



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.

5 things to do when conducting an internal investigation



When embarking on an internal investigation of a potential regulatory issue, consider instructing external lawyers at early stage



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



The dissemination of legal advice should be limited – advice should be circulated on a "need to know" basis only



If discussing legal advice at a board meeting, consider producing two sets of minutes – one for legal advice, the other for commercial issues



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



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



Attaching non-privileged documents to privileged documents does not give them any protection from disclosure



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



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