

Privilege & documents in internal investigations

What you need to know

1. Privilege can protect documents from disclosure to third parties, including regulators and the police. Different types of privilege may apply in different circumstances. In the context of internal investigations, 'legal advice privilege' may be the most relevant, but the wider 'litigation privilege' may also apply in some circumstances.
2. Legal advice privilege only protects the seeking and receiving of confidential legal advice from a lawyer (i.e. members of the legal profession, including foreign lawyers), nothing else. Communications with nonlawyers should therefore be monitored carefully to limit the risk of non-privileged documents being produced on sensitive matters.
3. 'Legal advice' means advice on the law or on what should prudently and sensibly be done in a relevant legal context. Any other document or communication will not be privileged, even if it is to or from a lawyer.
4. Legal advice from an in-house lawyer will usually be privileged but there is an important exception: EU competition investigations. For EU competition investigations, only legal advice requested or obtained from an external lawyer benefits from the protection.
5. Internal documents commenting on legal advice or liability issues will not be privileged, unless they are themselves privileged legal advice from an internal lawyer.
6. Litigation privilege is wider. It applies to communications between a lawyer and third parties (e.g. accountants, experts, compliance and PR advisors), to the extent that the communications were created when litigation was reasonably contemplated and for the purpose of that litigation. This involves an assessment of the facts in any given case, but may arise where the allegations being investigated could reasonably be contemplated to result in criminal or civil litigation if found to be supported by evidence. Whether litigation is reasonably contemplated should be assessed on an ongoing basis and documented.
7. Only where litigation is in reasonable contemplation will factual summaries of evidence or interview notes be privileged, even if produced by lawyers or to assist lawyers to give advice.
8. Documents that already exist can't be made privileged simply by sending them to a lawyer. Emails, letters and other communications can't be made privileged simply by copying in a lawyer, if their purpose is not to ask the lawyer for legal advice.
9. Only confidential documents can be privileged. So privileged documents will lose this protection if disclosed or sent to too many people or third parties. Forwarding legal advice to others (even internally) could result in loss of privilege.
10. Marking a document 'privileged' does not make it privileged. Similarly, not marking a document 'privileged' does not stop it being privileged. It is good practice to mark all documents containing or seeking legal advice 'privileged and confidential', but be aware that these labels are not conclusive. It is also good practice to keep privileged and non-privileged material separate, if possible.
11. Requests for advice from a lawyer on how to do something illegal will never be privileged.
12. It is not the document that is privileged, but the communication in the document. So while it may be possible to avoid creating an un-privileged document by dealing with the issue orally in conversation, the contents of that conversation could later have to be disclosed in legal proceedings (criminal or civil).
13. Deleted documents and older versions of documents can be reviewed in investigations using sophisticated software, whether they are emails, text messages, Word or other types of documents. Instant Messenger communications can also be retrieved. Using the company systems to access Gmail, Yahoo, Hotmail or similar accounts also leaves traces that can later be investigated. Consideration needs to be given to whether the issues being investigated justify recovering these sorts of documents.

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