upon the provisions of the CPR relating to expert evidence.
- In Northern Ireland, Practice Direction no. 6/2002 (*Commercial list practice direction – expert evidence*) states: ‘5. Payments of fees, charges or expenses to an expert witness contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be offered or accepted. To do so would contravene the expert’s overriding duty to the court. ...’
- The joint *Code of Practice for Experts* issued by the Academy of Experts and the EWI (endorsed 22 June 2005 by the Master of the Rolls) states: ‘2. An Expert who is retained or employed in any contentious proceeding shall not enter into any arrangement which could compromise his impartiality nor make his fee dependent on the outcome of the case nor should he accept any benefits other than his fee and expenses.’

20.2 In relation to PS 10, both the *Principal message* of the PS and PS 2.1 emphasise the duty to set out the facts fully and give truthful, impartial and independent

opinions, covering all relevant matters. The existence of a conditional fee arrangement is clearly relevant, even if you take the view that your opinion has not been influenced by it. The point is that the existence of the arrangement may contravene your overriding duty to the tribunal and compromise your impartiality. Accordingly, it is a matter that should be disclosed so that the evidence can be properly weighed by the tribunal. PS 10 does not require you to disclose the commercial and numerical details of your fee arrangement, only that you are operating on a conditional fee basis (see PS 5.1(j)(iii)). However it is possible that a tribunal – either of its own initiative or following a challenge by a party – may order fuller disclosure of details of your fee arrangement. Accordingly, it is also recommended that you cater for this eventuality and the consequential loss of commercial confidentiality in your standard terms of engagement with your client.

- 20.3 (a) Rather than adopting a conditional fee arrangement, it is strongly recommended that you consider making other fee arrangements with your prospective client wherever possible. As PS 3.4 indicates, you are required to advise your client in writing of the risk that a tribunal may view evidence given under a conditional fee arrangement as being tainted by bias, and may attach less weight to it; it may even refuse to admit it at all; or declare the whole conditional fee arrangement void (see GN 20.3(b)–(e) below). Whilst RICS recognises that conditional fee arrangements are adopted in some surveying specialisms, it would not expect any of its members to allow the quality of their evidence to be influenced detrimentally by the potential remuneration arising from a conditional fee arrangement.
- (b) You should be aware of a longstanding rule (the rule against champerty) that outlaws conditional fee arrangements for certain types of cases undertaken before some tribunals in England, Wales and Northern Ireland (but not Scotland). (**Note:** Although the case law pertaining to the issue of champerty is drawn, for the purposes of this document, from decisions of the courts in England and Wales, it is believed these would be persuasive to tribunals in Northern Ireland.) Your concern should be to ensure that:
- (i) the rule does not apply to you; and
 - (ii) the rule does not apply to the proceedings in which you are engaged as an expert witness or the tribunal before which you will be appearing.

In practice, there is very little guidance in the decided case law on these two subjects; this part of the guidance note is therefore conservative and cautionary.

- (c) As to GN 20.3(b)(i), historically, the rule has only been used so as to penalise lawyers. The rule has its roots in the perceived need to protect the integrity of public justice, and in particular to avoid *advocates* putting themselves in a position where their own interest may conflict with their duties to the court. The public policy behind the rule would appear to apply as readily to surveyors acting as expert witnesses as it does to advocates, although there is no recorded instance of a case in which a surveyor or his or her client has been penalised by the rule. In practice, it is unlikely (but not inconceivable) that the rule would now be extended to include expert witnesses.

- (d) As to GN 20.3(b)(ii) above, it is difficult to provide a conclusive list of the types of proceedings to which the rule applies. Disputes between parties that require resolution by tribunals (e.g. litigation, arbitration, adjudication, independent expert determination, and proceedings before the land(s) tribunals) are more likely to fall within the ambit of the rule than other proceedings involving the consideration of questions of an administrative or public nature (e.g. determination of planning permission, rating and fair rents). It should, however, be stressed that there is only one recorded instance in which the rule has been applied outside the sphere of litigation (in that case, to arbitration).
- (e) Where the rule does apply, the effect is to render the conditional fee arrangement unenforceable. The result will be not merely that the successful party will be unable to recover the conditional fee from the other party, but also that the expert witness will be unable to recover the conditional fee from his or her client. Accordingly, where you are thinking of entering into a conditional fee arrangement for a case in England, Wales and Northern Ireland (but not Scotland), a critical consideration will be whether, in the event of a challenge to a conditional fee arrangement, the tribunal you will appear before will regard the proceedings as of the type to which the rule would apply (using the criteria referred to in GN 20.3(d) above). If the proceedings are not likely to be so regarded, then you are likely to be within the law when entering into the arrangement. It is strongly recommended that you advise your client of the risk of unenforceability as set out in this paragraph GN 20.3, and decide whether you yourself wish to proceed in those circumstances.

