PRIVILEGE

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When a business faces a dispute or an internal or regulatory investigation it's important that the organisation can undertake enquiries and seek legal advice freely, without fear that the results of its research will ultimately be disclosable to the court or other parties. Privilege can enable an organisation to withhold documents without any adverse inferences being drawn. A proper understanding of privilege helps clients and their lawyers to obtain advice and information without risk of exposing or compromising their position. A lack of understanding and a loss of privilege, however, can prove fatal to a case.

In this resource for clients, we explain the law of privilege and share some top tips for the protection of this important legal right.

WHAT IS PRIVILEGE & WHY IS IT IMPORTANT

Privilege is a hugely valuable legal right. It entitles a client to withhold documents (including electronic communications) from a court or third party, without any adverse inferences being drawn.

Privilege is particularly important in the context of any dispute or investigation. Whilst the Civil Procedure Rules (CPR) generally require parties engaged in litigation to disclose to each other and to the court the existence of all relevant documents, there are certain categories of documents, known as 'privileged' documents, which may be lawfully withheld from inspection by the other party.

There are important public policy justifications underpinning privilege. These include the need for clients to be able to candidly disclose matters to their lawyers so that they can obtain the best possible legal advice; and the need for lawyers to obtain, investigate, record and freely communicate information to their clients, so that clients can make fully informed decisions.

On a wider scale, privilege is also critical in a regulatory context. It enables experienced lawyers to accurately advise companies, bodies and institutions how to comply with their legal obligations and how to efficiently and effectively cooperate with regulatory investigations. That, in turn, advances and protects public interest.

INTERNATIONAL

Whilst the concept of privilege does exist in most jurisdictions, it differs hugely across the modern business world.

Common law jurisdictions, including the UK, US, Hong Kong, Singapore, Australia and New Zealand, generally have a wide system of transparency and disclosure, which gives added significance to rights of privilege. Civil law jurisdictions (including many Western European countries, Russia and Japan), however, often oblige parties only to disclose documents that support their case or on which they wish to rely, such that privilege plays a less vital role. Even among common law jurisdictions there are wide-ranging differences in the scope and applicability of privilege.

