Institute and Faculty of Actuaries

Summary of Consultation Responses

APS X3: The Actuary as an Expert in Legal Proceedings

Regulation Board

October 2014

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1. INTRODUCTION

I am pleased to introduce this summary of the feedback received in response to the Institute and Faculty of Actuaries' (IFoA) Consultation Paper on APS X3: The Actuary as an Expert in Legal Proceedings and the accompanying Guide issued by the Regulation Board.

The Expert Witness Working Party was set up to review the existing IFoA materials on members instructed to act as experts in relation to legal proceedings and to consider the introduction of a new Actuarial Profession Standard (APS) in this area. The working party was comprised of a number of members with experience of acting as experts. They include: Gordon Pollock (Chair), Jemma Beattie and John Pollock. Their work was also assisted by a review group of other members with relevant experience who provided input on the proposals.

The IFoA has now analysed all of the responses received and this feedback document sets out (1) a summary of those responses and (2) the conclusions of the working party in light of those responses. This document also sets out the agreed proposals for the new APS X3 and Guide: 'Providing expert opinion in Legal Proceedings: A guide for actuaries'.

It is hoped that the new APS X3 and the accompanying Guide will be helpful for members who are involved in this area of work or who are contemplating instructions to act as an expert in relation to legal proceedings as well as those who instruct members to be experts in that capacity.

We are extremely grateful for the care and attention shown by all respondents in preparing their comments on the discussion paper and I hope you will find this summary of the feedback received both useful and informative.

Desmond Hudson
Chairman of the Regulation Board
October 2014

2. EXPLANATORY NOTE

The proposals

As explained in the Consultation Paper, the proposed APS X3 and accompanying Guide are intended to introduce a mandatory standard and more detailed Guide for members involved in carrying out expert work in relation to legal proceedings.

The IFoA currently has a non-mandatory Information and Assistance Note (IAN) in place and, following a review of that document, it was concluded that it would be appropriate to replace it with an Actuarial Profession Standard (APS) and a more detailed Guide.

This view was reached taking into account a number of factors:

- The importance of this work and the impact that it has on those involved in legal proceedings, including individuals;
- Previous incidences where there have been failings by members involved in expert witness work;
- Feedback that this is an area of work where members might benefit from clarification of the expectations of them and of detailed guidance on court procedures and practices, particularly for those new to the work;
- Recognition that the importance of this work might merit some additional, more specific requirements to support the high-level principles set out in the Actuaries' Code for example, in relation to contingency based fee arrangements; and
- The appropriateness of having an APS which is concise and sets out the minimum level of standards required of those carrying out this work and which is accompanied by a separate non-mandatory guide which sets out more detailed guidance.

The working party was therefore tasked with producing an APS and Guide that would achieve these aims. The draft proposals were informed by discussions with members, employers of actuaries and other professional and regulatory bodies (including those outwith the actuarial profession).

The Consultation Process

The Consultation Package was published on 9 October 2013 and the deadline for comments was 9 December 2013. It included a draft 'APS X3: Actuary as an Expert in Legal Proceedings' and draft Guide: 'Providing expert opinion in Legal Proceedings:- A Guide for Actuaries'.

In terms of APS X3, this provides that:

- Members must establish clearly the nature of their instruction and, where appropriate, record this in writing;

- Members must be satisfied that they have the necessary levels of skill and knowledge in order to fulfil the requirements of the role in which they are instructed;

- Members are under duties in relation to providing independent and objective advice;

- Members instructed to be an expert witness must familiarise themselves with and act in accordance with the relevant rules and procedures that apply in relation to the proceedings in which they are instructed; and

- Members must not agree to be remunerated under an arrangement linked to the outcome of the proceedings in which they are instructed.

The requirements of APS X3 apply to those members who are instructed or contemplating instructions in relation to legal proceedings in the UK (i.e. in England and Wales, Scotland or Northern Ireland). However, there is also provision in APS X3 that requires members instructed, or contemplating instructions, in legal proceedings in jurisdictions outside the UK to 'consider the extent to which the principles underlying the requirements set out in sections 2 to 5 below are relevant to the instruction in question and, to the extent that they are relevant, apply those principles as may be appropriate in the circumstances'.

This approach is intended to recognise that there are a range of different types and natures of legal proceedings and legal systems in place outside of the UK. That means there may be situations where it is impractical and/or inappropriate to apply the specific requirements so there is a risk in having those specific requirements apply to all jurisdictions. APS X3 therefore seeks to achieve a balance by requiring members working in those other jurisdictions to consider the principles underlying the specific requirements and to apply them where appropriate but not requiring direct application of the provisions themselves.

In addition to the survey being sent to all members of the IFoA, it was also sent to a number of organisations that might have an interest in the proposals. This included not only those who employ, regulate or otherwise deal with actuaries, but also those who might instruct actuaries in legal proceedings or who might deal with actuarial advice in the context of such proceedings. All were invited to comment.

There were no consultation meetings held in relation to this consultation. However, those with an interest were invited to get in touch if they wanted to participate in a discussion by conference call with members of the working party. One respondent did take up this invitation and had such a call with a working party member.

Results of the Consultation Process

During the course of the consultation period, the IFoA received:

- 33 responses via a Survey Monkey questionnaire, and
- 9 responses via the Expert Witness mailbox

The responses were generally supportive of the proposals.

92% of respondents said that the APS and the Guide are helpful to an actuary taking on the role of expert witness or expert advisor.

There were a number of quite lengthy and detailed responses from members, organisations employing members and other bodies/individuals. Those responses are set out in section 3[1]. Some of those responses contained comments and/or suggestions about the details and content of the APS and Guide while others raised more fundamental points about the proposals.

Some key themes or issues that were raised in the comments included:

- Comments relating to whether there had been a sufficient case set out for introduction of an APS as opposed to having simply a Guide to supplement the Actuaries' Code.

- Objections to the inclusion of a restriction in the APS on the use of contingency fees, with some disagreeing with the inclusion entirely and some respondents questioning whether there should be a more limited application of the rule so that it applied only to those instructed as expert witnesses.

- A mixture of different comments on the extent to which the APS should apply to non-UK proceedings.

The working party met in January to discuss the responses to the consultation and also took further views of the Regulation Board in relation to the objectives of the APS. The working party agreed with the majority of the respondents and concluded that there is a firm basis upon which to proceed with the proposal.

The working party and Regulation Board did give further consideration to whether there was a good basis for introducing a mandatory APS to supplement the requirements of the Actuaries' Code and concluded that there were good reasons for introducing it. Those include:

- That it highlights specific principles for a particular area of practice which is one that can have significant implications for clients who are, in many cases, individuals.

- That it introduces specific requirements that are not expressly set out in the Actuaries' Code (e.g. the restriction on contingency fee arrangements)

- All APSs should be able to be linked back to principles of the Actuaries' Code as it is the foundation upon which the more specific requirements of APSs are built. However, the APS imposes a higher standard upon members carrying out that type of work in recognition of the nature of that work and the potential impact it may have directly on the public. For example, paragraph 3.1 requires the member to ensure 'advice, is and can be reasonably seen to be, **independent and objective**...'. This goes further than the

[1] Please note that this does not contain the detail of any responses where the respondent asked for those to remain anonymous.

Actuaries' Code requirements in 3.1 which involves a duty to ensure the ability to provide **objective** advice is not...compromised' (emphasis added).

The working party and Regulation Board also gave further consideration to the issue of the restriction in the APS in relation to contingency fee arrangements and concluded that it was appropriate to retain the restriction albeit with a narrowing of the requirement so that it applies only to those members acting as an expert witness. Some of the factors that they took into account in reaching that conclusion were:

- The acceptance of contingency fees by an expert witness is at odds with the witness's duty to the court therefore it is appropriate and in the public interest to have a restriction.
- Having a fee that depended on the outcome of a case would create a conflict of interest (or at the very least the appearance of one) in terms of the witness's personal financial interests and the interests of the court. It would also create the potential for opposing counsel or solicitors to question the witness's objectivity.
- It is in line with the restrictions imposed on experts under the England and Wales CPR and the restrictions imposed on solicitors in terms of entering into such arrangements with witnesses.
- It is in line with the principle 3.1 of the Actuaries' Code that 'members will ensure that their ability to provide objective advice to their clients is not, and cannot reasonably be seen to be, compromised.
- It is helpful clarification of that specific issue for members in that situation and removes any scope for uncertainty.
- The case for a restriction on expert witnesses is more compelling than that of a 'legal advisor' in proceedings given the nature of the role of a witness.

The working party also took into account the comments and suggestions provided in relation to the drafting and concluded that a number of minor changes should be made to the final APS X3 and Guide.

Those include:

1) Narrowing the scope of the restriction on contingency fee arrangements in paragraph 5.1 so that it applies only to those instructed as Expert Witnesses not to those instructed as Expert Advisors.
2) Correcting a few typographic errors in the APS and Guide;
3) Adding further clarification to the Guide in relation to the distinction between Expert Witnesses and Expert Advisers; and

4) Adding in a clarification that APS X3 applies only in relation to those instructed in connection with legal proceedings and that it is not intended to apply to those instructed in the role of Independent Expert for the purposes of Part VII transfers.

3. DETAILED RESPONSES AND COMMENTS

General Questions

Question 1: About you

Answered: 29 / Skipped: 4

Answer Options	Percent	Response Count
Name	100%	29
Position Held	86%	25

Question 2: Are you a member?

Answered: 30 / Skipped: 3

Answer Options	Percent	Response Count
Yes	97%	29
No	3%	1
Answered Question		30

Question 3: If yes, which class of membership?

Answered: 28 / Skipped: 5

Answer Options	Percent	Response Count
Student	7%	2
Affiliate	4%	1
Associate	4%	1
Fellow	85%	24
Honorary Fellow	0	0
Answered Question		28

Question 4: Do you want your name to remain confidential?

Answered: 30 / Skipped: 3

Answer Options	Percent	Response Count
Yes	37%	11
No	63%	19
Answered Question		30

Question 5: Do you want your comments to remain confidential?

Answered: 30 / Skipped: 3

Answer Options	Percent	Response Count
Yes	23%	7
No	77%	23
Answered Question		30

Question 6: About your organisation

Answered: 26 / Skipped: 7

Answer Options	Percent	Response Count
Name	100%	26

Question 7: Do you want the name of your organisation to remain confidential?

Answered: 30 / Skipped: 3

Answer Options	Percent	Response Count
Yes	57%	17
No	43%	13
Answered Question		30

Question 8: Do these comments represent your own professional views or your organisation's views?

Answered: 30 / Skipped: 3

Answer Options	Percent	Response Count
Personal views	74%	22
Organisation's views	26%	8
Answered Question		30

Question 9: Is the purpose in the APS sufficiently wide in its scope?

Answered: 26 / Skipped: 7

Answer Options	Percent	Response Count
Yes	**85%**	**22**
No	**15%**	**4**
Answered Question		**26**

Yes/No	Comments
Yes	Although the term 'legal proceedings' is not specifically defined (only by example) and in some areas is interchanged with just 'proceedings' so there may be misinterpretation as to how far the scope extends. In addition the APS is to apply to those 'instructed' - is this intended to be those instructed after the effective date of the APS or any who are already appointed but continue to work after that date (as far as compliance is relevant for the remaining work)? This could also be relevant where someone was initially engaged as expert advisor but then (after the effective date of the APS) becomes an expert witness. In this regard the term 'existing or potential' in relation to Proceedings might be misinterpreted where the actuary has already been instructed.
Yes	The content is scaleable; I found it useful and applicable to a wide range of situations that require expert opinion.
Yes	I think it is good to use the general wording proposed rather than try to list all possible specific applications.
Yes	We have no issue about the scope, but we are not sure that the case for a new APS has been made. APS X3 does not seem to impose any obligations on members acting as expert witnesses or advisors that are not already clear under the Actuaries' Code. In particular: • Section 2, in our view, is met by section 2 (Competence and Care) of the Actuaries' Code; • Section 3, in our view, is met by section 3 (Impartiality) of the Actuaries' Code; • Section 4, in our view, is met by section 4 (Compliance) of the Actuaries' Code; and • Section 5, in our view, is met by paragraph 2.6 and section 3 of the Actuaries' Code. Clearly, the Actuaries' Code is more general, but publication of this APS would imply that we do not have (or are not able or expected) to infer from the Code what behaviour is required in specific situations, which is surely not the case. Because of this, although on the face of it the requirements in the APS X3 are not burdensome, its publication could be harmful because of the impression it creates.
Yes	It is set out at an appropriately high level.

Yes/No	Comments
Yes	I do not see how it could be wider.
Yes	We wonder why the APS does not cross refer to the Guidance in any way, as this would surely assist the users more than the very broad statement of obligations that the APS presents.
Yes	1. Referring to Para 2 of the APS Draft - situations can arise when the need for a member to appear and depose before a tribunal or court which may not be voluntary but mandated by a court or tribunal. How can we demand a member to disqualify himself on grounds of his own evaluation of competency? 2. Referring to Para 3 of APS Draft - sometimes a tribunal or the like may demand an opinion on a certain aspect of a case in which the member has no option but to give his view and he may not have the opportunity or freedom to bring in his views on it affecting other parties. He is thus perforce denied an independent approach. How can he be independent in such circumstances? Can we always demand his independence in circumstances he does not have an option but to give his view on one side of a case as per tribunal mandates? 3. Referring to the bundle of guidance offered in the package - this is likely to be welcomed generally by all members and they are really well meaning to be of help to members. I have a feeling that by giving such explicit written mandated guidance there is a risk of vicarious responsibility falling upon the profession. I do not think that the profession is going to accept any such vicarious responsibility on account of a member deposition being burdened on the profession by a court. Hence, the guidance as far as this subject is concerned must be designated not as mandatory or only illustrative examples and the profession should include protective clauses against vicarious responsibility befalling it.
No	There is not enough about the need for the actuary to have a proper understanding of the case he is involved in. Does he understand the other side's case? If the complaint is against the office he works for, does he understand the case he has to answer? My experience with complaints about endowment policies is that actuaries pay little attention to the case made by the opposing side. The result is that the actuaries make impertinent comments.
No	Although the guidance notes touch on arbitration and mediation they only appear to envisage situations where an actuary is giving advice in order that another party makes a determination. It would be helpful if the guidance covered situations where actuaries are instructed to make a determination themselves (as expert) under a commercial agreement in the event of a disagreement between the actuaries appointed by the respective parties to the agreement.
No	It is too wide - it should not purport to deal with expert advisers.

Yes/No	Comments
No	The "Purpose" is inconsistent with the "Target Audience" /definitions of "Proceedings" and "Non UK Proceedings" - the definitions refer to proceedings "of a legal nature" whereas the "Purpose" refers only to legal proceedings". We suggest that "Purpose" be amended to be consistent with the definitions of "Proceedings" and "Non UK Proceedings".

Question 10: Do you agree that the APS should apply to a broad range of proceedings not just civil court proceedings? If you do not agree, what types of proceedings do you think the APS should cover?

Answered: 26 / Skipped: 7

Answer Options	Percent	Response Count
Yes	**96%**	**25**
No	**4%**	**1**
Answered Question		**26**

Yes/No	Comments
Yes	I think if there is a case made against a life office with an actuarial content, then actuaries should be personally responsible to present a satisfactory defence of their life office. It must not be left to claims handlers with no training in actuarial matters.
Yes	It should apply in all instances where the actuary is appointed as an expert advisor and/or expert witness.
Yes	It should cover such matters like compliance with the Right to Information Act (in the Indian context), consumer fora, Arbitration matters, etc.
Yes	If there is to be an APS it is reasonable for it to cover different types of judicial proceedings, such as tribunals, which are similar to the courts. However I do not consider it appropriate to classify appearances before Parliamentary Committees as falling into this category and they should not be covered, since different principles apply regarding scope, impartiality, etc.
Yes	I think the principles should apply to all legal and quasi-legal proceedings.
Yes	It seems to us that the issues are sufficiently similar that no additional value would be served by making the focus of this narrower, or by having separate APSs.
Yes	While there is an infinite variety of proceedings the principles and other notes are sufficiently applicable that this is better than having futile arguments about where or not the APS is applicable in a given situation.
Yes	We agree that the APS should apply to all judicial and quasi-judicial proceedings including tribunals and mediation.

Yes/No	Comments
Yes	The basic principles of acting as an expert witness and expert advisor are the same irrespective of the proceedings in which the expert is acting and therefore it is appropriate for them all to be covered by the APS.
Yes	Yes there should be principles for all situations where actuaries have an "expert" role.
No	1. The guidance believe must confine to only courts and tribunals invested with statutory authority. 2. In other cases it is up to the member to say something or not and he has generally the option. In such instances the broad set of principles must be followed by the member. But the existence of a set of principles so mandated should preclude the possibility of a member's decision made on the subject which might be the reason for his appearance. Shortly, self defence of a decision should be a member's freedom before such tribunals and this should not be impeded.

Question 11: Do you think the APS should be limited to UK jurisdictions? Please state your reasons for your choice.

