

Legal Professional Privilege – Practices Implemented by In-house Legal Departments

The following are examples of practices implemented by five multinational and/or European in-house legal departments:

Belgian Industrial Company

The Company's in-house legal department consists of around 15 in-house counsel, all located in Belgium. The company's in-house counsel are organizationally part of a centralized legal department. To help enhance client-counsel interactions and accessibility, in-house counsel are located near their business clients

In-house counsel in Belgium are regulated by the Belgium Institute of Company Lawyers ([Institut des juristes d'entreprise / Instituut voor bedrijfsjuristen \(IBJ / IJE\)](#)), a legally recognized statutory body, exclusively for in-house lawyers. The Belgian law grants confidentiality status to advice given by in-house counsel to their company.

In-house counsel within the Company's legal department implement a range of practices to help invoke and maintain legal professional privilege. "Implementing these practices is a matter of careful judgment, and this is where in-house counsel can be especially useful. If these procedures are used in all matters, people won't take them seriously; if used appropriately, they help identify to all involved which communications are covered by legal professional privilege," explains a member of the legal department.

PRACTICES TO HELP INVOKE AND MAINTAIN LEGAL PROFESSIONAL PRIVILEGE

Following are practices implemented by the Company's legal department to invoke privilege for advice to the Company:

- **Clearly Identify Self as In-house Counsel in Written Communications-** in-house lawyers clearly identify themselves as in-house counsel using the title, 'Company Lawyer,' which is reserved exclusively for IBJ/IJE members;
- **Use Proper Headers in Communications to Identify Communications as Privileged-** for those communications that company lawyers may wish to maintain as privileged, header legends such as "Confidential and Privileged" or "Confidential and Privileged under Article 5 of the Law of March 1, 2000" may be used to help make these communications clearly recognizable as in-house communications that are privileged;
- **Keep Sensitive Legal Advice Limited to Small Group on Need-to-Know Basis-** treat sensitive matters accordingly and limit distribution of

communications to those in-house counsel and business leaders that need to know;

- **Centralize legal documents-** the legal department uses a separate document management system to keep legal communications and documents separate from other company documents and systems; within the legal department's document management system, documents are organized by matter.

ADDITIONAL PRACTICES FOR EUROPEAN COMPETITION LAW MATTERS OR OTHER SENSITIVE MATTERS

In addition to the practices summarized above, the legal department takes extra measures, where necessary, if reliance on Belgian privilege may be in question (for instance matters involving European competition law).

- **Hire External Legal Counsel-** for important matters, the legal department generally uses external legal counsel;
- **Use Proper Heading Labels for Matters Involving External Legal Counsel Advice-** correspondence, emails and/or memoranda are labeled with the heading: "At the explicit request of external counsel" to help easily identify the communications as privileged;
- **Communications Based on Advice from External Counsel are Clearly Identified as Such-** internal communications from in-house counsel that are based on advice from external counsel on these matters are attributed to external legal counsel to help designate the communications as privileged;
- **Document Management System Allows Matter Segregation-** the legal department's document management system is organized so that all documents for a certain matter are 'filed' together; to help avoid difficult issues, the in-house counsel make assessments as to which matters are sensitive and which are not and then all matters in a given file deemed to be sensitive are segregated within that file and treated accordingly.

TRAINING AND CLIENT EDUCATION

Within the company, business managers receive training on compliance, and a component of this training includes sensitization to legal professional privilege issues and appropriate communications, including email communications and communications on mobile devices. Business leaders receive tips on situations that might merit practices to establish and maintain legal professional privilege and tips on language to use in communications.

Global Law Department Based in Europe

This company operates in almost every country in the world, and its in-house legal department includes more than 500 in-house counsel. In general, the legal department implements practices to help protect legal professional privilege on a country-by-country basis, keeping in mind local jurisdictional requirements as well as requirements in the United States. In addition, for cross-border issues involving competition law in Europe, given the current state of decisions, the law department uses external legal counsel for legal advice.

