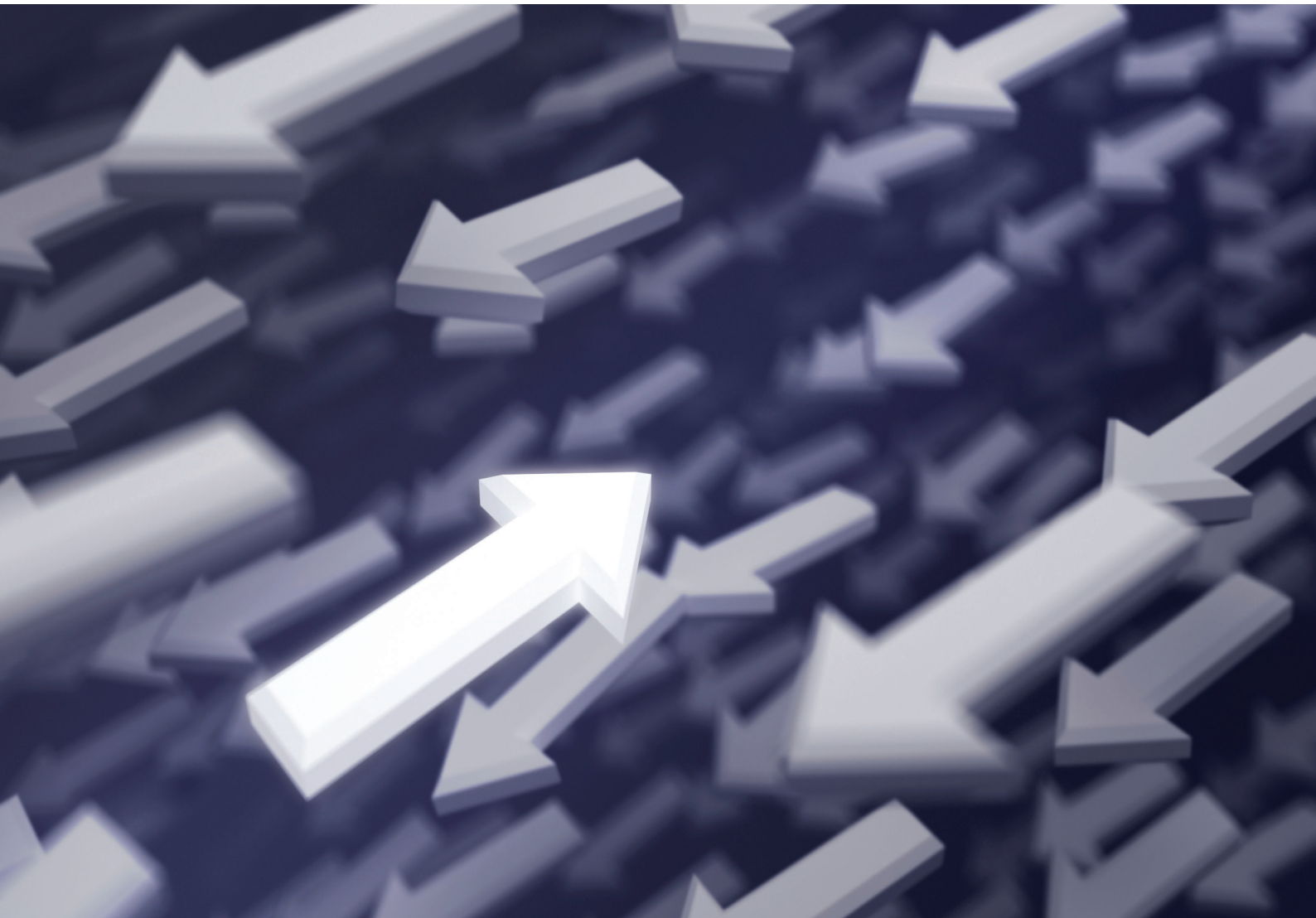




RICS Professional Guidance, UK
Surveyors acting as
expert witnesses
4th edition



Surveyors acting as expert witnesses

RICS Practice statement and guidance note, UK

4th edition

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This document references the Civil Procedure Rules (CPR) in a few places to ensure consistency between this guidance or practice note and the CPR.

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Foreword

I am very pleased to have been invited by RICS to write the foreword to the latest edition of this important practice statement and guidance note for expert witnesses.

The first recorded use of an expert witness in an English case was in *Folkes v Chadd* (1782) 3 Doug KB 157. In that case, Lord Mansfield overruled Mr Justice Gould's refusal to permit a jury to hear the evidence of John Smeaton, a civil engineer, whom some Norfolk farmers, who were being sued by the Wells Harbour Commissioners, wished to call to give his expert opinion as to the cause of the silting up of the harbour. Since that decision, expert witnesses have been called to deal with an almost countless variety of issues in an almost countless number of cases. In many hearings, expert evidence is crucial to the outcome of the case.

It is important for the integrity of the civil justice system that anybody, above all professionals, who take on the role of expert witness have a clear understanding of the duties involved, and that they perform their obligations to the court or tribunal concerned to the best of their ability. It is crucial for any judicial process which includes expert evidence that the expert witnesses are honest, objective and fair, so that their expertise can properly and helpfully inform, support and enhance the decision maker's decision and the process by which that decision is reached – i.e. so that justice can be done and can be seen to be done.

Accordingly, there is a real need for authoritative guidance for actual and potential expert witnesses. The role of experts in litigation should, of course, evolve in response to developments in law, technology, commerce, the demands for greater transparency and the other changes. The past few years have seen many changes in these areas, and the rate of change always seems to be accelerating. Therefore, if it is to be authoritative, any guidance must be up-to-date, thorough, and formulated by experts.

This guidance appears to satisfy all these requirements. It is the product of a great deal of detailed and extensive work by the dedicated and experienced members of a working party specifically set up for the purpose. The result is a document which provides helpful assistance, cutting edge advice and clearly defined standards for RICS members who act as an expert witness.

It is clear to me that an expert witness who properly considers and applies the contents of this guidance will not only enhance his or her own credibility, but will also promote confidence in the role of chartered surveyors as expert witnesses within the civil justice system generally. Consequently, it will promote best practice in the public interest.

The Right Hon the Lord Neuberger of Abbotsbury

August 2013

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Surveyors acting as expert witnesses: practice statement

RICS practice statements

This is a practice statement. It is the duty of every member to comply with relevant practice statements, and take account of other guidance produced by RICS in a particular area of expertise, to maintain high professional standards. There may be disciplinary consequences for a failure to comply with a practice statement.

Members should also note that when an allegation of professional negligence is made against a surveyor, the court is likely to take account of any relevant practice statement published by RICS in deciding whether or not the surveyor acted with reasonable competence. Failure to comply with practice statements may, accordingly, lead to a finding of negligence against a surveyor.

In the opinion of RICS, a member conforming to the requirements of this practice statement should have at least a partial defence to an allegation of negligence.

Where members depart from the practices set out in this practice statement, 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. There may be legal and disciplinary consequences for departing from this practice statement.

It is the member's responsibility to be aware of changes in case law and legislation since the date of publication.

Document status defined

RICS produce a range of professional guidance and standards products. These have been defined in the table below. This document is a practice statement.

Type of document	Definition	Status
Standard		
International Standard	An international high level principle based standard developed in collaboration with other relevant bodies	Mandatory
Practice Statement		
RICS practice statement	Document that provides members with mandatory requirements under Rule 4 of the Rules of Conduct for members	Mandatory
Guidance		
RICS Code of Practice	Document approved by RICS, and endorsed by another professional body/ stakeholder that provides users with recommendations for accepted good practice as followed by conscientious practitioners	Mandatory or recommended good practice (will be confirmed in the document itself)
RICS Guidance Note (GN)	Document that provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners	Recommended good practice
RICS Information Paper (IP)	Practice based information that provides users with the latest information and/or research	Information and/or explanatory commentary

Preamble

While 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 (for example ‘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’, ‘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’.

For the purposes of this practice statement and guidance note, the generic expression ‘tribunal’ means any body whose function it is to determine disputes.

This therefore includes:

- courts and tribunals (including but not limited to Lands Tribunals and Agricultural Land Tribunals; Leasehold Valuation Tribunals; Residential Property Tribunals; Valuation Tribunals)
- arbitrators/arbiters or arbitral panels/tribunals
- adjudicators
- committees (including Rent Assessment Committees and Valuation Appeal Committees)
- inspectors, commissioners and reporters (for example, 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.

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 is not to a client but to the tribunal where your expert witness report and evidence given:

- 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 Advocacy and expert witness roles).

The practice statement and guidance note are based upon the law and practice relating to expert witnesses in England, Wales and Northern Ireland, but are also designed to provide a template for global applicability. For example, a separate supplement to the practice statement and guidance note may be considered by Scottish members in relation to expert witness procedures to which Scottish law and conventions apply. It will be necessary for surveyors to discuss with the client’s lawyers the applicability of both the procedures and principles in the practice statement and guidance note, as the local law and procedural rules may require the surveyor to take a different approach.

PS 1 Application of practice statement

1.1 The start date of application of this practice statement is three months after its publication date. This practice statement applies to any RICS member (usually described hereafter as ‘the expert witness’ or ‘you’) who provides expert evidence, whether oral or written, to the proceedings of any tribunal subject to the rules of that specific tribunal and its jurisdictions.

1.2 This practice statement 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, the RICS practice statement and guidance note *Surveyors acting as advocates* will also apply.

