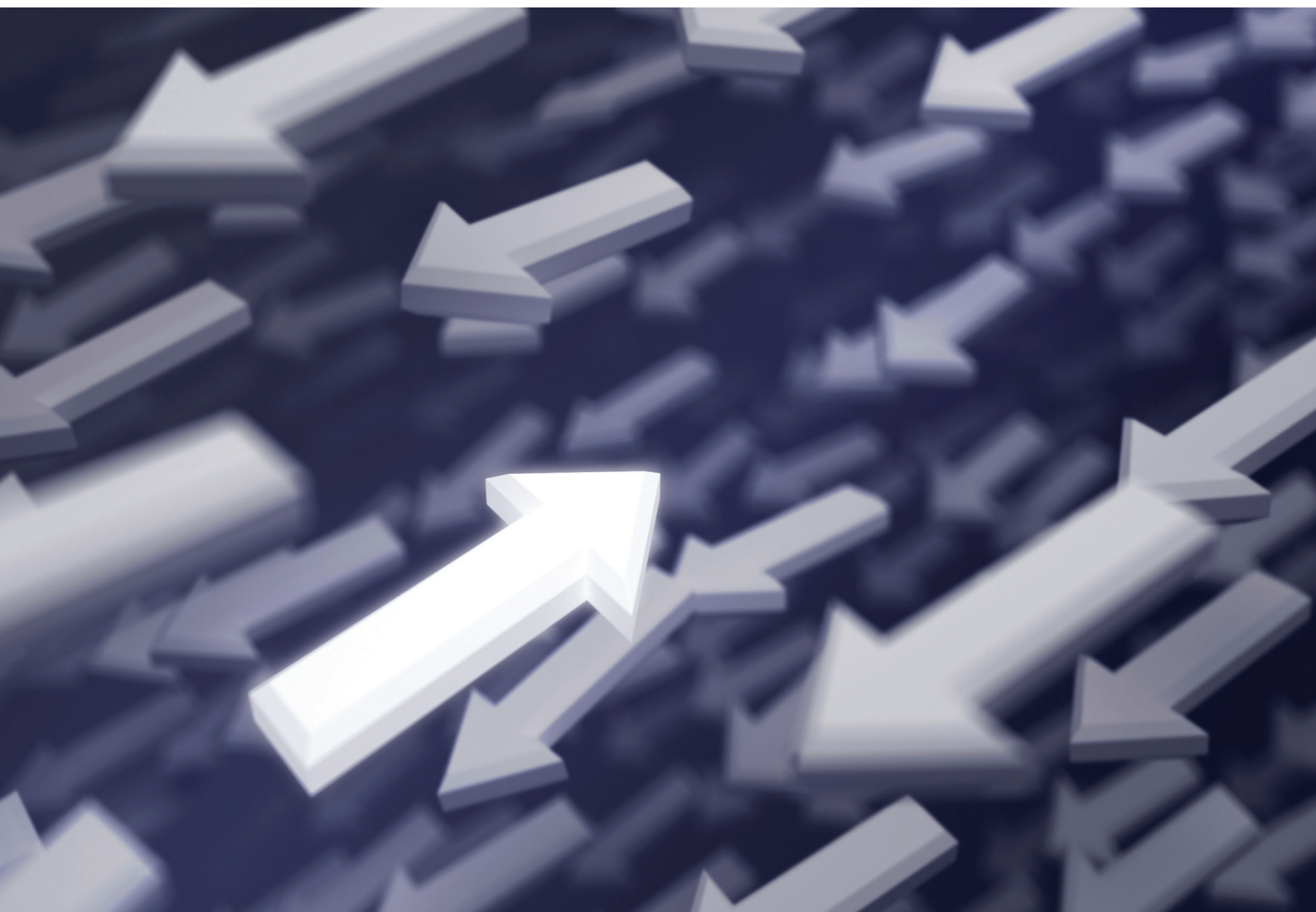




RICS professional standards and guidance,
England, Wales & Northern Ireland

Surveyors acting as advocates

2nd edition professional statement,
3rd edition guidance note,
February 2017



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RICS professional statement and guidance note,
England, Wales & Northern Ireland

2nd edition, RICS professional statement

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Contents

Acknowledgments	ii
RICS professional statements	1
Principal message.....	3
PS 1 Application of professional statement	3
PS 2 Principal duties	3
PS 3 Acting as a surveyor-advocate, and instructions	3
PS 4 Other duties.....	5
PS 5 Conduct as to statements of case, and submission.....	5
PS 6 Conduct as to evidence.....	5
PS 7 Conduct in relation to the tribunal.....	5
RICS guidance notes	7
Preamble	9
GN 1 Application of guidance note and introduction.....	9
GN 2 General duties and roles	9
GN 3 A 'dual role': surveyor-advocate and expert witness	11
GN 4 Acting as a surveyor-advocate, and instructions	12
GN 5 Case preparation and preliminaries	15
GN 6 Evidence and documents.....	17
GN 7 Hearings.....	18
GN 8 Opening the case.....	18
GN 9 Examination-in-chief	18
GN 10 Cross-examination	19
GN 11 Re-examination	19
GN 12 Questions by the tribunal	19
GN 13 Summing up/final submissions.....	19
GN 14 Costs	20
GN 15 Re-opening of the case.....	20
GN 16 Inspections.....	20
GN 17 The tribunal's decision.....	20
Appendix A: Sample Terms of Engagement	22
Appendix B: Definitions	24
Appendix C: Extracts – Surveyors acting as expert witnesses	27
Appendix D: Hearsay evidence	31
Appendix E: RICS Expert Witness Accreditation Service (EWAS)	32
Appendix F: Further reading	33

RICS professional standards and guidance

Surveyors acting as advocates – RICS professional statements

This is a professional statement, which RICS members must act in accordance with.

Sections within professional statements that set specific mandatory requirements for members use the word 'must'. Members must not depart from specific mandatory requirements.

Sections within professional statements that set an expectation or recommend best practice advice use the word 'should'. Where members depart from these, they should do so only for justifiable good reason. Where, in the professional judgement of the member, the departure may have a material impact on the surveyor's advice, the client must be informed in writing of the departure and the reason/s for the departure.

Any content that does not use the word 'must' or 'should' is information.

RICS considers that 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).

Members should note there may be legal and/or disciplinary consequences for departing from professional statements. When an allegation of professional negligence is made against a surveyor, the court is likely to take account of relevant RICS professional statements in deciding whether or not the surveyor acted with reasonable competence. Failure to act in accordance with professional statements may, accordingly, lead to a finding of negligence against a surveyor. In the opinion of RICS, a member acting in accordance with relevant professional statements should have at least a partial defence to an allegation of negligence.

In some cases there may be existing national standards that take precedence over professional statements. These can be defined as professional standards that are prescribed in law or federal/local legislation, or are developed in collaboration with other relevant bodies. It is the duty of members to be aware which standards apply.

Members should be up to date and have knowledge of professional statements 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.

Document status defined

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

Publications status

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 [PS]	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to. This term also encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	Mandatory.
Guidance and information		
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). Usual principles apply in cases of negligence if best practice is not followed.
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 information that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended best practice. Usual principles apply in cases of negligence if technical information is known in the market.
RICS insight	Issues-based input that provides users with the latest information. This term encompasses thought leadership papers, market updates, topical items of interest, white papers, futures, reports and news alerts.	Information only.
RICS economic / market report	A document usually based on a survey of members, or a document highlighting economic trends.	Information only.
RICS consumer guide	A document designed solely for use by consumers, providing some limited technical advice.	Information only.
Research	An independent peer-reviewed arm's-length research document designed to inform members, market professionals, end users and other stakeholders.	Information only.

Principal message

When acting as a surveyor-advocate you owe duties to your client. However, you also owe an overriding duty to the tribunal to act properly and fairly as set out in this professional statement.

PS 1 Application of professional statement

1.1 The start date of application of this PS is 1 June 2017. This PS applies where you agree (whether in writing or orally) to act as a surveyor-advocate before any tribunal in England, Wales or Northern Ireland; it does not apply where you are acting as an advocate by virtue of legal qualifications, and of rights of audience gained through an authorised or duly recognised body (such as the General Council of the Bar, Law Society, etc.). You **must** have regard at all times to the applicable law, rules, directions, orders or procedures relevant to a particular tribunal, and comply with these in those circumstances when they apply.

1.2 This PS does not apply to the provision of professional advice prior to the commencement of any formal proceedings before any tribunal, nor does it apply to those surveyors who may assist an advocate. It does, however, apply to all instructions to act as a surveyor-advocate whenever given and from the time so given, and in particular governs the preparation of any documents containing submissions to the tribunal.

1.3 Where you act as a surveyor-advocate and consider that there are special circumstances which render it inappropriate or impractical for the assignment to be undertaken wholly in accordance with the PS, the fact of, and reasons for, the departure **must** be given in writing to your client; alternatively you may wish to decline instructions or withdraw from a case. Any surveyor who does depart from the PS 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 Principal duties

2.1 As a surveyor-advocate you **must**:

- (a) take personal responsibility for the conduct and presentation of your client's case, and act in the best interests of your client
- (b) advance the case you are presenting by all fair and proper means

- (c) act promptly, diligently and competently in all respects
- (d) not allow your integrity or professional standards to be compromised
- (e) not deceive or mislead the tribunal or any opposing party
- (f) take reasonable steps to ensure that the tribunal has before it all relevant decisions and legislative authorities; and
- (g) have adequate and appropriate professional indemnity insurance cover.

PS 3 Acting as a surveyor-advocate, and instructions

3.1 You may act only in matters where you have:

- (a) the experience, knowledge and expertise appropriate to the case; and
- (b) the resources to carry out the assignment to the required timescale and to the appropriate standard.

