

# The Academy of Experts

## FACT SHEET

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‘Privilege’

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## Privilege

It is a principle of English justice that parties to litigation must 'lay all their cards on the table' – all documents and other information in the possession of a party and relevant to their case, must be revealed to its opponent, whether it helps that case or harms it. This is called disclosure/discovery. The only documents exempt from this duty are those protected by 'legal professional privilege'.

The concept of legal professional privilege – that certain documents created between a lawyer and their client should be protected from the sight of third parties and the court – has a long tradition in English law. It arose from the recognition by the courts that because lay-people are unable to best advise or represent themselves they must be allowed to take advice from lawyers, without fear of it being revealed – as if that party were keeping its own counsel. In litigation, the importance of this protection is that it enables the client who benefits from the privilege to refuse to produce documents for inspection by their opponents, or any other party, during the disclosure/discovery process.

In fact, legal professional privilege is a general expression that now covers two types of privilege:

- 1) legal advice privilege and
- 2) litigation privilege.

These are explained further below.

There is a further common type of privilege called 'without prejudice'. Without prejudice is narrower and very different from legal professional privilege. In particular, without prejudice does not protect communications between a lawyer and their client. Instead, it prevents communications between the parties to a dispute from being admissible in evidence. The condition for this protection is that the communications are made as a genuine attempt to resolve the dispute. Like the other forms of privilege, it is founded on public policy: encouraging the settlement of disputes, even when this may conflict with the policy of providing the court with the all the best evidence.

This fact sheet explains:

- legal advice privilege
- litigation privilege
- without prejudice

## Legal Advice Privilege

### Basic principles

- ❑ Legal advice privilege protects documents against a demand for disclosure, including in legal proceedings. It applies to confidential communications between a lawyer and their client regarding legal advice. The advice itself does not have to be in connection with legal proceedings. There are a number of conditions that must be satisfied before the privilege can apply.

### Qualifying communications

- ❑ The communication must have the dominant purpose of giving or receiving legal advice. Legal advice includes practical advice on what the client should do in a situation as well as on the law itself. More precisely, the House of Lords (now the UK Supreme Court) has said the existence of legal advice privilege depends on the “relevant legal context”, meaning the advice should concern the rights, liabilities, obligations or remedies of the client. As an example, the House of Lords has held that advice concerning the defence of personal reputation and integrity is at least as important as the pursuit or defence of legal rights, and legal advice privilege therefore applies.

### Who is the lawyer?

- ❑ Legal advice privilege applies only to communications between a lawyer and the lawyer’s client. For this purpose, lawyers are barristers and solicitors. CILEx qualified legal executives also benefit from the application of privilege. Lawyers working in-house are also included, provided they are providing legal advice – work done by in-house lawyers in a purely executive capacity is not protected. Trainee solicitors and other unqualified legal executives are protected only so far as their work is supervised by a qualified lawyer. Advice given by foreign lawyers, recognised as such in their own country, is also protected by legal advice privilege under English law.

### The client and client’s experts

- ❑ Communications with third parties are not protected by legal advice privilege (but see litigation privilege, below). Documents prepared by third parties to assist a client taking legal advice are also not privileged. This means that advice taken by a client from an expert is not protected by legal advice privilege. However if the expert is an employee of a client and included within the client team directly engaged in obtaining advice from external lawyers, then the privilege may apply to them. However, care needs to be taken to be clear about who is in the team taking advice in this situation as the Expert’s duty to the court may be compromised by being a team member seeing privileged material.

## Litigation Privilege

### Basic principles

- ❑ Communications and other documents between parties, their solicitors and third parties, may be protected by litigation privilege. For litigation privilege to apply, the documents must be created for the purpose of obtaining information or advice for litigation or contemplated litigation. Certain conditions apply, as follows

### Adversarial proceedings

- ❑ Proceedings must be adversarial in nature, rather than inquisitorial, for litigation privilege to apply. Adversarial proceedings are those where the court must decide which case it prefers between two or more parties. Contrast this with an inquisitorial procedure, in which the onus is on the court to establish facts and a course of action to protect one particular party. For example, the House of Lords has held that care proceedings are inquisitorial rather than adversarial. However, it would be exceptional for a commercial case not to be considered adversarial.

### Dominant purpose

- ❑ For litigation privilege to protect communications and other documents they must be created for the dominant purpose of legal proceedings. However, while litigation must be the dominant purpose for which the document was created, this requirement does not mean that litigation was the only purpose. To avoid the problem of a document having a mixed purpose, efforts should be made to record legal advice separately to other matters and clearly marked as such.

### Contemplated litigation

- ❑ For litigation privilege to apply, the party creating the document must be aware of circumstances making litigation between itself and others a reasonable prospect. The requirement that litigation be a reasonable prospect is not satisfied if there is only a mere possibility or a general apprehension of future litigation. But, this does not mean that there must be a greater than 50 per cent chance of litigation.

### Litigation privilege and experts

- ❑ Litigation privilege is a very important means to protect the preparation of work for litigation, because it extends generally to the preparatory work of experts. However, as with legal advice privilege, parties must be careful to maintain the confidentiality of privileged documents and communications. Even a partial disclosure of the contents of a document or a reference to it, may be deemed to have waived privilege in that document, or wider group of materials. To avoid accidental disclosures, all communications and the sharing of documents with experts should be carefully managed by the lawyer. Direct contact between the client and the expert should be kept to a minimum.



## Without Prejudice

- ❑ The dispute that the parties are attempting to resolve does not require legal proceedings to have already been started or threatened. Instead, the test is whether the parties might reasonably have contemplated that litigation would result if they could not agree.
- ❑ Without prejudice privilege does not apply to communications designed only to discuss the repayment of an admitted liability, but instead to the communications concerning the disputed liability itself.
- ❑ The use or non-use of the words ‘without prejudice’ in negotiations to settle a dispute may indicate that the communications at issue do attract privilege, but the use of the words themselves is not necessarily determinative of this. For example, blanket use of the words ‘without prejudice’ on documents does not protect them if their purpose is not to genuinely settle a dispute. Likewise, the omission of these words does not necessarily mean the document is not protected. It is a matter in each case of what the document is for in substance.
- ❑ A document that demonstrates that an agreement has actually settled proceedings, such as a letter confirming the parties’ position, is generally not protected by without prejudice privilege.
- ❑ Without prejudice privilege cannot be used to cloak ‘unambiguous impropriety’ such as blackmail and perjury. However, the public interest in the without prejudice rule is considered to be great by the courts and will not be overridden except in truly exceptional circumstances.

## USEFUL RESOURCES

- ❑ The Civil Procedure Rules; in particular Part 35 and Practice Direction 35.  
[www.justice.gov.uk/courts/procedure-rules/civil](http://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/](http://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](http://www.academyofexperts.org)
- ❑ Ministry of Justice:  
[www.justice.gov.uk](http://www.justice.gov.uk)

# 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



## 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.