

**THE
ACADEMY
OF
EXPERTS**



EXPERTS PARTICIPATING IN COMMERCIAL MEDIATION

GUIDANCE FROM THE ACADEMY OF EXPERTS

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GUIDANCE FOR EXPERTS IN MEDIATION

THE ACADEMY OF EXPERTS

1. Introduction

1.1 These Guidance Notes offer guidance to Experts who participate on the instruction of a party in a commercial mediation taking place in England and Wales. Experts participating in commercial mediations in other jurisdictions will also find these Guidance Notes helpful, but they should inform themselves of the procedure and law in relation to mediations in the relevant jurisdiction. These Guidance Notes are not intended to apply to a situation where an expert is instructed as a technical adviser to a mediator (rather than to a party).

1.2 The focus of these Guidance Notes is to highlight potential ethical and conflict issues which may arise in the context of commercial mediation and which Experts participating in Mediation should be aware of.

1.3 The Academy of Experts has published other documents relevant to Experts participating

in mediations, for example '*Guidelines for Mediation*'.

1.4 For more general guidance around the role of an Expert see www.academyofexperts.org

1.5 Where an Expert is instructed by their client directly, without the involvement of any legal representation, the Expert will need to be particularly alert to the issues addressed in these Guidance Notes.

Definitions

1.6 Throughout this document:

- i) An Expert means an individual with knowledge and/or experience of a particular field or discipline beyond that to be expected of a layperson, who has been appointed by a party to a dispute to provide independent expert opinion in relation to issues arising out of the dispute.

- ii) Mediation means any dispute resolution forum where parties to a dispute, together with a third party neutral, participate in dialogue of a non-binding nature which is without prejudice, and where the communications, whether written or oral, will not normally be disclosable, or capable of being referred to, in any continuing dispute proceedings in circumstances where Mediation does not lead to a resolution of the disputed issues. The confidential nature of mediation proceedings is an important aspect of Mediation in England and Wales. It should not be assumed that this is the case in other jurisdictions.
- iii) Mediator means the individual howsoever appointed to act as Mediator (i.e. to mediate as between the parties with a view to achieving a resolution of the dispute) whether by themselves, or as co-mediator. There are many different types of mediation, including, for example: (i) facilitative mediation, where the mediator's role is to facilitate the negotiation between the parties to a dispute; and (ii) evaluative mediation, in which mediators may make recommendations and/or express non-binding opinions on some or all elements of the parties' cases.
- iv) Words importing the singular also include the plural and vice versa when the context so requires.

2. Independent Expert Witness or Expert Adviser?

2.1 It is important for any Expert participating in a Mediation to understand whether they are being, or have been, appointed by their client as:

- i) An "Independent Expert Witness", appointed by a party or parties to a dispute, whose appointment extends to the giving of, or preparing of, expert opinion evidence, in the context of Court proceedings whose role is governed by the Civil Procedure Rules ("CPR") or in the context of arbitration or other tribunal proceedings; and/or
- ii) An "Expert Adviser" or "Shadow Expert", appointed to a limited role of providing expert advice to the client, and not

extending to the giving of, or preparing of, evidence in the context of Court or arbitral or other tribunal proceedings.

2.2 An Independent Expert Witness appointed in connection with Court proceedings will need to be familiar with the requirements of Part 35 of the CPR, including, but not limited to, the requirements that (i) it is the duty of Experts to help the Court on matters within their expertise and (ii) this duty overrides any obligation to the person from whom the Expert has received instructions or by whom they are paid.¹ An Independent Expert Witness preparing, or giving, expert opinion evidence before arbitral or other tribunals should be

¹ See CPR Part 35.3.

