

GN24: The Actuary as Expert Witness

Classification

Recommended Practice

Legislation or Authority

None

Application

Any actuary instructed as an expert witness.

Author

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Status

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1 Purpose & Scope

1.1 Purpose

This note provides guidance to the actuary instructed as an expert witness. It refers to Court rules, but does not seek to replicate them. Actuaries should refer to the relevant documents for their full terms. It is not intended to restrain unreasonably the selection of actuarial assumptions or methods, the communication of actuarial opinions, or the relationship between the actuary and a client, nor to constrain genuinely held differences of actuarial opinion.

1.2 Scope

1.2 These guidelines apply to actuaries in the United Kingdom when they give evidence as actuarial experts to the courts or to other tribunals. However attention is drawn to the fact that the Civil Procedure Rules referred to below apply only to England and Wales and do not apply to courts in Scotland or Northern Ireland, and actuaries giving evidence in these courts should interpret this guidance note accordingly.

2 Background

2.1 Increasing Exposure

2.1 Actuaries have been providing expert evidence for many years and the scope and frequency of such evidence has increased. This trend may continue, leading to increasing public exposure of actuarial experts.

2.2 Public Confidence

Competing actuarial opinions on the same issue have at times been so divergent as to raise a question about the reasonableness of one or both of the opinions. This question is particularly likely to arise when the basis for either opinion is not soundly thought out and explained or the different assumptions made are not highlighted. On the other hand, actuarial opinions that are supportable and carefully prepared and explained, though divergent, can generate confidence in actuaries' competence to evaluate future contingent events. The focus of these guidelines is on the preparation and delivery of sound expert evidence by actuaries.

2.3 The Civil Procedure Rules for England & Wales

2.3.1 The Civil Procedure Rules for England & Wales, which came into force for proceedings commenced after 26th April 1999 and for new step in proceedings commenced prior to that date, seek to address the general concern that civil litigation was too costly and too lengthy. One particular concern, identified by Lord Woolf in his report, *Access to Justice*, was that expert evidence was not only one of the major generators of unnecessary cost in litigation but also that experts sometimes acted in a partisan way rather than assisting the court impartially. Therefore, the Civil Procedure Rules stress that the overriding duty of an expert witness is to the court and not to the parties calling the expert to give evidence.

2.3.2 The Civil Procedure Rules include provision under which the court may (but is not required to) appoint a single joint expert where two or more parties wish to submit expert evidence on an issue. This guidance note applies equally to both circumstances, i.e. an actuary giving evidence as a single joint expert and actuaries appointed as experts by each party.

3 Background Preparation

3.1 Review of Relevant Guidance

An actuary undertaking an expert witness assignment should be familiar with the PCS and all relevant guidance notes issued by the Institute and the Faculty, and be confident of possessing sufficient experience relevant to the case.

3.2 **Familiarisation with the Civil Procedure Rules**

- 3.2.1 Actuaries undertaking expert witness assignments in England & Wales should make themselves familiar with the requirements of the Civil Procedure Rules in so far as they relate to their work. Failure to comply with the Civil Procedure Rules may lead to the expert's evidence being debarred. If in doubt as to which aspects of the Civil Procedure Rules are relevant to the actuary's work, or how to apply the relevant rules, the actuary should seek advice or instruction from the instructing solicitors.
- 3.2.2 Although the Civil Procedure Rules are written primarily for lawyers having the conduct of litigation, rather than for their clients or the witnesses they call, Part 35 of the Rules and its accompanying Practice Direction sets out the requirements for expert witnesses in terms which are readily intelligible to an actuary.
- 3.2.3 Other documents which form part of the Civil Procedure Rules may be relevant to the actuary's role as an expert witness in some cases, for example the "Protocols" for personal injury claims and for clinical disputes. Several of the courts (for example, the Commercial Court and the Chancery Court) have published guidelines of their own for the implementation of the Civil Procedure Rules, including guidelines on the calling of expert evidence.
- 3.2.4 The Civil Procedure Rules are currently evolving as the processes are put into practice and the lessons are learned from using them. Additional documents may be published from time to time. The solicitor(s) instructing an actuary ought to be able to advise the actuary as to the latest relevant documents in existence and will normally be willing to furnish the actuary with copies of the relevant documents (or relevant extracts, as the case may be). Copies are also easily accessible from the Lord Chancellor's Department web site (www.open.gov.uk/lcd).

