

Raising the bar

Jonathan Cope reminds us of the importance of the RICS *Surveyors acting as advocates* practice statement (PS) and guidance note (GN) and how surveyors should conduct themselves



For those of you thinking ‘The few letters I’ve written in adjudications aren’t advocacy so the practice statement and guidance note won’t apply to me’, think again: both apply when any RICS member agrees to act before any tribunal in the UK, including adjudicators, arbitrators, valuation tribunals, etc. For those of you thinking ‘Yes, but it’s only guidance’, not so: the PS is mandatory.

Let me refresh your memory of the wording of the preamble in all RICS PSs: ‘*RICS members should also note that when an allegation of professional negligence is made against them, the court is likely to take account of any relevant PS published by RICS in deciding whether or not they acted with reasonable competence. Failure to comply with practice statements may, accordingly, lead to a finding of negligence against an RICS member.*’ Having now grabbed your attention, I shall continue...

Lack of teeth

Prior to 1 January 2009, only a GN existed. The problem was that this lacked the ‘teeth’ of a PS and was also in need of updating. The Dispute Resolution Professional Group felt that mandatory rules of conduct for surveyor-advocates were important because surveyor-advocates do frequently appear opposite solicitors and barristers. Those professions are subject to mandatory rules of conduct governing advocacy and with no mandatory rules applying to surveyor-advocates, there was a perception of lower professional standards. This could taint surveyor-advocates’ submissions. To redress this imbalance, the PS requires surveyor-advocates to comply with the same fundamental principles as solicitors and barristers.

The principal message of the PS is that, while the surveyor-advocate owes duties to his client, he also owes a duty to the tribunal to act fairly and to assist in maintaining the integrity of the tribunal’s process. This is not the time to regurgitate the entire PS and GN, but I urge everyone reading this article to download it from the RICS website* and read it at the earliest opportunity.

A couple of the key duties in the PS are:

The duty not to deceive or mislead the tribunal or any opposing party

This is a very important duty but one that should not be misinterpreted – it should not preclude surveyor-advocates from putting a favourable interpretation on the evidence, but it should stop them from ‘twisting’ evidence to make up for shortfalls in a bad case.

The duty to draw the tribunal’s attention to all relevant case law or legislation, whether supportive of the client’s case or not

The first part of this duty goes without saying – it’s the second part that might come as a surprise to some. In my experience, this duty is ignored by some lawyers as well as some surveyor-advocates – but that is no excuse for failing to comply with it. Anyway, from a practical perspective it’s better to confront an unsupportive case at an early stage, so you can explain to the tribunal how it will be dealt with, rather than to wait for the other side to raise it and then look unprepared as you attempt to grapple with it.

The PS sets out many other rules for surveyor-advocates, all of which are supported by detailed guidance in the GN. I will leave you to read that for yourselves and move on to some of the practical techniques for good advocacy.

Case management

The first meeting with any client in the unfortunate position of being in a dispute can be a daunting prospect. Trawling through contracts, drawings and sometimes years of correspondence can be even more of a challenge. However, this exercise is essential because successful case analysis involves accurately identifying the issues or facts in dispute. This in turn focuses the mind on the evidence needed to support those issues or facts. For example, imagine you are representing a contractor claiming loss and expense from prolongation of the works as a result of a variation. A simple case analysis might look something like Figure 1.

Facts to establish	Available evidence
There was a variation to the contract.	Written instruction from the PM, contract specification, drawings, etc.
That variation caused the works to be delayed beyond the completion date.	Progress records including minutes and updated programmes, witness evidence, expert delay evidence, etc.
Direct loss and expense has been incurred as a result of that delay beyond the completion date.	Evidence of payments to non-working site staff, hire invoices for plant and welfare facilities, etc.

Figure 1 – A simple case analysis

Once a case analysis has been developed it becomes the case theory, that is: the best explanation on the available evidence logically explaining why the client's case will win.

On the foundations of the case theory, the surveyor-advocate can now start preparing the submissions. The PS is clear that all of the submissions prepared by the surveyor-advocate must be properly arguable and must not allege fraud or corruption without credible supporting evidence. Regardless of the tribunal, the first submission is likely to be some sort of statement of case. Some practical drafting tips are:

1. It is essential to get the procedural aspects of the statement of case correct (for example, the correct names of the parties should be obvious, but are wrong in a surprising number of cases)
2. Plead concisely. This does not necessarily mean briefly, but just say what you need to say clearly and in as few words as possible
3. Use plain English. Explain technical terms and avoid the use of Latin unless absolutely necessary
4. Attach all *relevant* evidence
5. Paginate all evidence and, when referring to evidence in your statement of case, cross reference to the exact page in the bundle. Remember that you want to be as helpful as possible to your tribunal.

