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Guidance to in-house counsel – managing the pressure to "Just say Yes"

In-house lawyers may occasionally feel pushed to agree to actions that threaten their ethical boundaries – and navigating these situations requires finesse.

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8 years ago I published an article about on the pressures that in-house counsel face and gave some ideas about how they can manage those pressures.

8 years later, and after giving advice to in-house counsel continuously over that period, it seems that the same issues still arise.

How you can get pressured at work

"Just sign this", "you don't need to see the detail", "it was off-the-record". If you have heard these words, you are not alone. Similar situations arise from time to time in the working life of an in-house lawyer.

The result is that you may feel pressured to agree to a statement or request that might go against your better judgment.

So, how do you respond without crossing an ethical boundary?

Also, and perhaps just as importantly, how do you navigate those situations without getting fired in the process?

Know where to draw the line

The starting point is to understand that you are a lawyer, first and foremost, and that with that professional status come overriding ethical obligations.

"A lawyer is independent of his client and having regard to his wider responsibilities and the need to maintain the profession's reputation, [he/she] must and should on occasion be prepared to say to [his/her] client 'what you seek to do may be legal but I am not prepared to help you do it'."

This advice is as applicable to the in-house lawyer as it is to any other lawyer. As an in-house lawyer, you provide advice independently, honestly, and fairly and must be confident in what is right and what is wrong. Your ethical priorities are the same as any other lawyer.

And, as such, you must always remember that your first duty is to the Court and to uphold the law and then next to your client. Knowing who your client is therefore becomes very important. You must always remember that your first loyalty is to your employer if they are a company, not your immediate manager or a company director. So how does this relate to those difficult situations that were identified above?

The following makes suggestions about how to deal with each situation.

Just sign as witness on this document for me please, I have already signed it and don't want to reprint it"

Non-lawyers may think it is acceptable for a person signing a document as a witness not to be present to see the person sign it. They may think you are being obstructionist or inefficient if you require the person to re-sign the document in front of you.

But it is professional misconduct not to insist on this. This is one where you have to politely explain that the witnessing is not legal unless you actually see them sign the document. Also, be very careful of witnessing property-related documents and guarantees as special rules apply to doing that.

There are also particular rules that apply when signing affidavits. A witness should never purport to take an affidavit unless the witness is in the presence of the deponent and, unless the witness has personally placed the deponent on oath. In taking an affidavit, a witness must first ensure that the deponent has read the affidavit and, if necessary, wait while this is done. The witness must then administer an oath or affirmation.

A witness cannot insist on reading the contents of the document. The witness should, however, be satisfied that the affidavit is neat and legible and that its form is correct.

The witness must not permit the making of an affidavit if the witness knows that its contents are false or if the witness believes that the declarant or deponent does not understand its contents or, does not understand the nature of an oath. The witness should make sure that the deponent is aware that if the contents are wilfully untrue, the deponent can be prosecuted.

The witness should also be satisfied that the deponent is not signing the document just because the deponent trusts the solicitor who drafted it. However, a witness is not obliged to conduct an investigation into the truth of the contents of the affidavit, and responsibility for a false statement in an affidavit ultimately rests with its deponent.

“Please just authorise this transaction, you don’t need to see the detail, trust me”

Just don’t do this!

That is, don’t do this unless you want to risk getting sued personally if things go wrong further down the track.

There have been any number of instances where in-house counsel have been asked to authorise commercial activities of a company.

Sometimes, this is merely a legal “sign off” role where the lawyer is expected to advise that the proposed transaction is legal and that all legalities have been observed. Obviously, in that situation, the lawyer needs sufficient information to enable them to form an opinion that the transaction is legal and it would be unprofessional and negligent of the lawyer not to seek such information.

But there are also situations where the in-house lawyer may be acting outside their role as lawyer. They may be acting as a company secretary or simply as an officer of the company in some other capacity. In those circumstances, it is equally important for the lawyer to seek and obtain sufficient information to form a proper opinion about the transaction.

Alternatively, if it is beyond your role to authorise the transaction, let the person who asks you to authorise it know this.

As an in-house counsel, a large part of your role will be helping your employer company manage risks. If there is not a clear line of authority for authorising transactions then you need to step in and help the company create systems and processes to manage authorisations.

“At school I was always told that honesty is the best policy so why don’t we just admit what we have done and get on with things”

A great many successful prosecutions occur only because of admissions made by the accused. Lay people do not generally understand that there is usually a presumption of innocence in criminal and quasi-criminal matters. They also do not understand that in civil matters, a party must still prove the facts that support the allegations being made before a Judge can find in their favour.

As an in-house lawyer, you need to explain that the management and officers of a company should never make an admission unless advised to do so by external counsel and only then after careful consideration.

Remember – admissions can be withdrawn. So even if someone inadvisably makes an admission, the company can withdraw it, in appropriate circumstances. For example, if a manager makes an admission of wrongful conduct by a company under a mistaken belief as to the law or facts, it would be possible and appropriate to withdraw the admission in certain circumstances.

You should also be aware that a company does not have a privilege against self-incrimination, but individuals who work for it do. So if a manager is called to give evidence under compulsion, they need to be properly advised about their own personal position. You may not be able to do that and at the same time act for the company. In that situation, it will be appropriate to arrange alternative representation for the individual.

"I told you that I was writing the email 'off the record', so why should we disclose that in the litigation?"

