



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



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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 X3: 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 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.

Members carrying out expert witness work within the Financial Reporting Council’s (FRC) UK Geographic Scope¹ should have regard to the FRC’s framework of Technical Actuarial Standards (TASs)² and consider whether their report or any other aspects of their work fall within the scope of one or more of the TASs.

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.

¹ Defined as “work done in relation to the UK operations of entities, as well as to any overseas operations which report into the UK, within the context of UK law or regulation.”

² <https://www.frc.org.uk/actuaries/actuarial-policy/technical-actuarial-standards/technical-actuarial-standards-2017>



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.³ Disciplinary action might be taken in these circumstances having regard to the general definition of “misconduct” (Rule 4.2 of the IFoA’s Disciplinary and Capacity for Membership Schemes), 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.

³ 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, Guidance for the Instruction of Experts to give evidence in Civil Claims (Guidance)⁴ has been published by the Civil Justice Council. When acting as an expert in England and Wales, the 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 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.

⁴ <https://www.judiciary.gov.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf>



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.⁵ 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*⁶, 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*⁷ 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.

⁵ See CPR Part 35.6.

⁶ [2011] UKSC 13

⁷ [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 courts⁸.

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 Solicitors⁹, 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 duty¹⁰.

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."*¹¹

⁸ *Amy Whitehead's SA Irvine* [2009] CSOH 77 ; 2009 SLT 1180

⁹ <https://www.lawscof.org.uk/members/business-support/expert-witness/expert-witness-code-of-practice/>

¹⁰ *BSA International SA v Irvine* [2009] CSOH 77; 2009 SLT 1180

¹¹ *Davie v Edinburgh Magistrates* 1953 SC 34 at 40



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:¹²

- 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.

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).

¹² by Mr Justice Creswell in *National Justice Campania Naviera, S.A. -v- Prudential Assurance Co. Ltd* (also known as the "The Ikarian Reefer" case) [1993] 2 Lloyd's 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.



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.

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 sought¹³.

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 overturned¹⁴. This immunity extends to giving evidence in court and, at least, preparing a report for relying on and giving evidence. However, more recent case law¹⁵ 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.

¹³ *Meadow v General Medical Council* [2007] QB 462

¹⁴ (1905) 7F 109

¹⁵ *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.¹⁶ 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.

¹⁶ the judgement of Cresswell J in *National Justice Compania Naviera SA -v- Prudential Assurance Company Limited (the Ikarian Reefer)* [1993]2 Lloyds Rep 68. 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.¹⁷ 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.¹⁸ 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.

¹⁷ The Rules of the Court of Judicature (Northern Ireland) 1980, Order 40, rule 1

¹⁸ 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 Service¹⁹ 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

¹⁹ <http://www.actuaries.org.uk/regulation/pages/professional-support-service-0>