20.4 It is also recommended that you carefully consider whether to pursue – or instead to avoid – conditional fee arrangements in any other instructions undertaken by you or your colleagues that are linked with your role as an expert witness. An obvious example might be other work involving the same property whether or not for the same client. Such fee arrangements may be perceived to endanger the duty of impartiality and independence required of you when acting as an expert witness.

20.5 PS 10.1 also applies where you are to act in the same case in a dual role, i.e. both as expert witness and advocate (see *Surveyors acting as advocates*: PS 3.6 and GN 4.6). Accordingly, even if your role is primarily to be that of an advocate, and your expert evidence in the case is to be very limited in nature, you are bound by PS 10.1.

GN 21 Responsibility for fees

21.1 The responsibility for payment of your fees would normally be clearly incorporated in the terms of engagement entered into. These may identify one party as being solely responsible for payment. Alternatively, consideration may be given to making more than one party (e.g. solicitors, claims consultants or similar) jointly and severally responsible for payment.

21.2 It is recommended that you should advise that liability will exist for all fees and disbursements properly incurred in accordance with your terms of engagement, even though those fees and disbursements may subsequently be reduced under the detailed or summary assessment of costs or, alternatively, to

the extent that they are not fully recovered from another party to the dispute. Prior to confirmation of your terms of engagement, it is recommended that you clarify whether those appointing you are required to obtain any form of authority or approval to secure your fees and disbursements, or any portion thereof. It is also recommended that you clarify whether any order or direction has been made limiting the amount of your fees and disbursements.

- 21.3 In a case to which the CPR apply, if you do not answer written questions asked by the party who does not instruct you, the court may order that the party who instructed the expert cannot recover the fees or expenses of that expert from any other party (see also GN 9.3 and 9.4).

GN 22 Immunity of the expert witness

England and Wales

- 22.1 All witnesses, including expert witnesses, are immune from any civil court proceedings arising out of their evidence (*Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 264). The immunity covers oral testimony and expert witness reports and extends to:

- (a) a statement or conduct which can fairly be said to be part of the process of investigating a crime or a possible crime with a view to prosecution in respect of the matter being investigated (*Evans v London Hospital Medical College* [1981] 1 WLR 184); and
- (b) a statement or conduct which could fairly be said to be preliminary to the giving of expert evidence in civil proceedings – judged by the principal purpose for which the work was done (*Stanton v Callaghan* [2000] 1 QB 75).

- 22.2 The immunity only bars civil suits. The immunity does not protect a witness against a criminal prosecution for perjury, for perverting the course of justice or for contempt of court. There are a number of exemptions to the immunity, which can be found in *Appendix C: Immunity of the expert witness – exemptions*.

- 22.3 Following the recent England and Wales case of *General Medical Council v Professor Sir Roy Meadow* [2006] EWCA Civ 1390, it is now confirmed as good law that the immunity does not extend to proceedings brought by a professional body (such as RICS) against an expert witness in respect of forensic expert evidence. In other words, RICS has the power to investigate and bring disciplinary proceedings against RICS members for breaches of their duties as expert witnesses; it has instigated such proceedings in the past and will continue to do so as appropriate, in the public interest.

- 22.4 (a) It is difficult to give comprehensive guidance since the immunity does not draw distinct lines between work done by an expert which is within the forensic process and work which is outside of that process and outside of the immunity. This is especially the case in civil proceedings where, for example, a surveyor may advise a client as to where a boundary lies between two properties and later may be called to give expert evidence in a boundary dispute. The initial advice may not be immune: the later

forensic expert evidence may be. As observed by Simon Tuckey QC in the case of *Palmer v Durnford Ford* [1992] 1 QB 483 each case will turn on its own facts:

‘The immunity would only extend to what could fairly be said to be preliminary to his giving evidence in court judged perhaps by the principal purpose for which the work was done. So the production or approval of a report for the purposes of disclosure to the other side would be immune but work done for the principal purpose of advising the client would not. Each case would depend upon its own facts with the court concerned to protect the expert from liability for the evidence which he gave in court and the work principally and proximately leading to it.’