1.3 You give expert evidence when you draw upon your professional experience, knowledge and expertise to provide evidence in the form of your independent professional opinion to a tribunal. Such evidence is distinct from:

- (a) advice given for the purpose other than a tribunal’s proceedings
- (b) evidence of fact; and
- (c) advocacy of a case.

1.4 Since this practice statement 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 practice statement 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 practice statement, 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 witness report prepared; alternatively you may wish to decline instructions or withdraw from a case.

Where you depart from the practice statement 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.

PS 2 Duty in providing expert evidence

2.1 Your overriding duty as an expert witness is to the tribunal to which the expert evidence is given. This duty overrides any contractual duty to your client. Your 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 under oath or affirmation.

2.2 Special care must be taken to ensure that expert evidence is not biased towards those who are responsible for instructing or paying you.

2.3 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. The duty endures for the whole assignment.

2.4 As an expert witness 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 and 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 may 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 (please refer to the RICS guidance note *Conflicts of interest*).

2.7 As an expert witness, 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, giving full reasons in support of your comments.

PS 3 Acting as an expert witness and instructions

3.1 Expert witnesses should confirm without delay whether or not they accept instructions.

3.2 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.

3.3 If you have any doubt as to whether you should accept instructions to act as an expert witness (because, for example, you are required to undertake work that falls outside your expertise, unrealistic deadlines are imposed, instructions are insufficiently clear, or where the position of the case does not reflect your own professional opinion or places you in a position of conflict), 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.

3.4 Prior to accepting instructions to act as an expert witness, you must:

- (a) Advise your prospective client in writing that this practice statement and the rules of the relevant tribunal will apply.
- (b) Offer to supply a copy of the practice statement in the form of the client guide to your prospective client. This client guide may be provided to your prospective client without copyright permission; however, you must make clear to the prospective client that his/her copy is for his/her use only, and that any reproduction of the guide for the use of a third party would breach RICS copyright.
- (c) 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, because your duty is to the tribunal.
- (d) Ensure without delay that you advise your prospective client in writing of the nature and

scope of your obligations under this practice statement and guidance note and the relevant tribunal 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.

- (e) 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 your initiative or those instructing you.
- (f) Confirm in writing if you propose that any part of the assignment is likely to be undertaken by a person other than yourself.
- (g) 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. Refer to the RICS guidance note *Conflicts of interest*.

3.5 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 3.4(e) above should apply. This paragraph (PS 3.5) does not apply to Single Joint Experts (see instead PS 8.7).

3.6 You shall not undertake expert witness appointments on any forms of conditional or success-based arrangement including when those instructing you are engaged on such a basis (see PS 10 Conditional fees).

3.7 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 on which your fees will be charged) and any specific mandates given as to important or contentious matters.

3.8 You must then ensure that 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.

3.9 Transparency of instructions is important and tribunals may allow cross examination of expert witnesses about their instructions if there are reasonable grounds to consider that the statements of an expert witness or the expert witness report may be inaccurate or incomplete. The omission from the statement of 'off the record' oral instructions is not appropriate.

3.10 Expert witnesses must neither express an opinion outside the scope of their field of expertise, nor accept any instructions to do so.

PS 4 Inspections

4.1 Where any inspection of any property or 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.

4.2 When such an inspection is not undertaken, or the inspection falls short of what is required, this must be stated and an explanation of the problems and implications for the evidence identified.

PS 5 Reports and oral evidence

5.1 In most tribunals, expert witnesses are usually required to present their evidence in the form of a written report unless directed to the contrary. This is usually referred to as an 'expert witness report', but in certain tribunals or circumstances, other terminology may be used and you should be careful to check with those instructing you.

5.2 Expert evidence should maintain professional objectivity and impartiality at all times, should consider all material facts and should be the independent product of the expert witness uninfluenced by the pressures of litigation. An expert witness should not assume the role of an advocate except in limited circumstances where such a joint role is appropriate.

5.3 The role of expert witnesses is to assist the tribunal by providing objective, unbiased opinions on matters within their expertise and make it clear when a question or issue falls outside of their expertise or if they are not able to reach a definite opinion; for example because they have insufficient information.

5.4 In providing a written expert witness report to be lodged before a tribunal you must comply with any rules, orders or directions and protocols of the tribunal to which the expert witness report is to be presented. It should usually be addressed to the tribunal and not to

the party from whom the expert has received instructions. The content and extent of expert witnesses' reports should be governed by the scope of their instructions, general obligations and overriding duty to the tribunal. 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). It is advised that the specific experience that is relevant to the case is set out in the body of the expert witness report with general experience, background and a wide-ranging curriculum vitae (CV) attached as an appendix.
- (b) State the substance of all material instructions (whether written or oral).
- (c) Consider all matters material to the issue and dispute, upon which you are required to give an opinion, including matters adverse to your client's case.
- (d) Make it clear when a question falls outside your expertise.
- (e) Where tests of a scientific or technical nature have been carried out, state the methodology used, by whom the tests were undertaken and under whose supervision.
- (f) Give details of any literature or other material which you have relied on in making the expert witness report, including the opinions of others.
- (g) State if any other individual or party has carried out any examination, measurement, test, experiment or survey that you have used for the expert witness report; their relevant experience, knowledge, expertise and qualifications; the nature, extent and methodology of the activity; and whether or not the work was carried out under your supervision. Explain any implication on the evidence.
- (h) Clearly state all material facts and make clear which of the facts stated are within your own knowledge, including those that might detract from the opinion as given, and state all assumptions upon which your opinion and reasoning are based. 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.
- (i) Distinguish between those facts that you believe to be true and those you have assumed (specifying those you have been instructed to assume).

- (j) When addressing questions of fact and opinion, keep the two separate and discreet.
- (k) Where there is a range of opinions on the matters dealt with in the expert witness report:
 - (i) summarise the ranges of opinions and their sources; and
 - (ii) give reasons for your own opinion.
- (l) When there are material facts in dispute, express separate opinions on each hypothesis put forward and show no preference unless it is possible to demonstrate that one set of facts is improbable or less probable and fully explain the reasoning.
- (m) If you are not able to give an opinion without qualification, such qualification must be identified, clearly stated and explained.
- (n) Include at the end of the expert witness report a summary of the conclusions.
- (o) Verify your expert witness report by including a signed statement of truth at the end of the report together with the declaration set out below and any other requirements of the tribunal. You must print your name clearly beneath the signature include all professional designatory letters and the date.
- (p) The requirements for statements of truth may differ between jurisdictions and tribunals. A tried and tested example is that set out in the Civil Procedure Rules (CPR) in Practice Direction 35. This practice statement has included in the statement of truth the same wording so as to avoid duplication in the courts of England and Wales. The following wording to verify the expert witness report by a statement of truth must be adopted by all chartered surveyors acting in the capacity of an expert witness, in the following form:

(i) Statement of truth

'I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.'

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(ii) Declaration

1 'I confirm that my report has drawn attention to all material facts which are relevant and have affected my professional opinion.

2 I confirm that I understand and have complied with my duty to the [specify the tribunal*] as an expert witness which overrides any duty to those instructing or paying me, that I have given 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.]

3 I confirm that I am not instructed under any conditional or other success-based fee arrangement.

4 I confirm that I have no conflicts of interest.

5 I confirm that I am aware of and have complied with the requirements of the rules, protocols and directions of the [specify the tribunal].

6 I confirm that my report complies with the requirements of RICS – Royal Institution of Chartered Surveyors, as set down in the RICS practice statement *Surveyors acting as expert witnesses*'.

5.5 The scope of PS 5.4 covers written reports. In relation to expert evidence to be given orally, where no written expert witness report has been lodged or submitted to the tribunal, you must at the outset declare to the tribunal your expertise and capacity as an expert witness, your understanding of your duty to the tribunal and that the expert evidence you give complies with the requirements of the tribunal and this practice statement.

5.6 In the event of any departure from the requirements of this practice statement, this should be outlined to the tribunal at the earliest opportunity and in accordance with any procedures or arrangements agreed in advance.

PS 6 Amending the contents of written reports

6.1 If after disclosure of your expert witness report you identify a material inaccuracy or omission, or have a change of opinion on any matter as a result of an exchange of questions or following agreements required at meetings between experts or where further evidence or documentation is disclosed, you must, without delay and in writing, notify the need 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 an expert witness 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.

- (a) Where you change your opinion following a meeting of experts, a simple and dated addendum or memorandum to that effect should be prepared and issued.
- (b) Where you significantly alter your opinion, as a result of new evidence or because evidence on which you relied has become unreliable or for any other reason, you should amend your reports to reflect that fact. Amended expert witness reports should include reasons for amendments and in such circumstances those instructing expert witnesses should inform the other relevant parties as soon as possible of any change of opinion.

PS 7 Agreeing facts and resolving differences

7.1 As an expert witness you may be instructed to communicate with the other party in an attempt to agree facts and to clarify, narrow and resolve the differences between parties. This may require a joint inspection. 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 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 expert witnesses 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 that are agreed; and
 - (ii) those facts and issues that have not been agreed and the reasons for any disagreement on any issue.

PS 8 Single Joint Expert (SJE)

8.1 The objective of a tribunal in appointing a Single Joint Expert (SJE) is for each case to be dealt with judicially according to the circumstances, so that all parties are on an equal footing and costs are minimised, at the same time ensuring that all matters are dealt with expeditiously and fully.

