

The Academy of Experts

FACT SHEET

Confidentiality

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**THE
ACADEMY
OF
EXPERTS**

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What is confidentiality?

Confidentiality is the legal protection against use by or disclosure to unauthorised parties of information received in confidence. Confidentiality can arise from circumstances alone or by agreement in contract. The unauthorised use or disclosure of confidential information in either of these situations may give rise to an action for breach of confidence.

An action for breach of confidence can be brought against the original recipient of the information and/or any subsequent recipient who has actual knowledge that the information is confidential. However, because they are usually expensive and complex the courts are careful to avoid confidentiality cases without merits being used to harass, rather than protect bona fide rights.

In disputes, issues of confidentiality frequently arise, either because the confidential information itself is evidence relevant to the dispute, or because it is mixed with other information that is. As a result, Experts in litigation, arbitration or mediation are likely to encounter confidentiality to some extent during their engagement. Responsibility for managing confidential information lies primarily with the instructing solicitors. An Expert should never allow their duty to a court to be fettered by obligations of confidence. Confidentiality may nonetheless impact on their dealings with other parties at the time of or subsequent to a dispute, and it is something of which they need to be aware.

What information is protected? The general rules

- ❑ There is currently no statutory protection for confidential information. The duty of confidence has instead been developed by case law to apply to an individual who is in receipt of information which is:
 1. Confidential in nature to begin with – that is, it has the ‘necessary quality of confidence’; and
 2. Disclosed to the individual in circumstances ‘importing an obligation of confidence’.
- ❑ In order for the information to have the ‘necessary quality of confidence’ it must not have already been made freely and entirely public, although cases of relative secrecy, in which the information has been given to some interested parties, but not others, can arise. Merely stating something is confidential will not automatically make it so. Therefore, neither a term in a contract, nor a “confidential” heading on a letter or email, can confer confidentiality on information that is already publicly known.

- ❑ There are broadly three circumstances in which the disclosure of such information ‘imports an obligation of confidence’ on the person or team receiving it:
 - i. the obligation is imposed by contract: for example, a non-disclosure agreement;
 - ii. the obligation is implied by the context of the disclosure: this is tested by asking whether a reasonable man standing in the shoes of the recipient or recipients of the information would have realised that they were receiving it in confidence. This will depend on factors such as the manner in which the discloser treats the information;
 - iii. the obligation is implied by the special relationship between the parties concerned: for example, the Expert’s duty to maintain confidentiality to their instructing party or an opponent (*see The Academy of Experts’ Code of Practice for Experts*), or their duty to an employer.
- ❑ The best way of ensuring that confidential information is recognised and treated as such is by contract. Again, note that, once material ceases to be confidential (that is, it loses ‘the necessary quality of confidence’) for any reason, contractual wording to the contrary cannot alter that fact. Indeed, it is usual to recognise this by including express language that describes the particular circumstances in which information is regarded as no longer protected.

Confidentiality in disputes

- ❑ In the context of disputes, although there is a connection, confidentiality should not be confused with privilege (*see The Academy of Expert’s Fact Sheet 2015-04*). A document can be confidential without being privileged but it cannot be privileged without remaining confidential. Furthermore, confidentiality is not a basis on which to withhold disclosure in litigation, which is why steps must be taken by solicitors to protect it in the disclosure process (*see below*). However, to remain privileged documents must be confidential, and the right of one party in proceedings to withhold production of a document to another on the grounds of privilege is lost once it ceases to be confidential.
- ❑ Special rules apply to the use of documents disclosed in the litigation setting. When documents are disclosed by one party to another they are covered by the Civil Procedure Rules of England & Wales (CPR 31.22(1)). This rule restricts the use of those documents to the proceedings for which they are disclosed. This applies whether the documents are confidential or not, although to further protect confidentiality, particularly where teams of people are involved, a confidentiality club may be necessary (*see below*). This restriction lasts until such time as the documents are ‘read out in open court’. Being read in open court makes the document public and it therefore loses any confidentiality it may have had. However, the expression ‘read out in open court’ should not to be taken literally – it broadly

applies to documents brought into issue at trial or which are referred to in the judge's reading materials, such as written submissions. Even if documents are read in open court, a party may nonetheless seek to protect their confidentiality indefinitely at the end of trial by obtaining an order under CPR 31.22(2). Such an order will also cover an Expert to the extent that they know the relevant information.

- ❑ Confidential material that is referred to in a document that must be disclosed, but which is not itself relevant to the issues in dispute, will usually be redacted before the disclosure takes place and solicitors should ensure that Experts do not see it.
- ❑ The exchange of information and communications 'without prejudice' for the purpose of settlement, mediation or expert meetings, does not necessarily infer that that information is confidential or protect it as such. The parties should expressly protect confidential information in these circumstances, for example by confidentiality clubs (*see below*). These are again the responsibility of the solicitors, but they may, subject to the Expert's duty to the court, bind an Expert.