3.2

- (a) You **must** not act (or where you have already accepted instructions, you **must** cease to act):
 - (i) in any matter where to act (or to continue to act) would involve you in a breach of the law or where your ability to act (for the client) properly is compromised
 - (ii) in a matter in which there is a risk of a breach of confidential information entrusted to you (or to a partner or fellow employee) by another client, or where the knowledge you possess of one client's affairs might give an undue advantage to a new client. It is permissible to act (or to continue to act) in these circumstances if the original or previous client's consent to act is given, or the original or previous client's permission is given to the use of pre-existing information and knowledge; and
 - (iii) in a matter where a fellow employee or partner has an interest of which you are (or become) aware and it impairs your ability to act properly.
- (b) Conflicts of interest
 - (i) Where not yet instructed and where a conflict of interest exists between you, or your firm, and any of the parties to the proceedings, or where a risk that such a conflict may arise exists, you **must** raise this with your prospective client as soon as it becomes apparent and you **must** advise your

prospective client in writing if you consider that you should, given all the circumstances of the case, decline the instructions. Similarly, where already instructed, you **must** advise the client in writing if you consider that you should, given all the circumstances of the case, terminate the instructions. You may act (or continue to act if already instructed) if the client or prospective client has given informed consent in writing. 'Informed consent' requires:

- that the client or prospective client has given permission in the knowledge that you or your firm have a potential or actual conflict of interest
 - that all relevant issues and risks have been clearly drawn to the attention of the client or prospective client; and
 - that you have a reasonable belief that these issues have been understood by the client or prospective client.
- (ii) Where a conflict of interest exists, or a risk that such exists, between two or more clients or prospective clients in relation to a matter, you or your firm may act (or continue to act if already instructed) if the client or prospective client has given informed consent in writing (as set out in (i) above).
- (iii) You **must** have an effective system and controls in place to identify and assess potential conflicts of interest.
- (iv) RICS has published a guidance note on conflicts of interest for dispute resolvers. It is also shortly to publish a professional statement on conflicts of interest for surveyors acting as expert witnesses or advocates, with which surveyor advocates should comply so far as is relevant to them.

3.3 Providing advocacy services for an organisation by which you are employed is permissible.

3.4 Prior to accepting instructions you **must**:

- (a) advise your prospective client in writing that this PS applies and make a written offer to supply a copy of the PS. (Where a copy of the PS is later supplied, the copyright notice on page 1 of this document **must** be adhered to); and
- (b) notify your prospective client in writing that your firm operates a Complaints Handling Procedure (CHP) (if applicable) which can be provided on request.

3.5 You **must** confirm to your prospective client in writing and in good time whether you accept 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 You and your client may enter into an agreement that makes the fee for your services conditional upon the outcome of the case before the tribunal provided you have advised your client in writing of the nature, effect and operation of the agreement, and any risks to the client that might be associated with it. If you are to act in a case in a dual role as surveyor-advocate and expert witness (see further PS 3.9), you **must** also follow the requirements of *Surveyors acting as expert witnesses: Practice Statement 10.1* (declaration of fee basis) for your expert witness role.

3.7 You **must** only cease to act on reasonable notice and where you are satisfied that:

- (a) instructions have been withdrawn or terminated; or
- (b) your professional conduct is being impugned; or
- (c) there is some other good reason for so doing.

3.8 You **must** not:

- (a) cease to act without having first explained to your client your reasons for doing so, or having taken all reasonable steps to do so, unless to do so would breach the law
- (b) pass an instruction to another surveyor-advocate or other professional without the client's consent; or
- (c) terminate an instruction accepted (and for which a fixed hearing date has been secured), nor break any other professional engagement in order to attend a social engagement, unless the client, and where required the tribunal, consents.

3.9 A dual role: surveyor-advocate and expert witness

You **must** only act in a dual role as surveyor-advocate and as expert witness 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).

3.10 In those exceptional circumstances where you intend, or are invited, to act in a dual role as surveyor-advocate and as expert witness you **must**:

- (a) consider both whether it is permissible to do so 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.

3.11 Having complied with PS 3.10 above, you may only act in both roles if the client instructs you so to act.

3.12 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 4 Other duties

4.1 If at any time you consider that it would be in the best interests of your client to be represented by a lawyer-advocate or other representative (adopting an advocacy role), you **must** immediately advise the client of this. You **must** also advise your client without delay where you consider instructions unacceptable or insufficient, or if you realise you may not be able to fulfil the terms of the engagement and your duties.

4.2 You **must** not attempt to advise any client on, or advocate, matters beyond your professional competence.

4.3 Whether or not the relationship between surveyor-advocate and client continues, you **must** keep confidential all information about your client's affairs of which you learn while acting as a surveyor-advocate, save as to that which you are required to disclose by law; that which you are permitted to divulge by your client; and that which **must** be shared with colleagues in your organisation for the proper pursuit of the client's instructions. You **must** not use such information to the detriment of your client, or to the advantage of yourself or another party.

4.4 You **must** keep the client informed of progress and of any cost implications in the matter, unless otherwise agreed.

PS 5 Conduct as to statements of case, and submissions

5.1 You **must** not prepare a statement of case, submissions or other similar documents, unless properly arguable.

5.2 You **must** not allege fraud or any other dishonest or dishonourable conduct unless you have clear instructions to do so and credible evidence exists to support such an allegation.

5.3 You **must** not make any statements calculated solely to malign a person.

PS 6 Conduct as to evidence

6.1 You **must** not mis-state facts to advance a client's case or for any other reason.

If a client admits to you that he or she has misled the tribunal, you **must** cease to act further unless the client agrees to reveal the truth to the tribunal.

6.2 You **must** take all reasonable steps to ensure that all documents required by a tribunal to be disclosed are properly so disclosed.

6.3 When dealing with a witness, you:

- (a) **must** not rehearse or coach a witness
- (b) **must** not encourage a witness to give untruthful or partially truthful evidence
- (c) **must** not, except with the consent of the representative for the opposing side, or of the tribunal, communicate (directly or indirectly) with a witness in connection with the case during the course of the witness's evidence
- (d) **must** not ask questions calculated solely to malign a witness
- (e) **must** not make assertions that impugn a witness whom you have had the chance to cross-examine unless in such cross-examination you have afforded the witness an opportunity to answer the allegation; and
- (f) **must** put your case to an opponent's witness if you intend to challenge his or her evidence and give that witness an opportunity to answer.

PS 7 Conduct in relation to the tribunal

7.1 You have a duty to assist the tribunal, including not making statements to it that you know to be untrue or misleading in any way and, unless there is justifiable reason not to do so, complying at all times with directions of the tribunal.

7.2 You **must** not give any expert (opinion) evidence to the tribunal while in your capacity as a surveyor-advocate, unless acting in a dual role and permitted by the tribunal to do so.

7.3 You **must** draw the tribunal's attention to all relevant legal decisions and legislative provisions of which you are aware, whether supportive of your client's case or not. In the event that an advocate on the other side omits a legal decision or provision, or otherwise makes an erroneous reference to such, you **must** draw the tribunal's attention to this.

RICS professional standards and guidance

Surveyors acting as advocates – 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 that in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the guidance 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 acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this guidance 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 guidance note, they should do so only for 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 some cases there may be existing national standards that may take precedence over this guidance note. 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, 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 standards, guidance and information documents. These have been defined in the table below. This document is a guidance note.

Publications status

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 [PS]	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to. This term also encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	Mandatory.
Guidance and information		
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). Usual principles apply in cases of negligence if best practice is not followed.
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 information that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended best practice. Usual principles apply in cases of negligence if technical information is known in the market.
RICS insight	Issues-based input that provides users with the latest information. This term encompasses thought leadership papers, market updates, topical items of interest, white papers, futures, reports and news alerts.	Information only.
RICS economic / market report	A document usually based on a survey of members, or a document highlighting economic trends.	Information only.
RICS consumer guide	A document designed solely for use by consumers, providing some limited technical advice.	Information only.
Research	An independent peer-reviewed arm's-length research document designed to inform members, market professionals, end users and other stakeholders.	Information only.

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 (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 'member', 'you', 'surveyor' or 'surveyor-advocate' are to members of RICS of any class of membership, save for Honorary Members. All references to 'PS' denote 'professional statement', and those to 'GN' denote 'guidance note'.

Where you are acting as an assessor, valuation officer, listing officer, district valuer or commissioner of valuation (or as an authorised representative thereof) in local taxation 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 advocacy 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. In particular claiming parties are referred to differently before different tribunals, e.g. claimant, plaintiff, referring party and defending parties as respondent, defendant, responding party. In this document the terms claimant and respondent are used to refer to these two groups.

GN 1 Application of guidance note and introduction

1.1

- (a) The start date of application of this GN is 1 June 2017. This GN applies where you agree (whether orally or in writing) to act as a surveyor-advocate before any tribunal in England, Wales or Northern Ireland. You should have regard at all times to the applicable law and rules, orders, directions, practices and procedures relevant to a particular tribunal. The GN should be considered in conjunction with the foregoing PS.
- (b) The PS and GN do not apply if you are acting as an advocate by virtue of legal qualifications, and of rights of audience gained through authorised or duly recognised bodies; in those latter cases you will have regard to rules of conduct and guidance formulated by such bodies (see PS 1.1).

1.2 Supplementary guidance may be produced from time to time relating to the appropriate conduct before certain

tribunals and it is recommended that you satisfy yourself as to the existence of such supplementary guidance and, where appropriate, familiarise yourself with its contents.

1.3 If acting as a surveyor-advocate you may, in the same or a related matter, also act in one or more of the following roles at different times:

- (a) negotiator
- (b) case manager
- (c) expert witness
- (d) adviser; and
- (e) witness of fact.

