



HANDY HINTS FOR IN-HOUSE LAWYERS

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In-house lawyers are subject to the same ethical rules as private practitioners.

However, in-house lawyers face challenges that may not apply to private practitioners.

The Corporate Lawyers Committee of the Law Society of New South Wales has prepared this document to assist in-house lawyers in dealing with these challenges.

The contents of this document are not binding on the practice of in-house lawyers and are provided to be instructive only.

This document should be read in conjunction with the *Legal Profession Uniform Law (NSW)*, *Legal Profession Uniform Law Application Act 2014* and the Rules and Regulations made under them,¹ which are binding on all lawyers in NSW.

The various Rules made under the Legal Profession Uniform Law are collectively referred to as the Uniform Rules. In some parts of this guide, the relevant provision from the Solicitors' Conduct Rules² has been included in square brackets for easy cross reference.

1 Legal Profession Uniform Regulations 2015, Legal Profession Uniform Law Application Regulation 2015, Legal Profession Uniform General Rules 2015, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, Legal Profession Uniform Legal Practice (Solicitors) Rules 2015, Legal Profession Continuing Professional Development (Solicitors) Rules 2015 and the Legal Profession Uniform Admission Rules 2015.

2 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

DISCLAIMER: This document has been produced solely for use by in-house lawyers to provide general assistance in relation to some aspects of in-house practice. It is not exhaustive of issues which in-house lawyers may encounter, nor does it constitute legal advice. It is a general guide only and practitioners must take care to fully consider the circumstances and laws applicable to their circumstances. While every care has been taken in the production of this document, no legal responsibility or liability is accepted, warranted or implied by the authors or The Law Society of New South Wales and any liability is hereby expressly disclaimed.

HANDY HINTS

1. The same professional obligations apply

As a lawyer who practises in-house in NSW (often referred to as an in-house lawyer), you have the same professional and ethical obligations as any other legal practitioner in NSW.

First and foremost, you are an officer of the court and have a paramount duty to the court [see Solicitors' Conduct Rule 3].

Further, you must comply with the Legal Profession Uniform Law, including the Uniform Rules made under it that govern the conduct and obligations of your profession.

2. Your client

As an in-house lawyer, you are employed by your client, an organisation and, often, its related bodies corporate. You owe your professional obligations as a lawyer to your client.

You do not owe your professional obligations to the persons who manage your client, such as a Chief Executive Officer or Managing Director, individuals in senior management positions, directors of any Board of your client or to your other fellow employees.

3. Your obligations

Your ethical obligations are the same as for any other lawyer. Like any other lawyer, your first obligation is as an officer of the court. Your next obligation is to act in the interests of your client.

You also have obligations as an employee of your client. Although your obligations as an employee and as an in-house lawyer may at times appear to conflict, your obligation as an in-house lawyer to act in the interest of your client takes priority over your obligations as an employee of your client. If, for example, an individual in a senior management position is seeking legal advice to support an agenda that is not in the interests of your client, then as an in-house lawyer your obligation is to your client, not to the senior executive.

When establishing the terms of your employment as an in-house lawyer, it is prudent to ensure your employment contract clearly recognises these obligations. In addition, the in-house legal function should agree with the employer on an independence statement which covers the work and employment of in-house lawyers. A pro forma independence statement is attached at Appendix A. This will assist to minimise any possible conflicts or misunderstandings.

4. What are in-house lawyers there for?

As an in-house lawyer, your role is the same as that of any other lawyer. However, because your role requires an in-depth understanding of your client's core business, you are able to provide legal advice that takes into account the constraints imposed upon your client by their business and the environment in which it operates. Your role includes the recognition of legal risks and the management or resolution of those risks in a timely manner, as well as the provision of legal advice that can help your client to achieve its business objectives within the law.

Your role provides you with the opportunity to ensure that your client complies with the law and establishes good corporate governance and legal compliance processes and procedures. It also provides you with an opportunity to influence your client, particularly at any Board and senior management levels, to pursue ethical and socially responsible practices.

It may be, however, that your client maintains an in-house legal function for other reasons, such as the proximity and on-going availability of legal advice, early detection of legal risks, the protection of the confidentiality of business information, greater control over legal costs and the provision of more relevant instructions to private practitioners, if required.

