

# Legal privilege and internal investigations

Every regulated business should reconsider policies and procedures around internal investigations in the wake of the English Court of Appeal judgment in SFO v ENRC which rewrites the rules about legal professional privilege.

Internal investigations are a vital first step when faced with a regulatory issue - the SFO v ENRC case changes where and how legal professional privilege over documents can be claimed and maintained in the context of internal investigations.

The pathway to creating and maintaining privilege to keep relevant documents confidential is now clear, and enables clients and counsel to converse freely and frankly.

Ogier's Regulatory team specialises in internal investigations, training, risk management and compliance obligations, particularly in complex and cross-border matters.

#### Legal advice privilege

Legal advice privilege protects confidential communications between a lawyer and client for the purpose of giving or receiving legal advice.

#### Litigation privilege

Litigation privilege applies to confidential documents produced when litigation is reasonably anticipated and where the dominant purpose at the time of the creation of the document is for use in relation to litigation.

### 🗧 things to do when conducting an internal investigation

## things to know about maintaining legal privilege

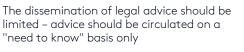


The "client" in respect of whom privilege might be claimed must be clearly defined who is specifically tasked with seeking and obtaining legal advice?

When embarking on an internal investigation

of a potential regulatory issue, consider

instructing external lawyers at early stage





Mark any privileged documents "confidential and privileged" but be aware that saying a documents is privileged doesn't mean that it is

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Set up a protocol for undertaking the investigation: establish a working group / designated team with clearly defined responsibilities to undertake the investigation

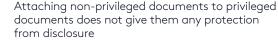


Don't add comments on any legal advice received because such advice may not be privileged



In one Jersey case, a report the Jersey Financial Services Commission told a regulated entity to obtain was not subject to legal professional privilege, and the report was discloseable in an action by one of the business's clients





If reports need to be drafted, ensure they are drafted by external counsel and only shared with core investigations team - once confidentiality is lost so is privilege