- aware that it is common for arbitral and other tribunals to adopt a similar approach to the CPR and they should ascertain, and be familiar with, such requirements at the outset of their involvement.
- 2.3 These Guidance Notes are principally concerned with Independent Expert Witnesses.
- 2.4 Expert Advisors, by contrast, are not governed by the CPR, or equivalent, although they will of course remain subject to any professional or regulatory obligations. Experts accepting appointments in this capacity should be aware, and their clients should be made aware, that such an appointment will usually preclude the Expert Advisor from accepting a subsequent appointment as an Independent Expert Witness in the same matter.
- 2.5 Independent Expert Witnesses participating on behalf of a party in a Mediation are not subject to an overriding duty to assist the Mediator/s. However, if the intention is that they will continue to be involved in the proceedings as Independent Expert Witnesses should no settlement be achieved, then it is essential that they do nothing which would compromise their ability to act as an Independent Expert Witness going forward, including compromising their ability to give independent opinion evidence.
- 2.6 Accordingly, if the Expert has been retained, or is likely to be retained going forward, in the capacity of an Independent Expert Witness, the Expert will need to be aware of, and ensure that the party appointing them is aware of, the need to ensure as far as possible that the Expert's participation in the Mediation does not limit their ability to subsequently perform their role as of an Independent Expert Witness.
- 2.7 In such a case, it would be prudent to ensure that the Expert's role as an independent professional is recognised by the Expert's client in the context of the Mediation. In general terms the Expert and their client should be aware of the following:
- 2.8 An Expert should avoid expressing any expert opinion within the Mediation that they would not be willing to provide before the relevant tribunal or Court;
- 2.9 If an Expert does express an opinion within the Mediation that they would not be willing to provide to the relevant tribunal or Court, that will preclude the Expert's ongoing involvement as an Independent Expert Witness.

3. Preparation for Mediation

- 3.1 It is necessary for the intended participants in any Mediation (including any Experts) to adequately prepare. From the Expert's perspective important preparatory steps are likely to include:
- 3.2 Understanding the type of Mediation which is planned and identifying and agreeing the role of the Expert in the Mediation; and
- 3.3 Reviewing, and ensuring familiarity with, the documents and expert issues.
- 3.4 In addition, the Expert may be asked to assist those instructing them with their preparation.

The type of Mediation and the Role of the Expert in the Mediation

- 3.5 It is important for the Expert to have clear instructions as to the type of Mediation (i.e. whether it is facilitative or evaluative in nature), the anticipated process, the role of the Expert at the Mediation, including whether they will be required to be physically present, with whom they will communicate during the Mediation and what task(s) it is anticipated the Expert will be carrying out at the Mediation.
- 3.6 The Expert should agree, with those instructing them, in advance of the Mediation, whether their attendance at the Mediation is useful and/or necessary, and, if yes, the manner of any attendance. An important consideration will be the need to preserve the independence of any Expert who has been, or in the future may be, appointed as an Independent Expert Witness.
- 3.7 It is common for each party to have its own break-out room during the Mediation for private discussions (without the Mediator

and the other party), although the Mediator may from time to time visit this room. It may not be sensible for the Expert to be present in private meetings involving just the party and their legal representatives. The parties and their representatives may explore matters (e.g. concessions, or compromises proposed by the other party) in the presence of the Expert which may impact on an Expert's ability to fulfil their obligations as an Independent Expert Witness at a later date.

- 3.8 Experts may attend the Mediation by telephone only (or not at all), if Expert issues are limited in scope, or if Expert issues are not central to the dispute or to the nature of the settlement discussions, or where the dispute is relatively small in value. This limited involvement can help preserve the Expert's independence and impartiality for any future, or ongoing, role as an Independent Expert Witness.
- 3.9 In advance of any Mediation, the Expert should ask what, if any, tasks the Expert will be required to carry out, as they will inevitably require preparation. Common tasks include:
- 3.10 The presentation of an oral synopsis of their Expert opinion at some point during the Mediation, whether during a session with the parties and the Mediator, or in sessions limited to the Expert's party and the Mediator. As part of this process, the Expert may be required to prepare a written presentation that can be shared with both parties and the Mediator. Separate written Expert statements may assist the parties and the Mediator in identifying the key Expert issues, the areas of disagreement or differences in the Experts' respective opinion/

interpretation, and the consequences or effects of these disagreements or differences. If the Expert has been appointed, or may be appointed going forward, as an Independent Expert Witness, the Expert should prepare any oral or written presentation as if the Expert was subject to the overriding duty to the relevant Court or arbitration or other tribunal.

