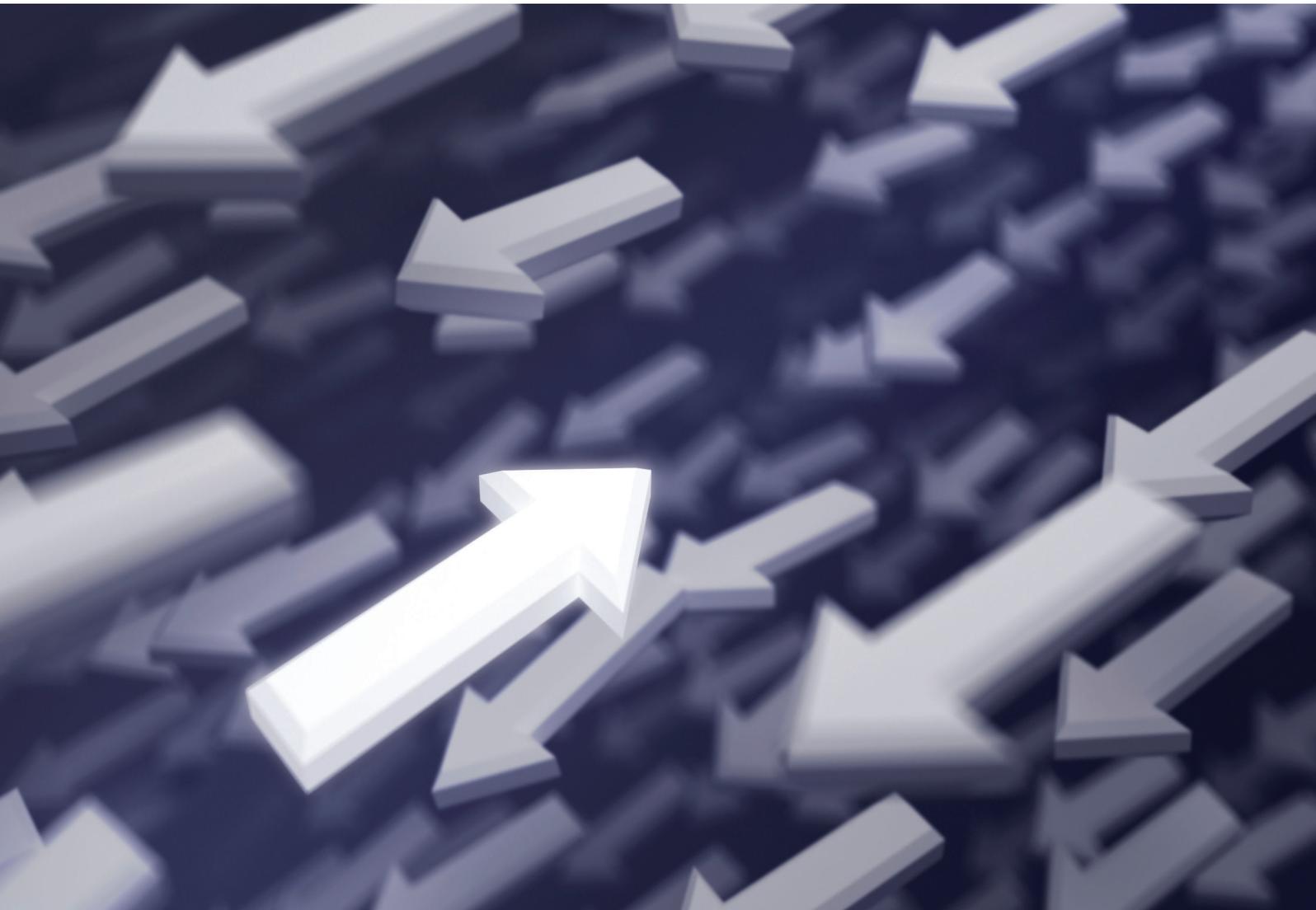




RICS professional guidance, Scotland

Surveyors acting as expert witnesses in Scotland

Client guide, August 2015



Surveyors acting as expert witnesses in Scotland: client guide

RICS professional statement, Scotland

1st edition, August 2015

Important note

Readers of this document are referred also to the copyright notice on page 2 of this publication.