Answered: 25 / Skipped: 8

Answer Options	Percent	Response Count
Yes	**24%**	**6**
No	**76%**	**19**
Answered Question		**25**

Yes/No	Comments:
Yes	Although it may have implications elsewhere.
Yes	In my experience all of our instructions are from UK solicitors for cases going through UK Courts.
Yes	It would be impossible to cover all possible jurisdictions with any specifics. General principles may apply but the APS is almost entirely covering matters which are in the Code of Conduct, which has global application.
Yes	I think the proposed wording is appropriate, ie "in relation to Non UK Proceedings then they must consider the extent to which the principles underlying the requirements ... are relevant to the instruction in question and, to the extent that they are relevant, apply those principles as may be appropriate in the circumstances"

Yes/No	Comments:
Yes	We expect that the legal expectations and the professional and cultural norms in different countries are likely to be sufficiently different that it would not be possible to produce something that is both clear and digestible, and that also applies more widely.
Yes	To broaden it to cover overseas situations would make it unwieldy.
Yes	Given the wide range of possible non-UK jurisdictions, it would be dangerous for the IFoA to attempt to be prescriptive about this.
Yes	There is the potential for the procedures and requirements of non-UK jurisdictions to impact on the matters covered in the APS.
Yes	1. The APS can be made applicable only to UK jurisdictions because similar actuarial bodies elsewhere outside UK may have an entirely different approach. 2. Even granting that the profession is equipped to address legal complexities of non-UK jurisdictions, it seems best to leave this to the actuarial bodies or other similar legal structures to address them on considerations of mutual respect.
No	Business, litigation and professional work is very international; standards and guidance should follow that reality.
No	The principles based approach should be easily applied in all jurisdictions. 2.4 of ED31 make it clear that legal differences in different jurisdictions should be adhered to.
No	Because if an actuary is subject to the UK disciplinary scheme he or she is just as likely (if not more so) to need the backing of a professional standard if instructed to act in a non-UK jurisdiction. Clearly the APS itself cannont encompass the detail of all such jurisdictions but the principles-based nature does allow consideration of work outside the UK. Adoption of the APS for work outside the UK would steer the actuary to act in the same way as he or she would in the UK, and provide similar authority to the work (and possibly also comfort against criticism or challenge).
No	If an actuary has the knowledge and experience to be an expert witness I do not see that that is necessarily limited geographically.
No	There are good principles in the APS which are appropriate for all expert type work.
No	Whilst many of the principles within the APS may well be appropriate for non UK proceedings, there may be rules or requirements in those territories which conflicts with the requirements of the APS. However the way the APS is worded is appropriate as it requires only those elements of the APS relevant to the territory to apply.

Yes/No	Comments:
No	Although we think the APS will be useful to members outside the UK jurisdictions, it is clear that much of the helpful additional guidance is ostensibly UK focussed. Given the number of overseas members of the IFoA, we wonder if overseas members involved in expert witness work may expect similar levels of support from the IFoA as is provided to UK members. We don't offer a solution to this dilemma, given the wide variety of jurisdictions within which members operate; we simply observe that much of the support coming from the IFoA has a UK bias.
No	Actuaries can use the principles worldwide but need to "check all the bases" in other countries so that they satisfy local rules as well. Clearly there being circa 250 countries in the world this is too much of an ask for the profession. Links could be made where useful, e.g. to the USA rules, but not covered in detail by the profession.
No	It seems sensible to apply the relevant principles to non-UK jurisdictions, subject to complying with local requirements.
No	I believe the approach of considering the UK in some detail and then requiring that appropriate similar principles apply in relation to other jurisdictions, in connection with whatever local regulations may apply is correct.
No	We agree with the intention that the APS should apply to non UK proceedings to assure the quality of expert evidence from members is maintained irrespective of the jurisdiction. However, we would encourage the IFoA to develop the more detailed guidance (as in the Appendices) suggested in questions 21 and 25, and include a comment that if a member is asked to act in a jurisdiction for which there is no such Appendix, they should seek specific guidance from their instructing solicitor, in particular to any personal implications that may apply, rather than just "have regard to the rules and procedures that apply to the type of proceedings".
No	Given the increasing focus of the IFoA and the fact that many UK actuaries now work in jurisdictions outside of the UK then there would be good reason to extend the scope of the APS. Although it is not possible to cover every jurisdiction the information that is currently contained in Appendix 4 of the Guide is not sufficient to help a member operating in a non-UK jurisdiction and more thought should be given as to how this area could be improved.
No	We need maximum flexibility to allow actuaries to participate in, e.g. multinational organisations' legal proceedings, yet still backed up with appropriate practice standards.
No	The APS should in our view set out the broad principles of acting as an expert witness and as an expert adviser. These will be substantially the same irrespective of the jurisdiction in which the person is acting although there may well be specific requirements in different jurisdictions such as CPR Part 35 (England and Wales). It is therefore not necessary to limit the APS to UK jurisdictions.

Yes/No	Comments:
No	Wherever there is a decision (or perhaps even a requirement) to appoint a UK actuary it is reasonable to expect for example that members will ensure they are suitably qualified (relevant skills/experience) and will follow appropriate guidance from the profession.
No	Normally, I would favour limiting APSs to UK jurisdictions, since law, regulation and best practice can vary outside the UK. However, this APS is sufficiently generic to be appropriate both outside and inside the UK. Ideally no; however I suspect the legal and jurisdictional aspects may be sufficiently different outside the UK that detailed advice may not be possible. Many members of the IFoA are from territories outside the UK and fall outside the reach of UK regulators. But even such members would be benefitted by the APS applying to them and this would further reinforce the spirit that adherence to the highest professional standards are expected from IFoA members, irrespective of their geographical locations. The content is reasonable and applicable to a wide range of situations that require expert opinion. Work done impacts on perceptions of UK qualified actuaries, no matter where the work is done. Same as other standards, that need to extend to work outside UK to varying extent. However, judgement will be needed on the lengths to which an actuary should go to establish the appropriate procedures in other jurisdictions. I have seen a complaint where, even after the actuary received advice from a foreign government department and followed it, a financial adviser tried to take action against the actuary for unprofessional conduct.

Question 12: Do you think that the wording of the APS is sufficiently clear?

Answered: 25 / Skipped: 8

Answer Options	Percent	Response Count
Yes	**88%**	**22**
No	**12%**	**3**
Answered Question		**25**

Yes/No	Comments (please specify):
Yes	It is clear about the areas it does cover. There is a great gap in the omissions of the things that need to be covered.

Yes/No	Comments (please specify):
Yes	Other than the reference to legal proceedings as above, and needing clarity on the effective date of application.
Yes	Very clear and easy to read.
Yes	Yes as far as it goes. But I remain unconvinced that a standard of this sort is needed for that it will serve a useful purpose beyond what is already in the Code of Conduct (see general comments at the end of this submission).
Yes	Pretty good. I don't like the bits prior to point 1. In my view they distract, and if required should come at the end. I think principle 3 is particularly important, and should be distinguished as different from other actuarial work. The current 3.1 sounds like a sentence from the Actuaries' Code.
Yes	But can it not be abridged a little more and why should we say too much and invite possible different interpretations of a word or a phrase in the draft. Legal experts may be consulted to make it more concise. I am sure this must have been already done, but still when things are finalised it should not be too voluminous.
Yes	In 2.1 I would have expected it to be the norm to record instructions in writing, rather just "when appropriate".
Yes (generally)	When the APS is intended to be principles based, it should be as succinct and concise as possible. However the Guidance 4.2 refers to the APS "requiring impartial and objective advice". The APS, at 3.1, actually requires **Independent** and Objective Advice. As it is not entirely clear who the actuary's advice has to be independent of, we suggest that the APS heading is changed to give consistency.
No	Up to a point. A member would need to be very conversant in the differences between expert witnesses and advisers and the subtleties between Proceedings and potential Proceedings to be aware of the distinction being made in the APS. A member not so conversant may not pick up some of the subtle distinctions being alluded to. More is given on this in the guide but if we are relying on the APS alone, it may not be sufficiently clear to all.
No	Most work carried out by an actuary is checked and peer reviewed. The APS does not seem to mention either of these aspects. I realise that an expert is giving his/her opinion, but does this mean that the opinion is not to be checked or reviewed? I suggest that the APS clarifies whether the opinion needs checking or reviewing.

Yes/No	Comments (please specify):
No	The definition of "proceedings" is very wide (to which I have no objection) but it is suggested in the introduction that it should be narrower - this is confusing for the reader. The APS does not deal properly with remuneration of an expert witness. Some expert witnesses are not remunerated at all for their expert witness work because they are salaried employees who act in the course of their employment. Speaking as a business proprietor employing a significant number of actuaries who act as expert witnesses I am unclear what is required.
No	There seems to be an anomaly between 2.2 and 2.3. 2.2 says that members "**must** be satisfied that they have the necessary level of relevant knowledge and skill" (emphasis added), but 2.3 seems to envisage that a member could sometimes act even if he/she does not meet this requirement - would he/she not then be in breach of 2.2? We suggest that 2.2 be re-worded. A bit cautious probably. It would benefit from either being 'simpler' or alternatively more comprehensive. In particular if it is to be a standard for compliance it is better if it is crystal clear. Because the APS seeks to be general it can give a misleading impression especially for the newcomer to 'expert work'. Some examples are: In S1. The impression may be taken that because 'different jurisdictions have different criminal procedural rules ....' that the same could not be said about civil proceedings. Similarly the last paragraph of S2. Whilst being accurate gives the impression that the same could not be said about, say, Hong Kong or the USA. In S3.1 the change from advisor to witness status needs to be dealt with more fully for example problem areas such as privilege and the overriding duty to the court. S3.3 does not differentiate between witness and advisor conflicts.

Question 13: Do you agree that the principles in the APS are sufficiently high level and principles-based to allow a degree of flexibility?

Answered: 24 / Skipped: 9

Answer Options	Percent	Response Count
Yes	**87.5%**	**21**
No	**12.5%**	**3**
Answered Question		**24**

Yes/No	Comments
Yes	Although I could debate the use of the word 'flexible' in the question! Even the word 'should' requires definitive action! The paragraph 3.1 "should" is presumably not a "must" because some cases are so big that nobody is completely free of conflicts of interest. May I also question the use of the word "must" in relation to remuneration (5.1) accepted for expert witness work? I think there are circumstances where the public interest would be served by (otherwise) pro bono work being rewarded if the case was unsuccessful.
Yes	In my experience, it would be difficult to write a hard-and-fast rule book given the differences between cases (even in my relatively narrow field of divorce reporting). A principle based approach works well, but there may be some benefit in clarifying the actuarial approach to some types of calculation through specific guidance/TAS.
Yes	The APS itself is high level (although this does detract from its usefulness).
Yes	The principles are all already principles of the Actuaries' Code.
Yes	Please see my comments in the previous section regarding checking and peer reviewing.
Yes	They highlight areas in which those who are acting need to be aware of and gives a good basic background to the role. The information is probably of more use to those acting as an expert witness rather than as an advisor.
No	I am only really concerned with the remuneration regulations. When in South Africa (pre 2003), I often prepared actuarial reports on the present value of losses suffered as input to courts' decisions on quantifying damages. If - as was common - the claimant was indigent (if not destitute) and the lawyers were funded by charitable organization and did not charge, I waived my fee in the event that the costs were not awarded. One of the reasons for my involvement in these cases was to argue for more conservative discount rates; all the commercial actuarial firm acted almost entirely for defendants and had an interest in minimising the claims by increasing discount rates. I do not believe that this impaired my independence in any - as my report was not relevant to the validity of the claim, merely to its quantification. It did however enable me to spend more time on these cases. The current wording would make this approach impossible. It almost certainly would leave indigent claimants with less opportunity to obtain actuarial advice. I therefore suggest that the wording should be "Members must not agree to be remunerated under an arrangement whereby a conflict of interest is created by the manner in which their fee is linked to the outcome of the Proceedings in relation to which they are instructed."
No	I think it allows it too much flexibility in that it fails to specify what is expected from the actuary.

Yes/No	Comments
No	Paragraph 2.3. There are situations where as the work progresses, the work may stray beyond the actuary's knowledge and skill. In such cases the scope of the expert's report is normally amended rather than the actuary disqualifying themselves. Paragraph 5.1. This paragraph does not envisage a situation where the contract for expert services is with a consulting firm and where the expert is paid by that firm irrespective of the fee structure agreed with the client.
No	I am stunned that the authors intend that the APS be described as "high level and principles-based". I shudder to think how it would look if the authors had set out to make it rules based!

Question 14: Do you think the APS and the Guide are helpful to an actuary taking on the role of expert witness or expert advisor?

Answered: 25 / Skipped: 8

Answer Options	Percent	Response Count
Yes	**92%**	**23**
No	**8%**	**2**
Answered Question		**25**

Yes/No	Comments
Yes	The guidance on being an expert adviser could potentially be extended to emphasise the difficulty of subsequent transfer to/subsequent appointment as an expert witness. For example - being asked what wasn't included in your formal report.
Yes	The IAN was useful but the APS and the Guide are certainly a step forwards.
Yes	Between them they replicate and expand on the current IAN. However the fact that the supporting Guide is so detailed could mean that there is a danger of it getting out of date or being inconsistent with other guidance. The existing IAN includes a number of links and we suggest that this could also be done for the Guide, which would enable users to ensure that they are applying the latest principles and requirements. A general rule is that the briefing from the instructing solicitor should cover process as well as scope, and this would ensure that the current requirements are met.
Yes	Although I don't think there is anything in the APS and Guide that are not covered by the general professional responsibilities of being a Fellow and an Actuary

Yes/No	Comments
Yes	The APS does not make clear that an expert should avoid acting as an advocate. There is a misconception that sometimes experts are there to promote the view of the instructing solicitor. Whilst this comes out in 5.1 of the Guide it would be helpful to include this within the APS itself. The APS and/or Guide should highlight some problems that may arise from time to time: - Experts being expected to support their client's opinion and then being blamed if it does not; - Being provided with one-sided input and then being blamed when that is not reflected in the report.
Yes	Some specific comments below. The Guide is too long and too repetitive.
Yes	In practical terms, the Guidance is more useful that the APS, which does not add much, if anything, to the Actuaries' Code. The guidance gives more relevant information.
Yes	They are helpful but could be even more so if expanded. For example although mentioned in terms of agreeing remuneration there is very little regard to the terms of engagement that the expert is instructed on. In our experience this is an area that often causes an expert considerable difficulty and therefore we would recommend that experts have proper formal terms of engagement which they use particularly when acting as an expert witness. These would include fee rates, cancellation terms etc. The Academy publishes Model Terms of Engagement for those acting as Experts.
Yes	The Guide is particularly helpful.
No	Wrong issues covered.
No	I think the guide is useful for actuaries taking on such a role but am not convinced that the APS is useful and so cannot answer yes to them both being helpful.
No	It is necessary for an actuary to know whether he is acting as an expert witness and in order to decide this he needs to know what an actuarial advisor is. But the issues faced by an expert advisor are the same as those of an actuarial adviser (ie whether there are currently proceedings or not) including for example what happens if the client wants to take a negotiating position in dealings with another party that diminishes or emphasises a particular point or points but because it is technical he wants his actuary to assist him. There is potentially a common theme with being an expert witness namely advice going beyond the client and others being asked to rely on what the actuary says - guidance on how to deal with this situation would be useful (but is not dependent on whether there are proceedings or not).
	The Guide : Yes definitely. The APS, sadly no.

Question 15: Do you think the APS and the Guide sufficiently cover questions or issues that may arise when considering whether to accept the appointment of an expert witness or expert advisor?

Answered: 25 / Skipped: 8

Answer Options	Percent	Response Count
Yes	**84%**	**21**
No	**16%**	**4**
Answered Question		**25**

Yes/No	Comments
Yes	Albeit the Guide, Section 7, might usefully suggest greater emphasis on the big issue(s).
Yes	Generally I think the note does a good job in this area. The repeated stress of being aware of the relevant regime and of liaising with the instructing solicitor provides strong guidance One thing I would like to see clarified, though, is the issue relating to a fee not being dependent on the outcome of a case as I think it leaves a question to do with a client who says "I am happy to agree your fee of £x but please note that the only way I can pay it is if I win this case." Is such an arrangement acceptable or not?
Yes	Objectivity and skills are paramount here, and well covered by the APS.
Yes	Subject to the comments about potentially reviewing the scope of work should the work extend beyond the expert's knowledge and skill.
Yes	We would prefer more clarity on getting instructions in writing. We think there is some ambiguity in paragraph 2.1 of the draft APS when compared to section 3.2 of the draft Guide, mainly due to the words “where appropriate” and the suggestion that initial instructions “should” be in writing whereas “it may be helpful” for additional instruction to be in writing. It has also been suggested to us that "initial instructions" may be overridden during the course of an assignment and that the report that is finally required may bear little resemblance to the "initial instructions". We understand that it is not uncommon for lawyers to agree on the final wording of the instruction some time after the Expert has been engaged.
Yes	A recommendation to make reference to a more experienced colleague would be appropriate as otherwise, members may have the experience in actuarial matters, but not in the practical issues.
No	Actuaries are not experts in Contract Law or Tort Law. An insurance policy is a contract. I find that actuaries are not equipped with a knowledge of contract law to be suited to this role.

Yes/No	Comments
No	I don't think that we should set out to cover all the questions or issues. Members wishing to be experts would be advised to attend and receive specialist training to know the issues fully. The guide and APS, however, provide a useful set of questions to start the process of questioning for a prospective expert.
No	There should be some comments about accepting appointment as an expert witness in other jurisdictions.
No	Remuneration is an issue as I have explained above. Also, if appointment is accepted and a limitation is found in experience or competence later the usual approach is to seek to have the instructions rewritten with more limited scope rather than the actuary disqualifying himself as is suggested. We suggest that the guide should emphasise far more the need to disclosure all potential conflicts to the instructing solicitor at the outset and let them decide - even if the actuary thinks the chance of conflict is remote. And client pressure to shape the advice in a particular way can be a real danger. We would also question how anyone can move from being an expert advisor to being an expert witness on the same case. There could be more information and advice about the costs associated with the actuary's work and the need for proportionality. Probably. Although we believe that further clarity is required for example differentiating between the role of the expert witness and the expert advisor when it comes to conflicts of interest.

Question 16: Are the definitions of expert witness and expert advisor sufficiently clear?

Answered: 24 / Skipped: 9

Answer Options	Percent	Response Count
Yes	**75%**	**18**
No	**25%**	**6**
Answered Question		**24**

Yes/No	Comments
Yes	But see above regarding confidentiality if providing both advice and subsequently being appointed as an expert witness.
Yes	The definitions in the APS are clear provided one also reads the Guide. It may be appropriate to cross-refer to them specifically in the Guide) and also to refer specifically to the CPR information on this).
Yes	What was interesting was seeing that they are not always regarded as being separate
Yes	Very helpful clarification of the difference.

