

In-house counsel and privilege: 10 tips

The issue of whether legal professional privilege attaches to communications or documents generated in a company or organisation that employs an in-house lawyer has received quite a lot of attention from the courts. After all, it is an area that often raises issues about the circumstances in which the advice was given and the independence of the lawyers working in-house who provide that advice. Where in-house counsel wear more than one hat, the lines between legal and commercial activities can become blurred.

Is there a risk that you could lose a privilege claim over documents you assumed were privileged? The short answer is 'yes'. Depending on the context in which you are generating communications or documents, you may find that a claim for privilege cannot be maintained and/or that you are ordered by a court to produce a document for inspection.

Here are some steps you can take to minimise the risk of losing a privilege claim:

1. Maintain a practising certificate

In the event of a privilege dispute you will need to prove the communication was between a lawyer and a client for the dominant purpose of obtaining or providing legal advice. A current practising certificate will assist in establishing that you are a lawyer, although it may also be necessary to establish that the advice was given in the capacity of acting as a lawyer and not in some other non-legal capacity.

2. Use position title that emphasises legal role

Position titles that emphasise your legal role are better than those that emphasise non-legal or management responsibilities.

3. Maintain separate area for legal

Ideally, the in-house lawyer and/or legal team would be situated in a separate office area that can be restricted to legal staff. If this is not possible, it is important that files are kept securely and access is restricted to the legal team.

4. Maintain the confidentiality of files

Ensure that both hard copy files and electronic files are restricted to the legal team, and are not more widely accessible to others within the office.

5. Ensure all communications are clearly identified

It helps if all communications are clearly marked as being from 'legal'. A separate and distinct letterhead (e.g. 'Office of General Counsel') should be used for legal communications, and in-house lawyers should always sign off emails with their full legal titles.

When you seek external legal advice, ensure that communications are clearly identified as being for the purpose of obtaining external legal advice – e.g. 'privileged and confidential – external legal communication'.

6. Record the dominant purpose of your advice

Even if you subjectively intend that a report be commissioned for the dominant purpose of obtaining or providing legal advice, or to conduct or aid in the conduct of, litigation in reasonable prospect, this isn't determinative, because the test is objective. If the communication was requested for the relevant dominant purpose, try to get that request and the company's purpose in writing.

It is also a good idea to create and use formal protocols for the way in which legal advice is requested from, and provided by, the in-house lawyer.

7. When you wear two hats, keep them separate

If you find yourself having both a legal and a commercial role, how do you ensure that you don't waive privilege? The courts tend to construe the concept of legal advice fairly broadly. It goes beyond formal advice on the law – it extends to professional advice on what a party should prudently or sensibly do in a relevant legal context. Legal advice does not extend to advice that is purely factual or commercial.

If you have both a commercial and a legal role, keep them as separate as possible and make sure this is reflected in your communications. You might consider having two titles, which you use at different times, depending on the role in which you are acting. It helps if you:

- Keep your commercial and legal files separate.
- Avoid combining legal and commercial advice in one document where possible; where it is not possible, use headings to delineate what is commercial advice and what is legal advice.
- State in the advice the capacity in which you are acting.

8. Mark documents as 'privileged' only when you believe there is a justifiable claim

Marking documents as 'privileged' can be useful to remind people to keep documents confidential and privileged. You may wish to include a header on documents and a subject line in emails stating they are 'privileged and confidential'.

However, overusing the 'privilege' label may undermine a claim of privilege over documents that *are* actually privileged, so only use the 'privilege' label when you believe there is a justifiable claim.

9. If you are giving advice, consider whether it is possible to be independent

Even if you have taken steps to maintain your status as an independent legal adviser, there may be some circumstances when your advice may not be independent legal advice. In these situations, you should consider engaging outside legal advice.

10. Avoid waiving privilege

The key to waiver is acting inconsistently with the maintenance of the privileged document. You obviously need to avoid an express waiver of privilege, such as actually disclosing a document. You also need to avoid an implied waiver (i.e. acting inconsistently with the maintenance of the privilege). This could include referring to the privileged communication in a forum such as a negotiation with another company or a media statement.

Even disclosing the gist or conclusion of legal advice may constitute a waiver of privilege. It is wise to minimise the circulation of legal communications around your organisation. One suggestion is to mark a document or email with a header that it is not to be forwarded without the permission of in-house legal, or to put legal advice in formal communications, such as a memo that is attached to an email as a PDF document.

Care should also be taken to ensure that privilege is maintained by not disclosing communications to third parties (including insurers) unless there is a legal obligation to provide the information, there is a common interest and no conflicting interests between the parties, and the intended use and confidentiality of the communication has been agreed.

Does your organisation need strategic advice or training on issues relating to legal professional privilege?

Determining when a document or communication is privileged can be a challenge. Guidelines providing assistance on how to determine when a document or communication is privileged are available at: [**When will a document or communication be privileged?**](#)

For further information and advice on legal professional privilege and risk management for your organisation, contact Susan Bennett, Principal on +61 2 8226 8682 or email susan.bennett@sibenco.com.

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