8.2 So as to achieve these objectives, the parties to a dispute are required to assist the tribunal as appropriate and together with the SJE must submit to active case management and follow the directions of the tribunal as quickly and efficiently as possible.

8.3 The SJE, in complying with the objectives of the tribunal, must also be familiar with the specific requirements of any particular tribunal and the rules as stated.

8.4 An SJE is restricted to only giving evidence that is reasonably required of them on matters within their expertise to help the tribunal resolve the subject proceedings. This duty overrides any obligation to any party to the dispute.

8.5 The SJE should therefore be clear on the following points when accepting an instruction as an SJE:

- (a) the subject matter of instructions
- (b) the need for expert evidence and its extent
- (c) the issues arising that require to be addressed
- (d) the presentation of the evidence
- (e) the release of the expert's evidence to the parties; and
- (f) the requirement that opinions must only reflect the SJE's areas of expertise.

8.6 Some tribunals may retain powers to direct the parties to a dispute to provide appropriate information to the SJE. The SJE must ensure they are aware of such obligations and the arrangements for such information to be provided to them so that they may successfully undertake this role.

8.7 Some tribunals allow the expert witness to direct questions to them where the expert is unable to secure appropriate instructions from their client or when instructions are passed to the expert by either side which the expert considers to be improper or out of time. The rules of the tribunal must be followed at all times and it is usually preferable to secure answers without such references to the tribunal as this option, where permitted, should be used only as a last resort.

8.8 The SJE must be careful to ensure they have disclosed any conflicts of interest or involvement with the parties or the case as well as confirming their ability to discharge their instructions in an appropriate manner and timescale, having regard to any rules of the tribunal and set timetable.

8.9 Difficulties may arise in the SJE receiving clear instructions from the parties to the dispute, in which case the SJE must establish what opportunities or rules exist so as to ask for or secure appropriate and clear instruction.

8.10 Where other difficulties arise or where further instructions are required, in the event that these are not agreed between the parties, the SJE should make a written request to the tribunal although, subject to the rules of tribunal, this will again normally only be a last resort. The SJE should notify the parties in reasonable time before taking such action.

8.11 The SJE should bring to the attention of the parties to the dispute, and as appropriate the tribunal, any involvement arising after appointment that may give rise to a conflict of interest or the perception of potential bias in the eyes of the public. This is to ensure that the circumstances arising do not undermine the findings and judgment of the tribunal.

8.12 SJE should not attend any meeting or conference that is not a joint one unless all parties have agreed in writing or the tribunal has directed that such a meeting may be held and who is to be responsible for the fees and costs.

PS 9 Advocacy and expert witness roles

9.1 The roles of advocate and expert witness are very different, requiring distinct skills, and cannot normally be carried out by the same person. However, in certain circumstances some tribunals, usually lower order tribunals, do allow surveyors to act in the same case both as surveyor-advocate and as expert witness where it is in the public interest, and where not allowing such a dual role would limit access to justice by certain parties (see also the RICS practice statement and guidance note *Surveyors acting as*

advocates). 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 (for example, the disproportionality of retaining two persons in separate roles) and where it is in the public interest to do so by providing access to justice which otherwise may not be available.

9.2 However, where 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 3.2) 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 likely impact on your impartiality as expert witness, and any possible impact in terms of the perception of that impartiality by others (for example, the weighting given to your opinion evidence); and any possible impact on your advocacy submissions
 - (ii) whether or not you will be able to fulfil both roles properly with professional integrity 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 and the tribunal so permits.

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

9.5 Surveyors, when acting as advocates, are required to comply with the RICS practice statement and guidance note *Surveyors acting as advocates*.

PS 10 Conditional fees

10.1 You should not undertake expert witness appointment on any form of conditional or other success-based arrangement including where those instructing you are engaged on such a basis.

10.2 It is inappropriate to be remunerated by way of a conditional fee arrangement when acting as an expert witness but it may be an appropriate fee basis when acting as an advocate. When acting in a dual role as expert witness and advocate, where permitted in lower tribunals, a conditional fee arrangement may be acceptable because it will be seen as attached to the role of advocate. Such a dual role improves access to justice by reducing costs and therefore a conditional fee payment can be supported in these limited and strict circumstances.

10.3 When acting in a dual role and where a conditional fee arrangement has been agreed, this must be declared to the tribunal.

10.4 It is unlikely that a dual role will be permitted in higher tribunal formats and consequently previously agreed conditional fees when the surveyor has appeared in a lower tribunal will, at the point of transferring to the superior or higher tribunal, need to be commuted and replaced by an hourly rate or fixed fee arrangement.

Surveyors acting as expert witnesses: RICS guidance note

RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations which in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member had acted with reasonable competence.

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

It is for each member to decide on the appropriate procedure to follow in any professional task. However,

where members do not comply with the practice recommended in this note, they should do so only for a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

Document status defined

RICS produces a range of professional guidance and standards products. These have been defined in the table below. This document is a guidance note.

Type of document	Definition	Status
Standard		
International Standard	An international high level principle based standard developed in collaboration with other relevant bodies	Mandatory
Practice Statement		
RICS practice statement	Document that provides members with mandatory requirements under Rule 4 of the Rules of Conduct for members	Mandatory
Guidance		
RICS Code of Practice	Document approved by RICS, and endorsed by another professional body / stakeholder that provides users with recommendations for accepted good practice as followed by conscientious practitioners	Mandatory or recommended good practice (will be confirmed in the document itself)
RICS Guidance Note (GN)	Document that provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners	Recommended good practice
RICS Information Paper (IP)	Practice based information that provides users with the latest information and/or research	Information and/or explanatory commentary

GN 1 Application of guidance note and introduction

1.1 The start date of application of this guidance note (GN) is three months after its publication date. This guidance note applies where any RICS member provides expert evidence, whether oral or written, to the proceedings of any tribunal subject to the rules of that specific tribunal and its jurisdictions. It is recommended the guidance note be considered in conjunction with the foregoing practice statement (PS).

1.2 The guidance note provides direction on good practice where you are required to give expert evidence before the tribunal (including acting as an expert in arbitration or adjudication or as a Single Joint Expert). Tribunals may have their own specific rules which make provisions for expert evidence and must at all times be followed.

1.3 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. If your role includes the role of expert witness, you must carefully consider whether to take any of the other roles outlined 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, the RICS practice statement and guidance note *Surveyors acting as advocates*. 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). You should bear in mind that your advice may well not attract legal professional privilege and may therefore be disclosable to a tribunal thereafter.
- (c) **Expert witness** (and as a Single Joint Expert (SJE); see PS 8 and GN 16): your primary duty as an expert witness, including as an SJE, will not be 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 this practice statement and guidance note.
- (d) **Negotiator:** in this capacity you will be acting to negotiate a resolution to disputed matters. 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 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 their 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 under oath or on affirmation as to something you saw, heard, experienced, said or did (that is, 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.

1.4 The practice statement 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 practice statement 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 practice statement or not. A common misunderstanding is that it is always mandatory to act as an expert witness in proceeding before a tribunal.

1.5 Nothing in the practice statement or this guidance note should be construed as suggesting that a tribunal has powers to mandate that presentations made to it 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 representations, compliance with the practice statement is required.

1.6 All surveyors are, as a matter of professional conduct, expected to comply with the applicable rules of tribunals and be aware of those circumstances in which they apply and the existence of and effect of changes to the rules of the relevant tribunals. For the

avoidance of doubt, this guidance note is not intended to provide a commentary on any particular tribunal rules and it is the responsibility of the expert witness to be familiar with the relevant rules.

1.7 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 practice statement aims to assist in ensuring the independence and impartiality of the opinion given by the expert witness.

1.8 The obligation imposed upon you to make the existence of this practice statement known to the client when accepting instructions to act as expert witness (PS 3.4(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 5.4(o) to make a Statement of Truth, and the specified declarations of PS 5.4(p), are intended to assist in this respect.

1.9 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 and common law jurisdictions (including Scotland and Hong Kong) and are generally seen as a useful benchmark in most arbitrations and adjudications.

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*).'

1.10 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.

GN 2 General duties

2.1 The specific duties and various tasks that may be undertaken as an expert are to:

- (a) act independently and impartially
- (b) assist the tribunal
- (c) provide a range of opinions as appropriate and where the evidence requires it
- (d) assist a party to establish the facts and to assess the merits of a case and help with its preparation
- (e) define and agree issues between the parties
- (f) help quantify or assess the amount of any sum in dispute and identify an appropriate basis on which a case might be settled

- (g) 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
- (h) meet with other experts of the same discipline either in an attempt to agree and narrow liability issues in dispute or to attempt to agree matters of quantum and valuation (this will often result in the experts preparing and issuing joint reports to the parties); and
- (i) conduct enquiries when instructed to do so by the tribunal and report to that body as to findings either as an expert acting for one party or where instructed as an SJE.

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 fulfil the task specified within any allocated time span.

2.3 If you cannot fulfil the criteria in PS 3.2, PS 3 Acting as an expert witness and instructions, makes it clear that 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 3.4(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.

2.6 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 practice statement, should be construed as implying that an employed surveyor giving expert evidence on the instructions of their employer is not capable of giving unbiased, truthful expert evidence.

2.7 Where you are acting, or have previously acted, in the subject case in another role, such as the negotiator or adviser on the transaction, this may adversely affect your ability to present yourself with the impartiality and independence of opinion required of an expert witness. Consider the position carefully and discuss with your client and/or the legal adviser as appropriate.

