

# The Academy of Experts

## FACT SHEET

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### Conflicts of Interest for Experts & others

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## What is a Conflict of Interest?

In this Fact Sheet the term 'Conflict of Interest' is also referred to as 'Conflict' and used interchangeably with the full phrase. The term Conflict of Interest is often misused in everyday speech. In professional circles there are many definitions and a large number of Professional Institutions have published their own definitions and Rules.

Black's Law Dictionary defines a conflict of interest as, "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties". For Expert Witnesses it might better be defined as, "any situation where an interest of the Expert, whether pecuniary or otherwise, might, or might be seen to, influence their independence, impartiality or integrity in providing expert testimony".

In simple practical terms a Conflict of Interest is when **you** believe that because of some knowledge or relationship that you may have, your judgment is, or is likely to be, impaired.

## Types of Conflict

In practice there are three distinct types of Conflict of Interest:

- Actual Conflict**  
This is when **you** believe you are conflicted (as in the definition above).
- Deemed Conflict**  
Some organisations, for example arbitral bodies, include in their Rules definitions of certain situations which are 'deemed to be conflicts of interest'. The Rules will define the action to be taken and or the consequences.
- Perceived or Potential Conflict**  
This is when a reasonably minded person who is in full possession of the facts and information would reasonably believe there was or might be a Conflict.

### WARNING

Failure to properly disclose can:

- damage your **Professional Reputation**;
- damage your **Personal Credibility**; and
- cause little or **no weight** to be given to your evidence

## Why do Conflicts pose a problem?

- ❑ Independence is a fundamental principle of the Rules of Natural Justice. There are many trite sayings such as 'no man may be judge and jury in his own cause'. Each of these can be used to demonstrate what in the end can be distilled into The Academy's '3I's' – Independence, Impartiality, Integrity. Those using a 'Professional' are entitled to believe and assume that the individual does not have any Conflict of any type. They should not need to question the individual about whether any Conflicts exist as the Professional should already have made a completely transparent disclosure.
- ❑ Although this document primarily deals with Expert Witnesses the basic principles apply equally to others - referred to here as 'a Professional' - operating in the Dispute Resolution environment.
- ❑ The term 'a Professional' is used to denote a judge, arbitrator, adjudicator, Dispute Resolver or any similar role.

## How should the Expert decide if there is a Conflict?

- ❑ The start of the process is to do what is known as 'a conflicts check'. Essentially this is the undertaking of a positive look at clients and others, both professional and personal, who may be the underlying reason for there being a Conflict. This should be relatively simple and straight forward for a sole practitioner. However, for large entities there should be in place a Conflict checking enquiry process which ensures that, for example, unknowingly one person in the organisation is not acting for one side whilst another is acting for the other side.
- ❑ Once all appropriate checks have been completed and the results assessed the Expert must decide if any knowledge or relationship that they may have, will in their opinion, impair or may impair, their judgment. Should the answer be positive, the Expert should decline to act on the basis of an Actual Conflict of Interest.
- ❑ That decision should be relatively easy. The difficulty comes with the Perceived Conflict. The test is straightforward 'would a reasonable person in full possession of the facts, reasonably think that the Expert's judgment may be or may become impaired'. If in doubt always err on the side of caution.
- ❑ The Expert should check with all the Rules under which they are operating to see if they include events deemed to be Conflicts or they give Guidance on the subject.

## Who should decide if there is a Conflict?

- ❑ If the Expert decides there is an actual conflict, that decision can only lead to the Expert declining to act because of Conflict.
- ❑ If the Expert decides there is or may be a perceived conflict, then the ultimate decision should be made by the appointers. Disclosure must be made (see below).

## What action should the Expert take?

The Expert must at the earliest opportunity notify those appointing him of any:

- ❑ **Actual Conflict**  
The Expert should consequently withdraw from the case.
- ❑ **Deemed Conflict**  
Depending upon the Rules that have designated a deemed Conflict, the Expert must, in accordance with the Rules, either withdraw or make a full disclosure (see below).
- ❑ **Perceived or Potential Conflict**  
A full disclosure (see below) must be made and the appointer should decide if the appointment is to continue.