PRACTICES TO HELP MAINTAIN LEGAL PROFESSIONAL PRIVILEGE

The legal department implements a number of practices in connection with legal professional privilege:

- ***In-house lawyers licensed in the countries in which they practice***-key in-house counsel with certain management and/or subject-specific roles are expected to be licensed (or registered, as applicable) in the jurisdictions in which they practice;
- ***Monitor Legal Professional Privilege in the United States***- the legal department monitors case law and developments with regard to legal professional privilege in the United States and implements practices accordingly to help preserve any claims of protection for legal professional privilege for matters or cases involving U.S. authorities or parties;
- ***Competition Law and Cross-Border Issues in the EU***- in-house counsel do not provide written legal advice on cross-border EU competition law issues; instead, external legal counsel are engaged for any necessary written advice on these matters;
- ***Client Education on Protecting Company Assets and Document Management***- business clients receive training on the need to protect company assets generally, and on good email conduct including the use of proper language and limited information sharing according to a business communications and email code; in addition, business clients receive training and tools on procedures to help protect intellectual property rights, ensuring confidentiality agreements are entered into with third parties, marking documentation with information security classifications, the use of IT security mechanisms (encryption, firewalls, etc.), in addition to having a document retention standard in place to minimize the extent of communication leakage and/or abuse;
- ***Client and In-house Counsel Education on Proper Business Ethic and Legal Professional Privilege***- the legal department educates on the proper business ethic and practices to implement if business clients were to invoke legal professional privilege and how to apply it, but they also warn that

application of privilege and legal effect is still open to argument and encourage business clients and in-house counsel to be conscious of this in their communications;

- ***Mergers and Acquisitions Matter: Special Coding-*** corporate practices include special layers of communications protections for matters involving potential mergers and acquisitions and/or other share price sensitive information; practices include using special coded names, extra precautions and procedures for live link access and having corporate professionals, including in-house counsel, working on these matters sign fit for purpose confidentiality agreements to ensure due attention to the sensitivity of the particular project at hand.

Large Multinational Corporation Based in the United States

This corporation operates around the world and has a law department of more than 500 people. Following are some practices implemented within the global law department to help protect legal professional privilege.

PRACTICES TO HELP MAINTAIN LEGAL PROFESSIONAL PRIVILEGE

- ***Guidance to in-house lawyers on how to handle legal communications-*** in-house counsel receive guidance on how to handle legal communications; the law department's intranet includes education materials on privilege- both within and outside of the United States; in addition, in-house counsel located in Europe are provided with guidance that their communications won't be privileged for competition law issues and possibly beyond;
- ***Segregate legal advice from business documents-*** within Europe, advice and communications received and provided by counsel is recorded in a separate document rather than merging or including the legal advice within a business document; to the extent it is not practical to separate the legal advice included within the document is clearly marked as such to help delineate advice versus business information;
- ***Communications from external counsel are clearly marked-*** within Europe, communications from external counsel (and/or internal communications relaying information or advice provided by external counsel) are clearly marked as such and transmitted without adding any additional commentary;
- ***Sensitive communications generated in the United States may be routed to external counsel rather than directly transmitting to in-house counsel in Europe-*** within Europe, the law department implements practices to take precautions to send communications or documents on matters that may be particularly sensitive to external counsel in Europe

rather than transmitting such communications or documents directly to in-house business colleagues or in-house counsel;

- **Clearly mark protected communications-** the law department clearly marks all privileged or protected matters as ‘privileged and confidential’ and/or ‘protected by attorney work product,’ as applicable; in addition, such documents may generally include a legend that restricts further copying or distribution;
- **Separate e-files and hard files for privileged communications-** within Europe, the law department implements practices requesting that in-house counsel store separately within separate electronic folders, communications and documents considered to be privileged or protected; in addition, hard copy or paper documents considered privileged and/or otherwise protected are stored in separate files and/or locked cabinets.