2.8 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 your evidence before the tribunal. Some tribunals 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.

2.9 PS 3.4(b) requires the expert witness to offer to supply a copy of this practice statement to a prospective client. For this purpose a stand-alone version of the practice statement in the form of a client guide is available to members to download from www.rics.org. This client guide may be provided to the expert witness's client without copyright permission. However, it must be made clear to the client that his/her copy is for his/her use only, and that any reproduction of the guide for the use of a third party would breach RICS' copyright.

GN 3 Advice and disclosure

3.1 Surveyors, as experts in their field, may be asked to provide initial advice (for example, 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.

3.2 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'. Usually, all such initial advice is given within the normal client/professional adviser relationship. This is quite different from the relationship that exists if you are acting as an expert witness and great care should be taken in

circumstances where the surveyor moves from a position as the client's adviser to one of expert witness.

3.3 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 there is 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.

3.4 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.

GN 4 Duties to the tribunal

4.1 If, at the outset, you are not entirely confident that any of the duties referred to in PS 2 Duty in providing expert evidence, can be properly fulfilled, for whatever reason, you are advised to decline instructions to act as an expert witness, having first discussed the matter with your client.

4.2 If, having already been instructed, you are not entirely confident that any of the duties referred to in PS 2 Duty in providing expert evidence, can continue to be properly fulfilled, you are advised to discuss the matter with your client and, where appropriate, cease acting as an expert witness on the case.

GN 5 Instructions and inspections

5.1 When you initially receive instructions, it is recommended that you notify those instructing you as soon as possible where:

- (a) you consider that your instructions and/or work are likely to have placed you in conflict with your duties as an expert witness
- (b) the instructions may not be acceptable (for example, where deadlines are unrealistic or instructions are unclear)
- (c) the instructions are insufficient for the completion of your task; or
- (d) you may not be able to fulfil one or more of the terms of your engagement.

It is advisable, prior to agreeing the terms of the instruction, that you seek appropriate variations, additional resources and information in these circumstances, wherever possible.

5.2 Prior to acceptance of instructions, you are recommended to:

- (a) check that the instructions contain basic relevant information (for example names, contact details, dates of incidents, etc.), including the identity of the parties to the dispute
- (b) ascertain the name of the party you are to be instructed by
- (c) ascertain the identity of the tribunal
- (d) 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
- (e) 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
- (f) consider and decide whether any conflicts of interest would arise, or might be perceived to arise if you were to be instructed.

5.3 An instruction is not static and during its course circumstances may change. The expert witness should always review that the terms of engagement can be satisfied at all times and alert the client if there is any cause for concern that there is, or might be, an issue that could mar or compromise their ability to continue to act as an expert witness.

5.4 Surveyors acting as expert witnesses may occasionally be approached directly by a prospective client who has no legal representative. In these situations, the client may seek technical, procedural and legal advice. The expert witness should explain the role of the expert witness but should exercise caution when providing procedural guidance. As noted in GN 2.9, the expert witness is required under PS 3.4(b) to supply a copy of the client guide to a prospective client.

5.5 The expert witness should not offer the client legal advice but should recommend that they seek advice from a suitably qualified professional.

5.6 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 fulfil your responsibility to be independent and to be able to act impartially.

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

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

5.8 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. Refer to the RICS guidance note *Conflicts of interest* to assess any involvement and whether or not a conflict of interest may be perceived as arising from such an involvement.

Where a conflict or potential conflict of interest arises, you are referred to the requirements of PS 3.4(e) and PS 3.7. In the case of an appointment as an SJE, you are referred to PS 8.7

5.9 For details of the requirements to establish clear instructions and for terms of engagement, see PS 3 Acting as an expert witness and instructions. 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).

5.10 Circumstances may exist or arise where you consider that part of your instruction requires assistance from another person. Reasons for needing assistance should be set out clearly. Remember that it is for the tribunal to accept the necessity for the submission of expert evidence. In such circumstances it is recommended that you notify the client in a timely manner and give the name of the individuals recommended to be engaged, together with information as to that person's experience, qualifications and expertise (see PS 3.4(d)).

5.11 In certain tribunals you may file a written request to the tribunal for directions to assist you in carrying out your function as an expert witness. You are recommended to consider referring in your terms of engagement to the possibility of such an application and, when contemplating making an application to the tribunal 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 should be taken to ensure that privileged or 'without prejudice' material is not disclosed during such an application. Unless the tribunal orders otherwise, a request for directions should 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 tribunal, when it gives directions, may direct that a party be served with a copy of the directions. It is recommended that the client be made aware, before instructions are accepted, of the expert witness's rights under such provisions.

5.12 An expert witness, when instructed by one party, may have written questions about their report put to them by another party (see GN 9, Documents). It is recommended that the client be informed, before instructions are accepted, of the effect of this 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.

5.13 It is recommended that you 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) Expert witness report: this may also involve supplemental reports, counter-representations or points of reply together with joint meetings of experts.
- (c) Giving evidence orally to a tribunal.

5.14 All three phases may involve conferences with advocates or meetings with solicitors. Advice given by you, while ancillary to the expert witness role, is provided in a professional capacity. You are reminded that, as an expert witness, you are providing your opinion to the tribunal to assist it in the case. 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.

5.15 PS 5.4(b) mandates that your report states the substance of all material instructions, whether written or oral. Such instructions are unlikely to be privileged against disclosure. A tribunal may order disclosure of

any specific document or permit any questioning of the expert as to the basis of their instructions where it feels there are reasonable grounds to consider the statement of instructions given to be inaccurate or incomplete. A tribunal will usually allow cross-examination of the expert witness as the basis of their instructions where it appears to be in the interests of justice to do so.

5.16 A party can usually apply for an order for inspection of any document mentioned in an expert witness's report which has not already been disclosed in the proceedings. Inspection of an expert witness's written instructions may also be sought where it has a bearing on matters referred to in the statement of case or '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.

5.17 Where your instructions are, or may be perceived to be, in conflict with your duties (for example, 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.

5.18 PS 4 Inspections, concerns any inspection of a 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 on which a property was inspected and clearly state the extent of the inspection.

GN 6 Evidence of fact

6.1 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 ensure that you recognise each role's distinctiveness. In addressing questions of fact and opinion, you should keep the two separate.

6.2 The duty to the tribunal under its rules will take 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 from those instructing you before preparing a report based upon confidential information, as it may be necessary to disclose confidential information.

6.3 It is usual for those instructing expert witnesses to provide them with facts, literature or other material, which expert witnesses may adopt if relevant to the matters with which they are dealing. As the practice statement 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 expert witness 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. Within the expert witness report you should give the source of factual information relied upon (see PS 5.4(e) and (f)).

6.4 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.

6.5 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.

6.6 a) Where ordered by a tribunal to communicate with the other expert witness in order to attempt to agree facts and clarify, narrow or resolve the issues in dispute (see PS 7.1), it is recommended that you request from your client a copy of any order or direction relating to such requirements.

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 the mandate of PS 7.3 could include (but might not be limited to):

- (i) the commercial interests of your client in advancing or delaying 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 play in prompting a settlement with the other party.

6.7 If you are in doubt about the admissibility (for example, possibly because it is privileged) of any fact or statement upon which you are relying, you are advised to seek legal advice. Hearsay evidence may be admissible in civil proceedings in certain jurisdictions, provided that certain rules are followed (see GN 7, Expert (opinion) evidence). If you are in any doubt about the use of hearsay evidence, it may prove valuable to seek instruction.

GN 7 Expert (opinion) evidence

7.1 In summary, expert evidence is the expert witness's own opinion based on experience and knowledge (see PS 3 Acting as an expert witness and instructions).

7.2 PS 5.4(h) makes clear that, where an opinion has been formed based on incomplete knowledge of facts such limitations are to be stated fully in the evidence.

7.3 Evidence that is within the expert witness's knowledge should be treated by the tribunal as more reliable evidence than that which is second hand and known as hearsay evidence. Hearsay evidence is permitted and it is up to the tribunal as to how much weight is accorded to that evidence. The expert witness must make it known that hearsay evidence will be included in the report. Hearsay evidence, which is uncorroborated, runs the risk of not revealing all the details. The possibility of incomplete or misleading evidence (whether that is by innocent mistake or deliberate manipulation) is increased. The tribunal's emphasis will be on the weight it attaches to that evidence rather than its admissibility. The expert witness should be aware that, where there is heavy reliance on hearsay evidence, it is advisable to clarify as much of the detail as possible and include it in the joint statement.

7.4 It is recommended that you do not express, as your own opinion, an interpretation of statute or case law unless qualified to do so. If your conclusions

depend upon assumptions as to such matters, however, you should identify the assumption being made.

GN 8 Questions to expert witnesses and answers

8.1 In many jurisdictions it is permitted for a party to put written questions to an expert witness instructed by another party, or to a Single Joint Expert (SJE) (see also GN 17, Expert evidence, advocacy and 'a dual role').

Unless the tribunal gives permission, or the other party agrees, it is usual that such questions:

- (a) may be put once only
- (b) must be put within a set period (often 28 days) of service of the expert witness's report; and
- (c) must be for the purpose only of clarification of the report.

8.2 An expert witness's answers to the questions will be treated as part of the expert witness's evidence, and the practice statement and guidance note will continue to apply to such work. It is recommended that you copy your answers to your own client and be aware that your general duties apply to your provision of answers.

8.3 Your client must pay any fees you charge 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.

8.4 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).