Whatever the reasons, your professional obligations remain the same.

5. Your obligation to maintain client confidentiality

The Law Society of New South Wales has a Statement of Ethics which requires that lawyers "act confidentially and in the protection of all client information". These obligations are found in the Solicitors' Conduct Rules [see Solicitors' Conduct Rules 9 and 10].

As with any lawyer, and any employee, you should maintain the confidentiality of information given to you by your client both during and after your employment. This is subject to any overriding legal obligation to disclose such information, or a legal compulsion to do so.

As with other professional obligations, your professional obligation to maintain confidentiality is owed to your client. You do not owe your professional obligation of maintaining confidentiality to the people who manage your client, such as a Chief Executive Officer or Managing Director, individuals in senior management positions, directors of any Board of your client or other fellow employees.

For the purposes of maintaining the confidentiality of "your client", "your client" includes employees of, and contractors, who perform services for, your client.

Given the nature of in-house legal practice and your position as a “confidant” of the business, it is also prudent to apply professional judgment when determining what information (if any) should be disclosed by you, and to whom, by taking into consideration:

- the nature and content of the information; and
- the manner in which it was disclosed to you.

In addition, you should consider whether your obligation to maintain confidentiality also extends to the manner in which you conduct your in-house legal practice, such as:

- your work environment;
- document management practices; and
- meetings and conversations.

If you are requested to provide such confidential information to a third party, you would need to obtain your client’s permission or be compelled by law to do so.

6. The advice which you provide

You should always provide legal advice independently, honestly, competently and fairly, even where it incurs the displeasure of the people who manage your client’s business. This is the case even if you have concerns that you may be seen as being obstructionist or non-commercial. It is important to remember that your client is the organisation. The legal advice is being provided for your client’s benefit, so it is in the interests of your client that you provide your legal advice without fear or favour.

In your role as an in-house lawyer, you may find you provide commercial advice as well as legal advice to your client. Where commercial advice (as opposed to legal advice) is provided, you must be mindful not to blur the two. Otherwise, you may jeopardise any claim your client may have to client legal privilege over the legal advice.

7. Your client’s ability to claim client legal privilege

In the past the courts have taken the view that a client is able to claim client legal privilege over legal advice provided by an in-house lawyer only if that lawyer is sufficiently ‘independent’ of their employer/client.

More recently, the courts have moved away from ‘independence’ being a separate requirement for in-house lawyers. Instead, courts have preferred the view that provided an in-house lawyer is acting in his or her professional capacity in relation to a professional matter and the confidential communications came into existence for the dominant purpose of legal advice, then client legal privilege will attach to the communications without the need to separately prove independence (see *Archer Capital 4A as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098). The focus will be on whether you were acting in your professional capacity as an in-house lawyer.

Section 38 of the *Legal Profession Uniform Law (NSW)* supports this view by providing that privilege is neither lost nor excluded because the lawyer is acting in the capacity of an officer, director, partner or employee of a law practice or in the capacity of a corporate legal practitioner or government legal practitioner.

To ensure that your client retains the option to claim that your advice is privileged, you should clearly mark your advice to show that is subject to client legal privilege. You should also be careful not to circulate legal advice widely by email or outside your organisation. Bear in mind that disclosing even the most general information about your advice may compromise its privileged status. You should make sure that you advise the recipients of your advice about the importance of keeping the advice confidential.

8. Holding a current practising certificate

An in-house lawyer usually holds a corporate legal practitioner (supervised) or a corporate legal practitioner (unsupervised) certificate.

A corporate legal practitioner certificate holder in NSW is not required to take out professional indemnity insurance cover.

The difference between the two corporate certificates is:

SUPERVISED – The holder is entitled to engage in supervised legal practice as a corporate legal practitioner or government legal practitioner until the holder has completed the period of supervised legal practice required.

