Privilege can be something of a minefield to navigate and to maintain, particularly when in the throes of litigation. In this session, Joanna Rhodes discusses the main types of privilege as well as giving some hints and tips as to how it can best be managed within an organisation.

Transcript

**Joanna Rhodes:** Good morning everyone, thank you for attending this session this morning and for spending your first morning of lockdown 2.0 with us. My name is Jo
Rhodes and I am a Senior Associate in the firm's commercial litigation team. In terms of my practice, I do general corporate and commercial litigation and also quite a lot of domestic and international insolvency litigation, as well as fraud and asset tracing work.

Privilege, which I'm going to talk to you all about today, pervades through all of those types of work, through all types of litigation and actually beyond that into day to day practice. If it's accidentally waived, which can easily happen in an in-house environment, it can cause issues so is definitely worth thinking about and getting it right.

Privilege can be a tricky topic and I'm very conscious that we could spend hours talking about each aspect of privilege and debating the merits of various approaches and the views taken by the court over the last 20 years. I'm sure you're all much too busy for that though, so what I have tried to do instead is put together a practical overview of privilege in terms of how each type of privilege might apply to you, and some hints and tips as to how you might best manage and maintain it, alongside the business, in an in-house team.

There aren't any slides for this talk, but you might have seen there was a handout sent out with the joining instructions, so please feel free to follow along with that.

**What is privilege?**

So, taking it right back to basics, what is privilege? At the heart of it, privilege is a legal concept which entitles a party to withhold evidence from production to a third party or the court.

What that means in practical terms is that it acts as a shield to protect you from having to hand over difficult documents if you get into litigation. In the English courts, we have a cards on table approach, which means disclosure at a certain point. Onerous obligation because all documents even if difficult or commercially sensitive unless rely on privilege to protect them from being sent across.

**Types of privilege**

I'm first going to run through the types of privilege, with a brief overview of each one.

**Legal advice privilege**

This is the one most people probably think of when they think of privilege as a concept. A couple of examples of when legal advice privilege might kick in:

a. The business asks you for some advice on an agreement which they are considering entering into. Generally, your advice on the terms of that agreement is going to be
Legal advice privilege applies to confidential communications between lawyers and their clients made for the dominant purpose of seeking or giving legal advice. It protects legal advice, easy if you have got external legal advisors trickier for in-house counsel for some of the reasons I'll come on to at the moment.

So, to break that down:

- **Requirement 1: Confidentiality**

  In most cases, confidentiality will automatically apply to legal advice privilege, because of the nature of the communications, i.e. between a lawyer and a client. But if you lose confidence, privilege will be lost.

  You can usually share with business on terms of confidentiality, for example:

  - You can disclose to board members in a board meeting, although ideally that advice wouldn't be recorded in board minutes if at all possible, because often those might need to be made public or circulated more widely and that would mean the confidentiality in the advice would be lost. There are ways around that though, so you might think about putting any advice in a confidential appendix to the board minutes so confidentiality in it can be maintained if the board minutes themselves are made public.

  - Generally an employer can disclose with employees if they need it for the purposes of their work, without loss of privilege.

    Everything will be taken on a case by case basis, these are just guiding principles.

    Generally speaking, the bigger circulation the bigger the risk of losing confidence and then it's got to be disclosed. Generally, to maintain confidentiality the circle to whom it's circulated should be kept as small as possible.

    It does mean that, for example, anything passing between either party and an opposing party cannot attract privilege, even if it reveals the sort of advice that's been given, because the confidentiality is lost. Worth noting that includes notes taken of calls between lawyers won't be privileged, unless for example you've annotated it
as advice.

- **Requirement 2: Communications**

Although this is the word used in most standard definitions of legal advice privilege, it’s a bit misleading because a "communication" between a lawyer and their client isn't actually required.

Confirmed in Three Rivers DC v Bank of England (No 5) [2003] EWCA Civ 474 that legal advice privilege extends to material which "evidences" the substance of confidential communications passing between a client and their lawyer for the purpose of giving or receiving legal advice.

If something (e.g. a memo) is prepared in the course of giving legal advice, and subject to satisfying the other requirements, that will generally attract legal advice privilege whether or not they are sent on to the client.