3.3 **Conflicts of Interest**

- 3.3.1 General considerations relating to conflicts of interest are addressed in the PCS. Certain additional considerations apply in relation to assignments in which the actuary is expected to give expert evidence, as set out below.
- 3.3.2 There is a conflict of interest whenever the actuary's objectivity, or duty owed to a client, or to the courts, is or could be impaired by competing interests. The actuary must disclose any such conflict to the instructing solicitors.
- 3.3.3 If the actuary is uncertain as to whether a conflict of interest exists, the actuary should make full disclosure of the facts to the instructing solicitors and should come to a conclusion with recognition of those parties' opinions on the subject of the potential conflict

- 3.3.4 A particular problem may arise where one individual in a firm is asked to act as an expert witness for a party in litigation against a current or previous client of a colleague in the same firm. One actuary might, for example, be asked to assess compensation for loss of pension rights on wrongful dismissal where a partner or colleague advises, or has advised, the directors of the employing company. The actuary would normally only be able to act after disclosure of the possible conflict to both clients and having obtained the consent of both clients.
- 3.3.5 Although the appointment as an expert witness is a personal one and not an appointment in the name of the expert's firm, it is unlikely to be acceptable to either the instructing solicitors or the firm for two colleagues to give evidence for opposing parties in a case.

4 Preparation of evidence

4.1 Responsibility for Data

The actuary is responsible for identifying the data necessary for an actuarial analysis. The actuary may not be responsible personally for verifying the data, but should, where practicable (taking into account the cost involved), be satisfied of its validity and reasonableness. The actuary should disclose any data limitations or shortcomings that might affect or have implications for the results (see also paragraph 4.4.2 on cost considerations).

4.2 Actuarial Assumptions

- 4.2.1 The actuary is normally responsible for both the actuarial assumptions and the methods of valuation that are used in an actuarial analysis given in evidence.
- 4.2.2 The actuary may, however, be asked by the client, by opposing parties or by the court to show what the outcome of a valuation would be on some alternative method or assumptions. It is perfectly proper for the actuary to present these calculations even if the actuary does not accept the assumptions given, provided that there is no misunderstanding by the court or any or the parties as to which of the actuary's calculations are based on assumptions the actuary regards as reasonable and which are not.
- 4.2.3 It is for the party requesting the calculations to decide whether to withdraw the request or to have the calculations presented in circumstances where it has been drawn to the court's attention that the calculations are based on methods or assumptions which are not accepted by the actuary.

4.3 **Review of Evidence**

The actuary is often shown and asked to review evidence, including opposing evidence. The actuary should conduct this review objectively, in terms of the reasonableness of the other evidence, rather than solely in terms of whether it agrees or disagrees with the actuary's own evidence.

4.4 **Formulating an Opinion**

4.4.1 The expert witness's fundamental obligation is to the court. An expert witness must be impartial and confine the evidence given to matters which lie within the expert's expertise. One test of impartiality is that the expert would give the same opinion if given the same instructions by an opposing party.

4.4.2 One of the overriding objectives of the Civil Procedure Rules (as stated in the rules as Part 1, paragraph 1.1(2) (c)) is to enable the court to deal with cases in ways which are proportionate to: the amount of money involved; the importance of the case; the complexity of the issues; and the financial position of each party. For this reason, some investigations, although desirable, are not justifiable on the grounds of cost. The actuary should bear this constraint in mind and, where appropriate, should ensure that instructing solicitors are made aware of the implications of including any costly investigations in, or omitting any costly investigations from, the work carried out by the actuary in formulating an opinion.