- (b) The key question would be to ask what the principal purpose of the work undertaken was – to give evidence or to advise the client? There are many grey areas and many questions remain open and untested in the courts. The prudent course for a surveyor to adopt is probably that, unless proceedings have begun or are likely to begin and he or she is instructed to prepare an expert report with a view to giving evidence and thus participating in the tribunal’s process, the surveyor should assume that, until that point has been reached, the principle of immunity from suit may well **not** apply to claims relating to his or her professional services provided at an earlier stage.

- 22.5 The immunity does not make the expert witnesses exempt from wasted costs orders in court proceedings in England and Wales (there is nothing to suppose that it would in Northern Ireland either) if the expert’s evidence causes significant expense to be incurred and does so in flagrant disregard to his or her duties to a court. *See Phillips & Others v Symes & Others* [2004] EWHC 2330 Ch.
- 22.6 A surveyor who acts as an advocate will owe duties to his or her client and to the tribunal in a similar manner as a lawyer advocate would do so (see *Surveyors acting as advocates*: RICS practice statement and guidance note). There is now no (lawyer) advocate’s immunity from civil proceedings (*Arthur J. S. Hall & Co. v Simons (A. P.)* [2002] 1 AC 615). Although there is no direct authority on the point, it is likely to be the case, similarly, that you will have no immunity as a **surveyor**-advocate either. You will therefore need to be careful to ensure that it is always clear when you are acting in the role of surveyor-advocate rather than another role (such as expert witness).
- 22.7 Some commentators argue that the immunity attaching to an expert witness applies logically, and as an extension of the public policy underlying it, to the giving of evidence to and before all the tribunals listed in the *PS Preamble*. There is no authority directly on the point.
- 22.8 At the time of publication, it is fair to say that there are many calls for experts to lose their immunity from civil court proceedings; especially following the ruling in *Meadow* and the lifting of the immunity to allow wasted costs orders. Members are advised to stay updated with developments in the law in this field, but are reminded once again, per GN 22.3, that the traditional immunity is not a shield against disciplinary proceedings being brought by RICS.

Scotland

22.9 The general principles of Scottish law relating to expert witness immunity are substantially the same as English law, although there is no direct equivalent of a ‘wasted costs’ order (see GN 22.5 above). The law was reviewed in the case of *Karling v Purdue* [2004] ScotCS 221. The real difficulty, both in England and Wales and in Scotland, is not only in defining the boundaries of immunity but in the application of any definition of those boundaries to a particular case. The position is summed up in two key passages in *Karling*:

‘When an expert is engaged in the context of an existing litigation or a prospective litigation, he may perform a dual role. The first is advisory and the second is in his capacity as expert witness with all the responsibilities to the court as which that entails ... In one sense, all communications by an expert to his client constitute advice in one shape or form. He may advise him of his factual findings following on investigation; he may advise him of his conclusions based on those findings and/or other established or assumed facts. He may suggest a particular strategy or tactic. Part or all of this may be included in a report to be lodged as a production to which he may in due course speak. All of the foregoing may be intimately or closely connected with proceedings, actual, contemplated or possible. The difficulty of identifying whether the work of an expert or part of it falls within or outwith the protective circle of immunity is greater in the context of civil proceedings than criminal proceedings. The period between engagement and the giving of evidence or the settlement of the case may be several years. Initial engagement may occur where litigation is not in contemplation.

In civil proceedings, as the English authorities illustrate, the position will often not be clear-cut. Experts may be engaged before actions are raised; their role may initially be restricted, and subsequently broadened, e.g. as to topic to report on, and as to function. Some experts are particularly good at providing detailed background information which can be used in cross examination, but are not themselves skilled at giving evidence and explaining their position simply and persuasively to the court. In civil proceedings many permutations are possible where fine distinctions may have to be made.’