- 3.11 Participating in joint Expert meetings with the other party's Expert, to identify matters which the Experts are able to agree and those matters which they are unable to agree. It is important to agree the parameters of any such meeting in advance, including whether the meeting will be without prejudice and whether the Experts will be expected to produce a joint statement identifying areas of agreement and disagreement which can be relied upon if the parties fail to settle the dispute (as would be the case with Court or arbitration or other tribunal joint Expert statements). Again, if the Expert has been appointed, or may be appointed going forward, as an Independent Expert Witness, the Expert should approach any such discussions and joint statement on the basis that the CPR, or similar, applies. If already appointed as an Independent Expert Witness, then the Expert will already be subject to the obligations imposed on such Experts. If not yet appointed as an Independent Expert Witness it is prudent to avoid acting in a way which may compromise the Expert's ability to accept such an appointment going forward. It is not the role of Experts in Mediation to seek compromise by way of concessions (whether in the context of joint Experts' meetings or otherwise). See Caveat Expert after 6.4.
- 3.12 Experts participating in private breakout meetings between their client and the

Mediator should establish whether the Mediation is being conducted on the basis that the content of such conversations are, absent express indication to the contrary, confidential between the party and the Mediator, or whether, as in some cases, the content of the conversations are not confidential and can be passed on by the Mediator to the other party.

Possible pre-Mediation work an Expert may be asked to provide

- 3.13 Opinion: The Expert may be asked to provide the party instructing them with the Expert's opinion as to the strengths and weakness of the case. Again, if the Expert has been appointed, or may be appointed going forward, as an Independent Expert Witness, the Expert should do so on the basis that the CPR, or similar, applies. Such an opinion, if produced in a way which can subsequently be disclosed, may also assist the Expert in subsequently establishing their independence. The Expert should understand the differences between the roles of adviser and Independent Expert Witness. If engaged to act as Expert Advisor at this stage, they will rarely be able to continue as an Independent Expert Witness subsequently.
- 3.14 Mediation statement: The Expert may be asked to prepare or provide input into a mediation statement, a written position statement provided to the Mediator and the other party for the purpose of the Mediation. Rather than having the Expert's 'content' incorporated into a mediation statement, it may be preferable to provide a degree of separation by having a separate summary statement, or report, addressing the matters upon which the Expert offers independent opinion. If the Expert has been appointed, or may be appointed going forward, as an Independent Expert Witness,

the Expert should ensure that their input does not stray into advocacy.

Knowledge gained during the Mediation

3.15 Broadly speaking there are two central aspects for an Expert to be aware of:

3.16 Information gained by the Expert during the Mediation may be relevant to their opinion in the context of any ongoing or subsequent Court or tribunal proceedings. Depending upon the nature and relevance of the material, the Expert may not be able to ignore such material when preparing a written report or giving oral evidence. Where the information or material is subsequently disclosed by the relevant party in the proceedings, this may not give rise to any issues. But it is possible for information or material to be disclosed in a Mediation which does not fall into this category (e.g. previous professional opinions which are subject to privilege), but which, having been made aware of, causes an Expert to conclude they are not able to ignore the same. It is for this reason that it is particularly important that the Expert and the party appointing them agree in advance of the Mediation the Expert's role in the Mediation and their likely role thereafter, assuming no settlement.

3.17 Similarly, information or knowledge gained by the other party about the Expert, and about the Expert's opinions, may be capable of being used by the other party for the purpose of challenging the Expert's opinion and/or their independence in any subsequent proceedings.

Managing expectations of those instructing you

3.18 Managing the expectations of both the party appointing you and their legal team (if any) is an important aspect of an Expert's role in the mediation process. Some parties will have

more experience than others in the mediation process. Many, however, will not understand the role of an Expert, and in particular the duties which an Independent Expert Witness is under.

