

# THE SOCIETY OF ACTUARIES IN IRELAND

## ACTUARIAL STANDARD OF PRACTICE EXP-1

### THE ACTUARY AS EXPERT WITNESS

#### Classification

Recommended

**MEMBERS ARE REMINDED THAT THEY MUST ALWAYS COMPLY WITH THE PROFESSIONAL CONDUCT STANDARDS, AND THAT ACTUARIAL STANDARDS OF PRACTICE IMPOSE ADDITIONAL REQUIREMENTS UNDER SPECIFIC CIRCUMSTANCES.**

#### Legislation or Authority

None

#### Application

Any actuary instructed as an expert witness

Version	Effective from
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1.0	05.09.2001
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1.1	30.12.2006
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#### Definitions

“ASP” means Actuarial Standard of Practice

“the PCS” means the Society’s Professional Conduct Standards

“the Society” means the Society of Actuaries in Ireland

## 1 Purpose and scope

### 1.1 Purpose

This ASP 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

These guidelines apply to actuaries in the Republic of Ireland when they provide actuarial evidence as experts to the courts or to other tribunals.

## 2. Background

### 2.1 Increasing exposure

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. Directories of expert witnesses are available, in which actuaries can promote their services in one or more of the specialist areas in which expert witness evidence is likely to be required.

### 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 Range of issues

Actuaries may be called upon to give expert evidence, which may be oral or written, concerning a broad range of issues, of which some common examples are:

2.3.1 Valuation of personal losses arising from accidents, fatal or otherwise, or alleged negligence

2.3.2 Valuation of individual retirement benefits, for example in family law situations or in claims regarding unfair dismissal

2.3.3 Valuation of assets and liabilities in a pension fund

2.3.4 Valuation of reversionary interests in settled property

2.3.5 Assessment of the relevant factors in disputes involving life or non-life insurance policies

## 2.4 The disclosure rules in High Court personal injury actions

- 2.4.1 Statutory Instrument No. 391 of 1998 came into effect on 1<sup>st</sup> September 1997. This requires, inter alia, that the Plaintiff must produce, within one month of the service of Notice of Trial, a schedule listing all reports from experts which are intended to be relied upon. The defendant or any other party must, within 7 days of receipt of the Plaintiff's schedule, produce his or her own schedule, listing all reports from expert witnesses intended to be called.
- 2.4.2 Within 7 days of the receipt of the Defendant's schedule the parties must have exchanged copies of all reports listed in their respective schedules.
- 2.4.3 While the parties are statutorily obliged to exchange expert witness reports, this does not mean that they must accept the contents of those reports without challenge. Mutual disclosure does not constitute automatic acceptance.
- 2.4.4 The author of an expert witness report must therefore be prepared to give the source of all items stated in a report to be facts and to explain the basis upon which any opinions presented in a report were formed.

## 3 Background preparation

### 3.1 Review of relevant ASPs

An actuary undertaking an expert witness assignment should be familiar with all relevant ASPs issued by the Society, and be confident of possessing sufficient experience relevant to the case.

### 3.2 Conflicts of interest

- 3.2.1 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.
- 3.2.2 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.
- 3.2.3 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 in coming to a conclusion should take into account the solicitor's opinions regarding the potential conflict.

- 3.2.4 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.
- 3.2.5 It is unlikely to be acceptable to either the instructing solicitors or an actuarial firm if two colleagues representing the same firm give evidence for opposing parties in a case.

#### **4. Preparation of evidence**

##### **4.1 Responsibility for data**

The actuary is not normally responsible for obtaining the data necessary for an actuarial analysis. However, the actuary should, where practicable, be satisfied as to the reasonableness of the data provided. In particular, the actuary should disclose any data limitations or shortcomings that might affect or have implications for the results.

##### **4.2 Actuarial assumptions**

- 4.2.1 The actuary is normally responsible for both the actuarial assumptions and the methods of valuation used in writing a report and in giving evidence. However in determining the assumptions due regard ought to be given to any established practice in a particular area (e.g. regarding assumed real rates of future investment return in the context of personal injury actions, bearing in mind that the Supreme Court has held that actuarial evidence be regarded as a "guide" to the trial judge) and to any evidence provided by other experts (e.g. medical or economic 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 provide impartial evidence to the court. An expert witness should confine the evidence given to matters which lie within the expert's experience and expertise.

4.4.2 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. The actuary's own opinion should not be modified to suit the exigencies of litigation.

4.4.4 If legal advisers 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 adviser's 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

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 the audience is unfamiliar. The actuary should explain technical terminology so that it 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 A written report should include the sources of the data used in any calculations made and a description of the actuarial methods and assumptions used to make those calculations.

- 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 Meetings of experts
- 5.3.1 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.
  - 5.3.2 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.
  - 5.3.3 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 5.3.1 and 5.3.2 applies to any circumstances where opposing experts are instructed to communicate directly with each other, rather than through solicitors.
- 5.5 Cross-examination
- 5.5.1 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.
  - 5.5.2 The actuary should explain and illustrate concepts and calculations in a professional manner. Considerations outlined in paragraph 5.8 below apply.

- 5.5.3 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.
- 5.5.4 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.
- 5.5.5 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.
- 5.6 Conflicting evidence
- 5.6.1 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.
- 5.6.2 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 Consistency with previous statements
- When preparing expert evidence, actuaries should be mindful of statements that they may have made on the same, or a 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.

#### 5.8 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.