1.4 You should be aware at all times which role is being adopted and differentiate between them as necessary. You should understand the fundamental importance of keeping the role of expert witness separate from that of the role of surveyor-advocate, negotiator, case manager, adviser or witness of fact. The weight, if any, that may be attached to evidence given by an expert witness has, as its cornerstone, the impartiality and independence of the opinions given. This is in direct contrast to the role of, for instance, surveyor-advocates, who seek to do the best for their clients subject to limitations with respect to their duties to the tribunal. PS 3.9 to 3.12 deal specifically with the dual role of surveyor-advocate and expert witness. Additionally, it is possible that some negotiators may not find it possible to act as an expert witness as their impartiality may be damaged, or may be perceived to be damaged, by the prior or continuing role of negotiator. It is recommended that you be alert to this.

GN 2 General duties and roles

2.1 A surveyor-advocate owes the duties set out in the accompanying PS. Failure to comply with your duties may render you and/or your client susceptible to sanctions (whether by way of costs penalties or other means) or orders by the tribunal.

2.2 A surveyor is not entitled to appear as surveyor-advocate before some tribunals such as courts unless, rarely, the surveyor has rights of audience like some lawyers, or is given permission. You should satisfy yourself that you may appear before a tribunal as surveyor-advocate before accepting instructions.

2.3

- (a) You should also be satisfied that you have the appropriate experience, knowledge, expertise and resources, prior to undertaking the role of surveyor-advocate. This includes adequate knowledge of the law and practice, including all relevant time limits, applicable in the particular tribunal. The fact that you are not a lawyer will not usually excuse a failure to

comply with procedural requirements. Relevant knowledge can be gained in a number of ways, including through CPD activities, on-the-job mentoring and secondments. In cases involving particularly complex points of law, evidence or procedure, you should consider whether you would be properly placed to act as surveyor-advocate.

- (b) You would be expected to be familiar with the procedural rules for the particular tribunal and for the particular type of case. Further guidance on these may be obtainable from the tribunal concerned. You should note that while in England and Wales courts are bound by the Civil Procedure Rules (CPR), statutory tribunals (e.g. First Tier Tribunals) have their own rules, often with less strict requirements concerning evidence and procedure. Arbitrators are entitled to devise their own procedures and evidential rules, in the absence of agreement between the parties or a set of institutional rules being applicable. Other forms of tribunal (including independent experts) will apply their own rules, or they may be governed by the appointing document or agreement by the parties.

2.4

- (a) A surveyor-advocate's role is distinct from that of an expert witness. The PS expects you to ensure at all times that the submissions you make on behalf of any client as surveyor-advocate are seen as submissions, and cannot be construed by the tribunal as expert witness opinion; as PS 7.2 indicates, only with the permission of a tribunal might you give expert evidence while acting as a surveyor-advocate.
- (b) You should always remain alert to any risk that a tribunal might misconstrue elements of a submission as expert witness opinion. Particular care should be taken in this regard where the tribunal (or one or more members of it) is professionally qualified in – and/or has technical expertise in – the same field as you.
- (c) It is advisable in your submissions that you avoid use of terms and expressions that, in the context they are used, signify any form of personal belief in any facts, expert evidence or arguments put forward. It is impossible to prescribe in advance an exhaustive list of such terms but the following may be indicative and are to be avoided:
- 'in my experience of such matters the only conclusion to be drawn is ...'
 - 'in my opinion, your argument is ...'; or
 - 'the arguments put forward support a rent of £50 psf, which in my view is exactly the right answer'.

Advocates advocate and argue an outcome for their clients, and so their own opinion on any issue is irrelevant.

Care is therefore to be taken not to interpose your own judgments and opinions as a surveyor-advocate between your client and the tribunal.

2.5 When taking on the role of surveyor-advocate, you should be aware that communications to and from your client may subsequently have to be disclosed to the other party. It is therefore critically important:

- (a) that you are aware of the rules regarding 'disclosure' and privilege (see GN 5.8)
- (b) that you are careful about what is said in written communications between you and your client; and
- (c) that you explain these considerations to your client.

2.6 As surveyor-advocate, in the best interests of the client, you should bear in mind at all times the possibility of effecting a compromise settlement and that you notify your client of your opinion of the merits of doing so, keeping the client updated where your opinion changes. Such opinion may reflect your view of the strengths of each party's case and may not necessarily coincide with any professional opinion expressed to the client at an earlier stage or in another role undertaken in the same or a related matter (e.g. the role of expert witness). The PS mandates you not to attempt to advise on matters outside your remit or competence.

2.7 In an effort to negotiate an acceptable compromise, you may be in frequent communication with the other party (usually on a 'without prejudice' basis) throughout the case: the need to keep certain communications separate (i.e. those not 'without prejudice') from open procedural discussions with the opposing side, which may continue throughout the case, ought not to be forgotten. The former (non-procedural discussions with the opposing side) may be protected by privilege, whereas the latter will not be privileged and may be brought to the attention of the tribunal. You should be aware that 'without prejudice' communications may lose that status, e.g. if there is a dispute as to the terms of a settlement.

2.8 In reaching any agreement you should consider and record carefully the exact scope of the settlement. It is common, for instance, to seek to close out other claims or potential claims that may not have been mentioned in pleadings or submissions. Settlement agreements may be complex and you should consider reference to others if your experience is insufficient.

2.9 If the matter in dispute is agreed between the parties, you will need to be aware of the circumstances in which it may be appropriate to refer the agreement to the tribunal for a formal record (e.g. an agreed award in arbitration). You will also need to be aware of the circumstances in which the tribunal concerned is entitled to make such an award.

2.10 You should ensure that a full and proper record is kept of all actions in the case and that files are well ordered and noted, as these may be required for examination later as part of any appeal process or for detailed assessment of costs.

2.11 It is acceptable to hold the file electronically. But this too should be well ordered and easily printed if required. It is in any event advisable to hold the most important documents in hard copy, and vital that original tribunal documents are retained.

2.12 Some tribunals give reasons for their decision unless the parties agree otherwise, whereas others do not give reasons, or may do so only if requested to do so by either or both parties. The client should be advised of the implications, and in particular of the risk that dispensing with reasons might inhibit or preclude any subsequent appeal.

2.13 You should be aware as to whether the proceedings before the tribunal are private or public and advise your client, and any witnesses for whom you are responsible, accordingly.

2.14 In complex or lengthy cases you may wish to consider the advisability of arranging with the tribunal and the other party for a full record to be made of the proceedings, whether by employing stenographers or by recordings.

GN 3 A 'dual role': surveyor-advocate and expert witness

3.1 The PS makes it clear that you should only act in a dual role, as surveyor-advocate and as expert witness, 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).

Such occasions should be regarded as exceptional.

Surveyors do, however, act as surveyor-advocates in some tribunals where the volume of work and expense of separate representation make any other course impractical.

3.2 Where instructions are contemplated which may lead to you undertaking a dual role of expert witness and surveyor-advocate, you are obliged by PS 3.10–3.11 to ensure that the two roles of surveyor-advocate and expert witness are clearly explained to, and approved by, the client before being undertaken (see also *Surveyors acting as expert witnesses*, 4th edition PS 9, GN 17 and GN 19, which are reproduced in Appendix C of this publication).

3.3

- (a) The principal advantages and disadvantages of a dual role may be summarised as follows:
 - (i) A 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.
 - (ii) 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.
- (b) It is always imperative to understand the distinction between the two roles and that it is impossible for both roles to be carried out at the same time. The PS obliges you to distinguish at each stage which role you are undertaking. On occasions where surveyors undertake the dual role and fall below the necessary standards required of each role, the effect can be adverse, leading to the case being much weakened and often to criticism of the surveyor by the tribunal (which may subsequently come to the attention of the client). For example, if you give expert evidence unsupported by proper reasons or omit material facts, the tribunal may form the view that it is in effect little more than advocacy of the (client's) case, and thus give it little or no weight. Advocacy that mixes expert (opinion) evidence in its submissions is not allowed. A tribunal will do its best to assess the merits of each party's case: the weight of the opinion evidence presented and the nature and power of the advocacy submissions are important factors in the formation of any decisions by the tribunal.

3.4 PS 3.12 insists on you clarifying which capacity you are undertaking throughout a matter. The separation of facts from opinion (of the surveyor as expert witness) and from argument/submissions as surveyor-advocate, will also be vital in this regard. The use of language also plays a role in this differentiation (see GN 3.5 below).

3.5 It is particularly important in document-only proceedings that any dual role is clearly distinguished to the relevant tribunal. One way of so doing would be to introduce different paragraph headings 'Opinion' and 'Submission' (the former covering expert witness evidence and the latter advocacy) or to present two separate documents. Alternatively (or in conjunction with the foregoing), the use of different coloured paper could feature.

It is further recommended that consistent, iterative use of language would also be of assistance:

- 'I think that ...'; or
- 'I believe that ...'; or
- 'It is my opinion that ...'

to introduce your expert opinion and:

- 'I suggest that (on the facts presented and the opinion evidence of Ms Y) ...'; or
- 'I submit that (there can be no other explanation of ...'

to introduce submissions/arguments as a surveyor-advocate. You are also reminded of the recommendation of GN 2.4(c).

For example (the text below uses a fictional example):

'OPINION

For the following reasons, in my opinion, the amount of adjustment for factor A is between x and y and much closer to y ...'

'SUBMISSION

For the following reasons, I suggest that my opinion [introduced earlier/elsewhere in my capacity as expert witness] of the adjustment for factor A should be preferred ... item C is inadmissible on grounds that ... Mr D has wrongly interpreted the rent review provisions because ... etc.... It is therefore my contention that the value should be ...'

As a general observation, many surveyors often loosely use the terms 'representations' and 'submissions' in general parlance as interchangeable terms, to refer to either expert opinion evidence or advocacy (or both) when using either term. It is recommended that wherever possible and appropriate in context, the use of the term 'representations' to denote expert witness (opinion) evidence be avoided; rather, 'expert witness report' or 'expert evidence' are preferable, and the term 'submission' is better used to denote an advocacy submission.