UNSUPERVISED – The holder is entitled to engage in legal practice as a corporate legal practitioner or government legal practitioner. Such a practising certificate would enable an in-house lawyer to provide supervision to other in-house lawyers in the organisation, who hold a practising certificate, to engage only in supervised legal practice. To attain an unsupervised practising certificate, a period of supervised legal practice must be completed. The Law Society’s website provides additional information about the different kinds of practising certificates and the requirements for each: www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/yourpractisingcertificate

Subject to appropriate supervision (where required) as the holder of a corporate practising certificate, you may engage in legal practice only in the capacity of an in-house lawyer for your employer or a related body corporate of your employer (as defined in section 50 of the *Corporations Act 2001*)

Holders of a corporate practising certificate are also authorised to volunteer at a community legal service or otherwise on a pro bono basis provided that you are covered by professional indemnity insurance for such work. If you intend to provide legal services to any other person or entity, those services must be provided through a law practice holding the requisite professional indemnity insurance. In those circumstances you must hold a principal or employee of a law practice practising certificate.

9. Reporting lines

The senior in-house lawyer or General Counsel in an organisation should report directly to any Board or to senior management, such as the Chief Executive Officer or Managing Director. This is important because the protection of client legal privilege can be lost by your client if its legal advisors are not considered to be sufficiently independent.

If, however, the senior in-house lawyer does not report to a Board or to senior management, such as the Chief Executive Officer or Managing Director, your professional obligations as a lawyer do not change, even though your client may not be able to claim client legal privilege over legal advice you provide. In such circumstances the challenge is to ensure that the person to whom the senior in-house lawyer reports appreciates and respects the nature of your professional obligations as a lawyer and supports those obligations.

An alternate approach is to include in your contract of employment as a lawyer a clause acknowledging that:

- you are an officer of the court;
- you have an obligation to provide legal advice that is in the best interests of your client; and
- the advice you give may conflict with the immediate business objectives of the organisation (this could be tempered by including words to the effect that wherever possible your advice will be structured to facilitate those business objectives).

Ultimately it is in your client's interest to receive the best legal advice, and retain the ability to claim client legal privilege. Interference in the process of giving legal advice can lead to poorer advice being provided. Advice given to satisfy the demands of business managers in the organisation may ultimately not be in the best interests of your client.

10. When private practitioners are required

There are many different reasons that legal work is outsourced to private practitioners, such as a requirement for a particular area of legal expertise not available in the in-house legal function or excessive current workloads within the in-house legal function. As an in-house lawyer you have an important role to play in selecting, managing and working with private practitioners.

The in-house legal function is better placed than non-lawyers to determine whether, and if so what, legal work should be referred to private practitioners. The in-house legal function is primarily responsible for advising on legal issues that arise in the organisation and, in some instances, the risk and compliance functions of the business and is responsible for ensuring that the relevant advice is sought, obtained and then considered by the business.

Generally, where private practitioners are engaged it is best if the in-house legal function remains responsible for the carriage of the matter, engaging and instructing the private practitioners and managing the costs of the matter. This is because you have an in-depth understanding of the client's business, which will allow you to bring specific legal and business matters to the attention of the private practitioners. Because of your understanding of your client's business, you are well placed to ensure that the instructions provided to the private practitioners are clear and accurate and that the advice provided by the private practitioners is focused, provides value for the client and that the costs are reasonable.

Clear and detailed instructions to private practitioners are a very important consideration when dealing with business issues. As an in-house lawyer, you may need to explain relevant business information to the private legal practitioners and to ensure that the legal advice obtained is structured to enable the client to understand and implement it. This makes your role an important one as you know the legal and business history of the organisation and can guide any private practitioners with confidence and expertise.

You also have an important role to play in ensuring that legal advice provided by private practitioners is explained clearly and simply to senior management. With your understanding of your client's business and how it operates, you are well placed to do this.

11. Selecting private practitioners

There are a number of factors that should generally be taken into account in the selection of private practitioners. These include: reputation, industry expertise, cost effectiveness, prior knowledge of the business, flexibility of billing arrangements and personnel.

There are a number of different ways that the engagement of private lawyers can be structured, including selecting a panel of private law firms, one full-service firm or several firms at the same time with each being instructed in their area(s) of expertise. Both the choice of private practitioner and the structure of the engagement should be determined by what is the "best fit" for your client and the in-house legal function, as well as the kind of legal issues your client is facing. Different legal issues will require different considerations when looking at which private law firm is the most appropriate for the outsourcing of any particular matter.