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.

8.5 It may be possible for an expert witness to seek directions from a tribunal to assist them in carrying out their functions; for example, if the client or a party fails to resolve the problem or fails to approach the court for directions. Under these circumstances you may

consider the option to make a written request to the tribunal for directions, when the rules of the tribunal permit such a procedure.

Where such requests are made, you must provide copies to your client and the parties in advance and comply with any timescales that may be prescribed by the tribunal or the rules.

It is likely that the tribunal will direct the expert to provide copies of its directions or answers to the questions as put to the expert witness by a party or all parties.

8.6 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) is only 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.

8.7 A request to the tribunal for directions by letter would normally require written notice of at least seven days to the client and at least four days to the other party. The request will usually 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
- (e) copies of any relevant documents
- (f) the questions on which directions are required
- (g) the identity of those who have seen the questions and/or those circulated with a copy; and
- (h) the signature of the witness and date of the request.

GN 9 Documents

9.1 Any evidence given by you, in addition to your experience, will almost invariably be based upon documents either provided to or held by you.

9.2 When accepting instructions, it is regarded as best practice 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.

9.3 Documents from your own resources often provide useful factual information upon which to rely. Such documents might include:

- textbooks
- published material
- photographs
- plans
- the opinion of others
- evidence proformas or other evidence verifying documents from third parties
- codes of practice; and
- RICS practice statements, guidance notes, codes and information papers.

Where you rely upon such documents it is important that you make that clear as part of your evidence and provide, or offer to provide, full copies.

9.4 During the course of your enquiries you may be made aware that other documents exist which might be of relevance but which might not be available. In such circumstances, where applicable, you may need to consider taking further action to secure the necessary factual information.

9.5 Where a party has access to information which is not reasonably available to another party, the tribunal may direct the party who has access to the information to:

- (a) prepare and file a document recording the information; and
- (b) serve a copy of that document on the other party.

9.6 In any event, it is considered best practice for chartered surveyors and all expert witnesses to ensure that both the client and the other side see all evidence and relevant material supporting their case, prior to the exchange of expert witness reports. The withholding of evidence as a tactical approach, so as to deliberately mislead or ambush the other side, is regarded as unprofessional and may result in costs being awarded against your client even if you 'win' the case. It may also lead to a charge of misconduct against the chartered surveyor who deliberately and wilfully, for tactical reasons, does not make available their evidence to the other side prior to the submission of expert witness reports.

9.7 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 immediately verify the

status of the materials without reading the papers (the preferable option), or return the papers unread with an explanation for their return.

GN 10 Oral evidence

10.1 Most tribunals require expert witness evidence to be given in a written report unless directions are issued to the contrary. Oral evidence will usually be given under oath or affirmation but, in any event, 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 important that you say so.

10.2 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.
- (c) Ensure you have been given sufficient time to undertake all appropriate investigations and finalise your professional opinion based on the facts and your own expertise and experience.
- (d) Ensure that the client fully understands your duty to the tribunal, even when an element of your evidence may not support the client's position or wishes on part of the case. If your evidence and professional opinion is not supportive of the general thrust of the client's case, you must communicate this position to the client and/or those instructing you at the earliest opportunity. Failure to do so may significantly undermine your position as an expert witness and can lead to delays, increased expense and inconvenience to all parties, including the tribunal, which must be avoided.
- (e) Bear in mind that, if you refer to documents or notes while giving evidence, the advocate or the tribunal can request to see those documents or notes. This includes annotations on such documents or notes which are already before the advocate and tribunal.

10.3 Where you have to refer to bulky material in your evidence, and to electronic and 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, as well as the other side and your own client and advocate, as appropriate.

10.4 Oral evidence may take a variety of forms, principally examination in chief, where you will be asked questions by your client's counsel, and cross-examination, where you will be asked questions by the other party's counsel. More recently, the practice of tribunals hearing concurrent evidence from expert witnesses of like discipline has become prevalent. This is often colloquially referred to as 'hot tubbing'. While the procedure varies and is generally at the tribunal's discretion, it is not unusual for expert witnesses to be sworn in together and to affirm opinions or give evidence simultaneously. The tribunal may ask questions and the expert witnesses may engage in discussion with, or the questioning of, each other. Counsel for the parties may also be given the opportunity to ask questions. Often the process of hot-tubbing occurs after traditional cross-examination and provides the tribunal with an opportunity to speak to the expert witnesses at the same time about particular issues that may be of concern.

10.5 When giving evidence, you will be questioned by advocates and possibly the tribunal. All answers are expected to be addressed to the tribunal. Concise answers are preferable and should be a direct reply to the question as put. This will often be a simple yes or no. However, you should not let advocates prevent a full answer being given where additional commentary is required to put your answer to the question into the correct context or where you feel it will be helpful to the tribunal to extend your answer to give a full and clear understanding. It is recommended that the direct answer is volunteered first before making any additional comments or clarifying the basis on which such an answer has been given. If you are unsure as to the appropriateness of extending your answer, it may be best to enquire of the tribunal if you may have permission to expand on the answer as given in direct response to the question.

10.6 Adjournments of the hearing (whether for lunch, overnight or longer periods) will often occur. While you are under oath or affirmation, you are not permitted to discuss the case with anyone during those adjournments. This restriction includes your client and client's advisers, advocates, fellow expert witnesses 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 11 Advising advocates

11.1 As an expert witness you may be required to advise advocates and it is almost certain that you will have to liaise with an appointed advocate and explain the basis of your professional opinion in the context of the client's case.

11.2 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 and you contribute as appropriate to such discussions.

Such advice is not regarded as providing expert evidence and is privileged. Privilege is the right of a party to refuse to disclose a document or produce a document, or to refuse to answer questions on the ground of some special interest recognised by law. Discussing issues relating to a specific litigation with the instructed lawyers and advocate is regarded as privileged for the purposes of disclosure.

11.3 During the hearing, the advocate may wish to consult with you while other expert 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 witness is often asked to sit immediately behind or alongside the advocate in order that he or she can be consulted directly during the proceedings.

11.4 It is recommended that the expert witness discusses with the advocate and/or the instructing lawyer when attendance at the tribunal is required, so that the expert witness is able to remain involved with those parts of the dispute which cover the relevant subject matter and can advise of any implications for the client's case.

11.5 Expert witnesses who are not under oath or affirmation are commonly required to listen to others give evidence, especially the expert witness for the other side covering the same subject. The expert witness may also be required to discuss other matters relating to the case with advocates during adjournments.

11.6 You should discuss in advance of any hearing with the client and/or instructing solicitors, which expert witnesses for the other side you should listen to and where you may be excused from attending the hearing, so as to minimise costs to the client. However, it is important to ensure that you are not excluded from those parts of the proceedings which may have

relevance to your evidence or allow you to understand the context in which your evidence is given.

GN 12 Expert witnesses' written reports

12.1 It is recommended that your expert witness report be addressed to the tribunal and not the party from whom your instructions originate. Your written report 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 to check 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 the 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.

12.2 In PS 5.4 the Statement of Truth and declaration that the expert witness understands his/her duty to the tribunal (PS 5.4(p)) can follow each other or be combined into a sole declaration if desired. It should be understood that the basis of instructions will not be privileged against disclosure, and that you may be asked to include appendices within the expert witness report or provide, during the course of any hearing, a copy of the letter of instructions and/or relevant correspondence relating to the basis of your instructions.

12.3 The requirement in PS 5.4(k) is directed primarily to issues of practice or principle on which there exists a known and acknowledged range of opinions between experts in the field, or different schools of thought. 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 evidence of the expert witness and saying why their opinions do not cause you to change your views.

12.4 Where there are material facts in dispute, expert witnesses should express separate opinions on each hypothesis put forward, avoiding the expression of a view in favour of one or other disputed version of the facts unless, as a result of particular expertise and experience, one set of disputed facts is considered as being improbable or less probable, in which case the view may be expressed, supported by reasons for holding it.

12.5 It should be noted that the requirements in PS 5.4 may be varied or supplemented by, for example, various court guides or the rules or directions of a particular tribunal. If you are reporting to a court in England or Wales, CPR Practice Direction 35 paragraph 3.1(9)(b) requires an additional statement that you are aware of the requirements of CPR Part 35, the practice direction and the Protocol for Instruction of Experts to give Evidence in Civil Claims.

12.6 It is recommended that you keep matters of fact and opinion separate.

12.7 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. Where you rely on literature or other material and cite the opinions of others without having verified them, it is recommended that you provide details of those opinions relied on. It is also likely to assist the tribunal if the qualifications of the originator(s) are stated.

12.8 If, after disclosure of your expert witness report, you identify a material inaccuracy, omission or have a change of opinion on any matter, you must inform those instructing you of your obligations pursuant to PS 6.1. Where you have changed your opinions and are to amend your report, a simple signed memorandum/addendum to that effect will usually suffice.

GN 13 Form and content of an expert witness's written report

13.1 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, have

regard 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.

13.2 It is advisable that the front sheet reveals the name of the expert witness and includes:

- the proceedings and tribunal
- the nature of the evidence
- the instructing party and client
- the opposing party
- 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'.

13.3 It is recommended that written reports made to a tribunal by an expert witness avoid the excessive use of company logos.