4.4.3 The actuary acting as an expert witness should resist pressure from the client, the instructing solicitors or counsel to give evidence that is contrary to the actuary's true opinion. If the actuary feels unable to support aspects of the case being argued for the client, the actuary should make this clear at the earliest opportunity. The actuary's own opinion should never be modified to suit the exigencies of litigation. For this reason, it is preferable to agree with the client at the beginning of the assignment that the actuary must dictate the scope of investigative work undertaken in support of an opinion given in the actuary's evidence. Where instructions by the client demand that the scope be limited, this must be made quite clear in the Report (see also paragraph 5.2 below).

4.4.4 If solicitors propose that the actuary should avoid reference to particular information or, in some other way, depart from the general tenor of these guidelines, the actuary should comply only if entirely at ease with the solicitors' proposal, having fully considered the implications. It may be appropriate in exceptional circumstances for the actuary to seek independent advice or to suggest that, if the tenor or method of presentation of the evidence is not acceptable to the client, another expert should be instructed.

5 Communications and Disclosures

5.1 Background of the Audience

5.1 The experience of those involved and, in particular, the judge should be kept in mind when giving evidence as an actuarial expert. Actuarial concepts may be difficult to understand if their communication presupposes basic actuarial knowledge, or if they are presented using terms or acronyms with which audience is unfamiliar. The actuary should explain technical terminology so that they can be understood by the court. It is a matter of judgement as to the extent to which technical concepts should be explained to the court.

5.2 Written Reports

5.2.1 The Civil Procedure Rules include a number of requirements for expert evidence (as set out in paragraphs 1.1-1.6 of the Practice Direction associated with Part 35 of the Civil Procedure Rules). In the case of actuarial expert evidence, it will often assist the court if, in addition to the court's rules, the report:

- includes the name of the client, the actuarial methods used, the assumptions and support therefor, the names of persons doing the analysis (unless the analysis has been checked personally by the actuary giving the evidence so that it is the expert's own evidence) and any potential conflicts of interest, and descriptions and sources of the actuarial data;
- indicates (in the body of the report or as an appendix) the material available to the actuary and on which the report is based; and
- distinguishes clearly between matters of fact and the expert's own opinion; facts which the expert has been told by instructing solicitors would be distinguished from facts which are known to the expert or established from documents.

5.2.2 The report should also express the actuarial opinions clearly and succinctly, and in a manner appropriate to the audience.

5.2.3 The actuary should also consider, in consultation with the instructing solicitor, whether it would be beneficial for the report to give sufficient information for another actuary to be able to reproduce the calculations (given the same data) to an appropriate degree of accuracy.

5.3 **Disclosure of Remuneration**

Contingency fees, which are fairly common in commercial transactions such as management buy-outs, are not normally appropriate for expert witnesses because they are likely to be perceived as threatening the expert's objectivity. Early disclosure of such a basis, whilst clearly preferable to its revelation under cross-examination, affords little protection from this presumption.

5.4 **Meetings of Experts**

5.4.1 Opposing experts may be asked to meet before the trial, without solicitors being present. Instructions of this nature may arise either following a direction from the court to that effect or by agreement of the parties. The purpose of such a meeting is not for the experts to attempt to reconcile their clients' rival accounts of events or to decide between them; those are tasks for the court. The purpose of the meeting is for the experts to discuss technical matters that are within their expertise and their respective opinions concerning them with the objective that wherever possible, the experts should agree their evidence (in which case the factual basis on which the shared opinion is reached must be entirely clear) and determine and define the issues that remain in dispute.

5.4.2 Meetings held by agreement may be 'Without Prejudice' (the extent to which reference may be made in open court to discussions at such a meeting is limited) or they may be 'Open'. The actuary should seek a clear understanding of these terms from the instructing solicitor and clear instructions before attending meetings as to whether they are to be 'Open' or 'Without Prejudice'. The status of the meeting should be mentioned specifically at its commencement.