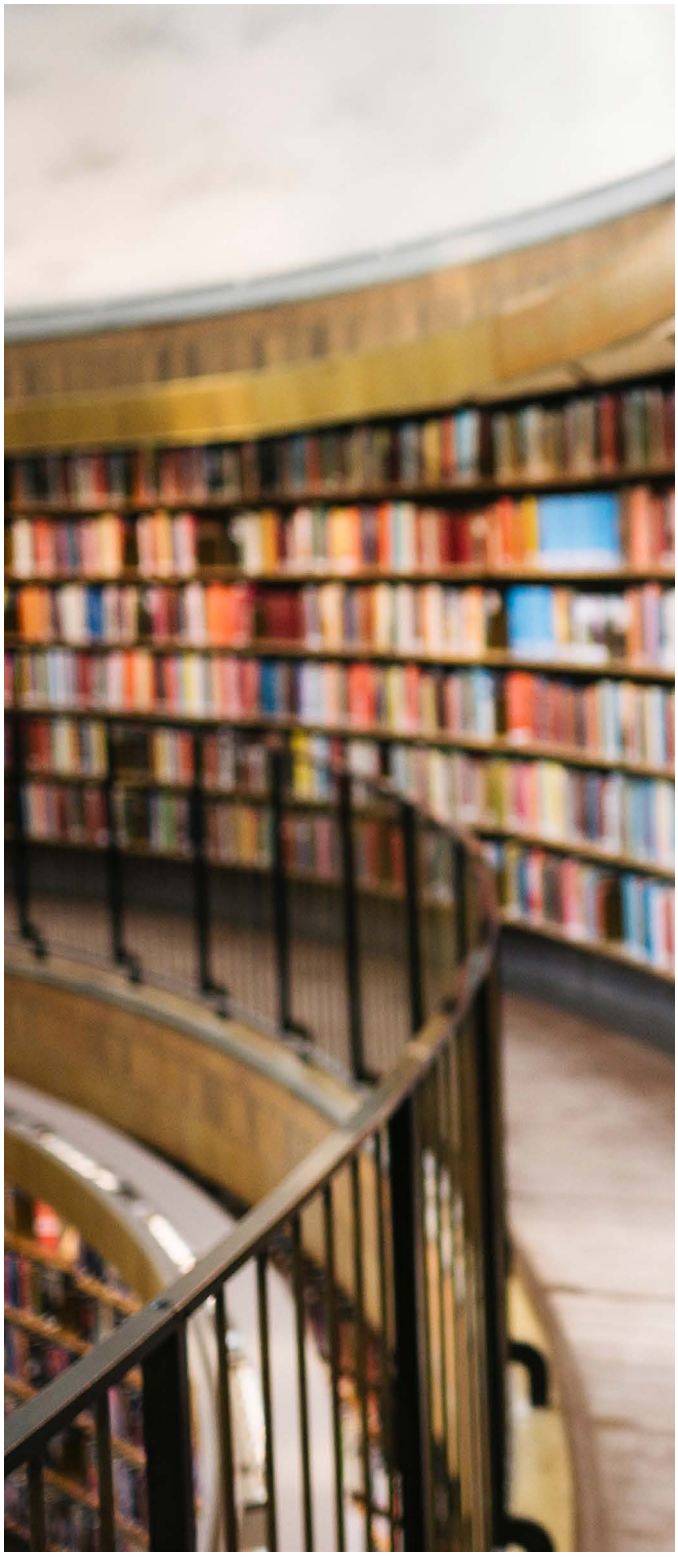
Different privilege regimes across different jurisdictions can cause difficulties for those involved in cross-border transactions, investigations or disputes. For example, a litigant or a company involved in a regulatory investigation may find itself obliged to disclose a document in one jurisdiction, while benefiting from privilege in relation to the same document in another. Seek advice from a specialist legal adviser if you are involved in any matters with an international element.

FORMS OF PRIVILEGE

There are various different forms of privilege, each of which can arise in different circumstances:

1. **Legal advice privilege**
2. **Litigation privilege**
3. **Joint privilege and Common Interest privilege**
4. **Without prejudice privilege**
5. **Privilege against self-incrimination.**

Legal advice privilege and litigation privilege are both sometimes referred to as types of 'legal professional' privilege. That's an overarching term, but can give rise to confusion. As we explain in more detail below, the involvement of a lawyer is essential for legal advice privilege to arise, whereas litigation privilege can attach to documents and communications which do not involve a legally qualified professional at all.



1. LEGAL ADVICE PRIVILEGE

Legal advice privilege covers confidential communications between a lawyer and client for the purposes of giving or receiving legal advice. However there are some essential factors which must exist for legal advice privilege to apply:

Confidentiality. The document or communication in question must be confidential. Any document that has been too widely disseminated or has been made public (for example has been posted online) cannot attract privilege protection.

Lawyer and client. The document must pass between a qualified lawyer and his or her client. It's important to note that legal advice privilege only exists where the adviser is a qualified member of the legal profession. It doesn't apply to advice given by other professionals, such as accountants, even if that advice covers legal matters. Similarly, 'client' in this context, is very narrowly defined – it only covers those members of an organisation who are actually charged with instructing lawyers.

The very narrow definition of 'client' for these purposes has created some practical difficulties, in particular for large corporations and/or those involved in regulatory investigations. In fact, unlike other major common law jurisdictions, England and Wales is somewhat out on a limb when it comes to this particular, rather limiting, requirement for legal advice privilege.

Relevant legal context. The document must have been created for the dominant purpose of giving or receiving legal advice in the relevant legal context. Today, a commercial lawyer's role often extends beyond advising on black letter law. That's often especially the case for in-house counsel. Whilst legal advice privilege will not arise where a lawyer advises on purely business or administrative matters, equally It's not confined just to advice on the law. Privilege can attach to practical or commercial advice, so long as there's a relevant legal context.