13.4 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 and relevant 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) A complete and transparent statement of all material instructions.
- (v) A history of the expert's involvement in the case and the sequence of relevant events, where such a history exists.
- (vi) The issues that the expert witness proposes to address in the report (you may wish to number them).
- (vii) An executive summary of the main report, as appropriate, depending on the circumstances. 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 that the expert witness has established for themselves (or others acting on their behalf have established).
- (ii) Identify the various sources of facts and material provided to and derived by the expert witness.
- (iii) List the documents upon which the expert witness relies in the report, and provide references to enable their identification.
- (iv) 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.
- (v) Where asked to make an assumption, it is advisable that the expert witness indicates their belief that it is unreasonable or improbable (that is, qualify the point as necessary) as the case may be.

(c) Opinions and conclusions:

- (i) The expert witness report should itemise the issues that arise from the facts and related enquires.
- (ii) The expert witness report should explore the issues in an open and transparent manner.
- (iii) The expert witness should not be limited to one opinion but where the issues could lead to a range of opinions the expert witness should articulate these.
- (iv) The reasoning behind the opinions should be fully and properly rehearsed.

13.5 The expert witness may have a personal style that is adopted for the layout of each report. Care should be taken to standardise the report into a template format. Each report should be structured to fit the situation of the case and be tailored accordingly.

GN 14 Meetings between the expert witness and the client's team

14.1 The bringing together of the client's team and the expert witness as early as possible is to be encouraged so that your professional opinion can be established and understood. This enables the strengths and weaknesses of your professional opinion, which will form the basis of your expert witness report, to be established, and the client's case and potential for success or otherwise to be evaluated.

14.2 It may result in you wishing to make changes to the report, and/or the client wishing to settle the matter. Consequently, such meetings, and the understanding arising from them, are often of critical importance as to how the case is progressed.

GN 15 Narrowing differences and meetings between experts

15.1 The purpose of meetings between the expert witnesses is to narrow the differences by discussion and achieve a greater understanding of the issues in dispute. PS 7 Agreeing facts and resolving differences, aims to facilitate earlier settlement and reduction of costs by mandating a proactive and cooperative approach among opposing expert witnesses; an obvious way to achieve this is to hold a meeting.

15.2 Unless directed by the tribunal, meetings between expert witnesses, although not mandatory, are best practice, but should only take place with the knowledge and approval of the client. Prior to the meeting, the expert witnesses must agree that it is being held on a 'without prejudice' basis.

15.3 'Without prejudice' is a rule governing the admissibility of evidence. The essential purpose of conducting the meeting on a 'without prejudice' basis is to encourage the expert witnesses to speak frankly and openly in the knowledge that the discussion cannot be relied upon or communicated to the tribunal, but the overall goal of the spirit of the meeting is being adhered to.

15.4 It is generally best if such meetings occur before reports intended for disclosure are exchanged, as expert witnesses can be slow to alter opinions after signing a report and time can be wasted. An exchange of skeletal reports or an agenda of the issues before such meetings may assist the process.

15.5 Meetings offer the opportunity for the expert witnesses to exchange and discuss evidence, pool relevant technical information, identify areas of

agreement and disagreement, and explore whether those areas may be narrowed or eliminated altogether. Expert witnesses should approach the meeting with a willingness to listen, and be cooperative and constructive. Expert witnesses should not be limited in expressing their professional opinions on the issues by those instructing them otherwise the worth of the meeting can be devalued. Narrowing of the issues may well lead to shorter, clearer reports which will save time, thereby reducing costs.

15.6 There is no prescribed protocol for a meeting between expert witnesses, although there may be times when the expert witnesses are directed to meet by the tribunal. If the expert witnesses are to meet, the following is recommended:

(a) Prior to the meeting:

- (i) The expert witness should discuss with the client and any legal adviser the purpose of the meeting, having regard to the terms of any order or direction by a tribunal, where available.
- (ii) Agree with the opposing expert witness where to hold the meeting. This can be seen as a tactical point and a place of neutrality may be preferred. In the context of the tribunal, it is generally expected that the claimant's expert witness is the convenor of the meeting.
- (iii) Establish with the opposing expert witness whether an agenda or skeletal expert witness reports are necessary and, if so, their contents. It is good practice to at least create a template that assists the expert witnesses to focus on the issues that need to be discussed and to identify any relevant material you intend to introduce or rely upon in the discussions. Any agenda should be neither hostile nor partisan.

(b) During the meeting:

- (i) Reaffirm at the outset that the meeting is being convened on the basis of 'without prejudice' discussion.
- (ii) The expert witness is expected to be aware of the overriding objective that the tribunal deals with cases justly, taking into account proportionality, expeditiousness and fairness (as set out in the CPR Practice Direction 1, Rule 1.1) and it is advisable to bear this in mind in terms of the conduct of the expert witnesses' meeting.
- (iii) Clients, lawyers and advisers will not usually be present at the expert witness meeting. If they are present, they should not intervene in the discussion, but may answer questions put to them and advise on the facts of law. The expert

witnesses are at liberty to, and may correctly insist on, conducting part of their discussion in the absence of lawyers, if they so wish.

- (iv) Where possible, agree and jointly sign minutes of the meeting to avoid misunderstandings later.

(c) After the meeting:

- (i) If it was not possible to do so at the meeting, agree and jointly sign the minutes of 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.
- (ii) The minutes should preferably set out those issues that are agreed between the expert witnesses and those which are not, together with the underlying reasons, as well as a list of new issues which may have arisen and/or further action(s) which is to be taken or recommended.

15.7 Where expert witnesses reach an agreement on issues during their discussions, that agreement does not bind the parties unless the parties agree to be bound by it.

15.8 The tribunal may have directed, or the parties may have voluntarily agreed, that the expert witnesses are to prepare a joint statement of what is agreed and what is not agreed. Such a document is usually the product of several expert witness meetings and discussions.

The publication of this document will normally be subject to a time deadline set by the tribunal. The joint statement is to be available for use in the proceedings and is not protected by privilege. Its purpose is to define and narrow the contentious issues. The tribunal may have also specified issues that the expert witnesses must address.

The tribunal is not usually bound by the findings of the joint statement but its decision is likely to be influenced by it.

You are reminded that the joint statement is not a legal document but one that rehearses the agreed facts and expresses the opinions of the expert witnesses and it should be their own work and not drafted, amended and/or approved by the client and/or lawyer and does not require their authority to sign it.

15.9 If an expert witness materially alters his/her opinion after signing the joint statement then he/she must provide to those instructing him/her a note or addendum properly and fully explaining the change of opinion.

15.10 The expert witness needs to be careful that a joint statement used at mediation does not lose its privilege if prepared under the tribunal's direction for any joint statement. The expert should seek the advice of the client's lawyers.

GN 16 Single Joint Expert (SJE)

16.1 In certain jurisdictions a tribunal may have the power to direct that evidence be given by a Single Joint Expert (SJE). The parties may be instructed to agree who should be the SJE or the tribunal may select the expert from a list prepared or identified by the relevant parties, or direct that the SJE is selected in such a manner as the tribunal may direct.

Where an SJE is appointed and one party is permitted to give instructions to the SJE, that party must at the same time send a copy to the other relevant parties.

16.2 The tribunal may give, and the SJE should seek, appropriate directions about the payment of their fees and expenses, any inspection, examination or experiments which the SJE wishes to undertake and any limit as to the amount that can be paid by way of fees and expenses to the SJE. The tribunal may direct that some or all of the relevant parties may pay an amount representing the fees in to the tribunal and where the relevant parties are jointly and severally liable for the payment of the SJE's fees and expenses, unless otherwise directed by the tribunal.

16.3 Where the SJE is required to consider varying instructions with multiple assumptions, the SJE must respond accordingly, giving appropriate answers for each option by taking account of the different assumptions or facts that have been identified, either by the agreement of the parties, or by the direction of the relevant tribunal.

16.4 It should be noted that an SJE's answers to the questions and instructions as put should be treated as part of the evidence of the SJE and therefore are covered by the 'Statement of Truth'.

GN 17 Expert evidence, advocacy and 'a dual role'

17.1 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. The dual role of advocate and expert witness is regarded as incompatible and gives rise to a conflict of

interests which is not in the best interests of the client or of assistance to the tribunal.

17.2 Nevertheless, in certain lower tribunals some surveyors do adopt a dual role; that is, act in the same case as surveyor-advocate and expert witness. This approach is permitted in some lower tribunals where it accommodates access to justice in a manner and at a cost which permits such cases to be brought forward.

17.3 The right to access to justice is a public interest matter, although it does require an understanding of the arrangements and potential disadvantages that exist in adopting such a position. Consequently, PS 9 Advocacy and expert witness roles, obliges you to consider the permissibility and appropriateness of undertaking a dual role in the same case.

17.4 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 imperative 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, 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). 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.

17.5 PS 9.1 and 9.2 refer to proportionality as a factor influencing any decision to adopt a dual role. Proportionality considerations encompass the following (which are 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.

17.6 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 substantial.

17.7 The dangers and difficulties of acting in a dual role were emphasised in the English 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:

- (a) combining the roles of expert and advocate before a public local enquiry was an undesirable practice; and
- (b) an expert witness had to give a true and unbiased opinion and the advocate had to do the best for his/her client.

An expert witness who has also undertaken the role of advocate may run the risk that his/her evidence is later treated with some caution by a tribunal.

In the English Lands Tribunal case of *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...’

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

- (a) As elaborated in the RICS practice statement and guidance note *Surveyors acting as advocates*, 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 misstate 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 practice statement makes clear that 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 practice statement specifies that special care must be taken to ensure your evidence 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 refer to questions of admissibility; refer to questions of interpretation of a contract (see GN 9.3), or include 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 expert witness report of your counterpart.