For some organisations, it may be a good strategy to choose a particular private law firm which can provide the bulk of the advice for general business purposes. This saves time and money as that firm will become familiar with the business and give expedient, cost effective and specific advice. Alternatively, an organisation may have a number of firms on a panel. In today's legal market many firms look to specialisation, which may result in a client wanting to have more than one firm looking after the business interests of the organisation.

12. Dealing with regulators

As an in-house lawyer you may have a considerably better understanding than a private practitioner of your client's regulatory obligations, the authoritative constraints of each relevant regulator, how to manage your client's relationship with relevant regulators, any obligations of confidentiality that your client may owe its stakeholders, and how to ensure that your client has the opportunity to avail itself a to claim of client legal privilege.

Of course, the instructing of private practitioners to assist in a regulatory exercise should always be considered as a prudent option.

13. Demonstrate value

As an in-house lawyer it is important that you demonstrate to the people to whom you report, such as the Chief Executive Officer, or Managing Director, individuals in senior management positions, or directors of any Board, the benefits of maintaining and engaging with an in-house legal function.

Legal risk management is the focus of any in-house legal function. An in-house function is expected to give legal advice, which will manage or resolve legal issues relating to your client's business. This value proposition is readily demonstrated to the relevant business unit.

If possible, maintain records of circumstances that may have turned out more advantageously to your client if a legal risk had been identified earlier and legal advice obtained in a more timely manner.

Situations where the presence of an in-house function has been more cost effective than instructing private practitioners should be quantified and drawn to your client's attention wherever possible. The in-house legal function has the opportunity to minimise loss by managing effectively the relationship between client and relevant regulators. Similarly, the in-house legal function is usually responsible for the establishment, maintenance and enforcement of the legal and governance compliance processes and procedures, thereby providing the opportunity to further minimise loss to the organisation. Additionally, the in-house legal function is very close to the client's business processes and procedures and has the opportunity to add value to the business by highlighting business risks early and, thereafter, managing or resolving them.

If possible, you should maintain records of the type of legal work the in-house legal function undertakes and compare the value of that to a reasonable estimate of the cost if the same work had been done by private practitioners. There are, of course, many other ways to demonstrate value: accessibility, pro-activity, commerciality, user-friendliness, internal feedback.

You may wish to consider what records will assist you to demonstrate the importance of the in-house legal function to your client. Many value propositions can be illustrated through monthly reporting on issues such as: cost effectiveness

(the costs of the in-house legal function versus the cost of private practitioners), the value of investigations carried on in-house (e.g. those of the Australian Competition and Consumer Commission and the Australian Taxation Office), and the value of employment law issues being dealt with in-house as well as the benefit of, the retention of specifically trained in-house legal employees.

14. Understand your client's objectives, report against them and speak the client's language

As a member of an in-house legal function that assists the executives of your client to achieve their business objectives in line with the organisation's strategies, you need to understand what those organisational strategies and business objectives are, and how they have evolved over time. This helps to ensure that your legal support is closely aligned with your client's needs.

To engage effectively with the executives of your client, whether providing legal advice, or articulating concerns about legal risks, it is useful for you to try and speak to them in their language. This doesn't mean using business "jargon". Rather, it means understanding and acknowledging the business drivers that your client pays the most attention to and showing an interest in how to influence them.

When reporting on the achievements of the in-house legal function, it may also be useful to align your report with the measures being reported by your client (using one or more of the measures suggested in Hint 13 above) to highlight how the in-house legal function has supported the business objectives and thereby demonstrate the value add of that function.

15. As lines blur

As an in-house lawyer, the opportunity to be involved in the commercial decisions of your client often provides a welcome opportunity to provide valued input, from a legal perspective, into the business operations or strategic decision making processes of your client.

The challenge for you is to ensure you are able to conduct your legal practice in accordance with your professional legal obligations, while potentially taking on the legal obligations of an "officer" of the client under the provisions of the *Corporations Act 2001* (Cth) where your client is a corporation registered under that Act. This may occur where, for example, you make or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation.