No waiver. Finally, and this can represent a trap for the unwary, privilege must not have been lost or waived, even inadvertently. Read on for advice to help guard against loss or waiver of privilege.

> To determine whether there is a relevant legal context, the court will ask whether the lawyer's involvement relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law and whether a policy justification for legal advice privilege applies in the particular case.

PROTECTING LEGAL ADVICE PRIVILEGE

Here are some top tips for the protection of legal advice privilege and to help guard against loss or waiver:

- At the outset of any investigation (internal or regulatory) or any dispute, consider carefully the advisers who will be retained and the 'client' (i.e. the person or persons within the client-organisation) who will be charged with instructing advisers.
- Privilege will only attach to documents and communications passing between a client and a qualified lawyer. Privilege will not arise when advice – even advice on legal matters – is taken from any other professional.
- If too many people within an organisation are charged with instructing lawyers that could undermine any claim to privilege. It could also cause case management difficulties if there are no clear reporting lines for the giving and receiving of instructions, documents and legal advice. It could also risk confidentiality breaches, which could, again, undermine privilege.
- However, if too few people are authorised to instruct lawyers, that could cause practical difficulties if, for example, the key client contact(s) was/were absent, uncontactable, or perhaps left the business.
- In line with one of the key underlying justifications for privilege, consider appointing specialist legal advisers to assist with any investigations and/or litigation. Appointing external lawyers can have the dual benefit of providing specialist expertise and strengthening any claim to privilege.
- Always think very carefully before disseminating correspondence and documents – even just within one company or organisation. Consider exactly to whom correspondence should be addressed and where and to whom documents should be distributed. Be especially vigilant when it comes to the use of non-encrypted e-mail accounts, websites and social media. Posting items online will almost certainly extinguish confidentiality - and with it, privilege.
- There may be circumstances in which dissemination of information, documents and/or advice relating to an investigation is necessary within an organisation beyond the defined 'client' circle. Where that cannot be avoided, the communication/ document should be endorsed with wording which confirms that It's privileged and that provision of it does not amount to a waiver of privilege. Confirmation should also be obtained from the recipient(s) that the document will be held in confidence and not distributed any further.
- Non lawyer employees, experts or advisers should not conduct the information-gathering, interviewing and/ or reporting process in any investigation or [potential] litigation. It's possible, even likely, that any documents created by non lawyers will be disclosable unless the fairly stringent requirements for litigation privilege (see below) can be met.
- In light of the 'dominant purpose' test, beware multi-addressee e-mails/meetings. It may be preferable to keep legal and commercial discussions separate, but businesses should seek specialist advice.
- Where lawyers attend meetings, any minutes should record the fact that lawyers are attending to give legal advice, and any advice given should be noted.

> The inclusion, in a multi-addressee communication or meeting, of non-legal advice-related content results in the 'dominant purpose' test not being met. That can preclude legal advice and is a key risk area.

2. LITIGATION PRIVILEGE

Litigation privilege is borne out of the principle that a litigant or potential litigant should be able to investigate [potential] disputes, take legal advice and consider their position without fear that the results of their research will be disclosable in any proceedings. It covers confidential communications between a lawyer and client, or between either of those and a third party (such as an expert adviser), so long as litigation is anticipated or ongoing and the dominant purpose for the communication is its use in litigation. There are some important points to note:

Lawyer/client/third party. The document or communication may be between a lawyer and client; a lawyer and a third party; or the client and a third party. This means that a client may to be able to rely on litigation privilege in circumstances where, for example, it wishes to (or has already) created documents or communicated with third parties at the outset of a dispute, before instructing a lawyer. In addition, as litigation privilege is not limited solely to lawyer/client communications, it can cover communications and documents within the client's organisation, even those created by/distributed to employees who are ultimately not part of the defined 'client circle', so long as the other essential requirements are met.