- **Requirement 3: Lawyer**

It sounds obvious, but for legal advice privilege to apply, the communication has to involve a client and their lawyer. This includes all members of the legal profession and extends to in-house lawyers, but there is an important caveat to that which I'll talk about in a second.

There was an interesting development recently in the PJSC Tatneft v Bogolyubov and others [2020] EWHC 2437 (Comm), that legal advice privilege extends to communications with foreign lawyers, including where they are "in-house", provided they are acting in the capacity or function of a lawyer. There is no additional requirement that foreign lawyers should be "appropriately qualified" or recognised or regulated as "professional lawyers" in their home jurisdiction.

- **Requirement 4: Client**

The courts have generally adopted a narrow definition of a client for these purposes, the safest approach is to assume it only applies to employees charged with instructing the lawyers and who are authorised to receive legal advice (although other documents might be covered by litigation privilege).

- **Requirement 5: For the dominant purpose of seeking or giving legal advice**

So I've said that legal advice privilege does or can extend to advice given by in-house lawyers. However, where the solicitor is acting, not as the client's legal adviser, but as the client's "man of business" (Three Rivers (No 6)), there is no privilege in those
Practical effect of that is that, in circumstances where, as an in-house lawyer you also have a management, business or administrative role (e.g. you're also company secretary), or you're being asked to provide commercial advice, privilege is unlikely to attach to communications regarding those roles, or at the very least it's a grey area. I'll come on to how to manage that a little later on.

More generally, the document in question must come into existence for the dominant purpose of giving or receiving legal advice about what should be done in the relevant legal context, confirmed in CAA v Jet2.com earlier this year. Thus, background documents that might be included by the client when seeking advice from a lawyer will not benefit from legal advice privilege if they existed before the need to seek legal advice arose (unless they attract a different form of privilege), and indeed are likely to form part of any disclosure obligations later down the track if it's something you're relying on or which harms your case.

**Litigation privilege**

Second "main" type of privilege. Confidential communications between lawyers and their clients, or the lawyer or client and a third party, which come into existence for the dominant purpose of being used in connection with actual or pending litigation. You can gather from that definition that the scope of this sort of privilege is quite a lot wider than the scope of legal advice privilege, which essentially means that once you're into the realms of litigation, it's slightly easier to assert privilege.

An example of when litigation privilege might apply, but legal advice privilege wouldn't, is if you as in-house counsel, or we as outside counsel communicate with either an expert witness or a witness of fact about their evidence.

- **Requirement 1:** The communication must be between lawyer and client or one of them and a third party (e.g. an expert witness). So you can see there is a wider possible circulation for litigation advice privilege to apply.

- **Requirement 2:** For the dominant purpose of litigation

Generally, where there are judicial functions are to be exercised by a court or tribunal and those proceedings are pending, existing or reasonably contemplated, this will satisfy the litigation element.

The dominant purpose test is just that. The document has to predominantly have been
created for the purpose of litigation, but exclusivity is not required.

A note of caution on this element: while I've said that the scope of litigation privilege is wider than legal advice privilege it does have its limits. Recently confirmed by the Court of Appeal that for the "dominant purpose of litigation" element to be satisfied, a communication has to be prepared for the dominant purpose of obtaining advice or evidence in relation to the conduct of litigation, and that documents prepared for the wider purpose of conducting litigation generally won't be covered. In that case, the documents in question were emails between the Respondent's board members and stakeholders discussing a commercial proposal for settlement, which were held not to be covered by litigation privilege.

The net result of that is that if, for example, two people in the business are discussing numbers for settlement by email between themselves, and those communications are held to have a purely commercial purpose, privilege can't necessarily be claimed in those documents. I'll come on to settlement discussions more generally in a minute when I talk about without prejudice privilege, but did as I say just want to add that note of caution.

- Requirement 3: Actual or pending litigation

Litigation must be a real likelihood rather than a mere possibility. So a possibility that someone might make a claim at some point, or a general apprehension of future litigation with a particularly adversarial counterparty won't be enough. So for example, if you're about to enter into a contract with a counterparty that is known for being particularly adversarial, anything you prepare on the basis that there might be a claim in the future with that party won't generally be covered.

- Requirement 4: Confidentiality

This is a developing area. Clearly not so clean cut where sharing with third party as it is between a client and a lawyer and confidentiality can't be assumed. Sometimes we think about putting a confidentiality agreement in place to help with that.