22.10 The difficulties were also illustrated in the discussion in *General Medical Council v Professor Sir Roy Meadow* [2006] EWCA Civ 1390. A key question would be to ask what the principal purpose of the work undertaken was – to give evidence or to advise the client? In particular, when engaged to prepare a report, consider whether an expert has been so instructed with a view, in due course, to giving evidence in civil proceedings. There are many grey areas and many questions remain open and untested. The prudent course for a surveyor to adopt is probably that, unless proceedings have begun or are likely to begin and he or she is instructed to prepare an expert report with a view to giving evidence and thus participating in the tribunal’s process, the surveyor should assume that, until that point has been reached, the principle of immunity from suit may well **not** apply to claims relating to his or her professional services provided at an earlier stage.

22.11 For the avoidance of doubt, RICS considers that the positions as stated in GN 22.6–22.8, and the exemptions listed in Appendix C, apply equally in Scotland,

subject to the following qualifications. The leading Scottish case on advocates' immunity is *Wright v Paton Farrell* [2006] SC 404 (IH), in which the Court, although concerned with criminal proceedings, indicated that *Hall* would be highly influential in relation to the question of an advocate's immunity from suit for the negligent conduct of civil proceedings. In relation to malicious prosecution, reference may be made to *McKie v Strathclyde Joint Police Board* [2004] SLT 982. In relation to disclosure of confidential material, reference may be made to *Watson v McEwan* [1905] 7 F (HL) 109, 13 SLT 340.

Northern Ireland

- 22.12** The position set out in the preceding England and Wales section of GN 22 is equally applicable to the situation in Northern Ireland; whilst tribunals in Northern Ireland are not bound to follow the decisions of other tribunals in the UK, the decisions cited are persuasive to Northern Irish tribunals and broadly reflect the procedure adopted in those tribunals.

Appendix A: Sample Terms of Engagement

Note: This appendix forms a part of *Surveyors acting as expert witnesses*: RICS guidance note. Its sample terms are not intended to be mandatory or prescriptive, and may be adapted as required. It is recognised that a variety of circumstances will prevail in the range of assignments surveyors may undertake and that clauses may not be appropriate in every circumstance. For example, where a Client appoints a surveyor directly, without using an Appointer, the terms would need to be amended accordingly. Other or additional terms of engagement may also be indicated, for example, by a protocol established under the CPR or in guides that supplement the CPR in certain courts.

Terms of Engagement

1 Recital of appointment

1.1 The Appointer has appointed the named surveyor (see 1.5) to provide the following services in respect of [*state identity of property/facility*] and in accordance with these Terms of Engagement.

[*state the nature and extent of the instructions, their purposes, the services which may be provided*]

1.2 The appointment is one which is subject to *Surveyors acting as expert witnesses*: RICS practice statement, a copy of which is available on request.

1.3 The Appointer is:

1.4 The Client is:

1.5 The Expert Surveyor is:

[*also state identity and qualifications of any assistant, and extent of their intended involvement*]

1.6 The Tribunal is:

[*state name of tribunal to which expert evidence is to be submitted*]

2 Definitions

Unless otherwise agreed by the parties:

2.1 'Appointer' means the person(s), organisation(s), or department(s) from whom instructions are received.

2.2 'Client' means the person(s), organisation(s), or department(s) on whose behalf the Expert Surveyor has been instructed to provide the services listed in 1.1 of these Terms of Engagement.

- 2.3 'Expert Surveyor' means the person named at 1.5, and appointed to provide the services described in 1.1 of these Terms of Engagement.
- 2.4 'Assignment' means the matter(s) referred to the Expert Surveyor by the Appointer, in respect of which the services are required, and to which these Terms of Engagement apply.
- 2.5 'Fees' means (in the absence of written agreement to the contrary) the reasonable charges of the Expert Surveyor based on the Expert Surveyor's agreed hourly/daily rate. [*Set out hourly/daily rates*] Time spent travelling and waiting may be charged at the full hourly/daily rate. Value Added Tax will be charged in addition (where applicable).
- 2.6 'Disbursements' means the cost, reasonably incurred, of (by way of non-exclusive example) all photography, reproduction of drawings, diagrams, etc., printing and duplicating, and all out-of-pocket expenses, including travel, subsistence and hotel accommodation. Value Added Tax will be charged in addition (where applicable).