GN 4 Acting as a surveyor-advocate, and instructions

4.1

- (a) PS 3.4(a) requires you to make a written offer to supply a copy of the PS to a prospective client. For this purpose a stand-alone version of the PS is available to members to download from www.rics.org
- (b) PS 3.4(b) requires you to notify your client in writing that your firm operates a Complaints Handling Procedure (CHP) (if it is an RICS-regulated firm). If your firm is not RICS-regulated, it is recommended nonetheless that you notify your client in writing of the existence and terms of any applicable complaints handling procedures.
- (c) PS 3.5 provides that instructions must be obtained in writing. The Sample Terms of Engagement set out

in Appendix A is a set of exemplar terms provided for the use of surveyors, which may be adapted as required. Care should be taken to ensure that any instructions received or acknowledged do not contain information, which, if disclosed, would prove prejudicial to the client's case, save as to information required for the proper application of this GN and accompanying PS.

4.2 Certain tribunals will require production of a formal appointment document signed by the surveyor-advocate's client before allowing a surveyor-advocate to address them.

4.3 Often instructions from the client provide for a surveyor to act initially as a negotiator attempting to settle the dispute with the opposing party. This is likely to require different skills and expertise from that of advocacy, reflecting the different objectives and responsibilities of each role. The role of negotiator, for example, includes no responsibility to, and should not include any involvement with, any tribunal.

4.4 PS 3.2(b) refers to conflicts of interest. A conflict of interest may arise out of a previous or current involvement of either yourself or your firm with, for example, any party, dispute, or property, such that it would cause you to be unable – or seen by a reasonable disinterested observer to be unable – to fulfill your responsibilities to the tribunal and/or to your client. A conflict of interest could be of any kind, including: a pecuniary interest; a personal connection; an obligation (e.g. as a member or officer of some other organisation); links to a business in competition with one of the parties to the dispute, etc. It is not possible to prescribe in advance a list of all such circumstances. You should have an effective system in place to identify and assess such conflicts. What that system will be will depend upon the size of your firm and the complexity of its structure. (RICS has also published a professional statement on conflicts of interest with which surveyor advocates should comply so far as is relevant to them).

4.5

- (a) Before accepting instructions you should discuss the following with your client, and record the outcome of your discussions in writing:
 - (i) the identity of the surveyor-advocate
 - (ii) a summary of possible methods of potentially settling the dispute which might, for example, include mediation, and the advisability of adopting a proportionate approach to resolution of the case; and
 - (iii) a description of the preferred or recommended dispute-resolving tribunal, and its general procedures (including whether the dispute will proceed by way of written submissions or an oral hearing).

(b) To the extent that you are able to do so prior to acceptance of instructions, but otherwise as soon as possible after accepting instructions, it is also recommended that you:

- (i) give a forecast of the likely timetable and cost for the case
- (ii) give an outline of the merits of the case, including:
 - the overall prospects
 - possible outcomes
 - the costs consequences associated with those outcomes (to include a summary of the assessment procedures that the tribunal may impose in the event that your client is unsuccessful, and of the liability to the other party that your client may have if unsuccessful); and
 - advice on the methods that may be used to safeguard your client against liability for costs, e.g. Calderbank offers and, in arbitration, the possibility and consequence of 'capping costs'. Note that in arbitrations conducted pursuant to the RICS Construction & Engineering Service Fast Track Rules, the arbitrator is bound to cap costs.

See also the particular obligations of PS 3.6:

- (i) state whether or not your remit includes negotiation to settle, as well as to act as a surveyor-advocate, or to act in any other role or roles (such as expert witness or case manager)
- (ii) outline the inspections, enquiries and meetings with the other party that may be required with a view to settling the dispute
- (iii) outline the reports which will be required during progress of the case and whether the client requires any such report to be addressed to the client's lawyer to establish privilege where possible; and
- (iv) outline the appeal processes which may apply, including the ability or otherwise to appear as surveyor-advocate in any such circumstance.

4.6 Surveyor-advocates and their clients will sometimes wish to enter into an arrangement that makes the fee payable to the surveyor-advocate dependent in some way upon the outcome of the case (i.e. a 'conditional fee' arrangement – see the definition in Appendix B). PS 3.6 sets out points that must be observed in relation to such arrangements. You are advised to note the following matters by way of additional guidance and explanation.

- (a) You should be aware of the longstanding rule that outlaws conditional fee arrangements for certain types of cases undertaken before some tribunals. (Although the case law pertaining to this issue is drawn, for the purposes of this document, from

decisions of the courts in England and Wales, it is believed these would be persuasive to tribunals in Northern Ireland.)

Your concern should be to ensure that:

- (i) the rule does not apply to you; and
- (ii) the rule does not apply to the proceedings in which you are engaged as surveyor-advocate or the tribunal before which you will be acting.

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

- (b) As to GN 4.6(a)(i) above, historically, the rule has only been used to penalise lawyers. However, the public policy behind the rule would appear to apply as readily to surveyor-advocates, and it is possible, but unlikely, that the rule could now be extended to include surveyor-advocates.
- (c) As to GN 4.6(a)(ii), it is difficult to provide a conclusive list of the types of proceedings to which the rule applies. Disputes between parties that require resolution by tribunals (e.g. litigation, arbitration, adjudication, independent expert determination, and proceedings before the various tribunals) are more likely to fall within the ambit of the rule than other proceedings involving the consideration of questions of an administrative or public nature (e.g. determination of planning permission, rating and fair rents).
- (d) Lawyer advocates may avoid the impact of the rule altogether, provided they enter into a detailed and complex agreement with their client that complies with rules made under the *Courts and Legal Services Act 1990* (as amended). This does not apply to surveyor-advocates. However, most surveyor-advocates who are entitled to appear before tribunals derive their rights from practices preceding the 1990 Act, and are not affected by its specific rules regarding conditional fee agreements. Nevertheless, they remain subject to the wider rule referred to in GN 4.6(b) above.
- (e) Where the rule does apply, the effect is to render the conditional fee arrangement unenforceable. The result will be not merely that the successful party will be unable to recover the conditional fee from the other party, but also that the surveyor-advocate will be unable to recover the conditional fee from his or her client. Accordingly, where you, as surveyor-advocate, are thinking of entering into a conditional fee arrangement for a case before a tribunal, it is strongly recommended that you advise your client of the risk of unenforceability as set out in this paragraph 4.6, and decide whether you yourself wish to proceed in those circumstances.

4.7 PS 3.7 refers to grounds for ceasing to act. Examples of reasons to cease to act under PS 3.7(c) might be:

- (a) where a client refuses to authorise you to make a disclosure to the tribunal, which your duty as a surveyor-advocate requires you to make
- (b) where there is a breakdown in confidence between you and the client; or
- (c) where you are unable to obtain proper instructions or the client goes into bankruptcy.

PS 3.7 makes reference to the need to give 'reasonable notice' to one's client. What amounts to 'reasonable' will be influenced by the particular circumstances. For example, it would generally be unreasonable to cease acting immediately before a hearing where it would be extremely difficult or impossible for the client to find alternative representation. Alternatively, there may be circumstances where it would be reasonable to give no notice.

4.8 Where you act as an advocate you will owe duties to your client and to the tribunal in a manner similar to a lawyer-advocate. There is no (lawyer) advocate's immunity from civil proceedings in England and Wales – see *Arthur J. S. Hall & Co. v Simons (A. P.)* [2002] 1 AC 615 as regards negligence in the conduct of a hearing or in its preparation. Although there is no direct authority on the point, it is likely to be the case, similarly, that you will have no immunity as a surveyor-advocate either. You should therefore be careful to ensure that it is always clear when you are acting in the role of surveyor-advocate rather than another role (such as expert witness).

4.9 As regards PS 2.1(e) and PS 7.1, the advocate's task is to seek to persuade a tribunal to reach a certain conclusion based on the evidence, without misleading the tribunal. There are however three points to note about this apparently extensive limitation.

Firstly, surveyor-advocates are allowed to use their powers of persuasion to their fullest extent, consistently with the evidence before the tribunal.

Secondly, surveyor-advocates are entitled to present an argument that may not coincide with their own views as an expert, provided that it is reasonably arguable on the basis of the evidence in front of the tribunal.

Thirdly, surveyor-advocates may suspect or believe that the evidence given by their witness is factually incorrect, but provided the surveyor-advocate does not know that it is, they will not be misleading the tribunal by submitting that it should reach a certain conclusion based upon that evidence.

An extended example – drawn from a rent review arbitration involving surveyor-advocates – should serve to illustrate these distinctions.

- (a) Surveyor-advocates are not entitled to say 'there is no authority on this point' if they know that there is,

or are unaware that there is but have not taken the trouble to research the point.

- (b) Conversely, surveyor-advocates are entitled to say 'there is authority on this point, but it is distinguishable', if that point is reasonably arguable, even if their own view is that he or she will lose.
- (c) Surveyor-advocates are not entitled to say 'there is no evidence that the property suffers from airplane noise' if in fact there is such evidence.
- (d) Conversely, surveyor-advocates are entitled to say 'there is no evidence that the property suffers from airplane noise' if in fact there is no such evidence before the tribunal, even if the surveyor-advocate knows from their own experience that the property does in fact suffer from airplane noise.
- (e) By contrast, surveyor-advocates are not entitled to say 'the property does not suffer from airplane noise' (even if there is no evidence before the tribunal that it does) if the surveyor-advocate knows from their own experience that it does in fact suffer from such noise.
- (f) Conversely, surveyor-advocates are entitled to say 'the evidence that the property suffers from airplane noise should be dismissed' if there are reasonable arguments to support a dismissal, even if the surveyor-advocate does not personally subscribe to them.
- (g) Importantly, if surveyor-advocates are aware of damaging evidence, which the other side has overlooked, they are under no obligation to draw the attention of the tribunal to it. The surveyor-advocate's duty to the tribunal does not extend to drawing the tribunal's attention to evidence favourable to the other side, thereby breaching the duty to their own client in so supplementing any deficiencies of the opponent's evidence.

