

Expert witnesses and conflicts of interest

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Faiza Ahmad looks at how to avoid a conflict of interest where an expert witness has a previous or ongoing working relationship with a defendant

My former colleague, a specialist rent review surveyor, is being sued for allegedly providing negligent advice in relation to a case. As well as working with one another for 5 years, we wrote a number of academic articles together. He is defending the claim and has asked me to appear as an expert on his behalf. Can I do so?

Yes, in principle. However, you and your former colleague should be aware that your involvement may end up being fatal to a successful defence of the claim – the court may find that you have an interest or bias that is sufficient of itself to dismiss your expert opinion when set against the other party's, or to affect significantly the weight the court is prepared to attach to your evidence.

That is what happened in the recent Court of Appeal case of [EXP v Barker \[2017\] EWCA Civ 63](#), in which it was said 'our adversarial system depends heavily on the independence of expert witnesses, on the primacy of their duty to the court over any other loyalty or obligation, and on the rigour with which experts make known any associations or loyalties which might give rise to a conflict?.'

This case involved a patient who brought a claim for clinical negligence against Dr Barker. Both parties instructed relevant experts; the expert instructed by Barker had trained him, however, and they had also written a number of articles together. Reference to these articles was absent from the expert's CV, which the court found might have had the effect of obscuring the connection between the pair.

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Even though the court made a specific direction that 'experts will, at the time of producing their reports, incorporate details of any employment or activity which raises a possible conflict of interest?', Barker's expert failed to do so. It emerged only in cross-examination at the trial that there was a lengthy and extensive connection between Dr Barker and the expert, and that Barker himself had suggested the expert be chosen, something that he had denied at first.

The Court of Appeal said that, in view of all this, had the lower court decided to exclude Barker's expert's evidence in its entirety – as it had considered doing – it would have

been a proper decision?. Although there was no doubt as to Barker's expert's knowledge or his competence to assist the court, the failure to disclose the connection was found to be a very substantial failure indeed?. The fact that Barker's expert 'did nothing' to reveal the connection was also noted.

Some experts do, of course, practise in narrow fields, and there may be occasions when it is entirely reasonable for them to have a close connection with a defendant. Of itself, this does not automatically imply any impropriety.

What is important in your situation, however, is to ensure that you do the following.

- Tell your former colleague's legal team without delay about your connection, and ask them to ensure that the connection is known to the court.
- Give full and frank disclosure of your connection to the other parties and the court without delay in order that any allegation that you are not an independent expert is flushed out at an early stage.
- Ensure that the details on your CV are accurate, and in particular make sure you specify and disclose details of any papers you have co-authored with your former colleague both there and in your expert's report, to avoid any implication that an omission is an attempt to conceal the connection.
- Understand that your duty is to help the court, and that this overrides any obligation to the person from whom you receive instructions or by whom you are paid.

In attempting to assist your colleague, the last thing that you want to end up doing is taking the time and effort to provide an expert opinion to which the court ultimately refuses to attach significant weight, and that not only proves to be fatal to the case but might also result in you damaging your own professional reputation.

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Further information

- RICS [Conflicts of interest](#) global professional statement
- RICS [Surveyors acting as expert witnesses](#) guidance note, 4th edition
- Court of Appeal judgment in [Barker](#) [in particular paragraphs 23-32]
- Judgment in the High Court in [Barker](#) [in particular paragraphs 45 and 57]
- Related competencies include: [Legal/regulatory compliance](#)
- This feature was taken from the RICS [Property journal](#) (October/November 2017)
- Related categories include: [Expert witness](#)