Yes/No	Comments
Yes	The distinction is well made, although as an Expert Advisor's role is to assist with the tactical approach to the case, then a no-win, no-fee remuneration basis is surely not unreasonable? More Guidance might be useful on the change in approach necessary when the Expert Advisor role changes to that of Expert Witness. Currently the Guidance does not address this satisfactorily. [Note that as the majority of my personal work has been in Scotland, I have not had such a distinction drawn in practice].
Yes	However I think they are too limited - see above The definitions (Proceedings and Target Audience) suggest that the guidance might only apply if matters are to be heard before a judge etc. - I would expect the guidance to apply (and to be relevant) in cases where expert advice is given to instructing solicitors after which a settlement is reached so that no such hearing actually takes place.
No	I think they are sufficiently clear in the APS. In the Guide, while paragraph 3.1 describes the role of an expert advisor, it does not explicitly describe the role of an expert witness - except perhaps by omission.
No	I think the distinction between Witness and Adviser could be much clearer.
No	Not in the APS - see above. Far more clearer in the guide.
No	This is the area where I struggled most with the APS and the Guide. Acting as an expert adviser is no different to a lot of work actuaries do whereby the actuary's obligation is, in the main, to their client; but acting as an expert witness brings with it an additional requirement of independence whereby the actuary's obligation is to the Court rather than the client. The way the APS and the Guide is worded currently is not, I feel, helpful in distinguishing the difference between the two.
No	I'm not sure why the distinction is necessary, as any advice provided could potentially lead to a duty to become a witness.
No	I struggled until I got to the words in Guide 3.1 'advise it specifically and confidentially on tactics in the litigation or prospects of success, without .....' and then it became clear. Suggest those words be used from the beginning. Another angle is that 'witness' applies if you may be asked to provide a report that is provided to the court and/or to give oral evidence in the court.
No	The Academy of Experts as the professional body for Experts of all disciplines, has more than 26 years' experience in this field and would be happy to work with the IFoA on this and related matters.
No	Why should we distinguish these? Let the principles be made applicable finally generally to both together. Assuming that an advisor can in his wisdom and approach can ramble a bit and such approach may be frowned at by courts - if both cases are to fall in line with the higher standard it does no harm. However any laxity noted in the depositions as an advisor coming before the profession

Yes/No	Comments
	for judgement can be viewed with the leniency that they deserve.

Question 17: Do you or have you ever acted in the capacity of expert witness or expert advisor in relation to legal proceedings? If so, in which jurisdiction(s) and in which type(s) of proceedings were you instructed?

Answered: 25 / Skipped: 8

Answer Options	Percent	Response Count
Yes	**60%**	**15**
No	**40%**	**10**
Answered Question		**25**

Yes/No	Comments
Yes	Scotland, England, Canada and USA. It is probably also worth mentioning the usual UK PII exclusion for work in North America. In practice it can be tacked with appropriate disclosure in the Letter of Engagement.
Yes	South Africa - claims for loss of support as a consequence of the death of a breadwinner or loss of earnings as a consequence of disability - due to wrongful actions by Police and employers
Yes	I have been specialising in divorce reporting since 2008, preparing pension sharing reports for the Court, virtually all on a joint instruction basis. I have not been asked to appear in Court as an Expert Witness and feel this is unlikely given the single joint expert nature of my instruction.
Yes	UK (E&W) jurisdiction. I am not in a position to disclose the nature of the proceedings.
Yes	Divorce proceedings in UK (England and Wales) Courts.
Yes	UK High Court Civil Proceedings, Criminal Compensation Authority Tribunal, Parliamentary Committees (to the extent that these are legal proceedings), Courts of Jersey, Guernsey, Isle of Man, Trinidad & Tobago.
Yes	UK, Civil
Yes	UK
Yes	Expert witness UK CPR Expert advisor UK family law - pension sharing on divorce

Yes/No	Comments
Yes	Experience as expert witness and as expert advisor solely under UK jurisdiction: - Employment disputes - Injury at work compensation - Placing capital value on trust income in order to accelerate payment from the trust - Loss of office - Pensions and divorce (extensive experience) The vast majority of these involved written reports which were potentially for the Courts or Employment Tribunals, although some cases were resolved without reference to the Court/Employment Tribunal. In a very small minority of cases a Court Appearance was required.
Yes	Australia, Federal Court - tax, commercial dispute.
Yes	England. Error case which had pensions impact.
Yes	UK - pensions valuation, divorce proceedings, employment tribunal.
Yes	Expert Adviser in UK civil cases.
Yes	UK jurisdiction; pensions litigation.
Yes	My current principle activity is in connection with Single Joint Expert Witness reports in Divorce situations [i.e. valuations, pension sharing order recommendations, etc]. I am currently dealing with 100-150 p.a. Jurisdictions are England and Northern Ireland [not Scotland] but a couple of Manx ones. I have been advised by lawyers in the Isle of Man that they do not have any specific equivalent to the English requirements, but that the Courts would accept a report produced to English standards [which is what I have done]. Should something along these lines be included in the Guide? And what about the Channel Islands [no personal experience]?
Yes	Scotland : Divorce cases, Industrial Tribunals, Civil Proceedings in Sheriff Courts, High Court, Court of Session and Disciplinary Tribunals. England : Divorce cases and Civil Proceedings in County Courts. Republic of Ireland : Civil Proceedings in High Court
Yes	UK, as expert witness also both as independent expert (and instructing other actuaries as such) to determine a commercial matter following a failure to agree between respective actuarial advisers - which does not currently appear to fall within the scope of "expert advice"
Yes	Expert witness and expert advisor. UK, Gibraltar, South Africa. Criminal (Crown Court), Civil (High Court and County Courts), Ombudsman test case (High Court), Disciplinary (Institute of Chartered Accountants; Financial Services and Markets Tribunal), Arbitration, and Income Tax Special Court.
Yes	Witness: UK High Court, VAT Tribunal, Arbitration, Disciplinary Tribunal. Adviser: As above plus international arbitration and DTI Inspection.

Yes/No	Comments
Yes	My firm has acted as expert witness and expert advisor in Guernsey and Jersey in relation to the court approval of the apportionment of trust funds between life tenants and reversionary interests, in relation to the pensions aspects of divorce settlements and in relation to disability compensation claims.
Yes ?	Not instructed personally, but acted as principal assistant to a senior member of the profession instructed as an expert witness in a prominent case in the High Court (Commercial Court) of England and Wales - requiring a substantial amount of work over a period of some years.
No	However representations to FOS are similar to making a case in court.
No	I have provided expert advice to my employer on numerous occasions and to external parties that would be expected to rely on my advice, but not yet in relation to legal proceedings.
No	Not formally. I have drafted actuarial advice on divorce proceedings (as, I believe, an expert advisor under the proposed APS definitions) for a colleague.
No	However The Academy is a professional body for those acting as expert witnesses and as such has over 26 years of experience in this arena. Aon Hewitt has acted in a range of cases, including for example for the Pensions Regulator and work for tribunals covering loss of pension rights (usually acting as an expert advisor to the client). We do appear in E&O related mediations. We have also been involved with expert witness outside the UK (which demonstrated the need to know the local process before acting).

Question 18: Do you think that the guidance provided in the Guide is accurate? If not, then what aspects of the Guide do you believe to be inaccurate?

Answered: 23 / Skipped: 10

Answer Options	Percent	Response Count
Yes	**91%**	**21**
No	**9%**	**2**
Answered Question		**23**

Yes/No	Comments
Yes	Please note that I have to answer 'yes' as I have no knowledge or experience that could allow me to answer 'no'. I think a 'Don't know' option would have been useful here.
Yes	To the best of my knowledge.
Yes	Generally yes, subject to the comments above.
Yes	Subject to my comments above.

Yes/No	Comments
Yes	But please see my comments earlier given.
Yes	Except some things I don't like. Page 3 unnecessary, boring. Second and third para of 2 repetition. In 3.1 there should be mention made of the difference between adversarial and inquisitorial legal systems (or maybe this can in the Non-UK appendix). I would also like to see mention of court-appointed experts, which I hope will become more common. Conflict of interest in in the last para of 3.1 and then again in 3.3 – should be together. More emphasis needs to made on how conflict of interest than normal commercial work, because there is no opportunity to get an understanding of whether the relevant parties (judge and other party) will acknowledge that some vague potential conflict is not a problem. Maybe a mention of the likelihood of challenge by the other party to admitting the evidence on the basis of conflict. 3.5 might deal with the possibility that 2 actuaries prepare a report, with the two having complementary skills to deal with the problem identified in the question. 3.6 goes too much into waffly legal advice. I think the critical point is 'Don't rely on a presumption of immunity from suit' In the 3rd para of 3.6 mention is made of keeping notes. While I much prefer this, I have frequently been advised by lawyers (and have seen examples) where the notes and working papers are actually the cause of great grief in discovery or subpoena. IFoA should be careful that it really means what it says here. This comes up again in 5.3. 3.7 has already been said and adds nothing I like the last para of 3.9 – good guidance. In 4.2 surely there is something about not advocating or supporting the clients objectives per se? This comes later in 5.1 but relates to 4.2? Or does 5.1 not apply to 'expert adviser', in which case the distinction should be clear. Does the whole of 5 relate to Witness only and not Adviser? 5.3 does not answer the question. I find it generally unhelpful to put lots of data in the report, especially that not crucial to the findings. I like to give meta-data and be careful that full data would be available if needed. 6.3 does not answer the question. The answer is No. 8.1 is relevant but does give tips or guidance about how to deal with it.
No	The guidance is defective because it does not emphasise the need to have a grasp of Contract Law.
No	In appendix 1: "If you are acting as an expert witness in England and Wales you must follow the provisions contained in Part 35 of the CPE." This is somewhat misleading, as for example, family proceedings are governed by The Family Procedure Rules. On a trivial, perhaps pedantic, point: "Members undertaking expert work must be aware that the provisions of the Actuaries' Code and the APS: The Actuary as an Expert are applicable to all members of the Institute and Faculty of Actuaries (IFoA) when carrying out expert work in the UK. They should also ensure that instructing solicitors are aware of those requirements." It would be better to say what members should do more in order to make instructing solicitors aware. For example, some wording to put into the letters of engagement. In general, where

Yes/No	Comments
	specific compliance is required, I would prefer to see specific guidance.
No	In 2.1 of the draft standard, it should be mandatory to require all instructions to be in writing (for the protection of the expert)
No	At paragraph 3.7, it suggests that the Determinations Panel is a tribunal. However, it is a committee of the Pensions Regulator - not a tribunal. At paragraph 3.8, we would suggest that 'abiter' be replaced with arbitrator. In the introduction, we feel that the text 'an actuary must be alert to procedural requirements' should be expanded to 'an actuary must be alert to relevant specific procedural requirements' in order to encompass jurisdictions that the APS and Guide does not cover (and to deal with the possibility that requirements may change before the Guide does). We note that the current IAN includes the text 'the specific rules and guidance applicable to the circumstances of their instruction' so the similar message ought to be presented in the Guide. Similarly, we believe that the comment in section 2 'Different legislative provisions, rules or guidance may apply in jurisdictions outside the UK' is misleading in its present situation. Although it is clearly true, the ext suggests it relates to the Actuaries' Code and the APS. To make the meaning clearer, the wording may be better placed in the following paragraph. Again the term 'proceedings' and 'legal proceedings' are interchanged, which may be misleading. The IAN referred to the fact that 'An actuary's instructions to act as an expert will not attract legal privilege'. This is no longer covered in the Guide. We believe that 3.6 is not very clear regarding the protection (or otherwise) from civil or disciplinary proceedings - in either England and Wales or Scotland. This may be made clearer of the second paragraph refers to 'protect someone from being *sued in civil actions* (e.g. for professional negligence) - then the second sentence makes more sense. And for Scotland, the IAN clearly stated 'There is no immunity from disciplinary proceedings which is reflective of the position in England and Wales.' - this message isn't clearly set out in the Guide. It would be helpful to acknowledge that there are different types of expert witness, for example party appointed and single joint expert as this will have an impact on the role they are undertaking. It would be sensible to include a note to the effect that those instructing should be informed by change such as those affecting conflicts or perceived conflicts of interest. Instructions should be in writing and where given verbally additional instructions should be confirmed in writing. 3.6 we believe that all those acting as experts should have professional indemnity insurance. This is required by the 'Code of Practice for Experts' which has been endorsed for use in both civil and criminal courts in England and Wales and has been adopted by EuroExpert (The Organisation for European

Yes/No	Comments
	Expert Associations) for use in Europe. A copy of this code is attached for your information. Experts should retain relevant information from preparing their reports in the same way as they would for their normal professional papers although there may be additional requirements for example, prosecution experts in criminal cases. 3.8 should seek guidance not only the role being played but also on the process of the arbitration itself and the Rules being used for that arbitration. 3.9 The expert should also be aware that information he learns via the mediation process may affect his opinion and therefore the report prepared. If he is acting as a Part 35 expert he will have a duty to amend the report accordingly. 5.2 The Judicial Committee of The Academy of Experts has published a Model Form of Experts Report which is in widespread use. Inclusion of this could be benefit. 5.3 Should make it clear that an expert should if appropriate qualify his opinion and if necessary give a range of opinion. It should be remembered that the expert is giving an opinion based on facts either actual or assumed and is not the finder of facts. The Ikarian Reefer Rules (from which you quote in Appendix 3) are a simple and fundamental form of guidance for experts and deal specifically with qualifying reports. It would be of benefit to include appropriate reference to these.

Question 19: Do you think the TASs should be applied in relation to expert work in connection with legal proceedings?

Answered: 24 / Skipped: 9

Answer Options	Percent	Response Count
Yes	**62.50**	**15**
No	**37.50**	**9**
Answered Question		**24**

Yes/No	Comments
Yes	TAS D: Listing data and documents essential.
Yes	But should allow for brief reports that include only essential information
Yes	They should lay down the principles of Contract Law.

Yes/No	Comments
Yes	I think this would be useful, but may be impossible to write given the variety of Expert Advisor work. By way of example, the Firefighters' Pension Scheme allows pension sharing on an internal basis, which means that the ex spouse becomes a pension credit member of the scheme. A proportion of the member's CETV (calculated for divorce purposes) is converted to a pension at retirement for the ex-spouse. The terms used reflect the transfer value / pension sharing factors used by the scheme administrators. If the factors are not publically available, then the Actuary must estimate the costs. If the factors are available, then using them would give greater accuracy in terms of the pension share and eventual pensions of the parties. Should the Actuary be required to obtain the factors ? Or at least try to obtain them? I personally have written to the main public sector schemes, where the factors are not already available publically. In the case of the Firefighters' Pension Scheme, the GAD was good enough to release a copy to me (after consulting their client). But not all schemes do or will. Perhaps these issues are best approached by suitable clarification in the report and through the principles based approach. Or perhaps a consensus on key points could be obtained through discussion with other Actuaries operating in the field in question, maybe via the internet forums. I would be happy to contribute to such a forum.
Yes	We believe the proposed approach in the Guide is reasonable and proportionate.
Yes	Where relevant, then yes.
Yes	Acting as an expert witness in actuarial matters should be reserved to qualified actuaries and hence effectively "reserved work"

Yes/No	Comments
Yes	In principle, but not in its strictest details. I interpret one aspect of TAS to be that sufficient information should be supplied to enable another actuary to replicate my calculations - but in the case of "Pensions in Divorce", this would represent a disproportionate additional cost requirement, given that a large number of different pensions can be involved on both sides with all sorts of benefits and options which will not have a material impact on the final result. Also, reports currently run to 50-60 pages and inclusion of such extraneous detail would make them unwieldy and materially more costly [I reckon that typical reports costing £1,000 to £2,000 could be doubled in cost if all such details were included]. That is the last thin which couples going through a divorce want to see. So proportionality suggests that not all details should be supplied [but main points clearly should be]. Can I suggest that the guide should explicitly state that the principles of TAS should be applied, but the supporting data/information in formal reports, whilst necessarily covering all the main points, can be restricted in the interests of cost proportionality?
Yes	TAS R could reasonably be applied. If computer systems are developed to value losses (e.g. Ogden style calculations) then TAS M might apply and depending upon the circumstances TAS D could apply.
Yes	Some of the rules contained in Part 35 of the CPR particularly in relation to reliance that is placed on data seem to be consistent with the requirements of the TASs, particularly in this case in respect of TAS D. Therefore it would seem logical that the TASs should apply, in addition to this they ensure a level of professionalism in the reports that are produced and will help to uphold the professional nature of the work that actuaries provide across the board in their role as experts to the courts.
Yes	The TASs are meant to improve the clarity of actuarial communications amongst other things, which in my view makes them directly applicable to expert work.
Yes	We are not fully conversant with the TASs but where appropriate they should be followed.
Yes	Surely actuaries would be expected to conform to all accepted standards.
Yes? / No?	It may conflict with requirements of the Court to comply with some aspects of TASs. For example in TAS R, sections C3.13 and C5.17/C.20 may be awkward, depending on the nature of the case.
No	They would not add to the requirements of the Actuaries Code, the APS and the requirements of the civil procedures.
No	Maybe not mandatory but, again, as part of my professional responsibilities I have considered the relevant TASs anyway.
No	A requirement to follow TASs might be unduly restrictive or require more information than is reasonably appropriate for a particular action.