'Confidentiality clubs'

- ❑ In order to ensure greater control over the confidentiality of disclosed documents in litigation and other forms of dispute resolution, it is common for parties' solicitors to agree restrictions on disclosed documents in a 'confidentiality club' or 'confidentiality ring'. These are a specialised form of written non-disclosure agreement. These agreements apply to the whole team who need to be able to review confidential documents. Typically this will apply to evidence disclosed to other parties. Although the confidentiality club should include Experts and their team, they do not restrict an Expert's duty to the court. An Expert may not exclude relevant information from their report or hold back a full and proper answer to a question put to them before the court, on the basis that they are concerned that it is protected by confidentiality.
- ❑ At the end of proceedings, a relevant party may make an application to the court under CPR 31.22(2) to preserve confidentiality in the information disclosed in court. This is an exception to the open justice rule.
- ❑ Outside the immediate context of the dispute, the obligations assumed in a confidentiality club not to disclose are usually comparatively easy for the parties and other individuals to comply with. The recipient has to make sure that they do not provide documents containing the information or otherwise reveal their contents to someone else. However, the obligation not to use, potentially, presents greater difficulty. This is because, once information has been learnt, it is impossible to 'unlearn' it, even by a recipient who wishes to comply fully with the obligation.

- ❑ Could an expert be liable for breach of confidentiality because they have used protected information inadvertently or subconsciously in the course of professional work unrelated to the dispute? The law says that unintentional or subconscious influence by known information is “use” and hence a breach, if the activity is outside that permitted in the agreement. The risk for an expert, or indeed the parties to a dispute themselves, is therefore that they later find themselves in danger of breach, unless they avoid activities to which the confidential information has, or may have, relevance. If this situation is not to arise, experts should carefully consider the terms of any confidentiality club. In particular they should have regard to their anticipated duties and activities and whether the subject matter may put them in difficulty later on.

Duties of experts

- ❑ Experts before a court have a particular duty to preserve confidentiality, save as expressly or by necessary implication authorised to the contrary (*see the Academy of Experts Model Terms of Engagement for the Employment of Experts*). Again, however, the expert is entitled to comply with any legislation, order or rule of Court of the law that may oblige the disclosure of information to third parties. This includes the overriding duty to the court.
- ❑ Companies can rely on the law of breach of confidence to protect unjustified use of their technical trade secrets by employees, former employees or consultants. Such protection is normally conferred by means of an express term in the employment or consultancy contract in a ‘restrictive covenant’. Current employees also owe a duty of fidelity to their employer which includes the protection of confidential information. The obligation to an employer or ex-employer does not impact on information received by the expert as part of their role in a dispute. However, when bringing their expertise to bear on the matters in dispute, experts should be careful not to volunteer confidential information of which they are in possession from previous employment or other work, unless compelled to do so. Experts should therefore consider carefully any involvement in a dispute where they have a duty of confidence that may come into conflict with their expert duties.

Note:

This Fact Sheet is intended to be a general reference guide to the subject matter and highlight issues. It is not a definitive statement of law and practice nor is it legal or professional advice.

Appropriate legal advice should be sought if necessary. Unless otherwise stated, it is based on our understanding of English law and practice. The position may be different in other jurisdictions.

Academy Fact Sheets

TAE publishes technical guidance on a range of issues. These are generally in the form of Fact Sheets & Information Sheets - the Fact Sheets being more technical in nature and aimed at TAE members whilst Information Sheets provide guidance for those seeking further information about the work of an Expert or TAE itself.

The Fact Sheets listed below are primarily aimed at Academy members - they are available to TAE members from the TAE website www.academyofexperts.org.

Title	Sheet	Jurisdiction *
Comments on the “Guidance for the instruction of experts in civil claims” produced by the Civil Justice Council	2015-01	England & Wales
Guidance on the NI Practice Direction effective 1st January 2015	2015-02	Northern Ireland
Discussions between Experts	2015-03	
Privilege	2015-04	
Expert’s Conferences in Hong Kong	2016-01	Hong Kong
Conflicts	2016-02	

* Where no jurisdiction is shown the Fact Sheets apply universally.

FURTHER INFORMATION

The Academy of Experts

www.academyofexperts.org

Resources and guidance for Experts and users of Experts
Dedicated Member area

Ministry of Justice (UK)

www.justice.gov.uk

Website contains resources for legal professionals including Procedure Rules for Civil, Criminal & Family Cases

Civil Justice Council (UK)

www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/

An Advisory Public Body established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the civil justice system. It has published a *Guidance for the instruction of experts in civil claims*.

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 Witnesses (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 and Expert Determiners. 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.