17.9 It is advisable that you 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. The RICS practice statement *Surveyors acting as advocates* makes it clear that, when conducting the role of surveyor-advocate, you are not able at any stage to present expert opinion evidence, unless permitted to do so by the tribunal.

17.10 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 practice statement 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.

17.11 If you are acting as surveyor-advocate and expert witness you should always ensure that such a combined role is permitted, that you are familiar with the procedures of the relevant tribunal and that the means adopted for distinguishing advocacy from expert witness evidence are appropriate to those procedures. Alternatively, 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 witness evidence begins, so that it is clear which material can be tested by cross-examination.

17.12 Where the two roles are conducted by written representations, if the distinction is not obvious, and the chances are it will not be to the decision maker, 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 RICS practice statement and guidance note *Surveyors acting as advocates*.

17.13 If undertaking the two roles, you and your client must be aware of the 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 will 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 and is likely to be given, as the dual role by this stage will have been accepted, but the tribunal may still be nervous about how any communications are conducted and may impose conditions.

17.14 It is also 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 18 Basis of charging fees

18.1 The basis of charging may vary depending upon the nature of your appointment.

18.2 When appointed by a party to a dispute, PS 3.6 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, to 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.

18.3 An expert witness is likely to be required to provide an estimate of their fee charges, but such an estimate should only be provided when the expert witness has a good understanding of the case and the scope of his/her appointment within it. The rules of the specific tribunal may be such that an inaccurate estimate could have significant consequences.

18.4 Levels of fees and expenses payable may be determined by the rules of particular tribunals, 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 that some tribunals, in determining costs or expenses, may treat any advocacy work undertaken as work done by a lay representative.

18.5 Have regard to the possibility that the level of fee that a successful client may recover from the other party might be subject to revision by the tribunal under the detailed or summary assessment of costs procedures.

18.6 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 as to any required or preferred time keeping arrangements or if there is a precedent in respect of their specific requirements.

18.7 Where the tribunal makes a direction for an SJE to be used, this may include requirements for the payment of the expert's fees and expenses and the basis upon which any inspection, examination or experiments may be undertaken. The tribunal may limit the amount that can be paid by way of fees and expenses to the expert and direct that some or all of the relevant parties pay that amount into the tribunal. As stated earlier, it should be noted that, unless the tribunal directs otherwise, the relevant parties are jointly and severally liable for the payment of the expert's fees and expenses.

GN 19 Conditional fees

19.1 PS 10.1 prohibits you from undertaking expert witness appointments on a conditional or other success-based arrangement including where those instructing you are engaged on a conditional or other success-based arrangement.

The reason for the prohibition is that such arrangements undermine the appearance and possibly the reality of the independence and the expert witness's overriding duty to the tribunal. This is because of the perception that an expert witness will be unduly influenced by an incentivised conditional fee, creating the potential for bias in the promotion of the evidence by an expert witness who seeks to be rewarded by the successful outcome for their client of the case.

19.2 It may, however, be permissible for surveyors who are merely providing support to lawyers to provide this support on a conditional or other success-based arrangement. Where other surveyors are instructed to be advisers, expert witnesses should be careful not to be influenced by those surveyors into expressing views that they do not genuinely hold.

19.3 When permitted in lower tribunals, where a surveyor acts in a dual role as both expert witness and advocate, a conditional fee arrangement may be entered into reflecting the advocacy aspect of the representations, thereby also supporting access to justice where otherwise it may be excluded by reason of cost.

19.4 Where a conditional fee is the basis on which the surveyor is being remunerated, it must be declared and confirmed to the tribunal that the surveyor is acting as either an advocate or in a dual role as advocate and expert witness. It should be noted that the dual role is likely to be permitted in lower tribunals reflecting the access to justice position, but must in any event only

be considered where the rules of the tribunal allow for such a dual role to be performed.

GN 20 Responsibility for expert witness's fees

20.1 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 (for example, solicitors, claims consultants or similar) jointly and severally responsible for payment. Note that, where an expert chooses to make a contract directly with the client, such terms should be written in plain, intelligible language and should satisfy the 'fairness' test in that a term may be considered unfair if it causes a 'significant imbalance' in the parties' rights and obligations.

20.2 It is recommended that you should advise those instructing you 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 confirming 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.

20.3 It is a requirement that you as an expert witness answer questions put to you either by the tribunal or by parties, other than your own client, where they have a right to put such questions to you. Failure to respond to legitimate questions may result in less weight being applied to your evidence. The tribunal is likely to have regard to any failure to respond fully to such questions when determining responsibility and the amount of a claim for costs by one party against the other, unless it can be demonstrated that such failure to respond was reasonable given the specific circumstances.

20.4 Occasionally surveyors may be asked to provide expert witness evidence in a criminal trial and where the procedures for an expert witness may differ from civil proceedings.

20.5 In criminal trials involving legal aid orders, the general rule is that the legally assisted person's

solicitor (or counsel) shall not be a party to the making of any payment for work done in connection with the proceedings. However, there are some important exceptions, such as where the solicitor has instructed the expert to attend a trial to give evidence. An expert's fees and expenses are usually restricted by the court. There are often specified rates applicable to the work undertaken by experts in criminal trials and which the expert witness must understand and agree to before accepting any instruction to act.

GN 21 Immunity of the expert witness

21.1 Expert witnesses will want to know before embarking on the process if they are likely to be held liable for failings in their expert witness reports and evidence. The answer in the UK since *Jones v Kaney* [2011] UKSC 13 is that the expert may be held to account for his/her failings; however, a proper reading of the case informs the reader that this is likely to be so only in very rare situations. The expert should ascertain the position in both the jurisdiction where any report will be received and the jurisdiction in which he or she operates. It is essential to consider liability for:

- (a) negligent acts or omissions in relation to the early advice and report
- (b) negligent acts or omissions while preparing joint statements and giving evidence
- (c) for things said or done while giving evidence; and
- (d) for the costs of the litigation if it is found that an expert acted unreasonably.

There may well be other issues to consider in any jurisdiction.

The current position in the UK is set out in Appendix B: Immunity of the expert witness.

Notwithstanding anything above, RICS members may have to answer to RICS if their conduct falls below that expected of an RICS member acting as an expert witness.

Appendix A: Sample Terms of Engagement

A1 This appendix forms a part of the RICS guidance note *Surveyors acting as expert witnesses*. 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 and the services which may be provided]

1.2 The appointment is one which is subject to the RICS practice statement *Surveyors acting as expert witnesses*, 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).

2.7 *[The Expert Surveyor’s]* Complaints Handling Procedure (CHP) (if the firm is an RICS-regulated firm) will not apply to this engagement, because of the Expert Surveyor’s duty to the tribunal.

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/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/her presence is required
- (g) give adequate written notice to the Expert Surveyor of any attendance required at hearings, meetings and appointments; and
- (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/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; and
- (j) retain all intellectual property rights and ownership rights in his/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 [*for example, the Expert Surveyor's firm*].

6.3 Any dispute over Fees or Disbursements that cannot be resolved by [*for example, the Expert Surveyor's firm*] shall be referred to [*for example, a mediator chosen by agreement of both parties*]. Where agreement cannot be reached on the identity of [*for*

example, a mediator] the services of [*for example, the RICS Dispute Resolution Service (DRS)*] shall be used to appoint [*for example, a mediator*]. In the event that any dispute cannot be resolved by [*for example, mediation*], the courts of [*state jurisdiction; for example, England and Wales*] shall have exclusive jurisdiction in relation to the dispute and its resolution.

6.4 The law of [*state law, for example, England and Wales*] shall govern these Terms of Engagement.

Appendix B: Immunity of the expert witness

England and Wales

B1 The general immunity from civil suit was removed by the UK Supreme Court on 30 March 2011 in *Jones v Kaney* [2011] UKSC 13. The effect of this decision is:

- (a) An expert witness owes a duty of care to give honest, independent and unbiased, advice and opinion to his/her client and to the court on the matters in which he/she is instructed. If the expert witness gives such advice that is within the range of reasonable expert opinion on the matter then it is very likely that he/she will have discharged his/her duty both to the court and his/her client.
- (b) The duty may arise by way of contractual relationship (through an express term or implied term under section 13 of the *Supply of Goods and Services Act 1982*), or in negligence (under the *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 principles), depending upon the nature of the appointment.
- (c) It is now clear that the duty applies equally to pre-expert witness report advice, expert witness reports, joint meetings and joint reports as well as evidence given in court.
- (d) The duty applies equally to expert evidence in relation to civil, criminal and family proceedings as well as all tribunals defined in the preamble to the practice statement.

B2 The absolute privilege enjoyed by all judges, advocates and witnesses in respect of claims for defamation in relation to anything said in court remains.

B3 Lord Dyson provided some very helpful guidance at paragraph 99:

‘There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client. If, however, he gives an independent

and unbiased opinion which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court, because he will have provided independent and unbiased assistance to the court. But he will be in breach of the duty owed to his client.’

B4 Further useful advice was given by Lord Collins at paragraph 85:

‘...a conscientious expert will not be deterred by the danger of civil action by a disappointed client, any more than the same expert will be deterred from providing services to any other client. It is no more (or less) credible that an expert will be deterred from giving evidence unfavourable to the client’s interest by the threat of legal proceedings than the expert will be influenced by the hope of instructions in future cases. The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence (which is not in any event likely), it would tend to ensure a greater degree of care in the preparation of the initial report or the joint report. It is almost certain to be one of those reports, rather than evidence in the witness box, which will be the focus of any attack, since it is very hard to envisage circumstances in which performance in the witness box could be the subject of even an arguable case.’