Other instances of conduct by a surveyor-advocate that would fall foul of the professional statement's constraint not to mislead the tribunal would be:

- to fabricate or alter evidence; or
- to try to persuade a witness to change his or her evidence.

4.10 As regards the application of the duty to cite relevant legal decisions (PS 2.1 (f) and 7.3), it is recommended that when citing a legal decision, you state the proposition of law that the particular decision demonstrates, and clearly identify, for the benefit of the tribunal, the parts of the judgment that support such a proposition. If citing more than one decision in support of a given proposition, it is advisable to consider stating to the tribunal the reason for doing so. You may leave yourself open to the displeasure of a tribunal if you cite, without good cause, multiple legal decisions in support of the same basic proposition. If citing legal decisions from another jurisdiction, it is advisable to

outline what such a decision adds to authority in the jurisdiction within which you act. See also GN 8.2.

GN 5 Case preparation and preliminaries

5.1 In addition to the role of surveyor-advocate, you may have responsibility for the management, administration, timetabling and general conduct of the case (on behalf of the client), and in these circumstances it is recommended that you attend to procedural matters as the case proceeds. In these respects you will be acting as case manager. You should be conversant with the procedural rules relating to the tribunal in question and the type of case involved. Further guidance may be gained from the relevant tribunal.

5.2 In those instances where the tribunal is appointed by, or on the application of, either party, responsibility for applying for, or making such appointments, or objecting thereto, can rest with the surveyor as part of the role of case manager. You may also have to reach agreement with the tribunal and the other party as to the fees charged by the tribunal.

5.3 In some cases it may be unclear initially which party is the claimant and which party is the respondent. In such cases you should seek to clarify and agree which is which with the other party as soon as practicable, and make representations and seek a ruling on this point from the tribunal if necessary.

5.4 As case manager, the surveyor will usually have responsibility for seeking or agreeing timetables for the proper progress of the case, any amendments thereto and any adjournments during the course of the case. You should be satisfied so far as reasonably possible that such timetables, amendments and adjournments are consistent with the best presentation of the client's case.

5.5 Many cases will involve the tribunal issuing directions or procedural instructions, usually after discussion with the parties' representatives at a preliminary meeting or in correspondence. If acting as surveyor-advocate, and also as a case manager, you will need to contribute to these discussions or to such correspondence; subject to justifiable reason not to do so. PS 7.1 requires you to ensure that all directions and procedural instructions of the tribunal are complied with. This is so whether or not it is in the interests of the client.

5.6 In certain cases, you will be required to agree with the tribunal and the other party the date, time and venue for any hearing, and will be responsible for ensuring that, as far as is reasonable, these are acceptable to your client's witnesses and to your client.

5.7 Identifying and dealing with the issues:

- (a) The purpose of the reference to the tribunal is to have your client's dispute determined as expeditiously, fairly and economically as possible. To that end, it will be vital to approach the identification of the issues, and to formulate the best way of dealing with them, as quickly and as carefully as possible.
- (b) One of the best ways of formulating the issues is for the parties to agree (or the tribunal to order) that statements of their case should be supplied to each other (arbitration rules may well provide for this to happen without intervention by the tribunal, and the substance of a construction adjudication is commenced by service of a Referral). It is usual for these statements to be sequential, with the claimant filing Points of Claim, to which the respondent will respond with a Defence ('Response' in a construction adjudication) or ('Points of Defence', which may introduce a counter-claim, although this is not normally permitted in construction adjudication). The claimant may then file a Reply (or 'Points of Reply'). These documents are important, and it is critical that they should be succinct, clear and complete. Where the facts cannot easily be condensed, a schedule may be appended to the statement setting out the claimant's detailed case in table format, with room for the respondent to add his or her own comments. As surveyor-advocate, you will be responsible for:
 - (i) the production of such statements on behalf of your client
 - (ii) considering whether there should be any response
 - (iii) responding to any requests for further information; and
 - (iv) liaising with the tribunal, with the client, and with any witnesses whose evidence is required to support the statements made.

In each case, it is recommended that you consider whether you are able and qualified to act in this way without legal advice. If you are not sure, you should take legal advice from the client's solicitor, and/or lawyer advocate as appropriate.
- (c) In an effort to narrow down the issues in dispute, the tribunal may direct that parties or their experts meet to narrow the issues, to produce schedules of agreed facts, items in dispute and items to be disregarded, by specified dates before any hearing or before the deadline for representation. Surveyor-advocates also adopting the role of case manager will be responsible for ensuring that such meetings take place and for ensuring the production of such schedules by the dates prescribed.
- (d) Once you have identified the issues, you will need to consider whether it is necessary to request the

tribunal to deal with any of those issues as preliminary issues, and if so:

- (i) how any such request should be made; and
- (ii) whether a right of appeal is required or allowed.

Similarly, you may need to respond to any such requests from the other party.

- (e) Some of the issues may raise or involve points of law. It is recommended that you be alert to identify them, be aware of the manner in which the tribunal can be required to deal with them, and make recommendations to your client as to how they should be tackled. If you are not competent to provide such advice yourself, it may be necessary for you to recommend that the client seeks legal advice and/or instructs a lawyer to argue the points of law (whether in writing or in the course of an oral hearing before a tribunal). Your terms of engagement should allow for such advice to be sought whether or not the client deems it necessary.

5.8 Disclosure and privilege

- (a) Courts and other tribunals have power in most circumstances to require the parties to a dispute to reveal to each other all the documents that are relevant to the matters in dispute. This process is called 'disclosure', and at its most formal takes place in two stages:
 - (i) the listing of all documents within the disclosing party's possession or control that are relevant to the issues; and
 - (ii) the production when requested of the listed documents.
- (b) There are limits to disclosure:
 - (i) not all tribunals routinely order disclosure to take place
 - (ii) even if disclosure is ordered, the order may be confined to specific classes of documents – say those relating to a particularly contentious issue of fact; and
 - (iii) documents that are privileged (see (c) below) need not be disclosed (technically, they ought to be listed as existing documents, but there is no requirement to produce them).
- (c) Documents need not be revealed to the other side, even where an order for disclosure is made, if they attract 'privilege'. There are a number of classes of privilege, and it is recommended that the surveyor-advocate be conversant with (and able to explain to the client) the most important three: 'legal professional privilege', 'litigation privilege' (see Appendix B: Definitions) and 'without prejudice privilege'.
- (d) It will be particularly important for the surveyor-advocate to safeguard from disclosure

correspondence that is intended to be kept confidential. First, as a general rule, communications between a surveyor-advocate and a client will not be privileged from disclosure (i.e. they will not attract legal professional privilege). However, where the communications are produced for the purposes of, or in contemplation of, proceedings, they may be privileged (because they will attract litigation privilege). Secondly, simply marking correspondence 'without prejudice' will have no protective effect unless created for the genuine purpose of settling the dispute.

- (e) PS 6.2 imposes a duty upon surveyor-advocates to take reasonable steps to obtain and disclose the necessary documents required rather than simply make enquiries about such documents. It is therefore recommended that surveyor-advocates be aware what rules of disclosure might apply in a particular case, and how the rules relating to privilege operate.
- (f) In larger cases, it is likely that many documents will be held by the client in electronic format. Some tribunals will order 'electronic disclosure' to take place. Surveyor-advocates should not attempt such disclosure unless they possess the experience and skills to do so. Law firms and companies that specialise in providing platforms for such disclosure are in general significantly better placed to carry out this exercise.

5.9 PS 2.1(f) and 7.3 require you to draw the tribunal's attention to all relevant legal decisions and legislative provisions of which you are aware, whether these are supportive of your client's case or not. This is a fundamental requirement for the surveyor-advocate. When you discover a point that appears to be contrary to your case, it is better to confront it at an early stage, and explain to the tribunal how you intend to deal with it, rather than wait for it to be raised, and then attempt to grapple with it.

5.10 You will need to decide whether to rely on any expert witnesses or witnesses of fact, and if so, in what respects. Most tribunals require details of witnesses in advance and seek to limit the number of expert witnesses on each side. You will, as soon as practicable, need to establish and/or be aware of such requirements. You will need to be aware of the circumstances in which witnesses can be compelled to appear (e.g. by use of witness summons), and also the circumstances in which:

- (a) only experts' written reports may be allowed; and
- (b) an expert may be appointed by the tribunal.

5.11 In many cases the tribunal will direct that the parties provide it with an agreed bundle of documents by a date in advance of any hearing and/or ahead of written representations. The surveyor-advocate in conjunction with the other party will usually be responsible for producing any such agreed bundles, which should be as helpful as

possible in identifying the issues in dispute, by the date prescribed. It is recommended that you be familiar with the tribunal's rules or directions for the preparation of such bundles including what type of documents are to be included and how they should be laid out.

5.12 After receiving any witness statements from the other party, it is advisable for you to consult with your witnesses as to which points made by the other side ought to be challenged.

GN 6 Evidence and documents

6.1 You should be aware of all evidence to be adduced from the witnesses on whose evidence you are relying for the presentation of your case. Where evidence is written you may wish to discuss it prior to it being finalised with a view to expanding or clarifying the witness statement. However, it is recommended that you do not – beyond such clarification – seek to influence the contents of a witness's statement, or to rehearse or coach a witness. You should not encourage the witness to give evidence which is not the truth, the whole truth and nothing but the truth. Witness familiarisation and preparation (e.g. regarding arrangements in the tribunal, tribunal layout, roles of different participants, basic generic requirements for giving evidence, such as listening carefully, speaking clearly, etc.) is permissible, but great care needs to be exercised in not doing or saying anything that could be taken as suggesting what a witness should say in giving evidence.

6.2 You should be aware of the rules of evidence, the legislation relating thereto and the tribunals before which such rules apply. In particular, you may need to be aware of, for example (in England and Wales), the *Civil Evidence Act 1995* and its effect upon hearsay evidence (see also Appendix D: Hearsay evidence), albeit that the submission of a witness statement will usually constitute the giving of a notice under the *Civil Evidence Act*. The application of these rules can limit witnesses, their evidence, their attendance and their liability to cross-examination.