Yes/No	Comments
No	I think it is too confusing to say that the TASs apply if applicable.
No	Our view is that they do not need to be formally applied to work done in the capacity of expert witness. Since part of the 'expertise' is knowing how advice should be delivered, implicitly it seems unlikely that their application to the area that is the subject of the expert's scrutiny could be ignored without good reason. Nonetheless, we agree that many of the principles in the TASs are likely to be relevant to the work done by an actuary working in an 'expert' capacity (although others are not). We would be concerned if, by making expert adviser work explicitly in scope, an additional layer of governance was imposed that might not add value to the process. As a compromise, we wonder whether the guidance should suggest that TAS compliance (whether formal or informal) could be considered as part of the terms of engagement for the work requested from the expert.
No	We believe that it is for the FRC to determine the scope and authority of the TAS regime. Whilst we acknowledge that the TASs may be useful to (UK based) members operating as Expert Witnesses, we recognise that other professionals may also operate in similar capacities. Additional compliance burdens to actuaries may create an unfair playing field. The Actuaries Code together with the draft APS and guidance should be sufficient.
No	Not in a mandatory way, as there is the possibility for conflict with the requirements of the CPR. The encouragements to apply TASs as appropriate are sufficient.
No	TASs were designed with different types of work in mind and we have seen the confusion and difficulty that TASs bring when trying to apply them to a situation for which they were not specifically designed. (eg trying to apply "transformations" TAS to a bulk transfer certificate). Result of applying TASs to expert work would be extra cost and more confusing reports.
No	I am not able to make my mind on this point.
No	As currently constituted, the TASs are not formulated in a manner that makes express compliance a possibility - and that is likely to remain the case. Many of the TAS principles have a read-across, but trying to impose a set of rules on how actuaries can give evidence in court, which has its own rules, is absurd. To take just one example, the rule that anything material that is spoken must be confirmed in writing. That would require the actuary to send the judge a written statement of the evidence he gave orally in court!
No	The APS should be sufficient.

Yes/No	Comments
No	The main body of the Guide is not specific to any jurisdiction. However paragraph 5.2 states that (i) the actuary should consider whether his or her report should adhere to the principles of one or more TASs and (ii) the report should adhere to the principles of the TASs. This may be appropriate for UK work (we do not wish to comment on that). However, we do not consider these to be appropriate stipulations for non-UK work. The jurisdiction of the TASs is very specific ("TASs are drafted in the context of prevailing United Kingdom legislation" - *Scope and Authority of Technical Actuarial Standards*). We consider it unreasonable to expect actuaries performing work in other jurisdictions to have sufficient familiarity with TASs to observe this guidance. Furthermore, in the performance of their work, those actuaries may already be subject to professional codes and standards of other International Actuarial Association member associations.

Question 20: Do you agree that the main body of the Guide should be general and not specific to any particular UK jurisdiction and that the procedural requirements for each of the UK jurisdictions should be set out in appendices? If not, can you explain how you think the guidance should be set out?

Answered: 23 / Skipped: 10

Answer Options	Percent	Response Count
Yes	**91%**	**21**
No	**9%**	**2**
Answered Question		**23**

Yes/No	Comments
Yes	I would go as far as to say that 'particular UK' should read 'particular'. I do not think it is wrong to say that as most occasions that an IFoA member acts as an expert is likely to be in the UK then there are appendices aimed at the regime in the relevant locales, but I do not think that the UK stress should be stronger than that.
Yes	This is more scaleable.
Yes	However, see earlier comments regarding overseas members.
Yes	Yes, but links (footnote or embedded) to the appendices would help.
Yes	The main trust of the Guidance is best described in generic terms, with specific jurisdictional aspects left to the Appendices. Otherwise the Guide would lose a lot of its clarity.
Yes	It is clearer to set out the main objectives and guidance as one document and then provide specific guidance as necessary or appropriate for the different jurisdictions. This could also be usefully done for different types of proceedings.

Yes/No	Comments
Yes	I think the guidance must be very general and please see my earlier comments also.
No	I think there is too much about CPR. This non-actuarial part would be explained by the lawyers as cases arise.
No	Answered no only on the basis that whilst I agree with treating the UK jurisdictions separately, I'm not sure the use of appendices works. For many, appendices are seen an additional, ancillary and not hugely important information (after all, if it were important it would be in the main body). So I would bring them into the main body as additional sections, not appendices. We agree that the proposed structure is sensible, although as noted above some of the text in the main body is too detailed (and may only apply in particular jurisdictions).

Question 21: Are there any specific jurisdictions or proceedings about which you think it would be helpful to have additional guidance for experts?

Answered: 22 / Skipped: 11

Answer Options	Percent	Response Count
Yes	**27%**	**6**
No	**73%**	**16**
Answered Question		**22**

Yes/No	Comments
Yes	Briefing around the North American document disclosure or discovery powers may be useful as this can limit what advice is requested in writing.
Yes	There should be clear guidance for actuaries about claims handling and an explanation that this is work that must be overseen by an actuary.
Yes	Perhaps a view on key markets, e.g. US would be useful.
Yes	Family procedure rules part 25 for pension sharing on divorce.
Yes	Family proceedings.
Yes	Has the working party considered whether any specific guidance or comment is required about appointments as an expert for regulators (TPR and FSA)?
Yes	The United States, as so many legal proceedings in respect of international finance are carried out within its jurisdiction
Yes	Further reference to the differences between Civil and Criminal (and indeed Family) may be of value. Presumably the location of your members will dictate or point to the principal jurisdictions that should be included.

Yes/No	Comments
No	Unless there are particular settings where IFoA members should be warned of the difficulty or danger of acting, I do not think it is the job of this document to supplant the need for a member to satisfy himself of the standard necessary to act as an appropriate witness.
No	It is not practical to include specifics for a whole range of jurisdictions but it might be appropriate to include some general comments about the need to be conversant with local requirements and procedures when acting in other jurisdictions.
No	Other than maybe a mention of the British Law jurisdictions in general.
No	Providing links is more practical, tracking guidance changes would be onerous? We suggest that some information on US proceedings may be of use, because there may be circumstances where UK proceedings would be linked to US proceedings. However (as applies to the appendices for England and Wales, Scotland and Northern Ireland) we suggest that too much detail may be inefficient because any change in the proceedings would necessitate revision to the Guide. Nuclear Liability from Atomic Power Stations for example.

Question 22: Do you think Appendix 1: England and Wales is sufficiently explained?

Answered: 20 / Skipped: 13

Answer Options	Percent	Response Count
Yes	**100%**	**20**
No	**0**	**0**
Answered Question		**20**

Yes/No	Comments
Yes	Although if anything this is too detailed and would require amendment if any of the requirements of the proceedings changed.
Yes	It is clearer to set out the main objectives and guidance as one document and then provide specific guidance as necessary or appropriate for the different jurisdictions. This could also be done for different types of proceedings. However because it is a synopsis it does not always give a fair reflection and some parts are not correct. Some examples are: "You must follow ..... Part 35 ...." whereas "You should consider ..... Practice Direction 35 ..... The reality is you MUST follow both P35 and PD35. Meetings between experts. It should state that the Court can order a meeting of experts and that they will be required to produce a joint statement showing the areas they reached agreement on and the areas they didn't with reasons for this.

Yes/No	Comments
	Written questions. This process is very clearly set down in CPR and it must be adhered to, the expert should be very careful regarding answering questions which fall outside the scope set down. Only one of the criteria is mentioned without suggesting there are others. General Comment: There should be a 'caution' that although Criminal Procedure Rules Part 33 are very similar in nature to CPR35 but they do contain differences so care should be taken.
No	The draft Guide says very little about the production and purpose of joint statements. This could usefully be expanded. Under CPR 35.14, an expert can file a written request for directions to assist him in carrying out his function. Although there are references in the draft Guide to the expert being familiar with the applicable court rules, we suggest this may be worthy of specific mention.

Question 23: Do you think Appendix 2: Scotland is sufficiently explained?

Answered: 19 / Skipped: 14

Answer Options	Percent	Response Count
Yes	**100%**	**19**
No	**0**	**0**
Answered Question		**19**

Yes/No	Comments (please specify):
Yes	Note that as evidence is given orally, backed up by lodged documents, the order of evidence can be relevant. In a case where I was instructed by the Pursuer, the original report had been prepared by the defence and I have prepared a review of it. As the Pursuer evidence comes first (naturally) I was being examined and cross examined on my response to the defender's expert's report and giving my views on it before he presented it "in chief". This may be unusual, but it is not exceptional and requires additional preparation. Some comment to this effect (or other such atypical events) might be helpful.

Question 24: Do you think Appendix 3: Northern Ireland is sufficiently explained?

Answered: 17 / Skipped: 16

Answer Options	Percent	Response Count
Yes	**100%**	**17**
No	**0**	**0**
Answered Question		**17**

No comments.

Question 25: Should there be more detailed guidance in terms of the position in relation to the Rest of the World (currently set out at Appendix 4)?

Answered: 20 / Skipped: 13

Answer Options	Percent	Response Count
Yes	**35%**	**7**
No	**65%**	**13**
Answered Question		**20**

Yes/No	Comments
Yes	Appendix 4 as currently included does not add much value and it might be appropriate to say rather more.
Yes	If it is possible to be brief/generic - possibly with links to the major other areas e.g. US.
Yes	Given the large proportion of IFoA members who work outwith the United Kingdom (especially Republic of Ireland, India, Australia and South Africa) additional appendices should be drafted by experts in providing evidence in these jurisdictions.
No	Not relevant to my work at this time but it may be to other actuaries acting as experts.
No	Although it seems attractive to have as much guidance as possible, in fact this could become counterproductive. Since it cannot cover every eventuality, actuaries operating in countries it does not apply to might feel obliged to take heed of guidance that was not drafted with their situation in mind and is not necessarily suitable for their purpose. However, the Institute and Faculty might be criticised if, for example, they wait until it becomes clear that members are involved in this capacity in other countries than the UK, to justify covering those countries where this is the case. An alternative might be to indicate that some of the principles that are included in the guidance might be equally appropriate in those countries with similar legal regimes or regulatory systems as those that apply in the UK, and provide a list of where this is thought to apply. In that case, it should be made clear that the guidance was not written directly for those

Yes/No	Comments
	countries and should not be followed if it appears to the local actuary that it would be preferable not to.
No	This is too wide a subject for the IFoA to attempt to cover in any detail.
No	Except possibly IoM and CI?
No	In its current form it is probably not worth including.
No	The variation in local practice is likely to make this impractical.
	I don't think this adds anything to 4.2 of the APS. In fact, it seems to be far weaker than this requirement - from 'must familiarise ..and adhere to' to 'should have regard to'.
	I do not think that it is feasible to attempt to cover the rest of the world in any more detail.
	We would suggest that when in doubt if the principles of CPR are followed it is unlikely to cause many problems for the expert. However in Appendix 4 the last word ("guidance") left unqualified is in our view potentially dangerous. The wording should make reference to Rules and Procedures in the jurisdiction as well as local guidance on practices.

Question 26: Do you think there are any other issues that should be covered in the APS or the Guide?

Answered: 21 / Skipped: 12

Answer Options	Percent	Response Count
Yes	**38%**	**8**
No	**62%**	**13**
Answered Question		**21**

Yes/No	Comments
Yes	Refer actuaries to text books of the kind that law students study. Without a knowledge of these general principles I do not think actuaries are up to the job.
Yes	Whether checking or peer review is needed.
Yes	See my comments earlier about proportionality of data/information in the report. This probably applies to areas other than my own interest.
Yes	3.6 - paragraph 3 - surely the notes and documents relied upon have to be retained in case required as evidence in an appeal, or in the event of a professional negligence claim?

Yes/No	Comments
Yes	I cannot say that it should be in this particular set of documents but I am concerned that while no requirements or guidance are needed specifically for expert advisors, because they are usually in the same position as any actuarial advisers, there is an issue where (like expert witness advice) the actuary gives advice that goes beyond his client particularly where he is asked effectively to assist in advocating a particular position on behalf of his client.
Yes	(This is not a suggestion re other issues *per se*, but there is no "general comments" section on this form). The Guide uses the word "must" frequently. We suggest that it be reviewed to check whether all instances of the word "must" are appropriate - mindful that this is a Guide, not an APS. There are some inconsistencies - e.g. 3.1 of the APS says that members "**should"** ensure that any advice they provide is ..... independent and objective", whereas paragraph 5.2 of the Guide says that "you **must** be objective (emphasis added in both quotes).
Yes	It is the nature of disputes involving insurance and/or pensions that cases may reach court some years after the event that is the subject of the claim. My understanding is that cases involving claims of professional negligence (or similar) are required to be considered in the context of what was reasonable industry or professional practice at the time of the event, and specifically to ignore how practice developed subsequently. The Guide is silent on this issue, which I think is a mistake. In section 3.4 of the Guide it should be necessary to have had the skills in the appropriate discipline *at the time of the event* in question. Current expertise in the field will not be sufficient if that knowledge has been largely acquired after the event - which might be expected to give rise to challenge from opposing counsel. In particular it is likely to be necessary to specifically ignore knowledge acquired subsequent to the time of the event in formulating one's opinion as to what was reasonable practice at the time. This is not necessarily straightforward, and as a result this is perhaps the one area of actuarial work in which fully up-to-date CPD may specifically be a hindrance in offering advice. In some cases the person in the best position to provide expert advice may be an individual who ceased working in that particular field at around the time of the event, whose knowledge has not been influenced by later developments in the field. Similarly in section 5 a report should be drafted to indicate whether an action or advice was reasonable in the context of knowledge and practice at the time of the event.

Yes/No	Comments
Yes	In my experience, instructing solicitors have a varied range of pension knowledge. Whilst may instructions are clear, many do not ask "the right questions" through lack of pension experience, or the instruction is vague in terms of what is required from the Actuary as an expert. I would draw the Actuary's attention to the fact that solicitors may not be experts in pensions, and that there may be a need to reply in writing explaining in clear terms any matters which may be misunderstood, or where clarification is needed. Sentence three of section 3.2 of ED31 APS X3 might not be sufficient to cover this.
Yes	We have a number of observations/concerns: - We note that in some places the Actuaries' Code has been paraphrased (e.g. para 3.1 of the draft APS). We would prefer that the exact wording of the Actuaries' Code is used when there is reference to it, to avoid confusion. - The APS and Guide should be checked where it cross references to the Actuaries' Code (e.g. we think that the reference in the final paragraph of section 3.1 of the Guide should be to paragraph 3.5 of the Actuaries' Code) - We think the Working Group (or the IFoA) should consider the area of Pensions and Divorce. Clearly the CPR applies to work in this area, but this tends to be low-margin work, where the value of the pension benefits can be quite small. Although the draft APS and Guide do not extend the requirement of the Courts, we have concerns about whether professionals can operate within these requirements where the pension benefits are of low value. There are several dangers here - that the public interest is not served because actuaries cease to operate in this area - that work which might be carried out by actuaries is carried out by non-actuaries at a lower cost (and possibly lower quality) - that the constraints on fee levels may compromise the quality of the service provided to the public. There has been adverse press comment on the level of service to the public. One of our colleagues relates an experience of giving evidence for the prosecution in a criminal case where a client had allegedly stolen pension assets. Although engaged as a material witness to the allegation rather than as an Expert Witness, having been led through his evidence by the prosecution barrister and following cross examination by the defence barrister, the presiding judge then asked the witness a number of general questions which related to actuarial/pensions practice and which would more appropriately been directed to an Expert Witness had one been engaged. We don't know if this is an isolated case or whether there are other instances of this happening, but if it does happen, the Guide might want to address how actuaries in these circumstances should deal with such a situation.

Yes/No	Comments
	We are surprised that there is no reference to Peer Review.
Yes	In relation to paragraphs 3.2 and 3.4 about written instructions, it would be useful to add an acknowledgement that it is recognised that, in practice, the precise scope of the instructions may be uncertain at the outset. Therefore, written instructions may not be given until a later stage in the preparation of the report. At paragraph 3.4, guidance is provided as to whether the expert has the relevant level of expertise. That section could also address the practical question of availability - both to prepare any report within the required timeframe and to appear as a witness in a trial (should that become necessary). We suggest paragraph 5.1 could be expanded to give some guidance on discussing draft reports ore preliminary views with instructing solicitors and make the point that this is perfectly permissible so long as the opinion ultimately expressed remains the expert's own, independent opinion. Paragraph 5.3 touches on the data used by the expert. We would suggest that this be extended to make it clear that it is permissible and, indeed, not uncommon for the expert to be assisted with the preparation of their report and/or the research/analysis which underlies them, and that this is perfectly acceptable so long as the expert makes it clear: - which parts are in his own work and which are his assistants' and - that all of the opinions are his own. We suggest that greater guidance on the structure of the report (perhaps even with format of a suggested draft report) could be of assistance. There are some references to "without prejudice" communications in the draft Guide. But we suggest some additional guidance could be given to its meaning, and that of legal privilege, and how they both might impact on the expert's work.

Question 27: Do you think the IFoA should develop professional skills training in relation to expert work in the context of legal proceedings?

Answered: 23 / Skipped: 10

Answer Options	Percent	Response Count
Yes	**70%**	**16**
No	**30%**	**7**
Answered Question		**23**

Yes/No	Comments
Yes	But using the British Academy of Experts may be most practical.
Yes	Courses in Professionalism should be Contract Law orientated. I do not think the proposals are satisfactory as there is too little in the salient areas. The consequence is that the questions asked are largely inappropriate.

Yes/No	Comments
Yes	This could be on demand, or specified open events.
Yes	It seems to us that the skills involved in being an expert witness are very transferable, and could result in better outcomes in other areas where members of the Institute and Faculty provide advice or services. In the area where Mercer largely operates (defined benefit pension schemes) there is a risk that the relationship between the trustee and company becomes very adversarial, sometimes because of the positions taken by their advisers “in their client’s best interests”. Being able to present a balanced view, whilst pointing out the different approaches different clients might reasonably consider because of their particular interests, could result in better outcomes.
Yes	We would suggest that the IFoA gathers some information about the extent to which members are engaged as Expert Witnesses and the nature of engagement. There may be two or more levels of engagement. For example, a major dispute about an insurance company merger may require intensive engagement whereas a report on pensions and divorce may require a fairly low level of engagement.
Yes	Possibly. However there are commercial organisations which provide this, and linking with one of them may be a way forward.
Yes	Any form of personal skills training is useful and the IFoA has arranged some good courses in the past on a range of subjects.
Yes	One problem I personally have is that it is well nigh impossible to find IFoA activities supporting my current main business activity. [I can cover pensions and mortality issues, but additional legal/professional training would be helpful. I currently supplement and include in my CPD attendance at conferences organised by the legal profession.]
Yes	Mock cross-examination would be excellent. One such was done many years ago in a Faculty meeting (and so presumably also at the Institute). Tom Ross, later President of the Faculty, was the expert being destroyed by a smart talking lawyer.
Yes	I would advocate making such training compulsory for any members acting in the role of an expert. This will show to the courts the level of professionalism shown by the Profession as a whole and the seriousness in terms of how it sees and takes on it responsibilities when a Member is asked to provide expert work in legal proceedings.
Yes	I think the actuarial profession should be supporting this as a potential growth area, particularly in view of the legal profession's historical difficulties with statistical interpretation.