3 The Appointer

3.1 The Appointer shall:

- (a) provide timely, full and clear instructions in writing supported by good quality copies of all relevant documents within his or her possession – including all court orders and directions which may affect the preparation of advice or reports – along with a timetable for provision of the Expert Surveyor's services; at such times as the timetable is altered, such alterations shall be notified promptly to the Expert Surveyor;
- (b) treat expeditiously every reasonable request by the Expert Surveyor for authority, information or materials, and for further instructions, as he or she may require;
- (c) update and/or vary without delay the Expert Surveyor's instructions, as circumstances require;
- (d) not alter or add to, nor permit others so to do, the content of an Expert Surveyor's report, or any text, document or materials supporting such report, before submission to the Tribunal, without the Expert Surveyor's permission;
- (e) where possible, at the Expert Surveyor's request, arrange access to the property/facility relevant to the Assignment in order that the Expert Surveyor can inspect such and make relevant enquiries;
- (f) ascertain the availability of the Expert Surveyor for hearings, meetings and appointments at which his or her presence is required;
- (g) give adequate written notice to the Expert Surveyor of any attendance required at hearings, meetings and appointments;
- (h) not use the Expert Surveyor's report or other works for any other purpose save that directly related to the Assignment.

4 The Expert Surveyor

4.1 The Expert Surveyor shall:

- (a) undertake only those tasks in respect of which he or she considers that he or she has adequate experience, knowledge, expertise and resources;

- (b) use reasonable skill and care in the performance of his or her instructions and duties;
- (c) comply with appropriate codes, rules and guidelines, including those of RICS;
- (d) notify the Appointer of any matter which could disqualify the Expert Surveyor or render it undesirable for the Appointer to continue with the appointment;
- (e) answer questions or requests for information from the Appointer within a reasonable time;
- (f) endeavour to make him or herself available for all hearings, meetings, etc. of which he or she has received adequate written notice;
- (g) treat all aspects of the Assignment as confidential;
- (h) provide all relevant information to allow the Appointer to defend the Expert Surveyor's Fees or Disbursements at any costs assessment;
- (i) respond promptly to any complaint by the Appointer within a reasonable time;
- (j) retain all intellectual property rights and ownership rights in his or her work and any other original works created by him or her in relation to or in connection with the Assignment on which he or she is instructed, unless otherwise agreed in writing.

5 Fees and Disbursements

- 5.1** The Expert Surveyor may present invoices at such intervals as he or she considers reasonable during the course of the Assignment, and payment of each invoice shall be due on presentation.
- 5.2** For the avoidance of doubt, the Expert Surveyor shall be entitled to charge for Fees and Disbursements where, due to settlement of the dispute, or for any other reason not being the fault of the Expert Surveyor:
- (a) the Expert Surveyor's time has been necessarily reserved for a specific hearing, meeting, appointment or other relevant engagement;
 - (b) specific instructions have been given to the Expert Surveyor for an inspection and report; and
 - (c) the reservation of time is not required because the engagement has been cancelled or postponed and/or the instructions have been terminated.
- 5.3** The Expert Surveyor shall also be entitled to charge for answering questions from a party relating to the Assignment or for the provision of any addendum reports.
- 5.4** The Appointer and [*identify party*] shall be jointly and severally responsible for payment of the Expert Surveyor's Fees and Disbursements.
- 5.5** Any restriction or cap by the Tribunal, or by another competent authority, of the recoverability of an Expert Surveyor's Fees and Disbursements, shall not affect the liability of the Appointer to pay those Fees and Disbursements.
- 5.6** The Appointer shall pay to the Expert Surveyor, if applicable, interest under the *Late Payment of Commercial Debts (Interest) Act 1998* on all unpaid invoices, or will pay to the Expert Surveyor, at the Expert Surveyor's sole discretion, simple

interest at [...]% per month (or part thereof) on all invoices which are unpaid after 30 days from the date of issue of the invoice, calculated from the expiry of such 30-day period, together with the full amount of administrative, legal and other costs incurred in obtaining settlement of unpaid invoices.

