

The Academy of Experts

FACT SHEET

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‘Discussions between Experts’

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www.academyofexperts.org

- ❑ This Fact Sheet is based on the position in England & Wales for all Civil cases. Appropriate adjustments may need to be made for other courts or jurisdictions

What are Discussions between experts

- ❑ The terms 'Meeting(s) of Experts', 'Discussion(s) of Experts' and 'Conference(s) of Experts' as well as others, are used in different jurisdictions and often in the same jurisdiction. Frequently they are used interchangeably as in reality they are essentially the same process. In this Fact Sheet they are referred to as 'Meetings'.
- ❑ In essence there are two types of Meetings – Court (or Tribunal) Ordered and Party Arranged. They are very similar but there are some practical differences in their scope. They are not mutually exclusive and both types of Meeting can be used in the same case. For ease of reference they are dealt with separately.

Court Ordered:

- ❑ The procedure is laid down in the Court Rules – Civil Procedure Rules (Part 35 and Practice Direction 35). These stipulate such matters as the status of the Meeting ('Without Prejudice'); who can attend; matters to be discussed; action to be taken (e.g. Joint Statement) and the timetable.

Purpose:

- ❑ The purpose of discussions between experts should be, wherever possible, to
 - Identify and discuss the expert issues in the proceedings;
 - Reach agreed opinions on those issues, and if that is not possible, narrow the issues;
 - Identify those issues on which they agree and disagree and summarise their reasons for disagreement or any issue; and
 - Identify what action, if any, may be taken to resolve any of the outstanding issues between the parties.
- ❑ They are not to seek to settle the proceedings. The role of the Expert does not include them being a negotiator or a mediator.

When should the Meeting be held:

- ❑ The Court will normally stipulate when the Meeting has to be held; frequently stating the date by which the Meeting must be concluded. The Court can Order a Meeting at any time. They can be at preliminary or early stages for example to enable the Experts to decide what tests need to be undertaken and for them to be arranged jointly with the attendant cost savings. It is the practice in some courts that a Meeting be held prior to the preparation of Reports but the conventional timing for a Meeting is after the exchange of Reports when the Experts from both sides will be fully aware of the other side's Expert's opinions. However each method has advantages and the choice of methodology will probably be determined by the nature of the case.

- ❑ Conventionally Reports are finalised and then 'exchanged', however it is possible for the Court to Order that they are prepared and disclosed sequentially. Where this happens the timing of the Meetings and procedures may need to be varied. Meetings can be arranged whenever the Court or the parties decide it is appropriate.

Meeting or Meetings

- ❑ The nature and complexity of expert issues and what is at stake will be factors taken into account when deciding whether one or more meetings should be held. Care must be taken to evaluate proportionality when reaching decisions about Meetings.

Prior to the Meeting:

- ❑ Experts (and those instructing them) must ensure that they are familiar with the appropriate Rules in order that they may comply with them. There are variations in the Rules of different Courts. Failure to properly comply can be costly both financially and reputationally.
- ❑ An agenda for the Meeting of Experts should be agreed in advance of the meeting and should usually be prepared by the parties' solicitors in co-operation with the Experts. The agenda should include any matter that the court has ordered; any matter that one or more of the parties wish to be discussed; any matters the Experts wish to discuss; it can include non hostile questions.
- ❑ Experts may not be instructed to avoid or defer reaching agreement on any matter within the Expert's competence.

The Meeting

Who should attend:

- ❑ The Meeting is a meeting of the Experts and is intended for the Appointed Experts only, it should not include Assistants and others. The sub text is that it is for 'Experts of like discipline' as Meetings with mixed expertises can be counter productive. Unless it is ordered by the Court, or agreed by all the parties and the Experts, neither the parties nor their legal representatives may attend the Experts' discussions. If legal representatives do attend they should not intervene in the discussion save to answer questions put to them by the Experts or to advise on the law. However where lawyers have permission to attend the Meeting, the Experts can if they wish, conduct part of their Meeting in private without anybody else being present.

Form of Meeting

- ❑ The Meeting may be 'live', that is a physical meeting of the Experts. However it does not have to be. The agenda and nature of the Meeting, the location of the Experts and the amount at stake all need to be considered as 'Meetings' can take place in any appropriate format for example, video link, over the

telephone or even by SMS. When deciding on the format care should be taken to consider whether a physical meeting might produce better results and also the attendant difficulties of recording agreements when Experts are not together. Proportionality is not solely about minimising expenditure, it must also take into consideration other factors including the likelihood of the Meeting being productive if the Experts are not in the same room.

Status of the Meeting

- ❑ The Meeting and all discussions that take place are on a 'Without Prejudice' basis. However the Joint Statement is also 'Without Prejudice' until it is signed. At this point it becomes an 'Open' document and will be seen by the Court. Experts should remember when drafting the Joint Statement that the trial Judge is likely to focus on the differences revealed by the Statement and that they do not need the permission of those instructing them or their lawyers in order to sign the Joint Statement which is meant to be their professional opinion. Before signing the Joint Statement it should be read carefully to ensure that all matters on the agenda have been properly covered and that the Statement properly reflects their opinion.

At the Meeting

- ❑ The Experts should conduct themselves as professionals and discuss all matters in a professional context and should not seek to advocate their party's case although they may advocate their own professional opinions. They should take care to cover all items on the agenda and wherever possible narrow the issues or at least to agree 'figures as figures'.