Yes/No	Comments
Yes	Based on experiences I have had I suggest actuaries should be warned about litigants or their legal advisers providing one-sided input and then complaining if this is not reflected in the actuary's report - this is especially dangerous for the actuary if it is oral and he does not feel it is correct to rebut it immediately while he is still forming his opinion. Another problem is litigants or their legal advisers claiming that the actuary should not have agreed to be instructed if he was not willing to ensure that his report supported their case.
Yes	Training in the presentation of oral evidence in Court would be particularly helpful.
Yes ? / No ?	The number of actuaries involved in such cases is likely to be small, and in some circumstances an individual actuary may be involved in only a few cases in their career. Seminars/workshops may not be the best approach, as they are likely to be provided only infrequently. The APS itself is a significant step forward. Having a current reading list of appropriate reference material - which could easily cover a variety of different jurisdictions - might be the best approach.
No	We do not see the need for this as the scope for such work may be small and (given that those carrying out the work will no doubt be more senior and better equipped to deal with the requirements) resources are better channelled into training for other areas. However we believe that some form of common interest group, or facility for those with experience to share that with others (even if not in the same firm) would be helpful. In particular the ability to discuss with those who have experience of court hearings would be very helpful.
No	Likely to be too much of a minority pursuit.
No	I don't think that the IFoA is necessarily the right body to provide this training. There are specialist providers for this for which training should be accepted as Professional Skills CPD given the nature of the work.
No	It depends what is meant by professional skills training. General professional skills training is already available and probably sufficient. Practical training might be useful for newcomers to the role but there are too few actuaries involved in this to be really practical.
No	Unless the level of demand increases over time.
No	There is plenty of training that can be sourced, and I think it is good for an actuary to do it in the company of other professionals.
No	I think that the expert witness should discuss what is required with a legal adviser at the time.
No	While access to others with experience is vital I suspect this work is not sufficiently common for generic training by the profession.

Yes/No	Comments
	Training should be actively encouraged in the role of being an expert witness. We would suggest that the IFoA consider working in partnership with an organisation such as The Academy of Experts who can offer expertise in this arena and is already providing a training programme for those working as experts. The Academy's courses are undertaken in a number of jurisdictions around the world and focus on the role of the expert which should be dealt with as a secondary skill set. The Academy has a partnership agreement for example with the ICAEW whereby it provides all of the training for experts and also manages the accreditation of the 'expert functions' to enable accountants to become ICAEW Accredited Accountant Expert Witnesses. We should be happy to discuss a similar arrangement with the Fiona. This is a welcome thing to do but I do not know whether the profession can meet this challenge without the collaboration and consent of the legal profession. There are plenty of existing services, e.g. from The Academy of Experts and the Expert Witness Institute.

Additional / Supplementary comments

Mark Allen

The CP is very helpful and includes some important points.

My one criticism is that it fails to distinguish between the role of an actuary acting as an expert witness in a dispute between two parties AND an actuary acting as an independent expert in, for example, a Part VII transfer.

I have taken both of these roles many times and there are very clear differences between the roles that are not brought out in the CP. As a result, the comments made are often unclear and the value of the CP is thus much diminished. It would be much better to distinguish clearly between the two situations in the CP and in any association guidance.

Simon Carne [Full details were supplied in the submission to the IFoA but the names of firms have been redacted for reasons of confidentiality]

On the whole the Consultation package struck me as a very well-crafted set of documents. I do, however, have two concerns on points of principle from the APS, where the proposed requirements seem to be demonstrably incorrect. So far as the Guide is concerned, I have just four points of specific detail.

APS: Paragraph 3 – incorrect principle

The requirement in paragraph 3.1 (disqualified from acting if advice is not "independent and objective") seems to be, quite simply, wrong – as is evident from the misguided cross-reference to principle 3 of the Actuaries Code, which doesn't support the point at all.

The Actuaries' Code does not require members to give advice that is independent and objective. The relevant section of the Code positively acknowledges that members may have "bias, conflict of interest, or [be under] the undue influence of others". The Code requires that this must not override the member's professional judgement, but that is quite different from not acting at all.

This is not a small point, or a pedantic one, as I can illustrate with some real examples in which the APS would have disqualified me from acting (or, more likely, the events would have brought about the withdrawal of the APS).

1 Some years ago, I was retained as an ***expert adviser*** by [firm A] during the (successful) defence of the negligence claim brought against them by [firm B]. The claim had the potential to wipe out all [firm A's] insurance cover and perhaps even bankrupt the 100 or so partners of the firm if [firm B] had won its claim.

As an alumnus of the firm, and a friend of many of the partners, I have no doubt that I was biased towards wanting to see them win. The challenge for me was to not let that affect my professional advice. Quite apart from any professional and ethical stance that I took, the knowledge that the case was heading towards court and that any poor arguments that I advanced would be ruthlessly exposed by the other side was a strong incentive to

behave absolutely properly.

Not surprisingly, the firm's defence team included several of their employees and their partners. No one would have expected them to be unbiased, independent or objective. But, as employees or partners, they wouldn't be considered to be "advisers". What possible logic is there for saying that, simply because I had left the firm's employment, I should be disqualified from advising whilst continuing members could carry on? Is it the intent of the APS that I would only be permitted to advise if the firm had re-hired me as a (part-time) employee, rather than as an adviser.

2 Around the same time as the first example, I was retained by [firm C] to act as an ***expert witness*** in defence of a negligence claim and a related misconduct claim against one of the audit partners, who I was quite close to. As a former employee of the firm (which I had joined on leaving [firm A]), it was most unusual that I was being asked to act as an expert witness, but the circumstances were unusual – so unusual that one of the other defence experts was an existing partner of the firm.

The firm had originally retained experts from outside the [firm C] family, as is the norm. But those experts had withdrawn when a report was published, apparently identifying a serious flaw in the financial model at the heart of the dispute. Once the report had been published, no one who was independent of [firm C], in the conventional sense, could be found who was willing to come forward to support [firm C].

I was asked for my opinion and, on investigation, I was able to demonstrate, with full supporting evidence, that the criticism of the model was misconceived. My report was served in evidence and my connection to [firm C] fully disclosed. In due course, the claim was settled and the misconduct charge against the individual partners was withdrawn. Once again, I am sure that I did not let my close connection to the client interfere with my professional judgement. I have no doubt whatsoever that my evidence would have passed the test of "independence" set out in the Civil Justice Council's Protocol for expert witnesses. The fact that I faced cross-examination by a top commercial QC was a major incentive to ensure that my evidence could withstand any attack.

Before my evidence was served, [firm C's] QC (subsequently a High Court Judge) was asked for his opinion on the propriety of using experts who were not independent in the conventional sense. His advice was that, of course it was not ideal, but if the judge could be persuaded by the logic of the arguments and the independence of the thought processes, he could not reject the evidence merely because the experts weren't independent of the firm (and if the judge wasn't persuaded by the arguments, it didn't matter anyway).

To sum up, the Actuaries Code has a perfectly proper principle regarding professional judgement and the Courts have their own rules regarding the independence of evidence. There appears to be no valid reason for this APS to extend the general principle into territory that is more restrictive than the courts require.

APS: Paragraph 5 - incorrect principle

Paragraph 5 prohibits fees that are linked to the outcome of a case. This is right so far as expert witnesses are concerned and reflects the courts' and the Civil Justice Council's position on this point. But extending the prohibition to ***expert advisers*** seems a step too far.

Lawyers are permitted to be paid on a contingency basis. Why shouldn't actuaries be remunerated similarly? Once again, the drafters of the APS seem to find it necessary to adopt rules that are tougher than even the courts require.

I have never taken a contingency fee (so far as I can recall), so I am not arguing in defence of a practice of my own. But I can well imagine that cases do arise in which an impoverished litigant needs actuarial advice on a contingency basis.

Guide: Paragraph 3.9 – typo

There seems to be a typo in the second paragraph, line 4. Given the structure of the surrounding sentence, the words in parenthesis, should really say "(sometimes referred to as "caucusing")".

Guide: Paragraph 4.2 – source of potential confusion

Paragraph 4.2 seeks to define "impartial and objective". Paragraph 5.1 seeks to define "independent". Do we need two different definitions, in two different sections of the Guide?

The implication of the separation is that "impartial and objective" is not the same as "independent" *and* that sometimes you need to be one thing and other times you need to be the other – and yet paragraph 4.2 defines "impartial and objective" as "independent", so they are the same after all.

Guide: Paragraph 5.2 – mis-drafting?

The opening sentence of this paragraph contains the statement that the expert witness "must not encroach into the area of giving your own evidence". This is most odd, because "giving your own evidence" is *precisely* what the expert witness is there to do.

At a guess, I suspect the author meant that the expert should not encroach into *advocacy*, or maybe they meant that the expert should not give *evidence of fact*.

Guide: Appendix 1 – error

Towards the bottom of page 15 of the Guide is the rather bizarre statement that:

> "… the IFoA regard it as good practice for actuaries to comply with the provisions in Part 35 even if the actuary is acting in their capacity as an expert advisor."

One only has to look at Part 35 to see that it simply isn't applicable to an adviser. Part 35 is about giving evidence. This sentence needs to be removed.

Chris Daykin

The questions do not include anything to ask whether it is appropriate for the IFoA to issue such as APS, which ought to be the first question in any consultation. In my view there is hardly anything in the draft which is not already covered by the Code of Conduct and it is hard to see what benefit there will be to users of actuarial advice in this area, or that it will increase the stature of actuaries providing expert witness to the Courts.

Specific comments:

2.1 The Actuaries' Code already requires the scope and purpose of advice to be made clear in any report.

2.2 Competence is a fundamental requirement of The Actuaries' Code.

3.1 The Actuaries' Code requires objectivity and impartiality. This is also generally a requirement of the courts in many jurisdictions for being an independent expert. However, I understand that in some jurisdictions an expert witness may have more of an advocacy role on behalf of either the claimant or the defendant, so this should not be entirely excluded..

4.1 Compliance is required by the Code of Conduct.

4.2 This is a requirement of the Court. At least in England and Wales it is a requirement to include within a report a declaration which, amongst other things, states.

I have read Part 35 of the Civil Procedure Rules and the accompanying practice direction including the "Protocol for Instruction of Experts to give Evidence in Civil Claims" and I have complied with their requirements.

I am aware of the practice direction on pre-action conduct. I have acted in accordance with the Code of Practice for Experts.

5 The Actuaries' Code effectively prohibits this. In England & Wales at least this is a requirement of the Court and it is a requirement to include within a report a declaration which, amongst other things, states.

I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

Rob Koch

My name is Robert Julius Koch and I am a fellow of IFoA and have been practising as an expert actuarial witness for over 30 years in South Africa. I have published several texts on damages assessments including an annual publication "The Quantum Yearbook". I practise under the style "Robert J Koch cc". I am the sole member. My work is primarily claims for damages for personal injury and death. I do no pension work nor life office work nor investment work.

I do not require my name to be kept confidential, nor my comments.

I do not intend to address the numerous explicit questions that you pose, but rather to comment directly on a few central issues.

Ad item 5: Remuneration: Lawyers in South Africa do not consider themselves bound to pay their actuary if the claim fails. If they do pay this is normally after the claim has been finalised and they have money in hand. There is a prescription period of 3 years and the actuary is generally left in the dark as regards progress with the claim and is not infrequently refused payment on the ground of prescription. Many claims take well in excess of 3 years to resolve, and law firms close and disappear. My own practice is to insist on payment in advance, or else a signed contract compelling payment regardless of outcome and within 3 years. Even with a signed contract it is difficult to avoid substantial irrecoverable bad debts. The amounts for damages fees are generally small, about 500 British pounds. It is uneconomical to litigate for unpaid fees, quite apart from the obstacles created by jurisdiction rules. Contingency fees are thus endemic to the system and the actuary is powerless to rise above it.

Verification of information: This is frequently impossible due to many claimant's being informal traders, or employees of failed businesses. Your proposal does address the common circumstance that the actuary is expected to use data as dictated by the lawyer. One needs to use subtle wording to indicate this, such as "I have been instructed…". Anything stronger is likely to attract an instruction to remove the wording from the actuary's report. In extremis the actuary must just withdraw as expert witness.

Information in actuary report: This should be sufficient to permit an independent actuary to reproduce the results of the calculations. Statements such as "A suitable life table has been used…" do not fulfil the "adequate information" requirement. I also believe very strongly that the actuary report should include a schedule showing detail of the calculation components on a year-by-year basis. Most South African actuaries do not do this, partly because it is quite difficult to do using Excel (but not impossible). It was much easier in the days of LOTUS 123.

Independent witness: It is quite common for the same actuary to be retained by both claimant and defendant. Technically the actuary is the witness of the party that first engaged him. It follows that all calculations done for the other side must be copied to the principal. This can cause upset and the other side should be warned that in using the same actuary they cannot expect confidentiality.

Document lists: It is desirable to list all documents on which the actuary has relied. Many lawyers send vast quantities of irrelevant documentation, most of which can be trashed and does not need to be listed in the actuary report.

Relevant law: The actuary doing damages work must be adequately informed as regards the numerous legal niceties affecting the calculations. Normal actuarial training does not equip an actuary adequately in this regard. There are numerous rulings in South Africa that run counter to normal actuarial training, such as: no interest on past losses; and deduction of 100% of child inheritances.

Volume of work: South African actuaries doing damages calculations often find themselves processing 10 or more claims a day. This is often done under pressure for extreme urgency because the matter is stood down in court awaiting the calculation. There is then little time for the finer niceties.

Brian Watson
I have read the Consultation Paper on the above subject.

The only comment which I have is that the paper assumes, I think, that instructions will always come from solicitors – the phrase "instructing solicitors" is used a number of times.

I have acted, inter-alia, as an expert witness in a number of tax cases before the Special Commissioners and the First Tier Tribunal. In some of those cases I have been instructed directly by HMRC (sometimes by internal HMRC lawyers and sometimes directly by HMRC staff with expertise in the area in question who are not lawyers); in another case I have been instructed directly by the tax payer.

I think that the APS will be particularly useful to both those coming to expert work for the first time and to those, like me, who do not undertake this type of work on a regular basis.

Aon Hewitt
In general we support the proposed approach as providing clarity on the expectations and duties of actuaries in this work, and providing professional backing to their conduct and advice. In many areas the provisions in the APS are common sense and would have complied with anyway by actuaries following the Actuaries' Code, but a specific APS adds authority to the actuary's input.

Questionnaire completed.

Mercer
We welcome the opportunity to comment on the proposals in Exposure Draft 31. Our detailed response is attached as an appendix to this letter (and we will also submit it electronically). Our main observations are that, whilst we agree that the updated guidance is helpful, we are not sure that the case for a new APS has been made. In particular, APS X3 does not seem to impose any obligations on members acting as expert witnesses or advisors that are not already clear under the Actuaries' Code:

- Section 2, in our view, is met by section 2 (Competence and Care) of the Actuaries' Code
- Section 3, in our view, is met by section 3 (Impartiality) of the Actuaries' Code
- Section 4, in our view, is met by section 4 (Compliance) of the Actuaries' Code; and
- Section 5, in our view, is met by paragraph 2.6 and section 3 of the Actuaries' Code.

Clearly, the Actuaries' Code is more general, but publication of this APS would apply that we do not have (or not able, or expected) to infer from the Code what behaviour is required tin specific situations, which is surely not the case. Because of this, although on the face of it the requirements in the APS X3 are not burdensome, its publication could be harmful because of the impression it creates.

We would be happy to discuss our concerns with you further.

SPC [John Mortimer, Secretary]

We welcome the invitation to participate in the consultation.

Introduction to SPC

SPC is the representative body for a wide range of providers of advice and services to work-based pension schemes and to their sponsors. SPC's Members' profile is a key strength and includes accounting firms, solicitors, insurance companies, investment houses, investment performance measurers, consultants and actuaries, independent trustees and external pension administrators. SPC is the only body to focus on the whole range of pension related services across the private pensions sector, and through such a wide spread of providers of advice and services. We do not represent any particular type of provision or any one interest - body or group.

Many thousands of individuals and pension funds use the services of one or more of SPC's Members, including the overwhelming majority of the 500 largest UK pension funds. SPC's growing membership collectively employs some 15,000 people providing pension-related advice and services.

The consultation paper has been considered by SPC's Actuarial Committee, which comprises representatives of actuaries and consultants.

INTRODUCTION TO OUR COMMENTS

Our comments are collectively on behalf of SPC and are from the point of view of commentators with no direct experience of acting as an Expert Witness.

COMMENTS ON THE CONSULTATION PAPER

We were a little surprised to see the distinction between UK and non UK proceedings in the exposure draft itself, given that the Actuaries' Code does not draw the same distinction between UK and non UK contexts. We do recognise, however, that it is made clear on page 4 of the accompanying Guide that the Actuaries' Code and the principles contained within the APS will apply wherever and in whichever forum members are working.

With reference to paragraph 2.1 of the exposure draft of the APS, we could not envisage circumstances in which it would not be appropriate for instructions to be recorded in writing.

The commentary on page 5 of the Guide, on the transition from expert adviser to expert witness seems particularly helpful. We would expect that the transition from one status to another would often be particularly challenging.

With reference to the final sub-paragraph of paragraph 5.2 of the Guide, and certainly in respect of written reports, we are surprised that there is not an unqualified statement that reports should adhere to the principles of the TASs.