Again, although I've said that litigation privilege widens the net in terms of what can attract privilege, that doesn't mean that just because you're into litigation documents should be shared with the world, as confidentiality still has to apply to the document or communication in issue.

**Without prejudice privilege**

So I said before that I'd talk a bit more about settlement discussions, which brings me on
to my final type of privilege, which is without prejudice privilege. I think that this is one that people might not necessarily think of, but is certainly worth looking at as it's another way to keep possibly tricky documents out of court.

This operates to prevent statements made, whether in writing or orally, in a genuine attempt to settle a dispute from being put before the court as evidence of an admission.

So, some examples of when this might apply are:

a. If a letter or email is written to the other side making, or rejecting, an offer to settle;

b. Or, if you have a phone call with the other side's in-house counsel to try to come to an agreement, anything said during that call can be protected by WP privilege (provided you've agreed that the phone call is to take place on a WP basis).

As to why it's important that these communications can't be put before the court as evidence of admission, clearly, it would not be conducive to productive settlement discussions if both parties feared the contents of those discussions might be put before the court to support the other side's position. For example, if you decide to make a generous offer to the other side for let's say 50% of the claim, even though you don't admit liability, and the other side rejects it, the fact of your making that offer can't be brought up in court as evidence of liability against you.

There are two different labels of WP privilege that you might see:

- Without prejudice: cannot be put before the court in the substantive dispute or on costs

- Without prejudice save as to costs: cannot be put before the court in the substantive dispute (i.e. on liability) but can be on costs once liability determined. For example, if you've made a generous offer which is rejected and you go on to lose at trial but the winner hasn't bettered your offer, you might want to be able to show that to the court on the matter of costs to try to persuade it to depart, even partly, from the usual rule of loser pays the winner's costs if you can show that costs have been incurred unnecessarily from the date of your offer.

**Hints and tips / Dos and Don'ts**

So I have five do's and five don'ts for you:

1. **Do** consider and document who the client is at the outset of litigation or the transaction, i.e. the people who will be charged with seeking legal advice. Within an organisation that is likely to be the key players who will make the decisions and who will most need
to communicate with the legal advisors.

2. **Do** label documents/emails/communications appropriately. Mark documents and emails "confidential and privileged" "prepared for the purposes of obtaining legal advice or litigation" and "not for onward circulation". So if you’re communicating with the business, for example when you’re giving advice on a contractual query, mark it "confidential and privileged" "prepared for the purposes of obtaining legal advice" and "not for onward circulation".

Likewise as regards WP. If you’re not sure if something's WP during settlement discussions, label it WP but bear in mind that it must be a genuine attempt to settle; just labelling something WP which isn’t doesn’t make it so. So you can’t just mark something WP and assume it will be protected; substance of communication will be taken into account in the event of a challenge.

Worth mentioning that any labelling of emails etc. won’t be conclusive or determinative if a claim to a privileged document is made (so not just a case of labelling something privileged and hoping for the best) but is nevertheless likely to be helpful in supporting a claim for privilege and give the reviewer in any disclosure exercise down the track cause to pause.

3. **Do** control and monitor the distribution of privileged information within the organisation. The tighter the control that you keep on it, the more likely it is to maintain its privilege. How you might do that (appreciate this will vary within your organisations):

   - Maintain a circulation list as to what documents have been sent to who in the business and when
   - Instruct people who you’re sending documents to, not to forward on privileged information without checking with you first. This sounds obvious to us as lawyers but not always obvious to others
   - Before forwarding an email chain, check for privileged information, again this sounds obvious, but in the throes of litigation it’s easy to forget
   - Avoid making privileged documents available on shared network drives or folders to which you cannot control access. So think about password protecting privileged documents for example.

4. **Do** ensure that lawyers (internal or external) prepare internal investigation reports. If these have to be done by someone who is not a lawyer, ask them to report orally to
you so you can prepare the report. You should then prepare the report on the basis that legal advice is necessary to ascertain legal risks and obligations. If the report does not contain legal advice, it is unlikely to be privileged so weigh up the importance of the report against the damage it could cause if disclosed.

5. **Do** consider offering basic training on privilege and the importance of maintaining it to employees who are likely to be receiving legal advice from you or from outside counsel. This is something we provide to clients and can be really helpful. Training is key; people can create tricky documents, a good basic message is don't write down anything you wouldn't want to be read out in open court.