6 Disputes over Fees and Disbursements

- 6.1** In the event of a dispute as to the amount of the Expert Surveyor's Fees and Disbursements, such sum as is not disputed shall be paid forthwith pending resolution of the dispute, irrespective of any set off or counter claim which may be alleged.
- 6.2** Any dispute relating to the amount of the Expert Surveyor's Fees and Disbursements shall, in the first instance, be referred to [*e.g.* the Expert Surveyor's firm].
- 6.3** Any dispute over Fees or Disbursements that cannot be resolved by [*e.g.* the Expert Surveyor's firm] shall be referred to [*e.g.* a mediator chosen by agreement of both parties]. Where agreement cannot be reached on the identity of [*e.g.* a mediator], the services of [*e.g.* the RICS Dispute Resolution Service (DRS)] shall be used to appoint [*e.g.* a mediator]. In the event that any dispute cannot be resolved by [*e.g.* mediation], the courts of [*state jurisdiction e.g.* England and Wales] shall have exclusive jurisdiction in relation to the dispute and its resolution.
- 6.4** The law of [*state law e.g.* England and Wales] shall govern these Terms of Engagement.

Appendix B: Hearsay evidence

This appendix forms a part of *Surveyors acting as expert witnesses*: RICS guidance note.

The *Civil Evidence Act 1995* and the *Civil Evidence (Scotland) Act 1988* contain provisions that alter the previous hearsay rules (that hearsay evidence was not admissible). The Acts abolish the rule against hearsay evidence in civil proceedings, set out guidance as to hearsay evidence and require a party who wishes to adduce hearsay evidence to serve notice on the other party.

The Acts therefore provide that in civil proceedings evidence otherwise admissible shall not be excluded solely on the grounds that it is hearsay. 'Civil proceedings' means civil proceedings before any courts and tribunals where the strict rules of evidence apply, whether as a matter of law or by agreement of the parties (in Scotland, this also includes any hearing by the Sheriff under the *Children (Scotland) Act 1995*).

It would appear therefore that the provisions of the Acts would apply to an arbitration where the arbitrator has ruled that the strict rules of evidence shall apply or the parties have agreed that this shall be the position.

A party wishing to rely on hearsay evidence must first serve notice on the other party, giving particulars of this evidence. Failure to comply with this requirement will not affect the admissibility of the evidence. However, it may be taken into account by the tribunal in the exercise of its powers in connection with the proceedings and costs, and by the tribunal as a matter adversely affecting the weight to be given to the hearsay evidence.

The change in the hearsay rule by the Acts is a change of emphasis from admissibility to weight.

Generally, a tribunal would have regard to any circumstances from which any inference can be drawn as to the reliability of the hearsay evidence.

Appendix C: Immunity of the expert witness – exemptions

This appendix forms a part of *Surveyors acting as expert witnesses*: RICS guidance note.

GN 22 considers the issue of the immunity of expert witnesses. GN 22.2 refers to a number of exemptions. The principal exemptions are:

- (a) statements or conduct that lies outside of the situations described at GN 22.1(a) and (b). Where the principal purpose of the statement or conduct is not part of the process of investigating or prosecuting crime or not preliminary to the giving of expert evidence in civil proceedings then it will be outside of the immunity;
- (b) claims for misfeasance in public office/conspiracy to injure for having fabricated evidence (*Darker v Chief Constable of West Midlands* [2001] 1 AC 435);
- (c) libelling the opposing party in a report for prepared for court proceedings (*Schneider v Leigh* [1955] 2 QB 195);
- (d) committing the tort of malicious prosecution where the expert witness by giving malicious evidence ‘procured’ the prosecution (*Martin v Watson* [1996] AC 74);
- (e) an expert witness can be sued for breach of confidence where he or she discloses an expert report to another without consent from the client (*De Taranto v Cornelius* (2002) 68 BMLR 62).

Appendix D: Definitions

This appendix forms a part of both the practice statement and guidance note of *Surveyors acting as expert witnesses*. The following are short definitions of some terms from the PS and the GN. In certain circumstances other terms may be used. Members are advised to refer to a legal dictionary (or legal textbooks), and/or to relevant rules, directions and procedures of the tribunal in question. Members may also find it useful to view *Appendix B: Definitions* in the publication *Surveyors acting as advocates*.

Surveyor-advocate: a person who presents to the tribunal a client's properly arguable case as best as he or she may on the evidence and facts available; a spokesperson for a client who, subject to any restrictions imposed by the surveyor's duty to the tribunal, must do for his or her client all that the client might properly do for him or herself if he or she could. Sometimes also referred to as party representative (although this term is occasionally loosely also used to refer to the surveyor as a negotiator). The advocacy role is markedly different from the role of an expert witness or a negotiator (see below).