6.3 You are responsible for checking the admissibility of the evidence that your witnesses wish to adduce, and, if necessary, challenging the admissibility of the other party's evidence. It is also important for you to establish whether all expert witness reports (of experts for each party or that of any tribunal-appointed expert) comply with the requirements of the expert witness's primary professional body and of the tribunal to whom the evidence will be given.

6.4 The tribunal may encourage or direct the parties to agree evidence in order to avoid or reduce the time and cost of the dispute resolution procedure, whether or not the procedure involves a hearing. In any event you are well advised to ensure (insofar as you reasonably can) that the case is conducted in a proportionate manner. It is recommended (though you may be required to) that you

liaise with the other side as to what evidence is agreed, when it may become part of any schedule of agreed facts or any agreed bundle, or what can be submitted without strict proof. If something is agreed between the parties as accurate, or is to be treated as accurate, then it is no longer capable of challenge. However, in cases where the CPR apply, agreement between expert witnesses will not bind the parties, unless the parties also agree to be bound. Nevertheless, if agreement between expert witnesses prejudices or destroys one party's case then that may be the end of the case. The purpose of any agreement between the parties is to agree what cannot be challenged, or cannot be challenged by evidence which is available. It is pointless to fight a case purely because the client cannot face the inevitable consequences of the material which they have. Challenge is legitimate only in circumstances where agreement on facts or opinion cannot be reached.

6.5 On rare occasions you may need the prior agreement of the tribunal and/or the other party if any of your witnesses intend to rely on photocopies of documents rather than originals. You should be aware of any original documents that are not available, and why not, and be satisfied with the reason for any non-availability.

6.6 Many tribunals require expert witness reports or witness statements to be produced to them and exchanged with the other side by a set date, most usually before any hearing. It is recommended that you liaise with your party's witnesses, the other party and the tribunal regarding the dates for such exchange and you should ensure that expert witnesses' reports or statements are exchanged as agreed.

6.7 In an effort to narrow the issues in dispute, the tribunal may direct that the experts should meet. If you are acting in the sole role of surveyor-advocate, you are advised to avoid involvement in the arrangement of such meetings, and to avoid being present or seeking to influence the agenda or discussion except where directed by the tribunal. However, where a meeting of experts takes place and, where you are acting as a surveyor-advocate and also an expert witness, you must at that meeting act as expert witness and not as surveyor-advocate, and take care with respect to any 'without prejudice' negotiations. See also GN 6.4 as the status of resulting agreements.

6.8 While PS 6.3(c) makes it clear that it is generally not permissible to communicate with a witness once he or she has begun to give evidence, it is very occasionally permissible to communicate with an expert witness while that expert is giving evidence (with the consent of the tribunal) for purposes of clarification – in no circumstances in order to influence the evidence being given.

GN 7 Hearings

7.1 If a hearing is to take place, the guidance contained in GN 8–13 may apply.

While these sections encompass situations where witnesses are anticipated to be involved, it is the case that there will be instances where no witnesses are involved, and therefore the guidance should be read accordingly. Where a dispute involves a number of issues, consideration may usefully be given at an early stage to hearing issues, or groups of issues, separately, and having separate decisions.

However, in certain circumstances, mindful of commercial considerations, and in an effort to save costs and/or expedite matters, tribunals may seek to deal with certain cases by written procedures rather than oral hearing. It is recommended that you be alert to the best overall procedure from the client's point of view and seek to arrange its adoption by agreement with the other party and/or with the tribunal.

7.2 Even where the bulk of a case is to be by oral hearing, many tribunals will require an advocate to provide them, and the other party, with an outline of the arguments from their opening statement in advance of the hearing.

GN 8 Opening the case

8.1 Prior to any hearing, the parties to the proceedings will have been designated as claimant (applicant) or respondent (defendant). It is usual for the claimant to open the case. In planning appeal hearings and inquiries the local planning authority (equivalent to the defendant) usually opens first. As surveyor-advocate you will usually include in the opening statement an outline of the case and how it will be supported by the evidence you intend to adduce. You may include in the opening statement an explanation of your response to any counter-claim by the other party and the evidence which will be given to support that response.

8.2 It is recommended that you raise all legal points except where these are clear on the face of the existing statement of case. By the beginning of the hearing, advocates for both parties should have exchanged a list of authorities if they intend to canvas any point of law. Where a new legal authority is raised or notified for the first time in the claimant's closing submission, the tribunal will normally allow the opposite party an opportunity to respond. Where you intend to refer to a legal authority, you should familiarise yourself with the status accorded to a particular law report series and refer the tribunal to the entire case, pinpointing as appropriate the relevant passages. It is advisable not to abstract only part of the report.

8.3 The surveyor-advocate for the respondent makes the respondent's opening statement after the claimant. By this

time the case should normally have been outlined fully to the tribunal, so the respondent's surveyor-advocate should avoid repetition. However, it may be unnecessary for the respondent's surveyor-advocate to open their case at all; it can be the closing submission which is more important so that the surveyor-advocate may comment in full on the position as at the close of the evidence.

8.4 It is by no means unusual for a case to be heard where the evidence is not in dispute so that the hearing is confined mainly or wholly to legal argument. In such cases, you are recommended to have a thorough understanding of the legal issues; if you do not, it is recommended that you as surveyor-advocate do not act and instead a lawyer should act as advocate.

GN 9 Examination-in-chief

9.1 Examination-in-chief is the process by which each surveyor-advocate takes their witness through their evidence. However, see GN 9.3 below.

9.2 In general an advocate is ill-advised to ask leading ('closed') questions of their own witness on any except procedural and undisputed points; there may be situations (e.g. before planning inspectors) where leading questions are prohibited. However, with the leave of the tribunal, leading questions might be allowed in examination-in-chief in the unusual case where the witness is uncooperative or 'hostile'. Accordingly, you should be aware of the nature of a leading question (i.e. a question asked of a witness in a manner that suggests the answer sought by the questioner). Where possible (except where leading is permissible), questions should be in the 'open' form (Who? Where? When? What? Why? How? How much? Can you explain?). The essential difficulty is that evidence in response to leading questions may have less weight than evidence in response to an entirely open question.

9.3 Where a witness statement, witness's report or proof of evidence has been provided to the tribunal and other party before the hearing, examination-in-chief of its contents is usually confined to checking with the witness that their evidence remains unchanged and making any corrections. (Where possible these should have been notified to the other party in advance). However, it is not unusual for supplemental matters to be added, but notice should have been given to the other side if the matters are of primary importance, and the consent of the tribunal is usually required.

9.4 It is recommended that, to the extent the tribunal permits, you ensure that any expert witness that is called deals with the case put forward by the other side. In some larger cases, the tribunal may have permitted a second round of expert reports which will have already sought to consider the other party's case. This should reduce the need for oral explanation at the hearing.

9.5 Many tribunals require evidence to be given on oath or affirmation and you are recommended to alert less experienced witnesses to this requirement, and explain to them the importance of telling the truth, and the sanctions for untruthful testimony. It is advisable to ensure the relevant scripture is available at the hearing.

9.6 Where the tribunal is dealing with the case in writing rather than at a hearing, evidence-in-chief is in the form of a witness's report or witness statement, possibly (where allowed) with the addition of separate written submissions (in the form of advocacy). PS 3.12 makes clear that these two elements should be clearly distinguished, where you act in a dual role.

GN 10 Cross-examination

10.1 Cross-examination is the questioning of the other party's witnesses by the opposing surveyor-advocate, during which leading questions may be, and generally are, asked.

10.2 Questions in cross-examination can be addressed not only to the evidence-in-chief given by that witness, but also to any evidence relevant to the case within the knowledge or expertise of that witness. Any notes taken into the witness box by any witness may be disclosed and form the subject of cross-examination.

10.3 Interrupting the cross-examination of the opposing surveyor-advocate is to be avoided except where there is a clear objection to the question being put. In this case, it is recommended that the tribunal be requested to adjudicate immediately on the legitimacy of the objection. Typically, you will, during cross-examination, question the other party's witness on those points where their evidence disagrees with your own witness. Unless it is clear from Directions given by the tribunal (e.g. in hearings subject to time limits, sometimes referred to as chess clocks) that the rule is relaxed, it is important that all contested points are covered in cross-examination, otherwise the tribunal may think that the points omitted are not in dispute. It is essential to put each point in your client's case fairly to every opposing witness who might reasonably be expected to be able to comment on it. The level of detail involved in this exercise will vary from case to case and common sense should be a guide. This is nonetheless an important point to consider.

10.4 Where the tribunal is dealing with the case in writing there is no opportunity for cross-examination unless an oral hearing also takes place (e.g. where granted after a request).

GN 11 Re-examination

11.1 Re-examination is the further questioning by each surveyor-advocate of his or her own witness, on matters

arising out of responses to cross-examination. It is recommended that no new matter be adduced at this stage; in some sectors no new matters may be introduced, save by permission of the tribunal. The same rules as to leading questions apply as in examination-in-chief (see GN 9.2). It is recommended that amplification and clarification of evidence already given in cross-examination, if necessary, should take place. This should also help to re-establish any credibility lost in hostile cross-examination, but re-examination may also enable an advocate to make a point because of new material which has been introduced by clumsy cross-examination.

11.2 Once a witness has completed giving evidence, the witness is obliged to remain at the hearing unless the tribunal, after consulting the other party, allows the witness to leave, usually described as 'releasing' the witness. In more complex disputes, problems might occur if witnesses from either side are excused from the hearing too soon and you should be alert to this.

11.3 Occasionally witnesses are recalled to give further evidence, typically arising out of evidence from the other parties by way of rebuttal. You should avoid having to recall a witness due to poor preparation of the case.

GN 12 Questions by the tribunal

12.1 While the tribunal may, without prompting, ask its own questions of witnesses during examination-in-chief, cross-examination, and any re-examination, it is usual for each party's surveyor-advocate to enquire whether the tribunal has any questions before each witness stands down.