Settling in particular is something that the business might try to do themselves. Try to make sure they don't do that without reference to the legal team to make sure something they've said during those discussions doesn't inadvertently become disclosable. If they absolutely must try to fix it themselves then make sure they do it on the phone and not in writing. Someone in business trying to fix something can actually cause more damage if it is not handled correctly.

3. **Don't** mix up your communications which contain strategic advice or relate to any other roles you have within the business and legal advice. Keep them separate. This way, you'll ensure the legal advice is protected from disclosure as the entire communication will be privileged.

7. **Don't** assume something's privileged just because you've sent it to your outside counsel or because someone from the business has sent it to you. A classic example would be where, even if an email itself is privileged, the attachment won't necessarily be.

3. **Don't** commit something to writing unless you have to, and ask the business to do the same. If the advice or fact finding can be done orally, do that if possible.

9. **Don't** record internal commercial discussions about litigation. Litigation privilege does not apply to purely commercial discussions; if it's commercial only won't attract privilege. Ideally, these conversations would take place orally but they should at least have an in-house lawyer present. Will depend on your business' policies. Commercial decision as to whether it's necessary to demonstrate proper procedure by recording the discussion as against the risk of the recording being disclosed.

J. **Don't** panic! If you think something privileged may have found its way somewhere it shouldn't have, there are mechanisms which can help:
a. Even if legal advice privilege has been lost, litigation privilege might still apply.

b. Under CPR 31.20, if a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court. The court can allow this where there has been an "obvious mistake".

c. Finally, if you are panicking do give us a call to see if we can help.

Tom Cox: Thank you for that Jo, I think don't panic is excellent advice at any time, but particularly in relation to privilege.

Now we have had one question through, the question we have is in two parts, the first part of the question is "If I write a legally privileged note that I then circulate with relevant Directors, does it lose privilege if it is then shared with other individuals within the business?"

Joanna: That will generally be fine, provided they're in the client circle or fall within the definition of client, so if they need it for the purpose of their role then that should be fine. I'd say that's more likely to be the case, and they're more likely to be the client if you perhaps redact the note so that only the relevant parts are shared with the appropriate person, so think carefully about what they need to see. Do all the usual things like marking it confidential and privileged as I said during the talk. Every claim to privilege comes down to its own facts and the substance of the document, but generally, I think that should be fine.

Tom: So it really comes down to maintaining control, and that brings us onto the second part of the questions, which is "If the document does need to be shared, do I need to send it out to the individuals direct?" I think what is being asked is, is it better that the communications go back to you and then out again rather than just being forwarded on?

Joanna: I would say it's better to go back into the legal team and out again, to maintain control. You as in-house counsel are much more likely to mark the documents appropriately than someone just sending it on.

Tom: Ok we have another question is reads "How does legal privilege apply to email chains, where the subject line is labelled as privileged but does not necessarily contain strictly confidential or privileged information?" So what effect does a label have on an email chain?
Joanna: I think a label is helpful but not determinative, so if you have something further down the chain which isn't confidential or privileged you are running the risk of that being disclosable, although the whole chain might not be. It goes back to the do, don'ts - just because something is labelled privileged and confidential, that doesn't necessarily make it so.

Tom: If I could just add, taking a practical example if you consider without prejudice offers, they can often go back and forth, and although the email subject line may say without prejudice I'm always careful to also mark every document/email without prejudice to make sure you're stacking the deck in your favour.

Joanna: Another practical point to make is that in a disclosure exercise those emails might be separated out, so if each email is marked without prejudice that will give the reviewer pause on every single one, so I'd say that is good practice.

Tom: Ok, the next question is "Question on advice privilege. If your internal client forwards email advice externally, is privilege lost in respect of that email advice only or in relation to the entire matter?"

Joanna: That's a good question, I'd say you're running the risk of it being waived more generally if something has been forwarded. So I would discourage anything being sent out. There is a risk that anything further will be waived.

Tom: I think that's right, it will depend from case to case but the danger with privilege is that it's like releasing a thread and then the thread can be pulled to ruin the whole jumper - if I can continue this tenuous analogy - and that is particularly the case with litigation privilege.

If you have any questions you haven't answered today please do feel free to get in touch with me or Jo directly. Thank you for joining us today, we will hopefully see you soon.
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