Fortune Global 500 Financial Institution Based in Canada

This company’s law group includes 155 in-house counsel located in 11 countries around the world. Most of the company’s in-house counsel are located in Canada and the United States. In addition, the company’s law group includes lawyers in London, Hong Kong and across a number of Caribbean Islands.

In addition to sensitizing in-house counsel on the sensitivities and uncertainties raised by the recent Akzo decisions, the company’s law group implements a range of practices to help establish and maintain solicitor-client privilege.

PRACTICES TO HELP ESTABLISH AND MAINTAIN SOLICITOR-CLIENT PRIVILEGE

In-house counsel for the company implement a number of practices to help preserve and maintain privilege for communications between business clients and in-house lawyers. Among these practices are:

- **Try to Ensure the Right People are Asserting Privilege in the Right Situations-** to help preserve a strong basis for making a claim of privilege protection, the company’s law group sensitizes in-house counsel and business clients, and encourages them to make assertions of privilege when necessary and not to blanket communications with privilege legends, which could dilute the effect of true protection; in addition, the legal group takes steps to help ensure that professionals who have legal qualifications but who are not in practicing lawyer roles (such as some compliance professionals) aren’t asserting privilege in connection with communications with other business professionals;
- **Educate on Proper Communications-** the company’s law group educates in-house counsel and business clients on use of email and other forms of

communications and how to appropriately communicate information on sensitive matters;

- **General Counsel University Training for In-house Counsel-** the company's law group offers an in-house education program for its legal team; privilege protection is part of the curriculum; the training is available by webcast so that lawyers around the world can participate and benefit;
- **Legal Document Management System-** documents for the company's law group are segregated and part of a legal document management system; access is restricted and is available only to members of the legal department.

SPECIFIC PRACTICES FOR CONDUCTING INTERNAL INVESTIGATIONS

In addition, the company's law group implements a number of specific practices to help protect solicitor-client privilege in Canada in connection with conducting internal investigations. Key components of the approach include: (1) a retainer letter (more on this below), and (2) training to sensitize internal personnel on the importance of privilege.

The Retainer Letter- in Specific

A key step in the process to help protect privilege in connection with internal investigations is issuing the retainer letter. Specifically, once contacted by a functional group conducting an investigation, the company's law group lawyer on point for working with that group prepares a 'retainer letter.'

Some core provisions in the retainer letter include:

- **Retainer clause:** within the introductory paragraph, the letter includes language stating that the company lawyer is retaining the assistance of the investigator and that of selected members of his/her team to review the circumstances surrounding the matter, and to assist the lawyer and the law group in assessing and advising upon the legal and regulatory risks, if any, which the organization has in that regard.
- **Statement regarding results of investigation:** statement that results of the review will form the basis of advice to senior management.
- **Confidentiality Acknowledgement:** the retainer letter provides that the lead investigator and additional members on the investigative team need to sign confidentiality acknowledgements.
- **Request to keep company lawyer informed:** letter includes a statement requesting that the investigator keep the company lawyer advised of the progress of the review, and of the information obtained as a result, and to provide to the lawyer copies of any reports that are prepared in connection with the investigation.
- **Statements to be included on documents created in connection with the investigation:** the letter requires that all working papers, reports,

communications and other materials prepared during the course of the investigation should include the following statement in all capital letters: “PRIVILEGED AND CONFIDENTIAL -PREPARED AT THE REQUEST OF COUNSEL SOLICITOR-CLIENT COMMUNICATION SUBJECT TO LITIGATION AND LEGAL PRIVILEGE”

- ***Request regarding disclosure and role of the Company’s law group:*** the letter asks the lead investigator (and all others who sign confidentiality acknowledgements) to ensure that copies of working papers, reports, communication and other materials prepared during the course of the engagement are not provided to anyone outside the group working on this engagement without the prior concurrence of the company’s law group.

INSIGHTS AND SENSITIVITIES

A senior lawyer for the company’s law group notes, “This is all very jurisdictionally sensitive. Legal leaders should consider their own legal jurisdiction when choosing the words and the approach used in the retainer and whether external counsel need to be involved as well. This is also an important point in regard to distribution — be careful where the report is sent as that may introduce another set of laws applying to privilege into play.”