12.2 Surveyor-advocates for each party may ask further questions on points arising out of each witness's answers to any questioning by the tribunal.

GN 13 Summing up/final submissions

13.1 When all the evidence has been heard, the surveyor-advocate for the respondent will sum up first. This is done by giving a résumé of the case and the evidence that they have called, and seeking to contrast that with the case and evidence from the other party and to persuade the tribunal that their evidence should be preferred. In the case of matters dealt with in writing, rather than orally, summing up takes the form of (written advocacy) submissions. However, it is common and helpful for the tribunal if each surveyor-advocate presents his or her summing up, either at the end or beginning of this stage, in writing; the hearing may be adjourned for this purpose. This is the point at which any final legal submissions should be made. NB in some circumstances, with the leave of – or at the

discretion of – the tribunal, the advocate for the claimant will sum up first (e.g. where the arbitration is about a counter-claim).

13.2 The hearing will normally conclude with the surveyor-advocate for the claimant summing up in similar fashion, although on occasions the tribunal may order simultaneous submission of a written final submission.

GN 14 Costs

14.1

- (a) Where the tribunal has the power to deal with costs, you should be aware of how to protect your client's interests. In planning appeals the parties are expected to meet their own costs, but for planning inquiries, hearings and some forms of written representations, costs may be awarded where one party incurs unnecessary expense as a result of the unreasonable behaviour of another.
- (b) You will need to advise the client of when and in what terms formal offers to settle should be made. Such offers may include Calderbank offers (see Appendix B: Definitions) and you should be aware of when to request the tribunal to make an interim decision reserving costs for a later determination.

14.2 You should be aware of the correct time to make submissions on costs. Usually any submission on costs will not be made until the tribunal has made its decision, but in those cases where the decision is made at the end of the hearing, submissions on costs are often made immediately. Where, however, a party has made an offer or offers to settle, it may ask for submissions and a decision on costs to be deferred until the outcome of the decision on the substantive issues is known and/or has been properly assessed.

14.3 If the issues are complex, you may request an oral hearing to deal with costs; alternatively you may consider that written submissions will suffice. It is possible to make Calderbank offers purely in respect of the assessments of costs.

14.4 You should also be aware of whether the tribunal has the power to award simple or compound interest on any sum awarded, and it is advisable to claim if appropriate. You may need to take advice regarding the assessment of reasonable costs other than your own costs, such as the parties' legal fees.

14.5 It is advisable that you be aware of the fact that some tribunals, in determining costs or expenses, may treat advocacy work conducted by you as work done by a lay representative on the footing that advocacy is not seen as the usual stock in trade of a surveyor.

GN 15 Re-opening of the case

15.1 Occasionally, new evidence relevant to the case becomes apparent after the hearing, or after written submissions (other terms may be used in different forums) and their counters have been lodged. In such situations you are recommended to consider whether to ask the tribunal to re-open the proceedings. In planning appeals, the proceedings can be re-opened only on the direction of the Secretary of State; and that discretion is exercised only rarely.

15.2 In general, the tribunal will re-open the case only if it considers that the new evidence is so fundamental to the issues in dispute that its exclusion will prejudice a fair resolution. In the event that such a situation exists, you should act without delay and may need to seek legal advice.

15.3 It is not possible to re-open the case for the submission of new evidence after the decision or award has been made.

GN 16 Inspections

16.1 The tribunal may wish to carry out an inspection of any relevant property or facility and any comparables referred to in evidence. It is recommended that you clarify whether the tribunal wishes to be accompanied during these inspections and, if so, you should confirm in what capacity you will accompany the tribunal and liaise with the other party to ensure that arrangements are made. Site inspections are invariably made in planning appeals.

16.2 Often the tribunal may prefer and find it more convenient, with the agreement of both parties, to make inspections unaccompanied. Inspections should be conducted in the presence of both parties or neither party, or their representatives, unless either party indicates in advance that they have no wish to be present and no objection to the inspection taking place in the presence of the other party.

16.3 You should clarify whether further submissions will be invited during any inspection or whether the inspection is simply to assist the tribunal in weighing up the evidence already adduced. Inspections are not normally appropriate occasions for re-opening the case. In planning appeals, no representations are permissible during a site inspection.

GN 17 The tribunal's decision

17.1 In certain cases the decision of the tribunal will not be made available to the parties until the fees and expenses

of the tribunal have been paid. You are advised to be aware of such circumstances and ensure that timely arrangements for such prior payments are made. See 17.4 below. In certain instances the time in which appeal may be made may run from the day the decision or award becomes available.

17.2 It is recommended that you study the decision and check for slips or clerical errors in a timely manner. If there are any, the tribunal may be called upon to correct them.

17.3 You may consider that there might be more serious errors or problems with the decision constituting grounds for an appeal, challenge, or application for it to be set aside. You should be clear as to whether you are able to make this judgment, and also whether such a matter will be considered by a tribunal where you do not have a right of audience. If you do not feel able to consider whether an appeal could be launched, or if you have no right of audience then the matter should be passed expeditiously to a lawyer utilising (where appropriate) 'Licensed Access' (formerly known as 'Direct Professional Access' in England and Wales; see Appendix B: Definitions), or under similar provisions in other jurisdictions. Equally, you may need to advise the client on the enforceability of the decision. If you do not have the competence to advise in this respect, you should inform the client expeditiously and suggest that the matter is referred to the client's solicitor or to an advocate utilising (where appropriate) Licensed Access.

17.4 The procedure for challenging, appealing or applying to set aside decisions from some tribunals is subject to strict time limits to which the surveyor-advocate should be alert. In particular it is recommended that you be aware of whether any time limit runs from the date the decision is made or signed rather than from the date on which the parties receive the decision. Funds may need to be organised to facilitate the release of the decision within the appropriate timescale. This may include your reserving the right for the client to pay all of the costs without prejudice to the final decision.

17.5 Following the making of the decision on costs, you should be aware of the potential requirement for the assessment of costs as well as the prospect of appealing against the decision in respect of liability for costs. You will need to decide whether the process of assessment of costs is one that you can undertake, or whether it would better to be handed over to a lawyer, or costs draftsman.

Appendix A: Sample Terms of Engagement

Note: This appendix forms a part of *Surveyors acting as advocates*: RICS guidance note, and is for the use of surveyors appointed to provide advocacy services to a tribunal where a surveyor is permitted to appear. The 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.

Terms of Engagement

1 Recital of appointment

1.1 The Client has appointed the Surveyor-Advocate named below (see 1.4) to provide the following advocacy services:
[state the nature and extent of the services which are to be provided]

Such services shall be subject to these Terms of Engagement.

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

1.3 The Client is:

1.4 The Surveyor-Advocate is:

1.5 The Tribunal is:

[state name of tribunal in relation to which advocacy services are to be provided]

2 Definitions

Unless otherwise agreed by the parties:

2.1 'Client' means the person(s), organisation(s), or department(s) to whom the Surveyor-Advocate has been asked to provide the above-stated services.

2.2 'Surveyor-Advocate' means the person named at 1.4, and appointed to provide advocacy services as described in 1.1 of these Terms of Engagement.

2.3 'Assignment' means the matter referred to the Surveyor-Advocate by the Client, in respect of which the stated services are required, and to which these Terms of Engagement apply.

2.4 'Fees' means (in the absence of written agreement to the contrary) the reasonable charges of the Surveyor-Advocate based on the Surveyor-Advocate's agreed hourly/daily rate. Time spent travelling and waiting may be charged in full. [Set out hourly/daily rates]. Value Added Tax (VAT) will be charged in addition where applicable.

2.5 'Disbursements' means the cost, reasonably incurred, of all other professional advice or opinion, photography, reproduction of drawings, diagrams, etc., printing and duplicating, and all out-of-pocket expenses, including travel, refreshments and hotel accommodation. Value Added Tax will be charged in addition (where applicable).

3 The Client

3.1 The Client agrees:

- (a) to provide timely, full and clear instructions in writing supported by good quality copies of documents within his or her possession; or to arrange or ensure the provision of all these things
- (b) to treat expeditiously every reasonable request by the Surveyor-Advocate for authority, information and documents
- (c) where possible, at the Surveyor-Advocate's request, to arrange access to the property/facility relevant to the Assignment in order that the Surveyor-Advocate can inspect such and make relevant enquiries

- (d) subject to reasonable prior consultation, that the Surveyor-Advocate may obtain such legal or other professional advice as is deemed reasonably necessary by the Surveyor-Advocate for the Surveyor-Advocate to provide the services set out at 1.1 above; and
- (e) that circumstances may arise where the Surveyor-Advocate's duty to the tribunal could require them to act in a manner that may not be perceived to be in the best interests of the client. Under such circumstances, if the Surveyor-Advocate is obliged to withdraw, they will be entitled to charge for work undertaken to the date of withdrawal on a fair and reasonable basis.

4 The Surveyor-Advocate

4.1 The Surveyor-Advocate shall:

- (a) undertake only those tasks in respect of which they consider they have adequate experience, knowledge, expertise and resources
- (b) use reasonable skill and care in the performance of their instructions and duties; and
- (c) comply with all relevant rules, codes, guidelines and protocols, including those of RICS.

5 Fees and Disbursements

5.1 The Surveyor-Advocate may present invoices at such stipulated intervals as they consider reasonable during the Assignment and payment of each invoice is due on presentation.

5.2 For the avoidance of doubt, the Surveyor-Advocate shall be entitled to charge fair and reasonable Fees and Disbursements where, due to settlement of the dispute or to any other reason not being the fault of the Surveyor-Advocate:

- (a) the Surveyor-Advocate's time has been necessarily reserved for a specific hearing, meeting, appointment or other relevant engagement but the reservation of time is not required because the engagement has been cancelled or postponed and/or the instructions have been terminated due to settlement of the dispute, or for any other reason that is not the fault of the Surveyor-Advocate, regardless of the period of notice given by the Client; and/or
- (b) such Fees and Disbursements have been incurred by the Surveyor-Advocate prior to receiving notice from the Client of any update and/or variation to the instructions for the Assignment.