3.19 As a result, it is not uncommon for parties to have incorrect and unrealistic expectations. It is important that at all stages of the Mediation, the Expert establishes that the party and its representatives understand that the Expert will not do anything that compromises or impairs, or is likely to compromise or impair, any of the following:

3.20 The Expert's independence, impartiality, objectivity and integrity.

3.21 Any applicable professional code of conduct.

3.22 The good repute of the Expert, or of Experts, generally.

3.23 The Expert's proper standard of work.

3.24 The Expert's duty to maintain confidentiality.

3.25 Where the Expert is appointed, or may be appointed, as an Independent Expert Witness, the Expert's duty to the relevant Court or arbitral or other tribunal.

3.26 Experts can express professional opinions, but should be aware of the need to avoid straying into advocacy or negotiation and may need to explain to their client that their role will require them to be honest with the facts, whether or not these facts are adverse to the Expert's client's case and/or interests.

Conclusion: the importance of good preparation

3.27 Good preparation with your client and any legal representatives should help avoid the risks associated with participating in the Mediation process and should reduce the likelihood of professional and ethical issues arising.

4. Participation in the Mediation

- 4.1 Experts should recognise that strong emotions can often be expressed by clients during Mediations, but should ensure that their own conduct remains calm, considered and professional throughout.
- 4.2 As flagged before, it is essential that an Independent Expert Witness, and Experts who might be appointed as such, conduct themselves in a manner which does not compromise their ability to act as an Independent Expert Witness going forward.
- 4.3 The fact that Mediations are undertaken on a without prejudice basis does not absolve an Independent Expert Witness from the duties imposed upon them by the CPR, or similar, nor more generally from their professional or regulatory obligations. Absent justification or good reason (e.g. new materials or evidence, or previously unreferenced literature) Experts should avoid saying anything during a Mediation that could conflict with opinions previously expressed, or which they may subsequently express in Court proceedings or to an arbitral or similar tribunal.
- 4.4 Experts should be mindful of the fact that, although the surroundings can be relatively informal, and statements may be made verbally, precision of phrasing remains important (i.e. as if the statements were written and in the formal atmosphere of a Court or arbitral or similar tribunal).
- Dealing with detrimental information**
- 4.5 During a Mediation, information can come to light, within the confines of private sessions, that is detrimental to a client's case. Knowledge of such information may affect that client's Expert's opinion. If subsequently instructed to produce a report and/or give oral opinion evidence, their overriding duty to the Court or arbitral or other tribunal would prevent them from ignoring relevant information which they are aware of, whether from the Mediation or otherwise.
- 4.6 The material may in any event have to be disclosed in any proceedings or arbitration by the relevant party, but the Independent Expert Witness is, irrespective of such disclosure, obliged to refer to any relevant material in any report and/or oral opinion evidence in any Court or tribunal proceedings. While the Expert may not be required to disclose this information in the context of the Mediation, they should not express opinions which do not take into account such information.
- 4.7 If new relevant information is provided to the Expert by the other party's Expert it will almost always be sensible to discuss this material with your client before discussing it with the other party's Expert.
- 4.8 It is important that the Expert makes their client aware of the potential impact of any detrimental information on the Expert's opinion, so that the client's approach to the Mediation, and any settlement proposals, can be informed by this.
- Confidentiality**
- 4.9 Experts should remember that the provision of any information during the Mediation will be strictly without prejudice and almost always subject to an agreement of confidentiality, subject to the Expert's duties to the Court (or arbitral or similar tribunal) and to any statutory or regulatory disclosure obligations.

4.10 It is important that Experts ensure that, if they are instructed to engage with representatives of other parties to the dispute, they avoid

disclosing information not previously disclosed, unless expressly authorised by their client to do so.