Case manager: a person who, acting on behalf of a party, is responsible for the general conduct, management and administration of the case, marshalling and coordinating that party's team (if any) and liaising as appropriate with the tribunal and opposing party.

Conditional fee: this term refers to any arrangement where remuneration – however fixed or calculated – is to be made conditional upon the outcome of proceedings or upon the nature of evidence given. Other labels in common use are 'incentive-fee', 'speculative fee', 'success-fee', 'success-related fee', 'performance fee', 'no-win, no-fee' and 'contingency fee'.

CPR: The *Civil Procedure Rules* (known as CPR) can be found at www.justice.gov.uk/civil/procrules_fin/index.htm. This is the set of rules governing the procedure of the Supreme Court and County Court in England and Wales. These procedural rules are supplemented by Protocols, Pre-Action Protocols, Practice Directions and court guides. The objectives of the CPR are to make access to justice cheaper, quicker and fairer. Some of the CPR apply to action taken before proceedings are issued and so the scope of the CPR should be considered in respect of any matter likely to be litigious.

Direction: a requirement laid down by a tribunal.

Disclosure: the production and inspection of documents in accordance with applicable rules and/or directions of a tribunal. Different rules apply in the Scottish courts where documents can be recovered from another party (known as the 'haver') using 'commission and diligence'.

Evidence: this may be evidence of fact, expert (opinion) evidence or hearsay evidence. The weight to be attached to evidence by a tribunal will depend on various factors, the importance of which may vary from case to case.

Expert witness: a witness called by a tribunal to give expert opinion evidence by virtue of experience, knowledge and expertise of a particular area beyond that expected of a layperson. The overriding duty of the expert witness is to

provide independent, impartial and unbiased evidence to the tribunal – covering all relevant matters, whether or not they favour the client – to assist the tribunal in reaching its determination.

Hearsay evidence: evidence by way of the oral statements of a person other than the witness who is testifying and/or by way of statements in documents, offered to prove the truth of what is stated. See also the *Civil Evidence (Scotland) Act 1988* and the *Civil Evidence Act 1995*. In arbitral proceedings, subject to any agreement between the parties or prior direction given by the arbitrator, hearsay will be admissible, subject to notice being given to the other party.

Legal professional privilege (sometimes called ‘**legal advice privilege**’): legal professional privilege attaches to, and protects:

- communications (whether written or oral) made confidentially;
- passing between a lawyer (acting in his or her professional legal capacity) and his or her client;
- solely for the purpose of giving or obtaining legal advice.

Licensed Access: RICS members are currently permitted by the General Council of the Bar of England and Wales to instruct a barrister direct, without the services of a solicitor for certain purposes. The surveyor should be experienced in the field to which the referral relates. The regime in England and Wales was formerly known as *Direct Professional Access (DPA)*. The RICS guidance note *Direct Professional Access to Barristers* is currently under review. RICS members are also able to instruct counsel direct under the terms of the Scottish *Direct Access Rules* and, in Northern Ireland, under *Direct Professional Access*. The relevant Bar Councils (of England and Wales; and Northern Ireland) or the Faculty of Advocates in Scotland, can be consulted for further advice.

Litigation privilege: where litigation is in reasonable contemplation or in progress, this protects:

- written or oral communications made confidentially;
- between either a client and a lawyer, OR either of them and a third party;
- where the dominant purpose is for use in the proceedings;
- either for the purpose of giving or getting advice in relation to such proceedings, or for obtaining evidence to be used in such proceedings.

The privilege applies to proceedings in the High Court, County Court, employment tribunals and, where it is subject to English procedural law, arbitration. With regard to other tribunals, the position is less clear.

Negotiator: a person who negotiates a deal (of property or asset) or solution. Also, in dispute resolution, a person who seeks to negotiate the resolution of the dispute as best he or she may. A negotiator has no involvement in this role with a tribunal. A negotiator’s role is markedly different to that of an advocate, expert witness, case manager or witness of fact.