B5 Lord Phillips provided advice where an expert witness changes his/her mind:

‘...the question then arises of the expert’s attitude if he subsequently forms the view, or is persuaded by the witness on the other side, that his initial advice was over-optimistic, or that there is some weakness in his client’s case which he had not appreciated. His duty to the court is frankly to concede his change of view. The witness of integrity will do so. I can readily appreciate the possibility that some experts may not have that integrity. They will be reluctant to admit to the weakness in their client’s case.

They may be reluctant because of loyalty to the client and his team, or because of a disinclination to admit to having erred in the initial opinion. I question, however, whether their reluctance will

be because of a fear of being sued – at least a fear of being sued for the opinion given to the court. An expert will be well aware of his duty to the court and that if he frankly accepts that he has changed his view it will be apparent that he is performing that duty. I do not see why he should be concerned that this will result in his being sued for breach of duty.’

B6 Expert witnesses are reminded that, when considering what amounts to professional negligence in the discharge of their duties, regard will be given to the practice statement and the guidance note. In particular, reference should be made to the note about practice statements on page 2 of the practice statement.

B7 Expert witnesses are advised to obtain adequate professional indemnity insurance to reflect the nature of their practice rather than simply providing the minimum cover required by RICS.

B8 Expert witnesses are reminded that, regardless of whether they are pursued in a civil action for breach of their duties, there may be disciplinary consequences should they fail to comply with the practice statement.

B9 An expert witness remains liable for criminal prosecution for perjury, perverting the course of justice or for contempt of court.

B10 An expert witness remains liable for:

- (a) misfeasance in public office or conspiracy to injure for having fabricated evidence (*Darker and Others v Chief Constable of the West Midlands Police* [2001] 1 AC 435)
- (b) libelling the opposing party in a report prepared for court proceedings (*Schneider v Leigh* [1955] 2 QB 195)
- (c) the tort of malicious prosecution, where the expert witness by giving malicious evidence procured the prosecution (*Martin v Watson* [1996] AC 74)
- (d) breach of confidence (*De Taranto v Cornelius* (2002) 68 BMLR 62)
- (e) wasted cost orders if the expert witness acts in flagrant disregard of their duty (*Philips & Others v Symes & Others* [2004] EWHC 2330 Ch.)
- (f) procuring a breach of contract if a party acts on advice that is found to be invalid; and
- (g) possible other torts that need to be considered by an expert witness.

Scotland

B11 Although *Jones v Kaney* was a decision of the UK Supreme Court, it might not currently apply when expert witnesses are giving evidence in the Scottish courts. Lord Hope (giving a dissenting opinion), expressed the view that expert witness immunity is a matter devolved to Scotland; however, it is not clear if that is the case for civil law matters, given that the UK Supreme Court is binding in Scotland on civil law matters. The situation regarding the immunity of expert witnesses in Scotland is therefore uncertain, but is likely to evolve in due course.

B12 Surveyors acting as expert witnesses in Scotland (wherever they are based), are advised to be conversant with the potential implications of *Jones v Kaney* and discuss the matter with their professional indemnity insurers.

Northern Ireland

B13 The position set out in the preceding England and Wales section in paragraphs B1–B10 is equally applicable to the situation in Northern Ireland. While 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 C: 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 practice statement and guidance note. 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 RICS practice statement and guidance note *Surveyors acting as advocates*.

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 several courts in England, Wales and Northern Ireland. 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 parts 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 expert 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/her professional legal capacity) and his/her client; and
- 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 latest edition of 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; or
- 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.

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/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).

Tribunal: see definition in Preamble to the practice statement.

'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 under oath or solemn affirmation, gives evidence before a tribunal on a question of fact.

Appendix D: Further reading and glossary of Acts, procedures and protocols

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

Admiralty and Commercial Courts Guide 2013 (Section H2 and Appendix 11), available at www.justice.gov.uk/downloads/courts/admiraltycomm/admiralty-commercial-courts-guide.pdf

Baker, E., and Lavers, A., *Case in Point: Expert Witness*, RICS Books, Coventry, 2005 (ISBN 978 1 84219 230 6)

Bond, C. et al, *The Expert Witness in Court – A Practical Guide* (2nd edition) Shaw & Sons, Crayford, 1999 (ISBN 978 0 72191 441 1)

Boundaries: Guide to Procedure for Boundary Identification, Demarcation and Disputes in England and Wales (2nd edition), RICS Books, Coventry, 2009 (ISBN 978 1 84219 495 9)

Burns, S. (in association with Bond Solon Training), *Successful Use of Expert Witnesses in Civil Disputes*, Shaw & Sons, Crayford, 2003 (ISBN 978 0 72191 450 3)

Cato, D., *The Expert in Litigation and Arbitration*, LLP Professional Publishing, London, 1999 (ISBN 978 1 85978 662 6)

Civil Evidence Act 1995, available at www.legislation.gov.uk/ukpga/1995/38/contents

Civil Evidence (Scotland) Act 1988, available at www.legislation.gov.uk/ukpga/1988/32/contents

Civil Procedure Rules (CPR), together with associated Practice Directions, Pre-Action Protocols and Forms, available at www.justice.gov.uk/courts/procedure-rules/civil and the Guidance for the instruction of experts to give evidence in Civil claims (issued by the Civil Justice Council (CJC), July 2012, approved by the Master of the Rolls), available at www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications

CPR Practice Direction 1 – *Overriding objective*, available at www.justice.gov.uk/courts/procedure-rules/civil/rules/part01

CPR Practice Direction 22 – *Statements of truth*, available at www.justice.gov.uk/courts/procedure-rules/civil/rules/part22

CPR Practice Direction 31 – *Disclosure and inspection of documents*, available at www.justice.gov.uk/courts/procedure-rules/civil/rules/part31

CPR Practice Direction 35 – *Experts and assessors*, available at www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35

Clarke, P. H., *The Surveyor in Court*, Estates Gazette, London, 1985 (ISBN 0 7282 0091 0) (out of print but available from the RICS Library)

Criminal Defence Service (Funding) (Amendment) Order 2011, available at www.legislation.gov.uk

Criminal Procedure Rules 2013 (Part 33), available at www.legislation.gov.uk/ukSI/2013/1554/part/33/made

Court of Session Rules (Scotland), available at www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules

Dilapidations (6th edition), RICS guidance note, RICS Books, Coventry, 2012 (ISBN 978 1 84219 779 0)

Direct professional access to barristers (2nd edition), RICS guidance note, RICS Books, Coventry, 2003 (ISBN 1 8421 9133 0) (current edition under review)

Farr, M., *Surveyor's Expert Witness Handbook: Valuation*, Estates Gazette Books, London, 2005 (ISBN 978 0 7282 0463 8)

Hodgkinson, T., and James, M., *Expert Evidence: Law & Practice* (3rd edition), Sweet & Maxwell, London, 2009 (ISBN 978 1 8470 3614 8)

Morris, A., *The Surveyor as Expert Witness: Building and Development Play*, Estates Gazette Books, London, 2005 (ISBN 978 0 7282 0480 5)

Pamplin, C. (Dr), *Expert Witness Fees*, JS Publications, Newmarket, 2007 (ISBN 978 1 9059 2601 5)

Pamplin, C. (Dr), *Expert Witness Practice in the Civil Arena*, JS Publications, Newmarket, 2007 (ISBN 978 1 9059 2600 8)

Rating appeals (3rd edition), RICS guidance note, RICS Books, Coventry, 2009 (ISBN 978 1 8421 9488 1)

Rating consultancy: RICS/IRRV/RSA code of practice (3rd edition), RICS practice statement, RICS Books, Coventry, 2010 (ISBN 978 1 8421 588 8)

Surveyors acting as advocates, RICS practice statement and guidance note, RICS Books, Coventry, 2008 (ISBN 978 1 8421 9429 4)

Surveyors acting as arbiter or as independent expert in commercial property rent reviews (Scottish edition), RICS guidance note, RICS Books, Coventry, 2002

Surveyors acting as arbitrators and as independent experts in commercial property rent reviews (8th edition), RICS guidance note, RICS Books, Coventry, 2002 (ISBN 1 8421 9096 2)

Surveyors acting as arbitrators in commercial property rent reviews (9th edition), RICS guidance note, RICS Books, Coventry, 2013 (ISBN 978 1 7832 1020 6)

The Chancery Guide (Chapter 4), available at www.justice.gov.uk/

The Construction and Technology Court Guide 2010 (Section 13), available at www.justice.gov.uk/downloads/courts/tech-court/tech-con-court-guide.pdf

The Laws of Scotland, Stair Memorial Encyclopaedia, Butterworths, London, 1991 (contains 25 volumes)

The Queens Bench Guide (section 7.9), available at www.justice.gov.uk/downloads/courts/queens-bench/queen-bench-guide.pdf

The Rules of the Court of Judicature (Northern Ireland), available at www.courtsni.gov.uk/en-GB/Publications/court-rules/Documents/RsCoJ/RsCJ.pdf

Watson, J., *Nothing but the Truth – Expert Evidence in Principle and Practice for Surveyors, Valuers and Others* (2nd edition), Estates Gazette, London, 1975 (ISBN 978 0 7282 0015 9)

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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