The next submission is likely to be some sort of defence. Many of the same drafting tips apply to defences and the following should also be noted:

1. Identify the defence before starting to draft
2. Deal with every allegation. If necessary, review the statement of case using different coloured highlighter pens to mark which contentions are agreed, which are denied and which need to be proved. You may also find it useful to prepare a table setting out the defence to each claim and the evidence to be relied on
3. Respond to the statement of case on a paragraph by paragraph (or at least section by section) basis; this will make the defence more user-friendly
4. Admit any allegation known to be true, and/or state when nothing turns on an allegation
5. Where a denial is made, the reasons for that denial must be given
6. Only attach *relevant* evidence not already attached to the statement of case.

Evidence

A case or defence means nothing unless it is supported by evidence. Ultimately, by the time a dispute has developed to the extent that it needs to be resolved by a tribunal, what actually happened during the project has become less significant than what a party can *prove* happened. Evidence is therefore essential for persuading the tribunal. However, it is not enough to simply attach some site



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instructions to the statement of case and hope for the best, the surveyor-advocate needs to know the rules of evidence that apply to their particular tribunal.

For example, the surveyor-advocate must know:

- where the burden of proof lies and when it can shift between the parties
- the different categories of evidence (testimony, documentary and real evidence)
- the difference between fact and opinion evidence
- the difference between direct evidence and hearsay
- the exclusionary rules relating to privilege
- the matters the tribunal is likely to take into account when assessing the weight of the evidence.

Oral advocacy

While the formalities of an adjudication meeting are certainly not those of a court or arbitration hearing, surveyor-advocates should not ignore the essential skills of oral advocacy. An adjudicator can still ask a surveyor-advocate to make an oral submission, or even to cross examine a witness. This can be a nail-biting prospect if the surveyor-advocate is sat across the table from a barrister, or even a QC. So, imagine it is two days before a meeting or hearing and the tribunal asks both representatives to make a closing submission at the meeting or hearing; when preparing for the submission the surveyor-advocate needs to think about what result he is trying to achieve. He needs to set out the submission as propositions supported by evidence, and not the other way round. When delivering the submission, the surveyor-advocate needs to think about:

1. Style: two tones of voice are required – a functional tone for dealing with procedural matters and a persuasive tone when trying to persuade the tribunal
2. Signpost: tell the tribunal the structure of the submission at the beginning
3. Avoid words such as 'story' and 'version' because they are not appropriate in a submission. Use words such as 'account' and 'case' instead.

All of the submissions prepared by the surveyor-advocate must be properly arguable and must not allege fraud or corruption without credible supporting evidence



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Increased opportunities

With the increased use of alternative dispute resolution in the property and construction sectors, it is inevitable that the opportunities for surveyors to act as advocates will also increase. This is something that should be embraced by the profession. The PS sets the boundaries within which this can be undertaken and I recommend that any member undertaking advocacy reads it again and again until they fully understand the mandatory requirements. If members need any persuading to do this, then the extract from the PS preamble at the beginning of this article and the word 'negligence' should be enough. However, please remember that the aim of the PS is not provide a 'stick' to beat you with, but rather to raise standards. The very useful guidance in the GN elaborates on how members can comply with the PS.

Jonathan Cope is a Chartered Surveyor and Barrister, and is a Director of MCMS Limited. As well as regularly acting as an adjudicator and expert witness, he has represented both referring and responding parties in adjudications
jonathan.cope@mcms.co.uk

Training info

Some surveyors may wish to undergo additional training, particularly on the practical aspects of advocacy, so RICS has developed a two-day advocacy training course with BPP Professional Education. This covers both written and oral advocacy skills and the emphasis is either on a construction or property case study.



For details of course dates in 2010, contact Raj Sohal of RICS DRS via rsohal@rics.org



*The combined PS and GN is available to download from www.rics.org/guidance



RICS Dispute Avoidance and Resolution Conference, 9 March 2010, London, www.rics.org/events

RICS Expert Witness Roadshow, various dates/locations, www.rics.org/events

The Surveyor-Advocate in Practice, various dates/locations, www.rics.org/events



Related competencies include: M006, T064, T077