Fortune 500 Company with Operations in More than 100 Countries

This company’s in-house legal department includes around 150 in-house counsel, with half being located within the United States and half being located in countries around the world. While the law department is a global law department with all in-house counsel ultimately reporting to the company’s General Counsel in the United States, the detailed organizational structure includes having general counsel in each country that constitutes a major market. There are also in-house counsel for several areas of the world, and they handle issues that cut across countries and may be relevant to a specific region.

The law department’s approach to privilege is to invoke and assert privilege for those matters believed to be deserving of privilege, with an internal caution that sometimes-- in spite of prudent efforts to establish and maintain privilege-- communications may ultimately be provided to government authorities depending on the specifics of a situation.

PRACTICES TO HELP INVOKE AND MAINTAIN LEGAL PROFESSIONAL PRIVILEGE

The law department implements a number of practices in connection with attorney-client privilege and work product protections:

- ***Use Proper Headers in Communications to Identify Communications as Privileged-***in-house counsel are expected to use their judgment on when to include a header on communications alerting the reader to the fact that the

communication is considered privileged or otherwise protected; in specific, a legend describing the communication as “Privileged and Confidential-Attorney Client Privilege and Attorney Work Product” may be used (some documents may refer to only privilege or work product depending on the nature of the communication or document);

- ***Training and Education***- the law department educates business clients on these protections, and legal leaders are sensitive to appropriate use of the legends to help avoid over-using them and diluting appropriate assertions of protections;
- ***Centralized legal documents***- within the United States, the law department uses a separate document management system to keep legal communications and documents separate from other company documents and systems;
- ***Legal Intranet***- the law department has a legal intranet; legal leaders are sensitive to what is posted on the intranet and do not post privileged information or communications on the legal intranet;
- ***Regional Collaboration to Explore Legal Professional Privilege in the EU***- with the anticipated decision of the European Court of Justice, a regional team of in-house counsel in Europe plans to assess practices in connection with legal professional privilege.

Global Legal Department Based in France

This company’s law department includes more than 300 lawyers located in France and in major countries around the world where the company does business. Practices to help protect legal professional privilege are implemented on a country-by-country basis.

PRACTICES TO HELP PROTECT LEGAL PROFESSIONAL PRIVILEGE

The legal department implements a number of practices in connection with legal professional privilege:

- ***Email privilege legend***- email communications from in-house counsel include a legend stating that the email may contain privileged information and cautioning recipients to treat it accordingly;
- ***Document segregation within the United States and Belgium***- to help protect recognized privileges for in-house counsel communications within the United States and Belgium, documents and correspondence for which privilege protection is sought are kept separately from other legal documents prepared by in-house counsel;
- ***Competition Law in the EU; role of external counsel***- in light of the Akzo decisions, any written legal advice on EU competition matters for which privilege protection may be important is secured from external legal

counsel; company clients are given the option of contacting an approved law firm directly to seek such legal advice or may contact an in-house lawyer and discuss the matter verbally; the law department's view in light of recent cases is that any legal guidance from in-house counsel located anywhere in the world on EU competition law matters would not enjoy legal professional privilege protections;

- ***Communications from external counsel are clearly marked-*** to help preserve legal professional privilege on communications from external legal counsel, such communications and documents are clearly marked privileged;
- ***Compliance audits performed at direction of external legal counsel-*** any in-house compliance audits are performed at the direction of external legal counsel; so, while the audit may be for internal diligence and primarily conducted using internal personnel, external legal counsel is involved in the audit process to help protect any privilege in connection with audit-related communications between business clients and external legal counsel; and
- ***Client Education-*** top and middle company business clients receive training on how to deal with legal privilege issues, especially in connection with compliance questions; as noted above, clients are informed that they may directly contact approved external counsel selected by the in-house legal department on matters involving competition or corruption questions.