5.4.3 In some circumstances, it may not be convenient for discussions between experts to take place in a face-to-face meeting and other arrangements may be made. The guidance in paragraphs 5.4.1-2 applies to any circumstances where opposing experts are instructed to communicate directly with each other, rather than through solicitors.

5.5 **Inherent Uncertainty of Results**

It will often assist the court if the actuary indicates in the expert evidence that an actuarial valuation (as in the case of most valuations of any kind) necessarily has a degree of uncertainty associated with it and (if it is the case) that the result of the valuation may be very sensitive to certain of the assumptions made. The actuary should indicate which of the assumptions that statement applies to and identify any assumptions where the relationship between them is more significant than their absolute levels. The actuary should be prepared to explain the concepts of uncertainty and sensitivity, verbally or numerically, and to convey to the audience the actuary's own expectations for future outturns. It will normally assist the court if the actuary

can indicate whether or not these expectations are within a range believed to be acceptable to most actuaries, supported by a justification for the actuary's belief.

5.6 **Cross-Examination**

5.6.1 The actuary must respond truthfully to questions posed during cross-examination and always give an honest professional opinion. The actuary must refrain from advocacy on behalf of the client.

5.6.2 The actuary should explain and illustrate concepts and calculations in a professional manner. Considerations outlined in 5.8 below apply.

5.6.3 The actuary should not be afraid to resist any attempt to characterise an actuarial opinion as nothing more than speculation. The actuary should be prepared to defend the concept of uncertainty against an attempt to use it to discredit the validity of actuarial work and testimony, and should be ready to explain that actuarial techniques are designed to provide solutions to financial and business problems involving uncertain future events.

5.6.4 The actuary should always be alert to, and be prepared to answer, questions from counsel which seek to:

- manoeuvre the actuary into adopting an extreme position in respect of any particular matter (thereby undermining the value of the rest of the actuary's evidence); or
- describe the actuary's field or background as narrow in an attempt to portray the actuary as inexperienced in an area where the actuary is a fully qualified expert.

5.6.5 As an expert, the actuary is not confined to responding specifically to the narrow question as asked, if this would give a misleading impression. The actuary should expand the answer so that the concepts are made clear.

5.7 **Conflicting Evidence**

5.7.1 At times, the opinions, assumptions and conclusions expressed in expert evidence by others may conflict. These situations may generate doubt in the minds of the audience as to which expert to believe or indeed whether either expert is believable.

5.7.2 If asked to comment on the differences in evidence, the actuary should do so objectively and in a professional manner. It may be that the differences in the two opinions arose because they were based on different factual premises or different assumptions. It may follow, therefore, that the conflict of evidence can be reduced, or even resolved entirely, by showing how the conclusions of both actuaries would more closely (or exactly) match each other once the same factual premises and assumptions are adopted.

5.7.3 In some cases, however, the differences of opinion may amount to one actuary suggesting that the other actuary's opinion is simply wrong. This is particularly likely to be the case where allegations of negligence made by a claimant are supported by one actuarial expert and defended by another. The actuary's overriding duty to the court (as well as the actuary's duty to the client) may require the conflict to be highlighted, if the actuary is asked about it, so that the court can arrive at a proper, and reasoned, judgement. When that is the case, the actuary should not be deflected from this duty.

5.8 **Consistency with Previous Statements**

When preparing expert evidence, actuaries should be mindful of statements that they may have made on the same, or related, subject previously, whether orally or in writing. This includes, but is not limited to, opinions which they have given in evidence for previous cases, articles, speeches or other published comments and past work for clients and/or employers. If the actuary employs different methods or assumptions in the current situation, the actuary should be prepared to explain why.

5.9 **Discovery of Error**

If, after delivering expert evidence, the actuary discovers that a material error has been made in it, the actuary has an obligation to make appropriate disclosure to instructing solicitors as soon as possible. Any errors in the actuary's evidence which the actuary becomes aware of during the course of giving evidence should be drawn to the attention of the court.

6 **Conclusion**

The actuary must always remember that the actuary is there to assist the court. The court is most likely to be convinced by an expert who gives evidence clearly, logically and in measured terms.