Towers Watson

Thank you for the opportunity to respond to this consultation. This response has been prepared on behalf of Towers Watson.

'Expert Witness' work is a feature of some parts of our business (particularly in our insurance practice) but in others, in particular the pension consultancy part of the business, Towers Watson does not generally take on such roles. Consequently, our initial impression was that the proposed APS X3 would not affect the vast majority of our actuaries. However, on closer examination it became apparent that the scope of the draft APS was significantly wider than this, incorporating a role of 'Expert Adviser' which includes any actuary who gets involved in advising his/her client in relation to a wide range of legal proceedings.

Our most significant comment in response to this consultation is therefore that the IFoA needs somehow to make the potentially wide application of this APS much clearer, otherwise we fear that a lot of actuaries within its scope might overlook it.

That said, the proposed content of the APS is not particularly onerous and content, almost without exception, be reasonably inferred from the Actuaries' Code without the necessity to refer to X3 itself. So in practice the implications of an actuary being unaware that this APS applies to a part of his/her work may not be significant, although there may be relevant points in the Guide that he/she may find useful but misses.

APS X3

We have just two comments on the wording of the APS itself:

- In 2.3, the draft wording is that Members not satisfied that they have the necessary knowledge or skill *should* disqualify themselves from acting. The use of *should* rather than **must** may be intended to reflect the possibility of agreeing a limited remit or the appointment of another adviser to cover any 'gap' (as discussed in 3.5 of the draft Guide), but we wonder if it would be better to make this clearer to avoid any possible undermining of principle 2 of the Actuaries' Code.
- In 5.1, there is a blanket prohibition (use of the word *must*) on outcome-linked fee arrangements for all work within the scope of the APS. While this appears entirely reasonable in relation to work that involves giving evidence to a court or similar, it is not clear that such an arrangement is inevitably unreasonable where the actuary's role to the client in relation to the proceedings is solely to help formulate arguments that will increase the chances of a successful outcome (although of course any such arrangement will always need to be carefully considered against principle 3 of the Code).

The Guide – general

Despite its upfront stress on the need for the actuary to know whether he or she is an 'expert adviser' or 'expert witness' role, the Guide is not itself very clear as to which of its sections are intended to apply just to the one role or to both roles. In addition, should more or a distinction be drawn between 'expert adviser' roles that may come to involve an appearance in the court (or similar) and those that are confined to providing tactical advice 'in the background'?

The Guide – the TASs and interaction with APS X2

In 5.2 of the draft Guide, it is mentioned that there are no TASs that deal specifically with the 'expert' work covered by APS X3. It is nevertheless possible that the work will fall within the scope of the TASs (for example, if it is advice to the trustees of a pension scheme in one of the categories detailed in section C of the Pensions TAS). For work that is not in the stated scope of the TASs, it is reasonable for actuaries to consider what standards should be applied,

including to what extent it may be appropriate to apply some or all of the TAS principles; however, we think that the draft Guide as currently worded goes (notwithstanding its advertised 'non-mandatory' status) too far as regards giving a steer to actuaries to treat the TASs as applicable even when the work is outside the scope that the FRC has specifically decided should be subject to these standards.

The TASs generally require oral advice to be followed up in writing. It is unclear how this principle can or should be followed in the case of advice provided at an oral hearing, and it would be useful if the Guide could include some specific comment about this. Similarly, the nature of the provision of advice at an oral hearing is that it cannot be subject to 'peer review' (or other quality assurance checks), and some comment on this (in light of the consultation also taking place now on APS X2) would also be desirable.

4. LIST OF RESPONDENTS TO THE CONSULTATION*

Individual respondents to the consultation

Anthony Asher
Allan Martin
Anthony Pepper
Ashley Gold blatt
Brian Watson
Chris Barnard
Christopher Critchlow
Chris Daykin
David Bor
David Turner
Geoff Atkins
Geoffrey Bernstein
Gordon Sharp
Ian Francis Shepherd
Mark Allen
Nick Foster
Rob Koch
Roger Grenville-Jones
Sathiavageeswaran Chidambaram
Simon Carne
Stephen Ainsworth

Organisations which responded to the consultation

Aon Hewitt
Capita Employee Benefits
Hymans Robertson LLP
Mercer
Perfect Numbers Ltd
Towers Watson
TrustActuarial Limited
Xafinity Consulting Limited

Other

- Association of Pension Lawyers, Pension Litigation Committee
- The Academy of Experts
- Society of Actuaries in Ireland
- Society of Pension Consultants (SPC)

* *Only those who indicated that they did not wish to keep their name, organisation or comments confidential are listed*

Institute and Faculty of Actuaries

APS X3: The Actuary as an Expert in Legal Proceedings

Author:	Regulation Board
Status:	To be approved under the Standards Approval Process
Version:	1.0, effective 1 January 2015
To be reviewed:	No later than 1 January 2018
Purpose:	This APS sets out principles for actuaries to apply when instructed as an expert in relation to existing or contemplated legal proceedings (including those within the UK and outside UK jurisdictions)
Authority:	Institute and Faculty of Actuaries
Target Audience:	**Members** acting as **Expert Witnesses** or **Expert Advisors** in **Proceedings** and **Non UK Proceedings**

General Professional Obligations:

All **Members** are reminded of the Status and Purpose preamble to the Actuaries' Code, which states that the Code will be taken into account if a Member's conduct is called into question for the purposes of the Institute and Faculty of Actuaries' Disciplinary Scheme. Rule 1.6 of the Disciplinary Scheme states that Misconduct:

> "means any conduct by a Member…in the course of carrying out professional duties or otherwise, constituting failure by that Member to comply with the standards of behaviour, integrity or professional judgement which other **Members** or the public might reasonably expect of a Member having regard to…any code, standards, advice, guidance, memorandum or statement on professional conduct, practice or duties which may be given and published by the Institute and Faculty of Actuaries and/or…the [Financial Reporting Council] (including by the former Board for Actuarial Standards (BAS))".

Members are required to comply with all applicable provisions of **APSs.**

In the event of any inconsistency between this **APS** and the **Actuaries' Code**, the Code prevails.

Use of the words "must" and "should":

This **APS** uses the word "must" to mean a specific mandatory requirement.

In contrast, this **APS** uses the word "should" to indicate that, while the presumption is that **Members** comply with the provision in question, it is recognised that there will be some circumstances in which **Members** are able to justify non-compliance.

1. General Requirements

1.1. Where a **Member** is instructed to act, or is contemplating an instruction to act, as an **Expert Witness** or an **Expert Advisor** in relation to **Proceedings** then they must comply with the requirements set out in sections 2 to 5 below.

1.2. Where a **Member** is instructed to act or is contemplating an instruction to act, as an **Expert Witness** or an **Expert Advisor** in relation to **Non UK Proceedings** then they must consider the extent to which the principles underlying the requirements set out in sections 2 to 5 below are relevant to the instruction in question and, to the extent that they are relevant, apply those principles as may be appropriate in the circumstances.

2. Initial instructions

2.1 When being instructed, and throughout their engagement, **Members** must establish clearly the nature and scope of their instruction, including whether they are instructed as an **Expert Witness** or an **Expert Advisor** or if the instruction is likely to involve them being instructed as both. Where appropriate, the instructions should be recorded in writing.

2.2 When being instructed, and throughout their engagement, **Members** must be satisfied that they have the necessary level of relevant knowledge and skill in order to fulfil all of the requirements of the instruction. This may include skills relating to the giving of oral or written evidence.

2.3 If, at any stage before or during the engagement, **Members** are not satisfied that they have the necessary level of relevant knowledge or skill, they should disqualify themselves from acting.

3. Independent and objective advice

3.1. Having regard to principle 3 of the Actuaries' Code, **Members** should ensure that any advice they provide is, and can be reasonably seen to be, independent and objective and **members** should disqualify themselves from acting if they are unable to ensure that is the case.

4. Compliance with rules and procedures

4.1. **Members** instructed as an **Expert Witness** in Proceedings must ensure that in addition to their professional responsibilities they act in accordance with any obligations to the Court, tribunal or other body that apply in the **Proceedings** and jurisdiction in which they are instructed.

4.2. **Members** must familiarise themselves with, and adhere to, the rules and procedures that apply in the jurisdiction, and to the **Proceedings**, in which they are instructed.

5. Remuneration

5.1 **Members** instructed as an **Expert Witness** in **Proceedings,** or contemplating such an instruction, must not agree to be remunerated under an arrangement whereby their fee is linked in any way to the outcome of the **Proceedings** in relation to which they are instructed.

Definitions

Term	Definition
APS	Actuarial Profession Standard.
Member	Means a member of the Institute and Faculty of Actuaries.
Expert Advisor	A person with relevant experience and expertise who is instructed to provide advice to an individual or organisation in relation to existing or potential Proceedings or Non UK Proceedings. In certain types of Proceedings this is recognised as a formal role in terms of the applicable rules.
Expert Witness	A person with relevant experience and expertise who is instructed to be a witness in Proceedings or Non UK Proceedings giving expert opinion evidence (rather than evidence as to the facts of a case).
Proceedings	Proceedings of a legal nature which take place in a jurisdiction within the United Kingdom and in which evidence is considered by a judge or other similar decision making entity or person, including (but not restricted to) civil or criminal courts, tribunals, disciplinary hearings, ombudsmen, public inquiries and parliamentary committees.
Non UK Proceedings	Proceedings of a legal nature which take place in a jurisdiction outside the United Kingdom and in which evidence is considered by a judge or other similar decision making entity or person, including (but not restricted to) civil or criminal courts, tribunals, disciplinary hearings, ombudsmen, public inquiries and parliamentary committees.

Appendix 2

Institute
and Faculty
of Actuaries

Providing expert opinion in Legal Proceedings: A guide for actuaries

Guidance for APS X3: The Actuary as an Expert in Legal Proceedings

by the Regulation Board

January 2015

Institute and Faculty of Actuaries

Contents

Introduction

Proceedings in which experts are instructed are often high profile and expert opinions need to be thoroughly prepared and carefully explained.

Actuaries are asked regularly to act as an advisor to a party in the course of litigation and other types of legal proceedings or, alternatively, act as an Expert Witness for the purposes of giving evidence on a matter which falls within their area of expertise. When carrying out the role of expert in relation to proceedings, an actuary must be alert to procedural requirements that apply as well as other good practice that they might be expected to follow.

So, how does a Member ensure that he/she is complying with all legislative and regulatory responsibilities when operating in the role of an expert?

1. The Guide – purpose

This guide is intended to help all Members who have been approached to act as an Expert Witness and/or an Expert Advisor for the purpose of legal proceedings. Often that will mean civil or criminal court cases but it may extend to other types of proceedings where an actuary is required to provide expert advice or evidence, such as regulatory or disciplinary proceedings. It should be read in conjunction with the Actuaries' Code and the APS: The Actuary as an Expert in Legal Proceedings (APS X3).

The Guide focuses primarily on proceedings taking place within UK jurisdictions. However, it should be borne in mind that the Actuaries' Code applies to all Members regardless of where they are working and APS X3 provides that Members acting as an Expert Witness or Expert Advisor in proceedings outside the UK must consider the extent to which the principles underlying the requirements in the APS are relevant to the instruction in question and, to the extent that they are relevant, apply those principles as appropriate.

This means that while Members involved in that type of work outside the UK are not required to apply the specific requirements in sections 2 to 5 of the APS, they must still consider what are the underlying principles of those requirements and consider the extent to which those are relevant in all of the circumstances of the particular jurisdiction and case and apply them so far as they are relevant and appropriate. This will require the exercise of judgement on the part of the Member in determining the extent to which it is relevant and appropriate.

The requirements of APS X3 apply only to those who are instructed to act, or who are contemplating instructions to act, as an Expert Witness or Expert Advisor in relation to legal proceedings, as defined in the APS. This means that it would not apply to day to day expert actuarial advice provided in relation to, for example, a commercial agreement, unless there were existing or potential legal issues that were likely to result in legal proceedings.

In addition, the Guide and APS X3 are not intended to cover the work of Members who are instructed (or are considering instructions to act) as an Independent Expert for the purposes of

Part VII of the Financial Services and Markets Act 2000 (commonly described as "Part VII Transfers").

This guide sets out:

- the differences in the role of an Expert Witness and an Expert Advisor and how a Member should deal with an instruction to perform either role or an instruction which is likely to involve performing both roles, usually at different stages of the proceedings;
- what steps to take when approached to become an Expert Witness or Expert Advisor to ensure compliance with applicable procedural rules, the Actuaries' Code and the APS in place (APS: The Actuary as an Expert);
- how to deal with remuneration to ensure the instruction is transparent and objective;
- how to understand the nature and scope of instructions and make sure that the actuary is suitably qualified to undertake the role described;
- tips for preparing for the hearing, both procedurally and practically;
- the skills required for hearings and how to avoid potential pitfalls; and
- particular features of different jurisdictions which an actuary should consider when accepting an instruction.

Members who are instructed in an expert capacity in relation to proceedings in England and Wales will be required to adhere to Part 35 of the Civil Procedure Rules (CPR) and more detailed guidance on those requirements are contained in Appendix 1. The CPR do not usually apply to experts involved in other types of proceedings or in cases outside England and Wales. However, if you are involved as an expert in a case where the CPR do not apply, it may still be worth looking at those rules and any accompanying guidance as they contain helpful general principles which you might find useful in carrying out your instructions.

The provisions in APS X3 apply to any set of proceedings in which a member may be required to be an Expert Witness or an Expert Advisor. This can include criminal proceedings, where expert actuarial evidence is sometimes required. This guide is intentionally general and does not address the particular requirements that often apply in criminal cases. Different jurisdictions have different criminal procedural rules and those will sometimes contain specific rules relating to experts. If you are instructed in a criminal case (or a set of proceedings that adopt criminal rules of evidence) then you should ensure that you are familiar with those rules and should speak to your instructing solicitor to understand any specific requirements for that particular forum.

2. Application

Members undertaking expert work must be aware that the provisions of the Actuaries' Code and the APS: The Actuary as an Expert are applicable to all Members of the Institute and Faculty of Actuaries (IFoA) when carrying out expert work in the UK. They should also ensure that those instructing them are aware of those requirements. Different legislative provisions, rules or guidance may apply in jurisdictions outside the UK.

If a Member is instructed as an expert in a foreign jurisdiction they must have regard to the specific rules governing expert evidence within that jurisdiction. Equally, different rules govern different types of proceedings and you should always have regard to the rules that apply to the type of proceedings in relation to which you are instructed. However, the Actuaries' Code and the principles contained within the APS will apply wherever and in whichever forum Members are working.

A key requirement of APS X3 is that, where a Member is approached or agrees to act as either an Expert Witness or an Expert Advisor, they must familiarise themselves with and have regard to the rules and procedures that apply to the particular proceedings. This may include, for example, the CPR, if the proceedings involve a case in England and Wales, or it could be the procedural rules of a particular disciplinary tribunal.

The rules governing the instruction of experts in the UK continue to evolve and develop and it is possible that additional documents will be published from time to time. Members should confirm with their instructing solicitor what the relevant and up to date requirements are.

3. Initial considerations – issues which you should bear in mind before accepting an instruction

3.1 What is the nature of your instruction – Expert Witness or Expert Advisor?

Prior to accepting an instruction you must be clear as to the exact nature of that instruction: is your expertise being sought by one party to advise it specifically and confidentially upon tactics in the litigation or prospects of success, without providing any expert evidence to assist the Court, tribunal or other type of decision maker? If so, it is likely that your role is one of an Expert Advisor, and your duties in such a situation may be slightly different to those that apply if you are an Expert Witness. You should ensure that your instructions are clear as to whether there is (or may be) a requirement to appear in court or at another type of hearing.

On the other hand, you may be formally instructed during the course of proceedings to peruse and digest documents with a view to providing your objective expert opinion upon questions posed to you by the instructing solicitor (or, in cases where there are direct instructions, those instructing you). In such a situation, it is likely that you will prepare an expert report and may be required to give oral evidence.

These two different roles are ones that are separately recognised and defined in the CPR in England and Wales. However in other jurisdictions, including Scotland and Northern Ireland, they are not specifically dealt with in their court rules in the same way.

During litigation it is often the case that the role of Expert Advisor can evolve to be that of an Expert Witness. In this situation, a member needs to remain aware of their obligations to act objectively and to consider carefully whether they can continue to act.

When considering whether it would be appropriate to accept an instruction as or extend the instruction to that of Expert Witness, you will need to consider carefully whether this may cause a conflict of interest. Principle 3 of the Actuaries' Code sets out that members will not allow bias, conflict of interest, or the undue influence of others to override their professional judgement. It should be borne in mind that a conflict of interest can arise even when an actuary's advice or expert opinion can be *reasonably seen* to be compromised (principle 3.1 of the Actuaries' Code – emphasis added). Principle 3.5 of the Actuaries' Code states that members will not act where there is a conflict of interest that has not been reconciled.

3.2 What form should the instructions take?

Initial instructions should be in writing, as the report will need to state the substance of all instructions. If additional instructions are received verbally, it may be helpful for you to seek those in writing as this will avoid any confusion in future as to the exact nature of those instructions. If you are unable to reach a definite opinion; for example, because you do not have sufficient information on which to form your opinion, this should be raised with your instructing solicitors immediately and written clarification sought. Similarly, if instructions are received which raise matters which fall outside your expertise, this should be discussed with your instructing solicitors as quickly as possible; you should then consider whether you can continue to act on a full or partial basis. Clarification should specifically be sought as to whether a report will be required.

3.3 Conflict of interest – how might it arise and how should you deal with it?

Prior to accepting any instruction as either an Expert Witness or Expert Advisor you must also consider whether a conflict of interest would prevent you from accepting the instruction, in line with principle 3 of the Actuaries' Code and section 3 of the APS: The Actuary as an Expert. For example, it may be that another part of your firm is acting for one of the parties in a dispute in a different capacity; this could cause a real or perceived conflict of interest. Alternatively, you could have, in the past, advised one of the parties in the dispute on a different matter; this could similarly cause a perceived conflict of interest. You must take appropriate steps to make sure that your objectivity cannot be compromised throughout the course of your instruction by a conflict or perceived conflict which may arise.