5. Interface with the Mediator

5.1 It is unlikely that there will be any interface between the Expert and Mediator in advance of the day of the Mediation. Normally any questions that the Mediator has in advance of Mediation will be channelled through the participants and/or their legal representatives. Any direct contact between the Mediator and the Expert is to be discouraged/avoided. Should the Mediator seek to contact the Expert directly in advance of the Mediation, the Expert should inform their client and/or those representing them and seek guidance. Any direct communication, if authorised by the client, should be in relation to matters of expert opinion only and not on a wider basis.

5.2 The Expert should, in advance of the Mediation (and without contacting the Mediator), familiarise themselves with who will be attending the Mediation on behalf of all parties involved, the facilities at the Mediation venue, the Mediator's skillset and any technical expertise, the time allowed for the Mediation, and in particular whether the Expert is expected to attend for all or part of the Mediation.

5.3 As set out above, although the Expert should understand in advance of the Mediation the likely procedure or format of the Mediation, they should be prepared for the unexpected or unplanned, including but not limited to:

- i) Meeting with Experts from other parties and/or the Mediator to discuss matters

falling within the Expert's expertise;

- ii) Being excluded, or excluding themselves, from certain sessions to preserve independence, including meetings of the legal teams of the party appointing them;
- iii) Managing expectations of their clients and legal teams as to the Expert's availability during the Mediation; and
- iv) The prospect of the Mediation running later into the day/night and the need for accommodation and/or transport arrangements.

In relation to any such matters, if an issue arises which causes the Expert concerns or possible concerns, the Expert should communicate this to their client and their client's legal representatives.

5.4 Experts should be sensitive to and take note of how much assistance others require to understand the Expert's area of expertise. In the context of Mediation, this applies particularly to the Mediator and, of course, to the Expert's own client and legal representation.

5.5 If the Mediator appears to misunderstand the Expert's opinion or parts of it, and/or has reached a different conclusion to the Expert, then the Expert should draw this to the attention of those who have appointed the Expert.

6. Post Mediation

- 6.1 Should the Mediation lead to a settlement, with all disputes or all disputes involving the Expert being resolved, then the Expert's role in the Mediation will come to an end.
- 6.2 Insofar as any settlement agreement includes terms which touch on the areas of the Expert's opinion, such as financial or cost schedules or remedial works, the Expert may be asked to comment, check, phrase or verify the contents of such terms. If so, the Expert should take care to obtain clear instructions and to satisfy themselves that they are comfortable with such instructions and any reliance placed upon their expert input.
- 6.3 Should matters involving the Expert not settle at the Mediation, the Expert should take the following steps with their client or their legal representatives:
- i) Clarify their role going forward;
 - ii) Confirm in writing what (if any) new information has been obtained at the Mediation and seek clear instructions as to any requirements as to documents created for and/or during the Mediation, such as non-disclosure in subsequent litigation (or destruction of any notes of the Mediation as required);
 - iii) Insofar as the Expert's instructions change as a result of the Mediation, the Expert should ensure that such changes are recorded in writing, separate from any written dialogue relating to the Mediation;
- iv) If matters have been agreed as between Experts during the course of the Mediation and assuming that there are ongoing proceedings, the Expert should consult with their client and their client's legal representatives and review whether any joint statements should be produced in the ongoing proceedings; and
- v) Inform those instructing the Expert whether any views of the Expert have changed as a consequence of the Mediation and identify if anything has been communicated to or by the Expert that causes concern as to their ability to continue as an Independent Expert Witness.
- 6.4 If the expert is requested to participate in a further mediation at a later date, they should again confirm their brief and role, seek formal instructions, and follow these guidance notes regarding further conduct. In particular, the Expert should seek clarity as to whether a further Mediation is to be conducted as a continuation of the previous Mediation, and whether on the same or different terms as the previous Mediation.



Caveat Expert

Mediation proceedings are normally ‘without prejudice’ which in simple terms means that the parties can be privy to the details of discussions and any involved documents. However, these cannot be used in any legal proceedings. For example, the court can be told that a mediation took place but cannot be told any of the details about ‘what went on’ during the mediation. Similarly, documents produced for the purpose of the mediation cannot be used for any other process. There are exceptions.