## Disclosure – what is it?

- ❑ A full, complete and frank disclosure must be made when all information relating to the perceived conflict, is completely stated in an unambiguous detailed manner neither omitting or 'hiding' any matter so that the complete picture is completely clear to the reader without the necessity to seek further information from the Expert or other Professional. There should also be a statement that in the Expert's opinion the perceived conflict does not affect his ability to conform to the '3I's' or the Expert's overriding duty to the court.
- ❑ If the appointment continues after the disclosure to the Appointer(s) the Expert's Report must include a full disclosure.
- ❑ Non-disclosure, in full or in part, is likely to damage the Expert's reputation and to cause less weight to be given to the Expert's entire evidence.

## Continuing Duty

- ❑ The duty to consider and disclose any Conflict is a continuing duty and must be kept under review. Should there be any change in circumstances during the currency of the appointment any Conflict actual or perceived must be immediately notified accompanied by a full disclosure.

### Extract from the Code of Practice for Experts.

“An Expert should not accept instructions in any matter where there is an actual or potential conflict of interests. Notwithstanding this rule, if full disclosure is made to the judge or to those appointing him, the Expert may in appropriate cases accept instructions when those concerned specifically acknowledge the disclosure. Should an actual or potential conflict occur after instructions have been accepted, the Expert shall immediately notify all concerned and in appropriate cases resign his appointment.”

### Extract from the Expert’s Declaration to be used in their Reports

“I know of no conflict of interest of any kind, other than any which I have disclosed in my report.

I do not consider that any interest that I have disclosed affects my suitability as an expert witness on any matters on which I have given evidence.

I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to (the) points above.”

## Notes for information

- ❑ The Bar Council for England and Wales does not believe that an actual conflict exists where members of the same chambers are involved in a case where, for example, one is arbitrator and another is an advocate. It does however acknowledge that there may be an international perception that this is not the case.
- ❑ The International Bar Association (IBA) has a traffic lights grading regarding conflicts. Essentially where a situation is coded as a ‘red conflict’ it means one cannot act; whilst conflicts ‘coded green’ are not deemed to be conflicts barring the individual from acting. However, those designated as ‘amber’ require further investigation and disclosure. The IBA Rules provide useful guidance but they are not definitive and the English courts have voiced disapproval of their detail.
- ❑ Experts should always consult any guidance given by their professional bodies and the Rules under which they would be operating for that specific appointment.
- ❑ The Golden Rule is if **you feel conflicted** do not accept the appointment; if you do not feel conflicted but suspect others, especially a losing party, might feel you are, disclose fully, completely, accurately and transparently.

# The Academy of Experts

## The Academy (TAE)

Located in Gray's Inn TAE was founded in 1987 with the objective of providing, for the first time, a professional body for experts to establish and promote high objective standards.

Although there is representation on the Academy's Council from the legal profession the majority of the officers, including the Chairman, are practising Experts - The Academy of Experts (TAE) is run by Experts for Experts and those using them.

## Training and development

TAE offers a comprehensive range of training programmes to enable members to develop their expert skills, and undertake Continuous Professional Development activity. Courses range from basic Role and Responsibilities through to the requirements of Procedure Rules and the practice of Giving Evidence.

TAE is also a training and accreditation body for ADR Neutrals, including Mediators, Conciliators and Expert Determiners. It publishes and maintains The Register of Qualified Dispute Resolvers and awards the designatory letters QDR to those achieving the approved standard. Standards are enforced in exactly the same way as for experts.

## Accreditation of experts

All applicants to TAE who wish to become Accredited Practising Expert Witnesses undergo a rigorous vetting procedure to ensure standards of excellence are maintained. This is the process which gives the officially recognised full accreditation as a Practising Expert. Those achieving it are awarded the designatory letters MAE. Ethical and professional standards are underlined by Codes of Practice and enforced by a disciplinary committee.

## ADR

The promotion of Cost Efficient Dispute Resolution became increasingly important to TAE. It is now a major force in the introduction and development of Alternative Dispute Resolution (ADR) and has led to the development of the Faculty of Mediation and ADR.



## Range of services

TAE provides a full range of services to its members including:

- Technical Helpline
- Bespoke Training
- Technical Meetings
- Magazine and regular newsletters
- A detailed Expert's Handbook for Practical Guidance
- A regular survey of expert's fees
- Regular meetings on matters of expert interest
- Social functions

TAE provides a number of services which assist both Academy members and the legal profession including:

- ExpertSearch Finding and matching the right accredited expert to the case.
- Full training & accreditation of Commercial Mediators. The Academy awards the qualification QDR (Qualified Dispute Resolver) to members on its register.
- Mediator Appointment Service - Finding the right accredited mediator.
- Membership also open to lawyers.