Should a conflict arise during the course of your instruction, this must be brought to the attention of those instructing you (which will usually be your instructing solicitor) as soon as reasonably practicable; a decision will then need to be taken as to whether it is appropriate for you to continue to act as an independent and objective witness.

3.4 Do I have the relevant skills to accept this instruction?

Prior to accepting any instruction you must address your mind to whether you have the relevant level of expertise to allow you to hold yourself out as an expert in the particular discipline in which advice is sought. In order to do this it might assist you to imagine yourself, for example, in Court or in a tribunal being cross-examined; can you justify that your experience is sufficient to profess yourself to be an expert? Consider the terms of your CV: have you advised on the matter in point recently? Are you up to date with developments in the area in which you claim to be an

expert? If the answer to any of those questions is "no", you should consider carefully whether your experience is sufficient to justify your instruction as an expert. You should also be alert to whether it is you that has the relevant expertise or if really it is your firm that has the relevant experience. Another factor to consider might be whether this is a role which requires someone to have had experience of working in an in-house role rather than just working for a consultancy firm. This might be the case if, for example, the expert opinion being sought is about a decision or matter which is something that arises mostly or solely in the context of in-house actuarial work.

Where there is a solicitor proposing to instruct you, they should be able to help with setting out the criteria required for the expert in the particular matter concerned and should be able to give you a clear idea of what is required for that particular instruction. In some cases it might be helpful to ask for a draft letter of instruction before accepting the instruction to see what it is likely to entail.

Paragraph 2.2 of the Actuaries' Code states that an actuary should not act unless they have an appropriate degree of relevant knowledge and skill. This does not merely extend to providing an expert report; consider also whether you would be confident to stand in a witness box and explain your position in an open hearing under robust cross-examination: this is one of the fundamental roles of an Expert Witness. If you do not have sufficient experience to be comfortable in doing so, you must consider whether it is appropriate for you to act in that particular case. Previous experience in giving oral evidence is not essential; you must however be confident that you will be able to provide your evidence in a clear and comprehensive manner. You may wish to consider receiving some general training on giving evidence before doing so, or watching the process of expert evidence being given prior to accepting an instruction. You should also consider the section of this Guide entitled "Preparation for Hearings". Should you need guidance on relevant courses providing training on giving evidence, you should contact the IFoA.

3.5 What if I personally cannot fulfil all of the terms of the instruction but I know someone who can?

It may be appropriate on occasion to seek input from professionals in other disciplines when preparing an expert report. In doing so you should consider your obligations under paragraphs 2.2 and 2.3 of the Actuaries' Code. This may arise, for example, where a tax issue has to be addressed which falls outside your area of expertise. In such a situation, you should inform those instructing you (usually your instructing solicitor) of the additional expertise required so that a separate instruction can be sought and a separate report provided. If you then rely upon the work undertaken by the second expert, you should narrate within your report which elements of your report rely on the other expert's report (and which aspects of that report are relied upon). This is so you can be asked how your opinion might alter if the judge or tribunal is not persuaded by the other expert's report.

3.6 Potential pitfalls of accepting an instruction

Members who accept an Expert Witness role must be aware that when providing expert evidence, if it is deemed to fall below the required standards, they could be subject to civil or disciplinary action.

The rules that protect someone from being sued (e.g. for professional negligence) or having disciplinary proceedings brought against them on the basis of their expert evidence (also sometimes known as 'immunity from suit') are slightly different in the various jurisdictions within the UK. In England and Wales, case law in recent years has ruled that no immunity from suit applies to professionals acting in an expert capacity, meaning that disciplinary or civil actions could potentially be brought against an Expert Witness if their expert evidence falls below the standards expected. A civil action can, however, be brought only by an actuary's client, not by an opposing party. The position in Scotland is the same in respect of the possibility of regulatory proceedings being brought against an actuary; the situation in respect of civil proceedings is that immunity applies (i.e. there is protection), but the law is less clear than in England and Wales and may be subject to change. In Northern Ireland there is immunity from suit but it has been noted in case law that this is not an automatic right which prevails in all circumstances; this position may also be subject to further judicial scrutiny.

If you act within the realms of your expertise and correspond with your duties under paragraph 2.2 of the Actuaries' Code, you can minimise the scope for any action to be brought against you. You should also consider having appropriate Professional Indemnity Insurance in place before accepting an instruction. It might also be useful to retain any notes or copies of documents that you relied upon when preparing your advice or report, as well as retaining a note of any meetings, as those can be referred to in the event that any aspect of your evidence is subsequently brought into question.

3.7 Tribunals

Members may be instructed to assist in a matter to be heard before a tribunal, for example the Determinations Panel or the Upper Tribunal in cases heard by The Pensions Regulator. In such cases, Members should have regard to the rules and procedures that apply to the particular tribunal.

3.8 Arbitration

Arbitration is an alternative dispute resolution technique in which a third party reviews the evidence in the case and imposes a decision that is legally binding on both sides and enforceable in law. It involves the appointment of an arbiter and all parties agreeing to be bound by the decision.

The form of an arbitration can vary enormously and there are a number of different types of arbitration available, including processes that are set out in legislation. For example, it may be conducted purely in writing or it may be conducted in formal hearings, with evidence heard and cross-examined, akin to a Court case.

If you are instructed to become involved in an arbitration you should seek guidance from your instructing solicitor as to what role you are being instructed to undertake.

3.9 Mediation

In a dispute, it is not unusual for parties to hold meetings at which they try to resolve the matter by means of what is known as 'mediation'. This can take place in a formal setting with a trained mediator, or by way of a more informal discussion. In some cases an expert might be involved in a mediation.

Formally, mediation is a term used to describe a settlement meeting which takes place in the presence of a neutral third party ("the mediator") who attempts to help the parties reach a settlement. The mediator may meet all sides together or hold meetings with each side separately (sometimes referred to as "caucus"), splitting his/her time between each party, each in separate rooms. Most frequently, mediations take the form of a combination of the two types of meeting in succession during the course of the day (or over several days), depending upon the mediator's assessment of how they can best assist the parties to arrive at a settlement.

Comments made to the mediator in caucus may be confidential from the other party or they may be passed on to the other side. It is a matter for your instructing solicitor's client to decide whether they wish a piece of information to be passed on or not and they should indicate their wishes to the mediator accordingly. It should be noted that some mediations are conducted on the basis that everything said in a caucus is confidential, unless the mediator is expressly told otherwise. Other mediations are conducted in the reverse manner.

If you are invited to attend such meetings, or help prepare for such meetings, your role is as an advisor, as you are not present to give evidence. Those instructing you (usually your instructing solicitor) should be asked to clarify what specific role, if any, you will be expected to play in the meeting.

You should keep in mind that if the mediation is unsuccessful and the case ultimately ends up in Court, certain topics discussed in the mediation could be raised in cross-examination. If the evidence given under cross-examination contradicts statements made by the expert in the mediation meeting, the expert may expect some vigorous questioning, even to the point of testing their integrity if the nature of the contradiction is such as to raise doubts about the honesty of the evidence. With this in mind, you should take care over what you say during mediation as it may be that your views will be communicated to the other party, depending upon the nature of the mediation taking place.

4. Upon acceptance of the instruction: further issues for consideration

If you have satisfied yourself that you are sufficiently experienced to carry out the role and there are no conflicts of interest, what issues may then arise?

4.1 How do you agree your remuneration? Points to consider

There are a number of different fee arrangements you could enter into for providing your expert opinion. For example, your report and appearance could be dealt with on an hourly rate, on a daily rate or on a fixed fee basis.

In order to comply with paragraph 2.6 of the Actuaries' Code, an actuary must agree the basis for their remuneration before commencing an appointment or instruction and before any material change in the scope of an existing appointment or instruction. In an instruction as Expert Witness, this becomes particularly important, given the requirements of objectivity: the scope of remuneration should be clearly set out which should in no way correspond to the ultimate outcome of the case. Actuaries should consider principle 3 of the Actuaries' Code when deciding whether it is appropriate to accept a certain form of remuneration agreement.

APS X3 provides (at paragraph 5.1) that Members instructed as an Expert Witness in proceedings must not agree to enter into arrangements whereby their fee is linked in any way to the outcome of those proceedings. This means that Members instructed as Expert Witnesses are prohibited by APS X3 from entering into 'no win, no fee' type feeing arrangements.

There may be situations where a Member is instructed as an Expert Advisor and, as the matter develops, that instruction turns into one to act as Expert Witness. The restriction on agreeing to enter into arrangements whereby the fee is linked to the outcome of proceedings applies to those instructed as Expert Witnesses as well as to those 'contemplating such an instruction'. This means that where a Member is considering an instruction as an Expert Advisor, they should also consider whether this is likely to transition into an Expert Witness role and whether this means that that they should not enter into an agreement to act on a contingency fee basis.

4.2 What is meant by 'impartial and objective' advice?

APS X3 requires Members to ensure that any advice they provide is impartial and objective. This means that not only should you be in a position where you are free from bias (actual or perceived) but you should also give (and be in a position to give) advice which is independent of any personal interests or feelings.

5. Preparation of a report

After a Member has confirmed the scope and nature of their instruction, has agreed a rate for remuneration and has received written instructions, there are a number of other matters to consider.

5.1 Forming an opinion

Expert Witnesses must provide opinions which are independent, regardless of the pressures of an adversarial process. The test of "independence" is that the expert would express the same opinion if given the same instructions by an opposing party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocate.

5.2 How should a report be framed?

When preparing a report, you should restrict your opinion to the areas in which it is sought; you must not encroach into the area of giving your own evidence as to the facts of the case, but, instead, should summarise the evidence presented and provide an opinion based upon that factual evidence. You must keep in mind that you are not an advocate for one particular point of view; you must be objective and present your opinion based upon the facts presented to you.

You should also remind yourself about who will be reading the report and how knowledgeable they will be about the underlying facts and circumstances of the issue in question.

There are no Technical Actuarial Standards (TASs) which deal specifically with the work of Expert Witnesses or the provision of actuarial advice in relation to proceedings. However, adoption is encouraged when carrying out this type of work and you should consider whether your report should, in whole or in part, adhere to the principles of one or more of the TASs. Your report should adhere to the principles of the TASs where appropriate.

5.3 How detailed must I be about the data I have used in the report?

An actuary must identify the data used within the expert report to undertake an actuarial analysis. Although an actuary would not normally be responsible for verifying the data, where practical, taking into account the costs involved, they should be satisfied of its validity and reasonableness. A Member should also identify any limitations or shortcomings in the data used which might have an effect or have implications for the conclusions set out in their reports. If any such shortcomings are identified, these should be set out clearly in the report.

There may be situations where it is not possible to obtain all of the information that you would want to obtain in order to prepare your report. This may mean that you are required to make some specific assumptions and you should be alert to the fact that these may be more easily challenged or refuted by the opposing side. In all cases, any assumptions material should be made clear in your report.

It may also be useful to keep detailed notes of your thought processes, methodology and the assumptions underlying the conclusions in your report. While you will not be able to refer to those notes while giving evidence, it may be helpful to remind yourself of those things later on, particularly if there is a long time period between preparing the report and giving oral evidence at a hearing.

6. Preparation for Hearings

Preparation for hearings includes a number of procedural and practical steps which must be adhered to.

This may involve a meeting of experts to exchange views and find common ground (that will apply in some but not all cases and types of proceedings).

6.1 What should I do if a crucial fact is revealed by the expert on the other side during a "without prejudice" meeting?

The purpose of such a meeting is to have an open and honest discussion about matters in the case. You should divulge this information to those instructing you (usually this will be your instructing solicitor) and allow them to consider how best to deal with it.

6.2 What should I do if my opinion changes after the meeting with the other expert in the case?

It is quite possible that your view may change, for perfectly proper reasons, during the course of a case. New factual evidence may come to light or you may genuinely form a different view after reconsidering the matter. This is not an unusual situation. If you change your mind following a meeting of experts, it would usually suffice to express that change of opinion in a signed and dated addendum, setting out the reason for the change in your view. However, if the change of opinion is significant and alters the fundamental nature of your opinion, your report should be amended to include reasons for the amendments; your instructing solicitors should also be advised of this change of view as soon as possible. When your view changes you should communicate this to those instructing you and discuss with them how best to present your amendments.

6.3 Will the Court, tribunal or other decision making body take a dim view if I identify a mistake in my report shortly in advance of the hearing?

Errors do happen; the main issue to consider is how to deal with those errors. If an error is identified, you must inform those instructing you (usually your instructing solicitor) of the error and the reasons for it as soon as possible. Similarly, if, while giving evidence, you consider that an incorrect statement or error has been made, this should be identified to the Court (or the relevant tribunal or other decision maker) immediately, in compliance with your responsibilities under principle 1 of the Actuaries' Code.

7. At the hearing: points to note

Members acting as experts in proceedings should be suitably experienced and qualified to justify the contents of their report in that particular setting. A Member should always remember that they are instructed to assist the Court (or other forum) by providing their relevant expert opinion. A decision maker is most likely to be persuaded by an expert who gives evidence clearly, logically and in measured terms.

The way in which you present your oral evidence is also very important. Experts who act inappropriately in the presentation of their evidence (for example, by opining upon matters outside their expertise) may find themselves subject to disciplinary action and/or sanction by a court/hearing which may, in some types of proceedings, include costs orders being made directly against them.[1] Disciplinary action might be taken in these circumstances having regard to the general definition of "misconduct" (Rule 1.6 of the IFoA's Disciplinary Scheme), and paragraph 2.2 of the Actuaries' Code.

When being cross-examined you should be alert to questions from barristers or advocates which seek to manoeuvre you into adopting an extreme position in respect of a particular matter. Adopting such an extreme stance may then undermine the rest of your evidence.

It might feel natural to address answers to your questions towards the barrister addressing questions towards you; however, as the Judge, tribunal (or other relevant decision maker) is the ultimate arbiter, all answers to questions should be addressed to them.

Some common issues which arise during the course of the Court hearing are not dealt with in any guidance. Some such issues are as follows:

7.1 Can my instructing solicitor or the barrister/advocate tell me what questions will be asked?

In certain types of process, evidence in chief will be provided by means of a report. This means that it would not be necessary for the representing party instructing you to take you through your evidence in detail. However, in other types of hearings the expert's evidence in chief is adduced orally. Once your evidence has been led 'in chief', the other parties will have the opportunity to cross-examine you. If you have been jointly instructed by all parties (which is something which happens in certain types of process), all parties have an opportunity to cross-examine you.

Although an expert can be guided as to what areas they may be asked to comment upon, it is not appropriate for specific 'coaching' to be given by a barrister or advocate; this would be contrary to their professional code. 'Coaching' could be deemed to include providing specific questions to which an answer will be sought, or, more seriously, guidance on what answers to those questions should be.

[1] *For example, this is something that can happen in the England and Wales High Court – see Phillips v Symes* [2004] EWHC 2330 (Ch).

7.2 What if I am asked in cross-examination to assume figures that I think are unreasonable?

In such a situation your duty is to provide an objective opinion and you must present the calculations, even where you do not accept the assumptions upon which they are proceeding. You should, however, make clear that the answer you are giving is hypothetical and you do not believe those assumptions to be appropriate.

If a situation arises where you are asked to comment upon methodology or figures which you believe are not specifically relevant to the matter in hand or may be misleading, you should make this clear when giving your answer.

You must always have in mind that your report is reflective of your own view; if this is not the case it will be easily exposed in cross-examination, when evidence is being given under oath.

7.3 How do I respond to questioning if I believe that the expert instructed on the other side is wrong in their opinion?

A Member's duty is to provide objective and clear evidence based upon their expertise. Balanced with that, it is stated at principle 1.1 of the Actuaries' Code that Members will show respect for others in the way they conduct themselves in their professional lives. If you disagree with an opinion expressed by a fellow actuary or other professional, you must address this in a factual way and explain clearly why there is a disagreement, explaining different assumptions and calculations used, if appropriate.

7.4 If my evidence is not completed in one day, can I speak with those instructing me whilst the case is adjourned?

When you are giving evidence you will usually be operating under oath. When a witness is under oath they should not speak with anyone in relation to the case, including their own instructing legal team. This is sometimes known as 'purdah'. To avoid any suggestion that inappropriate discussion has taken place, you would be best making little if no contact with your legal team before your evidence is complete. In some cases your evidence could be incomplete and then the matter is adjourned for a period. In such a situation you will be able to speak with your instructing solicitors (or, if you are directly instructed, with those instructing you) about arrangements for the reconvened hearing; however, you must not discuss any of the facts of the case upon which you will be giving evidence.

8. General points

8.1 What should I do if my instructing solicitor puts pressure on me to tailor my opinion to meet their needs?

On occasion it may be that a solicitor (or other person) will apply pressure to an expert to either give evidence or form an opinion that is contrary to the actuary's true view, or express an opinion which is outside the actuary's expertise. In such a situation, you must keep in mind your duties under principles 1, 2 and 3 of the Actuaries' Code. The actuary's opinion must be objective, fully reasoned and stand up to scrutiny. You may also be required to sign a statement of truth indicating that the contents of your report are true to the best of your knowledge and belief (this is a requirement of some, but not all, procedural rules) and, if giving oral evidence, you are likely also to be asked to take a form of oath or affirmation.

8.2 Differences of opinion

Whilst giving evidence, you may be asked to comment on differences between your evidence and earlier evidence that has been heard. If you do comment, you must do so objectively and professionally; and should consider, depending on the factual situation, explaining that either the difference of opinion between the actuaries may have arisen firstly, as a result of the opinions being based on a different factual premise or on different actuarial assumptions; or because one actuary is using a different type of methodology or approach to the other. In this case, you may be unable to assist further, beyond explaining the basis for your own opinion and highlighting the existence of the difference of professional opinion.

