

12 Best Practices For Preserving Privilege



A solid understanding of both the fundamentals, and the nuances, of legal privilege is key to legal practice. The client's right to privilege underscores long-standing values of the importance of candour in the lawyer-client relationship, the confidentiality of preparation for litigation and the promotion of settlement as a means of dispute resolution.

While it is the client's right to privilege, the lawyer plays a critical role in ensuring privilege is not lost. Privilege can easily be lost if thought is not given to how privileged information is communicated to and from clients. However, an organized lawyer need fear not: in this article, we provide practical tips to preserve protection over privileged information.

Practical tips to preserve privilege

1. Limit the circulation of privileged documents on a "need to know" basis
 - Broad circulation can constitute waiver
 - Remind recipients in writing that the documents are privileged and should not be duplicated
 - Instruct recipients of a privileged email not to forward the email without approval
2. If you are in-house counsel, consider:
 - using distinct departmental letterhead, for both

internal and external communications, in connection with matters on which legal advice has been sought

- signing documents as “legal counsel” when acting in a legal advisory capacity, but not otherwise

3. When collecting information, confirm the purpose of the collection:

- When requesting information from employees, confirm that the request relates to litigation, or the giving of legal advice
- Reports to legal counsel by employees should state that they are made for the purpose of obtaining legal advice, or assisting counsel in giving legal advice, or for the purpose of litigation, as the case may be

4. Segregate legal advice files:

- Legal files should be physically segregated in the legal department
- Electronic legal files should be segregated on the company network so that access is restricted to legal personnel

5. Separate business advice from legal advice:

- Put legal advice in a separate document from business advice if possible
- If in one document, label each one clearly so that legal advice can be redacted
- Identify the facts in support of the privilege at the beginning of the legal advice portion

6. Anticipate the need to prove privilege

- State the facts and circumstances supporting the assertion of privilege, including the purpose of the document, at the beginning of the privileged document
- Identify the actual or anticipated litigation, if applicable

7. Keep communications with clients separate from communications with third parties ‘ one may be

privileged while the other is not

8. Mark privileged documents "privileged and confidential."
Do so consistently and with restraint ' only where there is a legitimate basis for asserting privilege.
9. In meetings at which privileged information is shared, ensure that no third parties are present if their presence could constitute waiver
 - e.g., at Board of Directors' meetings, ensure that outside consultants unconnected to the legal advice or litigation are excluded when privileged matters are discussed
10. Put systems in place to ensure that documents containing privileged material are identified so that they are not inadvertently disclosed (for example, in response to a regulator's request for information or in the collection of documents in execution of a search warrant)
11. When retaining third party experts, it is preferable that they:
 - Be retained by outside counsel
 - Not be the same experts who are already providing business services to the company
 - Sign a written retainer agreement making it clear that they have been retained for the purpose of facilitating the provision of legal advice, preparing for litigation, or both
12. On particularly sensitive or substantial matters, consider:
 - Formally identifying the legal advisory role being played by in-house counsel, or
 - Retaining outside counsel
 - To minimize the heightened scrutiny that courts bring to the review of materials prepared by in-house counsel

When a court considers whether the right to assert privilege over information has been waived (or lost), context matters. By implementing the above practices, you will be demonstrating

to the courts and the public that your client intends to maintain privilege over the information being shared, reducing the likelihood that the cloak of privilege will be pulled off.

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