Crown copyright material is reproduced under the Open Government Licence v2.0 for public sector information: www.nationalarchives.gov.uk/doc/open-government-licence/



Published by the Royal Institution of Chartered Surveyors (RICS)

Parliament Square
London
SW1P 3AD
www.rics.org

No responsibility for loss or damage caused to any person acting or refraining from action as a result of the material included in this publication can be accepted by the authors or RICS.

Produced by the Dispute Resolution Professional Group, Scotland, of the Royal Institution of Chartered Surveyors.

ISBN 978 1 78321 099 2

© Royal Institution of Chartered Surveyors (RICS) August 2015. Copyright in all or part of this publication rests with RICS. No part of this work may be reproduced or used in any form or by any means including graphic, electronic, or mechanical, including photocopying, recording, taping or Web distribution, without the written permission of the Royal Institution of Chartered Surveyors or in line with the rules of an existing licence.

Acknowledgments

RICS Scotland wishes to express its sincere thanks to the following:

Scotland working group

Peter Balnave FRICS (Cushman & Wakefield LLP) Chairman of the working group

Ewan Easton WS (Maclay Murray & Spens LLP)

Joan Hewton FRICS (Lothian Valuation Joint Board)

Allan Robertson FRICS (Allan Robertson Consulting Ltd)

The Scotland working group wishes to express its sincere thanks to those involved in the production of the corresponding practice statement and guidance note for England & Wales, upon which this adaptation is based.

RICS also wishes to thank all those who have contributed to previous versions of this publication.

Contents

Acknowledgments	ii
Copyright notice	2
Surveyors acting as expert witnesses, professional statement	3
RICS professional statements	3
Preamble.....	5
Principal message.....	5
PS 1 Application of professional statement	6
PS 2 Duty in providing expert witness	6
PS 3 Acting as an expert witness and instructions	7
PS 4 Inspections	7
PS 5 Reports and oral evidence	8
PS 6 Amending the contents of written reports	9
PS 7 Agreeing facts and resolving differences.....	9
PS 8 Single joint expert (SJE)/Court appointed expert (CAE).....	10
PS 9 Advocacy and expert witness roles.....	10
PS 10 Conditional fees	11
Appendix Definitions	12

Copyright notice

Copyright in this professional statement (PS) and guidance note (GN) belongs to the Royal Institution of Chartered Surveyors (RICS). Copyright does not apply to the Statement of Truth specified at PS 5.4(p). This professional statement is also published in the form of a client guide, a copy of which can be supplied by the expert witness to his/her prospective client. This client guide may be provided without copyright permission; however, the expert witness 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, as specified in PS 3.4(b).

The wording of the Statement of Truth and declarations (PS 5.4(p)) may be used in expert witness reports without the need to seek prior consent from RICS.

An acknowledgment of RICS copyright ownership should appear on any extract from, or copy of, the professional statement and guidance note that is reproduced, save when the Statement of Truth (PS 5.4(p)(i)) or other declarations (PS 5.4(p)(ii)) are being used in expert witness reports, or when reproducing Appendix A: Sample Terms of Engagement.

Appendix A: Sample Terms of Engagement may be reproduced without the need for prior consent from RICS. Where it is adapted and integrated into personalised terms of engagement, no copyright acknowledgment is required; however, any other usage by way of reproduction requires an acknowledgment of copyright.

Reproduction (other than as specified above) or republishing in any format requires express written permission from RICS. A request for such permission, or any other enquiry related to copyright, may be addressed to:

RICS Publishing and Content Services

Parliament Square

London SW1P 3AD

United Kingdom

International standards

RICS is at the forefront of developing international standards, working in coalitions with organisations around the world, acting in the public interest to raise standards and increase transparency within markets. International Property Measurement Standards (IPMS — ipmsc.org), International Construction Measurement Standards (ICMS), International Ethics Standards (IES) and others will be published and will be mandatory for RICS members. This professional statement links directly to these standards and underpins them. RICS members are advised to make themselves aware of the international standards (see www.rics.org) and the overarching principles with which this professional statement complies. Members of RICS are uniquely placed in the market by being trained, qualified and regulated by working to international standards and complying with this professional statement.