Litigation. There's no doubt that litigation privilege can arise where the anticipated or ongoing litigation involves proceedings in the civil courts, proceedings in the employment tribunals, arbitration and, for construction disputes, adjudication. The position is less clear where the proceedings in question take place within other tribunals or are public inquiries or regulatory investigations. A suggested test is that litigation privilege may arise in the context of adversarial proceedings where judicial functions are exercised, but it may not apply in merely investigative or administrative proceedings. Case law is not definitive on the point.

Anticipated or ongoing. The litigation must be pending, reasonably contemplated or existing. That means it must be a real likelihood, rather than a mere possibility. Whilst it doesn't matter if litigation doesn't actually follow, neither a possibility that sooner or later someone might make a claim, nor a general apprehension of future litigation, would be enough to satisfy this test.

Dominant purpose. The requirement that the dominant purpose behind the making of the document or communication be its use in litigation is the point at which many attempts to establish litigation privilege fail. One of the key reasons for this is that documents often have more than one purpose: for example, a document might be created to prepare for litigation and to manage risk and/or to report on and/or prevent recurrence of a situation. The test is strictly what is the dominant purpose? If the main objective of a document is anything other than its use in the litigation, no litigation privilege will arise.

Confidentiality. It's widely accepted that privilege per se cannot be claimed unless the document or communication in question is confidential. However the position is less clear with litigation privilege than It's with legal advice privilege by virtue of the fact that litigation privilege often involves communications with third parties (who may not be subject to confidentiality obligations) and/or documents which have been more widely disseminated. Generally, if a document has been disclosed to only a limited number of third parties on express terms that it was to not to be (and did not in fact become) generally available outside that limited group, then litigation privilege may still arise.

PROTECTING LITIGATION PRIVILEGE

Having to disclose documents which reveal a party's early investigations and thought-processes can be devastating to a party's case in litigation. So how do you protect your right to keep such documents privileged from disclosure? The following tips should help:

- At the first hint of a dispute, consider what work and investigations you need to carry out to establish your position. Do you need third parties to investigate? If yes, how will you instruct and deal with these third party, non lawyer, advisers and experts?
- Ask yourself is there is a risk of litigation? Is the impending litigation the dominant reason for your instructions? You must be able to answer 'yes' to these questions to successfully claim litigation privilege.
- If litigation is anticipated, ensure your instructions to your third party advisers and experts refer specifically to the potential dispute. Explain that their work is being sought in contemplation of litigation, to help with your pre-action investigations. Ensure that all correspondence refers to your genuine concerns about the potential dispute. Consider appointing external lawyers to instruct and deal with any other third party advisers and experts.
- Mark your correspondence "confidential" and head it up with a note that It's "prepared in contemplation of litigation".
- Ensure that your team knows that there is the potential for litigation and that they deal with and endorse all correspondence and documents accordingly. (Practically speaking, this is also good practice in terms of advising the team of the need to preserve all relevant documents, including electronic documents, for the purposes of instructing lawyers/obtaining legal advice, and for the purposes of the subsequent disclosure process when litigation is underway).
- As with legal advice privilege, ensure that both your team and the third party advisers treat the documents as confidential and privileged. Do not risk waiving privilege by showing the documents to persons unconnected with the dispute. Keep the documents within as small a team as possible.
- If there are other reasons for investigating the facts which are the subject of the documents, other than impending or ongoing litigation (for example to improve internal processes and/or to manage risk), there is a real risk that your communications will not satisfy the dominant purpose test and will not therefore attract litigation privilege. If in doubt, or if there are two or more reasons for creating the document and/or instructing the third party, your documents might be better protected if you can rely on legal advice privilege instead. In those circumstances, instruct and speak to your external lawyers first and ask them to manage the investigations.
- Alternatively, consider giving your advisers two sets of instructions and keep separate any privileged issues relating to even the smallest chance of a dispute.

3. JOINT PRIVILEGE & COMMON INTEREST PRIVILEGE

'Joint' and 'common interest' privilege (so-called) are, strictly speaking, not actually forms of privilege in their own right. Rather, they are legal principles that have developed to allow a party to share materials that are already privileged with another party who has the requisite joint or common interest.