5.3 The Client shall pay to the Surveyor-Advocate interest under the *Late Payment of Commercial Debts (Interest) Act* 1998 on all unpaid invoices, or will pay to the Surveyor-Advocate, at the Surveyor-Advocate's sole discretion, interest at [...] % per month (or part thereof) on all invoices which remain unpaid after 30 days from the date of issue of the invoice to the Client calculated from the expiry of such 30-day period. The Client shall also pay 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 Surveyor-Advocate'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 that may be alleged.

6.2 Any dispute relating to the amount of the Surveyor-Advocate's Fees and Disbursements shall, in the first instance, be referred to [*state mechanism or process* e.g. the Surveyor-Advocate's firm's Complaints Handling Procedure].

6.3 Where any dispute over Fees or Disbursements cannot be resolved by [*state mechanism or process*], such dispute shall be referred to [e.g. a mediator chosen by agreement of both parties]. Where agreement cannot be reached on the identity of [e.g. a mediator], the services of [e.g. the RICS Dispute Resolution Service] shall be used to appoint [e.g. a mediator].

In the event that any dispute cannot be resolved by [*state mechanism* e.g. mediation], the courts of [*state jurisdiction* e.g. England and Wales] shall have exclusive jurisdiction in relation to the dispute and its resolution.

(Note: clause 6.3 is applicable solely in the context of a firm not 'Regulated by RICS')

6.4 The law of [*state law* e.g. England and Wales] shall govern these Terms of Engagement.

Appendix B: Definitions

This appendix is a part of both the professional statement (PS), and the guidance note (GN). The following are short definitions of key terms in the PS and/or GN. In certain circumstances other terms may be used. Users are also advised to refer to a legal dictionary (or legal textbooks), and/or to the relevant rules, directions and procedures of the tribunal in question.

Surveyor-advocate: a person who presents to the tribunal a client's properly arguable case as best as they 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 their client all that the client might properly do for themselves if they 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 negotiator.

Applicant: a person who makes an application during the course of ongoing civil proceedings (see also 'claimant' and 'referring party').

Award: the conclusions reached on the main issues in dispute by an arbitral tribunal. This term is also occasionally misused to describe a 'decision' made by an adjudicator.

Calderbank offer: a firm offer to settle one or more disputes or part of it/them, written without prejudice save as to costs, so that the offer may be brought to the tribunal's attention only on the question of costs and after a ruling on the matter which is the subject of the offer has been made. Providing the offer is in terms enabling like to be compared with like (enabling the claim or claims to be satisfied), it may act to protect the person making the offer on costs subsequent to the date the offer ought reasonably to have been accepted if the offeree achieves no more than that offer by proceeding with the case. The procedure is available, for example, where in non-court proceedings (such as arbitration) there are no provisions for a 'payment in'. So called because the first time such an offer was used was in *Calderbank v Calderbank* [1975] 3 All ER 333.

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.

Claimant: a person who brings an action; sometimes also referred to as an 'applicant' or 'referring 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. Other labels in common use are 'incentive-fee', 'speculative fee', 'success-fee', 'success-related fee', 'performance fee', 'no-win, no-fee', and 'contingency fee'.

Costs: a term used to describe the legal costs and other expenses incurred by each party in preparing and advancing their case before the tribunal. These may extend (in cases of arbitration but not litigation) to include the fees of the tribunal itself. Rules governing costs and costs allocation are usually governed by the rules and powers of a particular tribunal or by statute (to take but one example, see sections 60–65 of the *Arbitration Act* 1996). Some tribunals may decide not to make an order on costs.

CPR: The Civil Procedure Rules (known as CPR) (available at www.justice.gov.uk/courts/procedure-rules/civil) is the set of rules governing the procedure of the Senior Courts and County Court in England and Wales. These procedural rules are supplemented by Protocols, Pre-Action Protocols, Practice Directions and court guides. In summary, 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.

Decision: refers to the conclusion reached by an adjudicator (or other relevant tribunal).

Direct Professional Access (DPA): see Licensed Access.

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.

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. This is different to a witness of fact (see below).

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.

Leading question: a question asked of a witness in a manner that suggests the answer sought by the questioner.

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; 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 RICS guidance note *Direct professional access to barristers* is currently under review. RICS members are also able to instruct counsel direct in Northern Ireland, under Direct Professional Access. The relevant Bar Councils (of England and Wales; and Northern Ireland) 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: 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 be any of the following, depending on the circumstances and context:

- a statement of case
- an assertion of fact(s)
- expert opinion evidence; and
- an advocacy submission.

Representations may be made orally or in writing.

Respondent: a person against whom proceedings are brought, or who is party to a dispute referred to a tribunal for determination. In an appeal, the party resisting the appeal is referred to as the respondent.

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.

Statement of case: usually a formal written statement served by one party on the other, containing the allegations of fact that the party proposes to prove at trial (but not the evidence) and stating the remedy (if any) that the party claims in the action.

Submission(s): the presentations 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, or to a mix of such expert opinion evidence and advocacy; such usage is often misplaced.

'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 tribunal 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.

Witness statement: A witness statement is a written statement that a person may put forward as evidence to a tribunal during the course of proceedings. It is a statement of facts within the personal knowledge and belief of the person making the witness statement. The person must also specify the source of the information or belief laid out in the statement. A witness statement might ideally (among other formal requirements) specify the title of the proceedings, the person making the statement, their address and occupation (and if not employed, a description of the person), and the party to the proceedings on whose behalf the statement was made.

Witness summons: an order by a tribunal, requiring a third party to either:

- appear before a tribunal on a particular day and give evidence; and/or
- produce certain documents that are required as evidence.

Failure to comply with a witness summons constitutes contempt of court and will usually result in a fine or even imprisonment. In other tribunal proceedings penalties may also follow for breach.

Appendix C: Extracts – Surveyors acting as expert witnesses

This appendix forms part of *Surveyors acting as advocates*: guidance note. PS 9, GN 17 and GN 19 below are reproduced from *Surveyors acting as expert witnesses*: RICS practice statement and guidance note, 4th edition, which is current at the date of publication.

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 professional 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:
 - (c) 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
 - (d) whether or not you will be able to fulfil both roles properly with professional integrity at all times; and
 - (e) 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 professional statement and guidance note *Surveyors acting as advocates*.

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 professional 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 professional 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 professional 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 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.

Appendix D: Hearsay evidence

This appendix forms a part of *Surveyors acting as advocates*: RICS guidance note. The *Civil Evidence Act 1995* contains provisions that alter the previous hearsay rules (that hearsay evidence was not admissible). The Act abolished the rule against hearsay evidence in civil proceedings, set out guidance as to hearsay evidence and requires a party who wishes to adduce hearsay evidence to serve notice on the other party.

The Act therefore provides that in civil proceedings evidence otherwise admissible shall not be excluded solely on the grounds that it is hearsay. 'Civil proceedings' means civil proceedings before any courts and tribunals where the strict rules of evidence apply, whether as a matter of law or by agreement of the parties.

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

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

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

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

Appendix E: RICS Expert Witness Accreditation Service (EWAS)

Introduction

Instructing lawyers are increasingly careful to ensure their experts are suitably qualified and capable of providing written and oral evidence to a high standard and in accordance with established legal requirements.

When assessing the suitability of experts, instructing lawyers are likely to prefer professionals who:

- have been trained and assessed by a recognised training organisation
- are able to demonstrate real understanding of the primary roles and duties of experts
- can demonstrate they are able to meet deadlines, and produce court compliant reports
- have credibility in the witness box; and
- have a thorough understanding of the relevant court procedures and rules.

The RICS expert witness accreditation programme is designed to enable professionals to discharge the specialist role of expert witness to a high standard.

The objective is to also give clients who instruct experts the confidence that RICS accredited expert witnesses will perform to best practice legal standards in their role.

At the end of the accreditation programme, successful delegates will be able to demonstrate that they possess the essential legal knowledge, practical skills and confidence to meet best practice standards as expert witnesses.

EWAS ensures expert witnesses are able to demonstrate they will:

- be, and are seen to be, independent and unbiased
- only deal with matters that fall within their personal expertise, experience and knowledge
- act impartially and with integrity
- be honest and truthful at all times

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Appendix F: Further reading

Most of the items below can be obtained via RICS Books

(www.ricsbooks.com). Please note that some publications reference earlier editions of *Surveyors acting as expert witnesses* or *Surveyors acting as advocates*.

Boon, A., *Advocacy* (2nd edition), Cavendish Publishing Limited, 1999

Civil Procedure Rules, together with associated *Practice Directions, Pre-Action Protocols and Forms*, (issued by the Civil Justice Council (CJC), August 2014.

Guidance for the instruction of experts in civil claims (www.judiciary.gov.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf)

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

Dilapidations (7th edition) RICS guidance note, 2016

Direct professional access to barristers, RICS guidance note. This guidance note is no longer current nor in force. The guidance note is available for historic reference purposes from the RICS library. For more information contact the Dispute Resolution Faculty of RICS.

du Cann, R., *The Art of the Advocate*, Penguin, 1993

Morley, I., *The Devil's Advocate*, 3rd Edition, Sweet & Maxwell, 2015

Napley, D., *The Techniques of Persuasion*, 4th edition, Sweet & Maxwell, 1991

Ross, D., *Advocacy*, Cambridge University Press, 2007

The Civil Evidence Act 1995

Wellman, F., *The Art of Cross-Examination*, Standard Publications, 2014

Current RICS professional statements, practice statements and guidance notes can be viewed and downloaded at www.rics.org/uk/tag/dispute-resolution1/

The RICS Library may be able to provide further information relevant to advocacy practice.



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 125,000 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.

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