RICS professional statements

This is a professional statement. It is the duty of every RICS member to comply with relevant professional statements, and to take account of other guidance produced by RICS in a particular area of expertise, in order to maintain high professional standards. RICS considers that any professional statements are technical standards for the purposes of Rule 4 of both the *Rules of Conduct for Members 2007* and the *Rules of Conduct for Firms 2007* (as amended from time to time). There may be disciplinary consequences for failing to comply with a professional 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 professional statement published by RICS in deciding whether or not the surveyor acted with reasonable competence. Failure to comply with professional 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 professional statement should have at least a partial defence to an allegation of negligence.

Where members depart from the practices set out in this professional 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 professional statement.

In some cases there may be existing National Standards which may take precedence over this professional statement. National Standards can be defined as professional standards that are either prescribed in law or federal/local legislation, or developed in collaboration with other relevant bodies.

In addition, professional statements 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.

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

Surveyors acting as expert witnesses in Scotland: professional statement

Document status defined

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

Type of document	Definition	Status
Standard		
International standard	An international high-level principle-based standard developed in collaboration with other relevant bodies.	Mandatory
Professional statement		
RICS professional statement	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to. This term encompasses practice statements, Red Book professional standards, global valuation practice Statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	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 or approach for accepted good practice as followed by competent and conscientious practitioners.	Recommended best practice. Usual principles apply in cases of negligence if best practice is not followed.
RICS information paper [IP]	Practice-based document that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended good practice. Usual principles apply in cases of negligence if technical information is known in the market.

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 'professional statement' (unless referring to practice statements published before March 2015), and those to 'GN' denote 'guidance note'.

For the purposes of this professional statement and guidance note, the generic expression 'tribunal' means anybody 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 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 and hearings); 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 (sometimes referred to as a 'skilled 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 professional statement and guidance note are based upon the law and practice in Scotland and apply to all surveyors when acting as an expert witness in relation to property in Scotland.

PS 1 Application of professional statement

1.1 The start date of application of this professional statement is three months after its publication date. This professional statement applies to any RICS member (usually described hereafter as 'the expert witness' or 'you') when accepting instructions to provide and when providing expert opinion 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 professional 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 professional 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 professional 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 professional 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 professional 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 takes precedence over and therefore 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* including the Scottish addendum thereto).

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 professional statement and the rules of the relevant tribunal will apply.
- b) Offer to supply a copy of the professional 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 professional 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’ (sometimes referred to as ‘precognitions’ or ‘statements of evidence’ in Scotland), 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 the expert witness 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).
- 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 discrete.
- 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 a summary of the conclusions in the expert witness report.
- 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. In Scotland, unless specific wording for a Statement of Truth is specified by a tribunal’s rules or requirements, the following default wording must be used by all chartered surveyors acting in the capacity of expert witness:

(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.’

Crown copyright material is reproduced under the Open Government Licence v2.0 for public sector information: www.nationalarchives.gov.uk/doc/open-government-licence/

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

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 professional statement *Surveyors acting as expert witnesses in Scotland*'.

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 professional statement.

5.6 In the event of any departure from the requirements of this professional 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)/ Court Appointed Expert (CAE)

8.1 The objective of a tribunal in appointing a Single Joint Expert (SJE)/Court Appointed Expert (CAE) 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/CAE must submit to active case management and follow the directions of the tribunal as quickly and efficiently as possible.

8.3 The SJE/CAE, 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/CAE 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/CAE should therefore be clear on the following points when accepting an instruction as an SJE/CAE:

- 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/CAE'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/CAE. The SJE/CAE 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 The SJE/CAE 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.

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

8.9 Where other difficulties arise or where further instructions are required, in the event that these are not agreed between the parties, the SJE/CAE 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/CAE should notify the parties in reasonable time before taking such action.

8.10 The SJE/CAE 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.

8.11 SJE/CAEs 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

8.12 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.

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.