3.1 JOINT PRIVILEGE

In some circumstances where two or more parties have a joint interest in the subject matter of a document or communication that already attracts legal advice privilege or litigation privilege, that interest may enable the parties to share the document/communication between them without the risk of losing confidentiality, and therefore losing privilege.

This 'joint privilege' means that neither party can assert privilege against the other (for example, if/when a subsequent dispute arises between them) and that both parties can assert privilege in respect of the relevant documents/communications against the rest of the world.

As this privilege is joint, so too is the ability to waive it. Joint privilege cannot be waived unilaterally by either party.

- The types of joint interest/relationships that may give rise to joint privilege include:
    - beneficiaries and trustees;
    - joint venture parties;
    - insurers and reinsurers where there is a community of interest;
    - partners;
    - parent companies and their subsidiaries;
    - companies and their directors;
    - generally, companies and their shareholders; and
    - parties instructing the same solicitor on a transaction (joint retainers).
- In order for joint privilege to arise, the joint interest must exist at the time the document/communication comes into existence; and
- the document/communication must have come into being for the purposes of, or for the furtherance of, the joint interest.

A shareholder is entitled to see all documents obtained by the company in the course of the administration of its affairs on the basis that a company cannot assert privilege against its shareholders, who have indirectly paid for the company's documents, assets, legal advice, etc. However, an exception to this is where the company receives legal advice relating to an actual or contemplated claim by the shareholder against the company.

Where parties retain the same solicitor, they are entitled to see any otherwise-privileged communications to which they have not been a party and they are not entitled to claim privilege against each other in any subsequent litigation.

3.2 COMMON INTEREST PRIVILEGE

Again, while 'common interest privilege' is not actually a form of privilege per se, It's a legally recognised principle which operates to preserve privilege in documents that are voluntarily disclosed to third parties. Typically, it arises where a person voluntarily discloses a privileged document to a third party who has a common interest, either in the subject matter of the privileged document or in the litigation in connection with which the document was brought into existence.

Common interest privilege is concerned with the subject matter of the document/communication, and so parties may be able to rely on common interest privilege in circumstances where there is no joint privilege.
Where common interest privilege applies, the document remains privileged in the hands of the recipient and the recipient can assert the disclosing party's privilege as against the rest of the world.

For common interest privilege to arise:

- the common interest between the disclosing party and the recipient must exist at the time the document/communication is shared; and
- the disclosure to the recipient must be voluntary.
- As mentioned above, the common interest must be in either the subject matter of the privileged document/communication, or in the litigation in connection with which it was created.
- The law is not clear, however, on exactly what common interests will suffice. Examples of scenarios and relationships where common interest privilege has been found to apply include:
    - co-defendants;
    - parties who do or might retain the same solicitor;
    - insured and insurer;
    - reinsured and reinsurer;
    - parent companies and their subsidiaries or other companies within a group; and
    - agent and principal.

Potentially, common interest privilege could also apply in other situations where there is a genuine, common interest in maintaining confidentiality in a privileged document. For example, where a potential purchaser reviews a target company's due diligence; or where neighbouring landowners or joint venture partners who are considering cooperative development plans share environmental and planning research about a proposed site.

However, with the law being largely uncertain as to whether/when common interest privilege will apply, the best advice is always to be cautious when considering disclosing privileged documents to third parties.

4. WITHOUT PREJUDICE PRIVILEGE

If a communication between negotiating parties attracts without prejudice privilege it will not be admissible in court. The rationale behind this form of privilege is that it's in the public interest that disputing parties should be able to negotiate freely with a view to settling their disputes wherever possible, without fear that any concessions they may make as part of those negotiations will be used as evidence against them.

For a communication to attract without prejudice privilege:

- there must be a real issue in dispute between the parties; and
- the communication in question must be, or form part of, a genuine attempt to negotiate a resolution.

Crucially, it's the substance of the communication that matters – not whether or not the document, meeting or phone call has been labelled or stated to be 'without prejudice'. To determine this, the communication must be analysed objectively in its context to assess whether it was sent in a genuine attempt to resolve the dispute. If it was then, even if it's not labelled as without prejudice, it can still attract the benefit of without prejudice privilege.