If an Expert is required by the instructing party to meet with the other party’s Expert and produce a Joint Statement and is told that it will be ‘without prejudice’ there could be difficulties in the event that the Mediation does not reach a settlement.

The term ‘Joint Statement’ is frequently used to denote the outcome of a Meeting of Experts especially where this has been Ordered by a court. That Meeting and the Joint Statement are ‘without prejudice’. However, once the Joint Statement has been signed by the Experts, it becomes an Open Document. In other words that Joint Statement is no longer ‘without prejudice’.

Where legal proceedings are already underway at the time of the mediation, this could put in doubt the ‘without prejudice’ status of a Joint Statement which has been signed in the mediation. This is especially the case if the court has already Ordered a Meeting of Experts in accordance with CPR.

Practical Guidance

In order to minimise any confusion and possible contamination of the status of any Joint Statement made in connection with a mediation the following Guidance is given:

- Do not use a usual CPR format.
- Do not include a ‘Statement of Truth’.
- Do not entitle it as a Joint Statement or call it an ‘Experts’ Discussion’.
- Commence the Joint Statement with “Following Instructions by the parties in the mediation, the experts met to consider certain technical issues within their expertise and on the basis of certain factual hypotheses presented to them without prejudice, for the purpose of their considerations during the mediation.”
- If instructed to do so by the parties to the mediation, sign the Joint Statement; having carefully read and checked that it is accurate.
- Unless the parties specifically instruct the experts not to do so, show the hypotheses instructed and considered.
- Conclude the Joint Statement with “This is an agreed record of the results of the discussion held on the basis stated above”.

The Academy of Experts

The Academy

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.

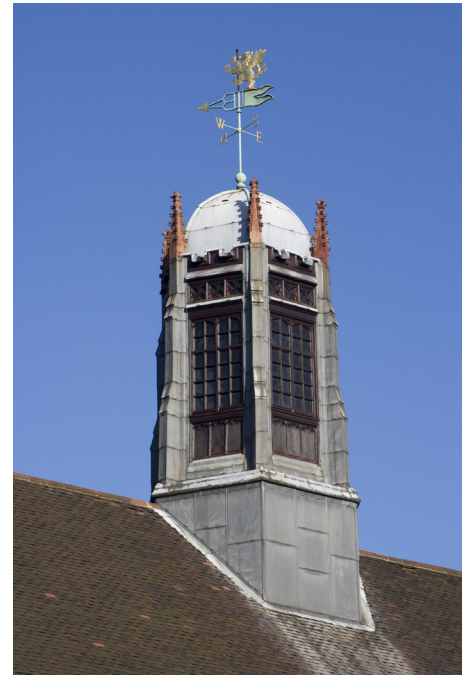
TAE is also a training and accreditation body for ADR Neutrals, including Mediators, Conciliators and Expert Determiners. It publishes and maintains The Register of Qualified Dispute Resolvers and awards the designatory letters QDR to those achieving the approved standard. Standards are enforced in exactly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



Range of services

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

- Technical Helpline
- Bespoke Training
- Technical Meetings
- Magazine and regular newsletters
- Practical Guidance for Members
- 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 the legal profession.

The working party that created the guidance:

- Laurence Cobb (Chairman)
- Chantal-Aimée Doerries QC – Atkin Chambers
 - Derek Nelson – HKA
 - James Taylor – Jackson Rowe
- Roger Isaacs – Milsted Langdon
- Max Twivy – Atkin Chambers

EXPERTS NEED TRAINING

- ❑ Rules changes are a constant and you need to keep up to date
- ❑ Experts need to be aware of best practice
- ❑ Professional knowledge must be accompanied by an understanding of your duties
- ❑ TAE training is widely used and recognised around the world
- ❑ TAE training is taken into account for those seeking TAE's Expert Witness accreditation

TAE ACCREDITATION

The Academy of Experts' accreditation shows instructing solicitors that you take your responsibilities as an Expert Witness seriously.

Accreditation gives those considering instructing you the confidence they need to proceed. It shows Judges and Arbitrators your standard.

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