Conclusion of the Meeting

- ❑ At the conclusion of the discussion between Experts, a Joint Statement must be prepared setting out:
 - Issues that have been agreed and the basis of that agreement;
 - Issues that have not been agreed and the basis of the disagreement giving cogent reasons for the disagreement;
 - Any further issues that have arisen that were not included in the original agenda for discussion; and
 - A record of further action, if any, to be taken or recommended, including if appropriate a further discussion between Experts.
 - Any significant change in an Expert's opinion should be noted in the joint statement explaining the change of opinion.
- ❑ A common practice is for the Joint Statement to be prepared by one Expert after the Meeting has finished. It will then be sent to the other Expert(s) for correction and signing; in practical terms this simple process is **not** Best Practice and can take a considerable amount of time and attendant expense. It should be remembered that the Joint Statement is effectively the minutes of what was agreed at the Meeting and not what an Expert, party or lawyer thinks should have happened. Wherever possible the Experts should sign

off items as they agree them. This process reduces the areas for subsequent disagreement about what was or was not agreed.

- ❑ The Joint Statement should be signed by the Experts at the conclusion of the Meeting or as soon as practicable and in any event within 7 days. The parties should be provided with signed copies of the Joint Statement not later than 14 days after they are signed. The Joint Statement must also contain a brief restatement, in the form of a Declaration, that the Experts recognise their duties and obligations as an Expert (see Resources below).

CAUTION

Carefully read and check the Joint Statement before you sign it – it will be too late after your signature is appended. Make certain that the Joint Statement reflects the discussion and any agreement reached.

Tribunal or Arbitrator Ordered Meetings

- ❑ When a Meeting is Ordered by a Tribunal or Arbitrator in essence the situation is the same as a Court Ordered Meeting. Court Ordered Meetings are governed by the Procedural Rules of the Court, these do not automatically apply to either Tribunals or Arbitration instead those of a Tribunal or Arbitrator will be governed by their own Rules which may not be identical although they are likely to be similar.
- ❑ Tribunals tend to have Procedural Rules and these will often be the same or similar to the Court Rules.
- ❑ Arbitrator Ordered Meetings will either be governed by the Rules of the Arbitration, for example LCIA or IBA or by the Order of the Arbitrator. Although CPR gives a good indication of Best Practice, care must be taken to comply with the appropriate Rules. In particular it is important to establish before the Meeting, the status of the Meeting; whether it is 'Open' or 'Without Prejudice'.

CAUTION

Carefully read and check the Joint Statement before you sign it – it will be too late after your signature is appended. Make certain that the Joint Statement reflects the discussion and any agreement reached.

Party Arranged Meetings

- ❑ The essential difference between a Party Arranged and a Court Ordered Meeting is control.
- ❑ With Court Ordered Meetings most of the decisions are reached by the court and laid down in the court rules (CPR).

- ❑ Therefore with Party Arranged Meetings the procedure, timetable, content of the Meeting and its status (for example is it 'without prejudice' or 'open') is for the parties to agree and stipulate. This includes matters to be or not to be, discussed and who may attend it. Although the provisions and process for Party Arranged Meetings can be identical to those for Court Ordered Meetings there may be little or no similarity. The procedures for Court Ordered Meetings will serve as a useful guide and check list for use or modification in Party Arranged Meetings. Those deciding on a Party Arranged Meeting of Experts need to consider and decide matters of principle in advance of the Meeting. Importantly Experts need to know of the decisions in advance of the Meeting and their preparation for it. As examples they need to know if they can disclose all documents including those which may be privileged; whether they are required to prepare and sign a Joint Statement and if so, what it should include.
- ❑ Party Arranged Meetings with their inbuilt flexibility can be of great value to all concerned but they need to be carefully planned and scheduled whilst having proper regard to proportionality.

CAUTION

If there is a Joint Statement or Joint Report you should read it carefully and check it before you sign it – it will be too late after your signature is appended. Make certain that it reflects the discussion and any agreement reached.

USEFUL RESOURCES

- ❑ The Civil Procedure Rules; in particular Part 35 and Practice Direction 35.
www.justice.gov.uk/courts/procedure-rules/civil
- ❑ The Guidance for the instruction of experts in civil claims published by the Civil Justice Council.
www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/cjc-publications/guidance-for-the-instruction-of-experts-in-civil-claims/
- ❑ The Model Form of Expert's Report published by The Academy of Experts.
- ❑ The Model Form of Expert Witness CV published by The Academy of Experts.
- ❑ The Academy of Experts.
www.academyofexperts.org
- ❑ Ministry of Justice:
www.justice.gov.uk

Joint Statement Declaration

For all civil cases in England & Wales under CPR in accordance with the Guidance for the instruction of experts in civil claims issued by the Civil Justice Council the following Declaration should be included in the Joint Statement immediately before (above) the experts' signatures.

The Declaration

1. We the undersigned experts individually here re-state the Expert's Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue so to do.
2. We further confirm that we have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid or otherwise defer from reaching agreement on any matter within our competence.

Joint Statement Declaration to be used when the Meeting is prior to Reports being prepared

Generally the discussion between experts takes place once the reports have been prepared and exchanged. These Reports would have included the Expert's Declaration. If however, the discussion is before the preparation of the Experts' Reports a different Declaration is required on the Joint Statement. This is shown below and should be in the Joint Statement immediately before (above) the experts' signatures.

The Declaration

1. We the undersigned experts individually confirm that we understand our overriding duties to the court, have complied with them and will continue so to do.
2. We the undersigned experts individually confirm that we have read Part 35 of the Civil Procedure Rules, the accompanying practice direction and the Guidance for the instruction of experts in civil claims and have complied with their requirements.
3. We further confirm that we have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid or otherwise defer from reaching agreement on any matter within our competence.

NOTE: This declaration is for the Joint Statement only and does not take the place of the full Expert's Declaration which should be included in all expert's reports - see www.academyofexperts.org

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) 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.