**Types of privilege**

This element explains the three most common types pf privilege.

**Civil procedure rules**

The main CPR which support the content of this element are:

- CPR 31.3

**Introduction**

A party has a right to inspect a document that has been disclosed except where (CPR 31.3(1)):

- The document is no longer in the disclosing party's control (CPR 31.3(1)(a));

- Allowing inspection would be disproportionate (CPR 31.3(2); or

- The disclosing party has a right or duty to withhold inspection, ie it is privileged (CPR 31.3(1)(b)).

This element explores the third of these – the concept of privilege (the first two exceptions are addressed in the element 'inspection').

**Types of privilege**

There are many types of privilege, but the most important ones are:

- Legal advice privilege

- Litigation privilege

- Without prejudice communications

This element will look at each of these in turn. Many practitioners will at some point also encounter common interest privilege, privilege against self-incrimination and public interest immunity – these are not covered in this element.

Note that these privileges have been established by common law (not by statute), and therefore their reach is defined by the case law, which is always subject to some interpretation and is constantly developing. We will be including the leading cases in this element as they underpin the concepts being described, but for many programmes, you do not need to recall or cite the cases mentioned (check if you are unsure).

If you have been asked to read commentary in relation to CPR 31.3, you may wish to consider that commentary alongside the pages that follow.

**Legal advice privilege**

A useful definition is:

"A document which is a confidential communication between a lawyer and a client and was prepared for the dominant purpose of giving or receiving legal advice"

This definition, and definitions of other privileges given later in this element, are useful starting points for understanding these privileges, and should be interpreted sensibly by reference to the purpose of the privilege. Properly applied, they will guide you to the correct answer in the vast majority of circumstances.

The different elements of this definition are considered on the following pages.

Note at the outset that it **is** **not** a necessary element of this privilege that litigation is contemplated. There is no mention of litigation in this definition.

*Confidential*

The principle is that a client should be able to get legal advice in confidence. If the document is not confidential, privilege will not apply.

*Communication between lawyer and client*

A solicitor's note of a conversation with his client concerning legal advice will be a confidential communication between lawyer and client and therefore subject to legal advice privilege.

A solicitor's attendance note of a conversation between parties (ie normally between the solicitors for each party), or of what happens at court, is not privileged since, although the court held that the note is a communication, there is no confidentiality in notes of matters at which both sides are present (*Parry v Newsgroup Newspapers* [1990] NLJ 1719, CA).

This means that solicitors' memoranda and notes are communications for the purposes of the test but they will only be privileged if prepared in relation to confidential work undertaken for their client for the purposes of legal advice.

This privilege does not currently apply to advice of a legal or quasi-legal nature given by non-lawyers (ie tax advice given by accountants rather than lawyers).

*For the dominant purpose of giving/receiving legal advice*

Where a solicitor is retained primarily to provide legal advice, wider communications between solicitor and client, even if ancillary to that purpose, will be privileged because they fall within the "continuum of communication" (*Balabel v Air India* [1988] Ch 317)

The House of Lords in *Three Rivers District Council and others v Governor and Company of the Bank of England (No. 10)* [2004] UKHL 48 held that the 'presentational advice' in question (ie advice including the most appropriate way to present information to the BIU) was covered by legal advice privilege. The fact that lawyers had been giving such advice through 'legal spectacles' was the key consideration. The advice did, therefore, fall within legal advice privilege - it related to what should prudently and sensibly be done in the legal context of the case.

*Bank of Nova Scotia v Hellenic Mutual War Risks Association (the Good Luck)* [1992] 2 Lloyds Rep 540 provides that if a client repeats internally legal advice provided by his lawyer, for example to other personnel within his company, then that repetition also has the benefit of privilege. However, whether what a client passes on is a repetition of his lawyer's legal advice (which is covered by privilege) or his own opinion (which is not covered by privilege) is often debateable. It is therefore important to advise clients to be very careful about how legal advice gets disseminated to the board of a company for fear of losing legal advice privilege in relation to the advice.