9. Summary

- **Always keep in mind your duties under the Actuaries' Code and APS X3: The Actuary as an Expert in Legal Proceedings.**
- **Consider rules specific to the jurisdiction and type of proceedings in which you will be giving evidence.**
- **Ensure that you are confident that you are sufficiently qualified to prepare a written report and give evidence orally, depending on what the instruction involves.**
- **Remember your report and evidence should be objective and impartial.**
- **Remuneration arrangements must be seen to be objective and must not be linked to the outcome of the case.**
- **Your report must remain objective even if you are asked to tailor it by your instructing solicitors; your role is as an independent expert, not as an advocate for one party in the case.**
- **When giving oral evidence, you must be objective and seen to be so. If points are raised in cross-examination to which you should concede, you should do so, otherwise your credibility could be called into question.**

Appendix 1 – Civil Proceedings in England and Wales

Introduction

If you are acting as an expert witness in England and Wales you must follow the provisions contained in Part 35 of the CPR. In addition to Part 35 of the CPR, a Practice Direction has been published to accompany Part 35. You should consider this Practice Direction when acting as an expert witness. Finally, a Protocol for the Instruction of Experts to give evidence in Civil Claims (Protocol)[2] has been published by the Civil Justice Council. This is due to be replaced by the Guidance for the Instruction of Experts to give evidence in Civil Claims (Guidance)[3]. When acting as an expert in England and Wales, the Protocol/Guidance should be read in conjunction with APS X3: The Actuary as an Expert and the CPR; you must ensure that you are familiar with the terms of the CPR and associated Protocol or Guidance and follow them as appropriate. In the event that you require clarity on the terms of those documents, you should speak to your instructing solicitor.

If you fail to comply with the provisions of the CPR when preparing your report, this may, in certain circumstances, lead to your evidence not being admitted in court, which may have significant consequences for the case; an in-depth knowledge of the CPR and associated Protocol and Guidance is therefore crucial.

The fundamental underlying principle is that the expert witness owes a duty to the Court, not to their instructing party. Maintaining objectivity and independence are therefore very important

The CPR also contain detailed provisions on remuneration, to which you should have regard if you are acting in England and Wales.

Instructions

Expert Witness or Expert Advisor?

The CPR specifically recognise the distinction in the roles of expert witness and expert advisor.

Where someone is an 'Expert Advisor', Part 35 of the CPR does not specifically apply. However, the IFoA regard it as good practice for actuaries to comply with the provisions in Part 35 even if the actuary is acting in their capacity as an expert advisor.

Where someone is instructed as an 'Expert Witness' then Part 35 of the CPR do specifically apply to such an instruction and should be followed. In such a situation, your principal duty is to the Court.

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[2] http://www.justice.gov.uk/courts/procedure-rules/civil/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf

[3] http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/working-parties/guidance-instruction-experts-give-evidence-civil-claims-2012

Are you instructed by one party or as a joint expert?

Although it is more common for separate experts to be appointed by each party to a dispute, there are occasions where (usually on cost grounds) a single expert is appointed by both (or all sides). The CPR also include a provision for the Court to direct that a single joint expert is instructed.

The same considerations in relation to conflicts of interest and sufficiency of experience apply to a potential joint instruction, and you should be satisfied that there is no conflict of interest in respect of any instructing party.

Where one expert is to be instructed on behalf of both parties, a single joint set of instructions is likely to be issued. Where you are instructed as a single joint expert, you should keep all of the instructing parties informed of any material steps that you are taking and should copy all correspondence to each party instructing you; this will ensure transparency and will allow compliance with the CPR.

Actuaries acting as expert witnesses should always be cognisant of their overriding duty to the Court, over and above their duty to the parties instructing them. A single joint expert should not attend any meeting or conference call which is not attended by all parties, unless the other parties have agreed in writing or the Court has directed that such a meeting may take place.

Report writing

There are certain requirements in Part 35 of the CPR which dictate the nature of information which should be contained within an expert report. When acting in England and Wales Members must correspond with these requirements to ensure compliance with the CPR in line with paragraph 4 of the Actuaries' Code.

Paragraph 3.2(2) of Practice Direction 35 requires that the expert's report should give details of any material which has been relied on in making the report. This should include any data provided to the actuary (as opposed to data which the actuary has compiled or verified for themselves). This is so that the court and the relevant parties are aware that the actuary's opinion may need to be revisited if the underlying data is subsequently found to have been incorrect.

What should I do if I am unable to fulfil the requirements of Part 35 of the CPR in relation to report writing?

In such a situation, you should raise this immediately with your instructing solicitor. It may also be appropriate to comment in your report as to why you are unable to meet all of the requirements contained within Part 35 of the CPR. You should also be cognisant of the fact that the report will contain a statement of truth. You should check the appropriate wording for the statement of truth with your instructing solicitor.

You should ensure that there is a section within the report which explains which facts and matters referred to in the report are within your own knowledge and which are not and that those facts within your knowledge are true, to the best of your knowledge and belief. If another professional colleague has been asked to provide input into the report, the exact nature of that input should be described.

Meetings between experts to exchange views and find common ground

This is provided for under the CPR; if thought appropriate, the actuary will be advised of the proposed meeting by those instructing them. The meetings can be held on an "open" basis or on a "without prejudice" basis. A meeting that is held on a "without prejudice" basis means that only limited, if any, reference can be made in Court to the discussions during the meeting. The discussions during an "open" meeting can, however, be referred to during any subsequent Court hearing.

Written questions to experts

In England and Wales, an order is often made for the exchange of each party's expert reports. After expert reports have been exchanged, it is possible that one party may write to the other party with questions about their report to clarify opinions and issues following the exchange of reports.[4] It is important that you answer all questions that are properly put honestly and accurately; failure to do so may result in sanctions being imposed upon you. To that end, if you do not understand the question, or if you think it has been asked out of time you should seek clarification from your instructing solicitors.

Method of giving evidence

In England and Wales, under the CPR, evidence in chief is provided by means of the expert report being provided to the Court.

Immunity from suit

In the case of Jones v Kaney[5], the Supreme Court ruled by a majority of five to two, that experts appointed by parties in legal proceedings would no longer be immune from claims for professional negligence brought by their clients. The case of Meadow v General Medical Council[6] had previously removed the immunity from professional disciplinary proceedings previously afforded to expert witnesses.

Experts acting in England and Wales can now be the subject of civil or professional discipline proceedings if their evidence falls below the standards expected. A civil action can only be brought by an actuary's client, not by an opposing party.

When giving evidence you should act within the realms of your expertise and remember your overriding duty to the Court. If you do so, and correspond with your duties under paragraph 2.2 of the Actuaries' Code and APS X3: The Actuary as an Expert, you can minimise the scope for any action to be brought against you.

[4] See **CPR** Part 35.6.
[5] [2011] UKSC13
[6] [2007] QB 462

Appendix 2 – Civil Proceedings in Scotland

Introduction

A Member instructed as an expert witness should be aware of the differences between the English position on expert witnesses and that taken by the Scottish courts[7].

You should note that when acting as an expert witness in civil proceedings before a Scottish Court that the CPR do not apply in Scotland nor is there an equivalent codified set of rules that govern expert witness evidence in Scotland.

There are, however, particular procedural rules that will apply to expert witness evidence and the relevant rules will depend on the particular court in which you are instructed. If you are instructed in the Court of Session, the Rules of the Court of Session will apply, whereas in the Sheriff Court the case is likely to be governed by the Ordinary Cause Rules (with specific rules for particular types of procedures such as commercial court cases or judicial review).

You should speak with your instructing solicitor about the particular rules that apply to the case in which you are instructed. You should also have regard to the Law Society of Scotland's Code of Practice: Expert Witnesses Engaged by Solicitors, which provides a framework of experts' duties when instructed in Scotland.

Function of an Expert Witness

It has been accepted in Scotland for some time that an expert witness owes a duty to the court. You should state in your report that you are aware of and have complied with that duty[8].

The function of expert witnesses has been authoritatively explained by the Scottish Court in these terms: "*Expert witnesses, however skilled or eminent can give no more than evidence. They cannot usurp the function of the ... court... Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in the evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury*."[9]

The principal duties and responsibilities of an expert witness in Scotland are similar to those codified within the CPR, and have been summarised in case law as follows:[10]

[7] Amy Whitehead's SA Irvine [2009] CSOH 77 ; 2009 SLT 1180

[8] BSA International SA v Irvine [2009] CSOH 77; 2009 SLT 1180

[9] Davie v Edinburgh Magistrates 1953 SC 34 at 40

[10] by Mr Justice Creswell in National Justice Campania Naviera, S.A. -*v*- Prudential Assurance Co. Ltd (also known as the "The Ikarian Reefer" case) [1932] 2 Lloyds Rep 68; see also opinion of Lord Bannatyne in case of Helen McGlone v Greater Glasgow Health Board [2012] CSOH 190 for a summary of the role of the expert.

- The expert evidence should be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;
- The witness should provide expert unbiased opinion in relation to matters within his/her expertise and should never assume the role of advocate;
- The expert should not omit to consider material facts which detract from his/her concluded opinion and he/she should make it clear when questions fall outside his/her own expertise; and
- The opinion should state if it is provisional only, or subject to any qualification.

Points to Note

In Scotland, an expert report is addressed to the solicitor instructing the report and not the court. The solicitors instructed by each party will decide whether it is necessary and appropriate to obtain an expert opinion on a matter and will instruct the expert to provide that report. If the matter proceeds to a hearing then the expert is likely to be required to attend and give evidence as to their opinion. There is not the same 'formal' distinction between 'Expert Witness' and 'Expert Advisor' as there is in cases in England and Wales under the CPR. Usually an expert will be instructed to prepare a report and, if the matter proceeds to a hearing, then the expert will be called to give oral evidence and be an expert witness.

In general, opinion evidence is not admissible in Scottish courts and under normal circumstances, if you are a witness in a case, you may only give evidence about matters within your direct knowledge. The evidence of an expert witness is an exception to this rule.

There is no rule of Court requiring an expert report to be provided nor is there any requirement that if a report is provided it is in any particular written form (or indeed in writing at all). There is not, for example, a requirement to include a statement of truth in a report as there is in other jurisdictions, including England and Wales. A Member instructed as an expert should refer to and follow the Law Society of Scotland's Code of Practice: Expert Witnesses Engaged by Solicitors[11].

The expert report only becomes evidence when the witness is called to give evidence orally and it is lodged as a piece of evidence. Experts would therefore normally appear at the hearing and provide 'evidence in chief' orally, before being subject to cross-examination by the other party's solicitor or advocate. The use of witness statements as evidence in chief is not something that is usually permitted in Scotland other than in exceptional sets of circumstances or in particular non-court proceedings (for example public inquiries or certain disciplinary tribunals).

Oral Evidence

It is important to remember that you will need to give evidence of your relevant qualifications and expertise or experience in a particular field in order to establish that you are an expert; these are also matters upon which you may be cross-examined.

[11] http://www.expertwitnessscotland.info/codepract.htm

In Scotland it is for each party to decide whether or not to call expert evidence and if so what documentation to lodge or otherwise. If a report is to be relied upon then this must be lodged in advance of your giving oral evidence. It may be the case that the other party's solicitor decides to call their expert without lodging their report, which means that you can be cross-examined on their evidence without you having detailed advance notice.

If you are instructed as an expert in civil proceedings in Scotland, you should also be aware of the possibility of having to give evidence before a jury.

Joint experts

Single joint expert appointments are rare in Scotland. It is however not uncommon for a meeting to take place between the respective parties' experts with a view to narrowing the issues in dispute. There is also the potential for certain evidence to be 'agreed' between the parties and this can save time and avoid the need to lead evidence on matters that are not in dispute.

Immunity from suit

As in England and Wales, you could be subject to disciplinary proceedings arising from your conduct in your role as Expert Witness, for example, giving evidence to the court outside your expertise and experience in the area upon which your opinion was sought[12].

The position in Scotland remains that an Expert Witness does have immunity from civil proceedings unless and until the House of Lords decision in Watson v McEwan is overturned[13]. This immunity extends to giving evidence in court and, at least, preparing a report for relying on and giving evidence. However, more recent case law[14] from the Supreme Court has cast doubt over the principle that immunity from suit is an automatic right that prevails in all circumstances. The position on immunity is subject to scrutiny and may change. It is important to appreciate that the availability of immunity may depend upon you fulfilling your duties and responsibilities as an Expert Witness properly and in good faith. You should seek to follow the principles of APS X3: The Actuary as an Expert and the Actuaries' Code to reduce the possibility of a successful civil suit being advanced against you.

[12] Meadow *v* General Medical Council [2007] QB 462

[13] (1905) 7F 109

[14] Jones *v* Kaney [2011] UKSC 13

Appendix 3 – Civil Proceedings in Northern Ireland

Introduction

It is important to note that a different procedural system applies in Northern Ireland. The CPR are not applicable.

The Rules of the Court of Judicature (NI) 1980 ("the Rules of Court") and the Commercial List Practice Direction No. 6/2002 set out what is expected of an Expert Witness preparing a report for the Courts in Northern Ireland. Practice Direction No. 6/2002 does not apply to expert advice which a party does not intend to adduce in the course of litigation. Neither does it apply to experts instructed only to advise, (for example, to comment on a single joint expert's report) and not to give or prepare evidence to be used in proceedings. It does, however, apply to experts who were initially instructed only to advise but who are subsequently instructed to give or prepare evidence for use in the proceedings.

Instruction to act

If you are instructed to prepare an expert report in Northern Ireland, you should have regard to regional legislation and rules. In particular Practice Direction No. 6/2002 sets out the duties of an Expert Witness who has been instructed to give or prepare evidence for the purposes of court proceedings. Each report you prepare should be certified by you to have been prepared for court use. You should also certify that you are familiar with the duties that an Expert Witness owes to the court as defined in case law.[15] The duties are as follows:

- the expert evidence should be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;
- the witness should provide expert unbiased opinion in relation to matters within his/her expertise and should never assume the role of advocate;
- the expert should not omit to consider material facts which detract from his/her concluded opinion and he/she should make it clear when questions fall outside his own expertise; and
- the opinion should state if it is provisional only, or subject to any qualification.

Immunity from suit

In Northern Ireland the position on immunity from suit is the same as that in Scotland.

[15] the judgement of Cresswell J in *National Justice Compania Naviera SA -v- Prudential Assurance Company Limited (the Ikarian Reefer) [1992] 2 WLR 407.*[15] An expert witness should have read a summary of this case in the Times on 5 March 1993

Preparing an Expert Report

When providing expert reports you should bear in mind that any failure to comply with the relevant professional obligations, rules of court, court orders, practice directions or any excessive delay for which you are responsible, may result in the party by whom the expert has been instructed being penalised in costs. In extreme cases the court may make orders directly against you if, by your evidence, you caused significant expense to be incurred, and did so in flagrant and reckless disregard of your duties to the court.

There is provision in the Rules of Court for the appointment of an independent expert or "court expert" to report upon any question of fact or opinion not involving questions of law or of construction.[16] If you are instructed as such an expert your report must be sent to the Court. The Court may direct you to make a further or supplemental report. Any party may, within 14 days after receiving a copy of the court expert's report, apply to the Court for leave to cross-examine you on your report, and on that application the Court shall make an order for the cross-examination of you by all the parties either at the trial or before an examiner at such time and place as may be specified in the order.

In preparing your expert report you should maintain professional objectivity and impartiality at all times. Experts are required to include a declaration in their report.[17] Please refer to the sample declaration detailed at the end of this appendix.

Unlike the position in England and Wales, it is unusual for the courts in Northern Ireland to accept sworn witness statements in place of calling a witness to give evidence orally.

[16] The Rules of the Court of Judicature (Northern Ireland) 1980, Order 40, rule 1

[17] Practice Direction No.1/2003 and Practice Direction No.6/2002

Sample Declaration to be used in reports in Northern Ireland

EXPERT'S DECLARATION

I, , say:

(1) I understand that my primary duty in furnishing written reports and giving evidence is to assist the Court and that this takes priority over any duties which I may owe to the party or parties by whom I have been engaged or by whom I have been paid or am liable to be paid. I confirm that I have complied and will continue to comply with this duty;

(2) I have endeavoured in my reports and in my opinions to be accurate and to have covered all relevant issues concerning the matters stated, which I have been asked to address, and the opinions expressed represent my true and complete professional opinion;

(3) I have endeavoured to include in my report those matters of which I have knowledge and of which I have been made aware which might adversely affect the validity of my opinion;

(4) I have indicated the sources of all information that I have used;

(5) I have where possible formed an independent view on matters suggested to me by others including my instructing Lawyers and their client; where I have relied upon information from others, including my instructing Lawyers and their client, I have so disclosed in my report;

(6) I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report or opinion requires any correction or qualification;

(7) I understand that:

  (a) My report, subject to any corrections before swearing as to its correctness, will form the evidence which I will give under oath or affirmation;

  (b) I may be cross-examined on my report by a cross-examiner assisted by an expert; and

  (c) I am likely to be the subject of public adverse criticism by the Judge if the Court concludes that I have not taken reasonable care in trying to meet the standard set out above.

(8) I confirm that I have not entered into any arrangement whereby the amount or payment of my fees, charges or expenses is in any way dependent upon the outcome of this case.

Signed ……

Date ……

Appendix 4 – The rest of the world

Expert Witnesses or Advisors operating in jurisdictions outside the UK should have regard to local guidance.

Contact us

Other sources of guidance

The IFoA offers a confidential Professional Support Service[18] to assist Members with professional and ethical matters.

Do you have any comments?

The content of this guide will be kept under review and for that reason we would be pleased to receive any comments you may wish to offer on it. Any comments should be directed to:

Regulation Team
The Institute and Faculty of Actuaries
Level 2
Exchange Crescent
7 Conference Square
Edinburgh EH3 8RA

or regulation@actuaries.org.uk

[18] http://www.actuaries.org.uk/regulation/pages/professional-support-service-0