Representation(s): this term may, depending on the circumstances and context, be used to refer to one or more of:

- a statement of case;
- an assertion of fact(s);

- expert opinion evidence; and
- an advocacy submission.

Representations may be made orally or in writing.

Scott Schedule: a document setting out, in tabular form, the items in dispute and containing (or allowing to be added) the contentions or agreement of each party. Named after a former Official Referee.

Single Joint Expert (SJE): an expert witness appointed pursuant to an order of a court, and instructed jointly by parties to a dispute. Though relatively rare in Scotland, courts in that jurisdiction can appoint their own expert.

Submission(s): the presentation by way of advocacy of a matter in dispute to the judgment of a tribunal. The term is occasionally used loosely in the surveying community to refer to evidence of fact or expert opinion evidence presented, or to a mix of such expert opinion evidence and advocacy; such usage is often misplaced.

Tribunal: see definition in *Preamble* to the PS.

‘Without prejudice’: the without prejudice rule will generally prevent statements made in a genuine attempt to settle an existing dispute, whether made in writing or orally, from being put before a court as evidence of admissions against the interest of the party which made them. There are a number of established exceptions to the rule.

Witness of fact: a person who, usually on oath or solemn affirmation, gives evidence before a tribunal on a question of fact.

Further reading

Most of the items below can be obtained via RICS Books (www.ricsbooks.com). Please note that some publications reference earlier editions of *Surveyors acting as expert witnesses* or *Surveyors acting as advocates*.

Agricultural Arbitrations and Independent Expert Determinations (2nd edition), RICS guidance note, 1998

Baker, E. and Lavers, A., *Case in Point: Expert Witness*, RICS Books, 2005

Barry, P., *The Expert Witness* (training pack), College of Estate Management, 2006

Bond, C., Burn S., Harper P., and Solon M., *The Expert Witness in Court – A Practical Guide*, Shaw & Sons, 1999

Boundaries: Guide to Procedure For Boundary Identification, Demarcation and Disputes in England and Wales (1st edition is out of print; a 2nd edition is under preparation)

Burns, S. (in association with Bond Solon Training), *Successful Use of Expert Witnesses in Civil Disputes*, Tottel Publishing (Crayford, Shaw's), 2003

Cato, D., *The Expert in Litigation and Arbitration*, LLP Professional Publishing, 1999

Civil Procedure Rules, together with associated Practice Directions, Pre-Action Protocols and Forms, available at: www.justice.gov.uk/civil/procrules_fin/index.htm – and the *Protocol for the Instruction of Experts to give Evidence in Civil Claims* (issued by the Civil Justice Council (CJC), June 2005, approved by the Master of the Rolls), available at: www.justice.gov.uk/civil/procrules_fin/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf

Clarke, P. H., *The Surveyor in Court*, Estates Gazette, 1985 (out of print but available from the RICS Library)

Dilapidations (5th edition), RICS guidance note, 2008

Direct Professional Access to Barristers (2nd edition), RICS guidance note, 2003 (current edition under review)

Farr, M., *Surveyor's Expert Witness Handbook: Valuation*, EG Books, 2005

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Rating Appeals (2nd edition), RICS guidance note, 2001 (current edition under review)

Rating Consultancy Code of Practice (2nd edition), RICS practice statement, 2005 (current edition under review)

Surveyors acting as advocates, RICS practice statement and guidance note, 2008

Surveyors Acting as Arbitrator or as Independent Expert in Commercial Property Rent Reviews (Scottish edition), RICS guidance note, 2002

Surveyors Acting as Arbitrators and as Independent Experts in Commercial Property Rent Reviews (8th edition), RICS guidance note, 2002

The *Civil Evidence Act* 1995, available at: www.opsi.gov.uk/ACTS/acts1995/Ukpga_19950038_en_1.htm

The *Civil Evidence (Scotland) Act* 1988, available at: www.opsi.gov.uk/acts/acts1988/Ukpga_19880032_en_1.htm#tcon

The Laws of Scotland, Stair Memorial Encyclopaedia, Butterworths

Watson, J., *Nothing but the truth – expert evidence in principle and practice for surveyors, valuers and others* (2nd edition), Estates Gazette Ltd, 1975

For the various court guides, see www.hmcourts-service.gov.uk

The RICS Dispute Resolution Faculty and RICS Library may be able to provide further information relevant to expert witness practice.

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