There are some exceptions, whereby negotiations can fall outside without prejudice privilege. These include:

- where parties choose to negotiate openly (perhaps because this is preferable tactically or perhaps because this is necessary for a party to demonstrate its position to a third party);
- where it would be manifestly unjust to allow privilege protection to apply. For example where a communication amounts to evidence of fraud, misrepresentation, undue influence, perjury, blackmail or other impropriety.

Without prejudice privilege also ceases to attach to communications between parties once the substantive dispute between them has been resolved. A common example is when a debt is acknowledged by a debtor in financial difficulties, and then the parties negotiate for the creditor to allow deferred or reduced payment as a means of mitigating its potential loss. The post-acknowledgement negotiations will not be privileged as the dispute over the debtor's liability to pay the debt has been resolved (by the debtor admitting the debt).

Traditionally, without prejudice has been seen to operate alongside the settlement of civil litigation. However, in today's increasingly regulated environment, case law has confirmed that without prejudice privilege can extend to communications made with a regulator about the settlement of an investigation.

There can be significant traps for those who negotiate without fully understanding the nature of without prejudice privilege:

- Parties often use the phrases 'without prejudice' and 'off the record' interchangeably when they want to engage in written or oral correspondence privately and without facing potential comeback in any subsequent legal proceedings. The difficulty with this is that, unless the correspondence specifically pertains to a settlement effort, it simply will not be privileged as a matter of law. Communications cannot be designated 'without prejudice' by a heading or statement to that effect; and 'off the record' is not a legally recognised concept in any event.
- Like other forms of privilege, without prejudice privilege can be waived, even inadvertently.
- In some instances parties expressly choose to waive without prejudice privilege in a communication, often because the letter, e-mail, attendance note or other document contains some information which one or both parties actually wish to place before the court. However it's not generally possible for parties to cherry pick items or admissions within any one communication without waiving privilege in respect of the entire communication or even an entire negotiation or suite of documents.
- Without prejudice privilege, like other forms of privilege, can also be waived if a communication is inadvertently adduced. In those circumstances an order of the court will be required to determine inadmissibility, and the party against whose interests the communication operates will have to rely on the court disregarding what it has seen in any subsequent litigation.

Parties should also be aware that communications marked 'without prejudice save as to costs' may be shown to the court following judgment of the main dispute, when the court is considering the question of who should pay the costs of the proceedings and the amount of costs to be paid. Such communications can reveal how reasonably (or not!) a party has acted, and can be highly influential as to the determination of any costs award.

PROTECTING WITHOUT PREJUDICE PRIVILEGE

Anyone who is involved in a dispute and considering contacting or negotiating with the other side outside of the litigation or investigation process should bear in mind the following practical advice:

- Be on guard at all times. Whilst without prejudice privilege exists to encourage free negotiations and to facilitate settlement, it will only arise to protect parties in particular circumstances.
- Remember, if discussions or documents do not amount to genuine attempts to settle a dispute, they won't be protected from disclosure regardless of any attempt to label or categorise them as 'without prejudice'.
- The question of whether or not privilege exists primarily relates to a communication as a whole. Generally, unless specific items of content within a communication are very clearly separable, It's not possible for a party to argue that some aspects of a communication can be disclosed to a court, but not others. Be careful not to include matters that you do want a court to see in privileged documents – and vice versa.
- Consider every communication individually and ask whether it should be wholly without prejudice, or without prejudice save as to costs, and endorse accordingly.
- Beware inadvertent waiver. Speak to your legal adviser immediately if you are ever unsure whether actions or reactions that you or your opponent have taken in respect of any 'off the record' correspondence or correspondence between the parties may have waived or undermined without prejudice privilege.
- Take extra care when negotiating with litigants in person. Those without legal representation may be less likely to appreciate the subtleties of legal concepts such as privilege protection.