Communications with in-house lawyers can also enjoy legal advice privilege before the English courts in civil actions, as long as the communication concerns advice given in a legal capacity rather than a general commercial or executive capacity with no legal context. However, privilege is unlikely to attach to communications with individuals who are qualified lawyers but who are not employed in a legal role, even if they are in fact giving legal advice.

**Litigation privilege**

A useful definition is:

"A document which is a confidential communication which passed between the lawyer and his client or between one of them and a third party, where the dominant purpose in creating the document is to obtain legal advice, evidence or information for use in the conduct of litigation which was at the time reasonably in prospect"

Again, the different elements of this definition are considered on the following pages.

*Confidential*

Confidentiality is also an essential element of litigation privilege – see the explanation above in relation to legal advice privilege.

*Communication between lawyer and client*

This is self-explanatory, but the privilege also extends to documents which are brought into existence for the purpose prosecuting or defending the claim. Examples include memoranda from one lawyer in a firm to one of his/her colleagues relating to a litigation case, or drafts of statements of case). This is the case notwithstanding that (depending on your interpretation) they are not communications between a solicitor and a client nor between one of them and a third party.

*Communication between lawyer and third party*

For example, this could be a communication between a solicitor and witness (who is not the client).

or

*Communication between client and third party*

For example, between the client and a witness.

*The dominant purpose is to obtain evidence/advice for litigation in reasonable contemplation.*

Dominant purpose: If there is more than one purpose behind the preparation of a document, the court will look at the dominant purpose – the test, therefore, is one of dominance and not exclusivity. Establishing the dominant purpose of a document may be particularly difficult where documents have been produced for a dual purpose.

**Example**: Following an accident on a railway, the railway faces a claim by an injured person. The railway produces a report for the dual purposes of improving safety on the railway and being submitted to the railway's solicitors for legal advice. As the litigation was at best a purpose, not a dominant purpose, the report was not privileged (from *Waugh v British Railways Board* ('BRB') [1980] AC 521.

*Litigation reasonably in prospect*

The litigation for which the documents are to be used must be 'reasonably in prospect'. This means litigation must be a **real likelihood rather than a mere possibility. A general apprehension of future litigation is insufficient.**

**Example:** documents produced by a company, not for specific litigation, but because it felt it was constantly under the threat of litigation by customers, were not privileged (from *USA v Philip Morris* [2003] EWCH 3028).

**Without prejudice communications**

A useful definition is:

"A document whose purpose is a genuine attempt to settle a dispute"

*Substance not form*

The document need not be marked 'without prejudice' for the privilege to apply. Conversely, a document marked 'without prejudice' may not be a genuine attempt to settle and would therefore fall to be inspected. The court will accordingly look to substance rather than form (*Rush and Tompkins v Greater London Council* [1989] AC 1280).

Without prejudice documents will not generally be seen by the court unless the privilege is expressly waived (waiver is explained later in this element). Some documents are, however, marked as being 'without prejudice save as to costs'. This means that the court will not see the document's contents unless it is considering the costs of the action or a particular issue. If it is considering costs, the judge is generally entitled to see the document and can take its contents into account when deciding (for example) the parties' conduct and which party is liable for costs/the amount of costs payable.

**Summary**

A party can refuse to allow inspection of a disclosed document when that document is privileged. There are various types of privilege.

A useful definition of legal advice privilege is 'A document which is a confidential communication between a lawyer and a client and was prepared for the purpose of giving or receiving legal advice'

A useful definition of litigation privilege is 'A document which is a confidential communication which passed between the lawyer and his client or between one of them and a third party, where the dominant purpose in creating the document is to obtain legal advice, evidence or information for use in the conduct of litigation which was at the time reasonably in prospect'. Litigation need not be the only purpose of the document, but it must be the dominant purpose.

A useful definition of without prejudice privilege is 'A document whose purpose is a genuine attempt to settle a dispute'.