Appendix: Definitions

This appendix forms a part of both the professional statement and guidance note of *Surveyors acting as expert witnesses in Scotland*. The following are short definitions of some terms from the professional 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 equivalent Scottish Rules of Court can be found in the relevant Parliament House book.

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 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 *Faculty of Advocates Direct Access Rules 2006* 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 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 the lawyer 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 circumstances where court proceedings are in reasonable contemplation or in progress. This may also apply where tribunal or other dispute resolution methods are in contemplation but legal advice should be sought in such cases before reliance is placed on litigation privilege, 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) or Court Appointed Expert (CAE): an expert witness appointed pursuant to an order of a court, and instructed jointly by parties to a dispute.

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 professional 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.



Confidence through professional standards

RICS promotes and enforces the highest professional qualifications and standards in the development and management of land, real estate, construction and infrastructure. Our name promises the consistent delivery of standards – bringing confidence to the markets we serve.

We accredit 118,000 professionals and any individual or firm registered with RICS is subject to our quality assurance. Their expertise covers property, asset valuation and real estate management; the costing and leadership of construction projects; the development of infrastructure; and the management of natural resources, such as mining, farms and woodland. From environmental assessments and building controls to negotiating land rights in an emerging economy; if our members are involved the same professional standards and ethics apply.

We believe that standards underpin effective markets. With up to seventy per cent of the world's wealth bound up in land and real estate, our sector is vital to economic development, helping to support stable, sustainable investment and growth around the globe.

With offices covering the major political and financial centres of the world, our market presence means we are ideally placed to influence policy and embed professional standards. We work at a cross-governmental level, delivering international standards that will support a safe and vibrant marketplace in land, real estate, construction and infrastructure, for the benefit of all.

We are proud of our reputation and we guard it fiercely, so clients who work with an RICS professional can have confidence in the quality and ethics of the services they receive.

United Kingdom RICS HQ

Parliament Square, London
SW1P 3AD United Kingdom

t +44 (0)24 7686 8555

f +44 (0)20 7334 3811

contactrics@rics.org

Media enquiries

pressoffice@rics.org

Ireland

38 Merrion Square, Dublin 2,
Ireland

t +353 1 644 5500

f +353 1 661 1797

ricsireland@rics.org

Europe

[excluding UK and Ireland]

Rue Ducale 67,
1000 Brussels,
Belgium

t +32 2 733 10 19

f +32 2 742 97 48

ricseurope@rics.org

Middle East

Office G14, Block 3,
Knowledge Village,
Dubai, United Arab Emirates

t +971 4 446 2808

f +971 4 427 2498

ricsmenea@rics.org

Africa

PO Box 3400,
Witkoppen 2068,
South Africa

t +27 11 467 2857

f +27 86 514 0655

ricsafrica@rics.org

Americas

One Grand Central Place,
60 East 42nd Street, Suite 2810,
New York 10165 – 2811, USA

t +1 212 847 7400

f +1 212 847 7401

ricsamericas@rics.org

South America

Rua Maranhão, 584 – cj 104,
São Paulo – SP, Brasil

t +55 11 2925 0068

ricsbrasil@rics.org

Oceania

Suite 1, Level 9,
1 Castlereagh Street,
Sydney NSW 2000, Australia

t +61 2 9216 2333

f +61 2 9232 5591

info@rics.org

North Asia

3707 Hopewell Centre,
183 Queen's Road East
Wanchai, Hong Kong

t +852 2537 7117

f +852 2537 2756

ricsasia@rics.org

ASEAN

10 Anson Road,
#06-22 International Plaza,
Singapore 079903

t +65 6635 4242

f +65 6635 4244

ricssingapore@rics.org

Japan

Level 14 Hibiya Central Building,
1-2-9 Nishi Shimbashi Minato-Ku,
Tokyo 105-0003, Japan

t +81 3 5532 8813

f +81 3 5532 8814

ricsjapan@rics.org

South Asia

48 & 49 Centrum Plaza,
Sector Road, Sector 53,
Gurgaon – 122002, India

t +91 124 459 5400

f +91 124 459 5402

ricsindia@rics.org