5. PRIVILEGE AGAINST SELF-INCRIMINATION

The rule of privilege against self-incrimination (the UK equivalent of the US' 'pleading the 5th') provides that no person is bound to answer any question or to disclose or release any document in civil proceedings, if there is a real or appreciable danger that the answer or document would expose that person or his/her spouse or civil partner to any criminal charge or legal penalty.

Privilege against self-incrimination can be claimed by a company or any other legal 'person', but case law is not clear as to whether directors, employees or agents of a company can invoke the privilege where their answers would tend to incriminate the company. In addition, certain statutes have been held to abrogate this form of privilege, so as to allow investigating authorities to require answers to their questions. (Examples which are relevant in the context of regulatory investigations include section 174 of the Financial Services and Markets Act 2000, which deals with investigations into the business of persons authorised under that Act; and section 2 of the Criminal Justice Act 1987, which deals with investigations by the Serious Fraud Office.)

Privilege against self-incrimination can be claimed when refusing to produce documents or information, whether at or before trial. It can be particularly helpful where disclosure orders are sought as part of interim emergency applications, such as search orders and freezing injunctions, where the respondent has limited opportunity to take legal advice.

PRACTICAL ADVICE

- Staff education is crucial. Regular training as to the legal requirements and practical ramifications of privilege (and, in particular, as to any internal processes which must be followed to protect privilege) will be essential.
- Ensure all business teams know how and when to make it clear that confidential legal advice is being requested.
- Ensure all business teams know how to properly label their communications. You can't make a document or communication privileged simply by saying it, but the act of labelling communications correctly can focus minds as to the requirements for and protection of privilege. It can also help to strengthen your case if and when the question of privilege is ever disputed, and can help to ensure that privilege is not inadvertently waived.
- Always remember that confidentiality is a pre-requisite of privilege. If privileged material, even material subject to a confidentiality agreement, is disclosed to third parties, privilege might be lost and the material might become disclosable.
- Always remember that, for legal advice privilege to arise, the document must pass between a qualified lawyer and his or her client. The adviser must be a qualified member of the legal profession. Where a business has an in-house legal department, be aware that some members of the team may be legally qualified, but some may not.
- Ensure that all business teams know how, and with whom, to circulate documents. Foster a culture where circulation of documents is routinely as sparing as possible.
- Beware forwarding e-mails and attachments, 'chains' of e-mails, non-encrypted electronic communications and posting online – all of these increase the risk of inadvertent waiver of privilege.
- Where lawyers have a mixed legal and administrative/business role, ensure that careful consideration is given, on a case by case basis, to any communications and documents that are produced as a result. Always ask, what's the dominant purpose for creation of the document? To protect privilege, consider keeping legal and administrative matters separate.
- Consider carefully at the outset of any investigation or dispute how best to structure the 'client' team with responsibility for instructing external legal advisers and other consultants.
- Carefully consider at the outset whether other expert advisers should be instructed, and consider asking external lawyers to handle those appointments.
- Seek specialist local advice when dealing with cross-jurisdictional matters.

DISPUTE RESOLUTION

Walker Morris' Group of litigation and dispute lawyers is one of the largest and most successful outside London. The Group includes specialist teams undertaking work in relation to disputes arising in the context of commercial contracts, corporate transactions, intellectual property, construction, competition, banking and finance, insolvency, real estate, regulatory issues, HR and fraud.

Within the wider Group, the specialist Commercial Dispute Resolution (CDR) Team undertakes commercial and corporate disputes and litigation. It handles work arising out of operational and strategic domestic and international contracts and trading relationships, which our clients have with customers, suppliers, joint venture partners and third parties. The CDR Team operates in a diverse range of business areas and has core strengths in technology, energy, engineering, manufacturing and automotive, amongst other sectors.

Walker Morris' Dispute Resolution Group's core skills encompass UK and international litigation, arbitration and all forms of alternative dispute resolution. We advise global corporations and some of the UK's largest and best known companies on disputes governed by the law of England and Wales and in issues in the English courts and English arbitration. Given the popularity of English law, many of our cases arise in other jurisdictions, particularly in continental Europe, Africa and the Middle East.

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