

Surveyors acting as expert witnesses

**RICS practice statement (3rd edition) –
client copy**



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Surveyors acting as expert witnesses

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Surveyors acting as expert witnesses: practice statement

Preamble

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

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

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

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

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

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

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

Principal message

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

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

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

PS 1 Application of practice statement

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

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

PS 2 Duty in providing expert evidence

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

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

PS 3 Acting as an expert witness, and instructions

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

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

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

PS 4 Inspections

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

PS 5 Reports and oral evidence

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

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

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

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

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

- (i) 'I confirm that my report includes all facts which I regard as being relevant to the opinions which I have expressed and that attention has been drawn to any matter which would affect the validity of those opinions.'
- (ii) **A** – 'I confirm that my duty to [*specify the tribunal**] as an expert witness overrides any duty to those instructing or paying me, that I have understood this duty and complied with it in giving my evidence impartially and objectively, and that I will continue to comply with that duty as required.' (*The reference used may vary, as appropriate to the particular forum.)

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

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

- (iii) 'I confirm that I am not instructed under any conditional fee arrangement.'

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

- (iv) 'I confirm that I have no conflicts of interest of any kind other than those already disclosed in my report.'
- (v) 'I confirm that my report complies with the requirements of the Royal Institution of Chartered Surveyors (RICS), as set down in *Surveyors acting as expert witnesses*: RICS practice statement.'

- (k) Personally sign and date the report.

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

PS 6 Amendment of the contents of written reports

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

- (a) those instructing you;

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

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

PS 7 Agreeing facts and resolving differences

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

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

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

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

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

PS 8 Single Joint Expert (SJE)

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

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

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

PS 9 Advocacy and expert witness roles

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

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

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

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

PS 10 Conditional fees

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

Appendix: Definitions

This appendix forms a part of the practice statement *Surveyors acting as expert witnesses*. The following are short definitions of key terms. 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 refer to the equivalent appendix in the publication *Surveyors acting as advocates* (RICS practice statement).

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

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

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

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

Direction: a requirement laid down by a tribunal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- expert opinion evidence; and
- an advocacy submission.

Representations may be made orally or in writing.

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

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

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

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

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

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

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RICS EXPERT WITNESS REGISTRATION SCHEME

The RICS Expert Witness Registration Scheme (EWRS) is a voluntary scheme and register for surveyors who act as expert witnesses before tribunals in the UK.

The register lists individual RICS members with the experience, knowledge and expertise to provide impartial, independent evidence for a wide range of specialist fields. The register is accessible via an online, searchable directory that is available to the general public, lawyers and other potential clients seeking surveyors to act in an expert witness capacity.

All EWRS-registered expert witnesses will have:

- provided references from at least two people (one of whom is a solicitor or barrister) who have used the surveyor's expert evidence in the last three years;
- provided an expert witness report prepared for judicial/quasi-judicial proceedings within the last five years; this is assessed by RICS to demonstrate satisfactory knowledge of key criteria such as:
 - knowledge of *Civil Procedure Rules* (CPR);
 - relevant Practice Directions;
 - case law and codes of best practice, including RICS' own mandatory practice statements such as *Surveyors acting as expert witnesses*;
- been interviewed (if deemed necessary) by the Registration Committee before becoming an EWRS-registered expert witness.

Further information on the RICS EWRS, including costs and joining details, is available at: www.rics.org/ewrs

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