In addition, your client could find it loses the opportunity to claim client legal privilege over "advice" you provide that is objectively considered to be "commercial" advice, rather than "legal" advice.

The involvement of an in-house lawyer at senior management or Board level in a corporation provides your client with some benefits, particularly with regard to governance, ethics

and risk management. However, if you find yourself in this position it may be prudent to have a separate in-house legal function reporting into you so that the in-house lawyers in that function can meet the tests required to enable your client to maintain its opportunities to claim client legal privilege [see Solicitors' Conduct Rule 12].

16. When the interests of clients conflict

If you are an in-house lawyer within a corporate group and you act for more than one entity within that group, there may be occasions when the interests of one of your clients conflict with the interests of another of your clients. In such circumstances you should advise both your clients accordingly and seek to have your clients deal with the issue in accordance with the group's conflict management policy. In some circumstances, it may be appropriate for each client to instruct different private practitioners to act on its behalf [see Solicitors' Conduct Rule 11].

17. Finally: be confident in what's right

One of the biggest challenges in the practice of an in-house lawyer is dealing with non-lawyers. A common problem is a non-lawyer telling you how he/she thinks things that require legal expertise should be done. It is of paramount importance to advise as to the legal position and the best interests of the client at the same time as maintaining legal and ethical independence as an officer of the court and a lawyer.

For example:

- it is common for a non-lawyer to think it is acceptable for a person signing a document as a witness, *not* to have been present to see the person whose signature they are purporting to witness, physically sign the document. To a non-lawyer, it may be seen as being inefficient to insist on having the witness present or, worse still, as obstructionist to insist on having the document re-signed if you refuse to accept the attestation of a witness who was not present;
- non-lawyers who have not been educated in the obligations of a trustee may not know that a trustee must at all times act in the best interests of its beneficiaries, or that a trustee cannot profit from its office unless authorised to do so;
- non-lawyers often will not appreciate that admitting liability to another party, even if the facts are such that your client may be liable, is not in the interests of the client and may invalidate any potential liability insurance claim;
- with limited knowledge and understanding of the law, some business people may believe that if an advice that they have drafted is simply sent from a lawyer's email address, it is privileged and provides protection from discovery.

As an in-house lawyer, one of your roles should be to educate non-lawyers as to what is legally correct. Have confidence in yourself and in your training as a lawyer and remember that the support and resources provided by the Law Society of New South Wales, as well as your professional colleagues, are always available to you.

APPENDIX A - INDEPENDENCE STATEMENT

[In-house legal function name] Independence Statement

The lawyers in the [in-house legal function name] need to remain independent of the various lines of business, any Board and the management team of [organisation] to ensure that the legal advice they provide is sufficiently objective and impartial, and to comply with their professional obligations as lawyers.

Independence Policy of [in-house legal function]:

1. Legal services must be provided in an independent and professional manner in accordance with each lawyer's responsibilities as an officer of the Court or Courts in which they are admitted to practice and the laws, regulations and professional rules applying to legal practitioners in Australia.
2. In certain circumstances, the professional duties of the lawyers in the [in-house legal function name] may take precedence over their duties to [corporate entity] or individuals within [corporate entity].
3. The role of the [In-house legal function name] is to provide legal advice as opposed to commercial advice. This distinction must be clearly understood where a lawyer is providing legal advice to the business to assist the business in making a commercial assessment of a particular matter.
4. [Corporate entity] [management, such as a Chief Executive Officer or Managing Director, individuals in senior management positions, directors of any Board etc] and other employees must not seek to inappropriately influence the proper exercise of the independent professional judgment of a lawyer in the [in-house legal function name].
5. If a lawyer in the [in-house legal function name] forms the view that their ability to provide impartial legal advice has been, or may be, compromised he or she should immediately inform the General Counsel or the Chief Executive Officer, Managing Director or equivalent.
6. Where a lawyer in the [in-house legal function name] performs both legal and non-legal roles, those roles must be clearly delineated and the distinction identified where appropriate in relevant communications.

The lawyers in the [in-house legal function name] acknowledge that they owe a duty of confidentiality to those whom they advise and have a duty to act always with the utmost integrity

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