In Australia, there are different meanings that can be given to the words 'off the record'. A communication can be 'off the record' in the sense that it is 'without prejudice', as contemplated by section 131 of the *Evidence Act 1995*, but these words can also convey other meanings. Some people mean to say that they are telling you information that they wish you to hear, but not your client. Journalists sometimes refer to a communication being 'off the record' to indicate that they would not divulge the source of the information requested or that they will not use the information at all.

In the US, the words 'off the record' are sometimes used when depositions are conducted. A deposition is a process in which witnesses may be examined before trial to determine facts about a case. Generally, the testimony of the deponent, as well as any stated objections, is taken stenographically. If the deposition is halted for any reason, the stenographer states "we are now going off the record". When the deposition is resumed the stenographer states "we are now on the record".

The better approach is always to use the words 'without prejudice' when seeking to invoke the protection afforded by section 131 of the Act. This view is supported by long experience, if nothing else.

For example, the High Court of Australia, in its judgment in Field v Commissioner for Railways for NSW, held that:

"For some centuries almost it has been recognised that parties may properly give definition to the occasions when they are communicating in this manner…[a privileged manner]…by the use of the words 'without prejudice' and to some extent the area of protection may be enlarged by the tacit acceptance by one side of the use by the other side of these words…The question, however, does not depend altogether upon the expectations of the parties. It depends upon what formed part of the negotiations for the settlement of the action and what was reasonably incidental thereto."

Whilst the protection afforded to communications by section 131 of the *Evidence Act 1995* is not dependent on the use of the words 'without prejudice', the use of other language, such as the words 'off the record', can be confusing and should be avoided.

10 Practical tips for better managing these situations

1. **Communicate**

Communication is the key and the key to communication is active listening. As an in-house lawyer you will need to deal with the people who raise issues that may put you under pressure.

Often the best way to do this is to listen attentively and actively to what they are saying – repeating the request to them. This will help you clear up any ambiguity in what they have said and help them to see that you fully understand the request being made of you.

At that stage you can then correct the person making the request by properly advising them based on the briefing they have given you. People will often react better to you denying them what they want when you show them that your response is considered and thought-through rather than a quick dismissal of the request.

Educate stakeholders in your organisation by regularly communicating the legal standards, regulations, and potential risks to your business partners. This helps them understand the rationale behind your advice.

Ensure that you frame responses that you give to people in a constructive manner. Instead of a flat "no," explain the reasoning and offer alternative solutions or ways to mitigate risks. For example consider using language like, "I can't approve this as is, but if we make these changes, we can move forward."

2. **Show confidence and be assertive when required**

When faced with high-stakes issues, stand your ground, even if it's uncomfortable. Remain calm, confident, and assertive in your communication.

People respond to logic and evidence. So, do your best to support your position with data, past experiences, or precedents. This can make your advice more compelling.

You are an important part of the company and you sometimes need to use that power and influence.

Warn people “I represent the company and may have to report this”.

Sometimes people just don’t want to take “no” for an answer, no matter how diplomatically or logically that is presented to them. In those circumstances, you just have to stand firm.

3. **Bring in External Experts and use external resources**

Be alive to situations where you may need a second opinion from outside lawyers or the Law Society.
If you are in doubt about whether your opinion is correct or what to do, you need not worry alone. The Law Society offers confidential support to all practitioners about ethical issues.

You can also seek the opinion of external counsel. Sometimes, involving outside counsel or experts can help reinforce your position and provide a neutral perspective.

It also helps to leverage external standards to help explain and enforce legal obligations. Point to external laws, regulations, or industry standards that mandate certain actions. This can help depersonalize the decision and reduce pressure.

4. **Personal matters vs company matters**

Avoid giving advice on personal matters, encourage employees to get their own lawyers if necessary.

Don’t fall into the trap of giving free advice – all you do is lessen your own independence and potentially make yourself personally liable if the advice you gave was not correct.

5. **Use a Risk-Based Approach**

There are risks for the company and risks for yourself that you will need to help manage.

Not all risks are equal. Help your colleagues understand the level of risk involved and categorize them as low, medium, or high.

Keep a record of the advice you give, especially when you’re overridden. This ensures there’s a paper trail if issues arise later.

6. **Sometimes adopt a style that supports your authority**

Develop respect through a “formal” approach – adopt procedures and written processes to create formality.

Processes and formality often acts as a buffer to people who want to pressure you to bend the rules. It also gives you an excuse to be able to tell them “I would love to do that for you, but the company rules don’t allow me to”.

7. **Be a Trusted Advisor**

Foster strong relationships with key stakeholders by being approachable and understanding their business needs. When they trust you, they’re more likely to respect your advice.

But how do you achieve that – well it takes effort and a principled approach to your work life dealings. It requires consistency and long term commitment and the desire to reciprocate with others.

Excellent advice can be gained from people who have studied what it is to be a trusted advisor. For example I strongly recommend reading everything you can find that has been written by David Maister, the famous professional management professor – a guru in this area of thought.

Maister wrote this about being trusted:

“People will trust you, be they client, colleague or employee, to the extent that they know what your principles (or deeply held values) are, and to the extent that they know you can be relied on to act in accordance with your principles. If people don’t know what your values are, or worse, suspect that you have none beyond your own short-term self-interest, they will not trust you with their business, their loyalty or their cooperation.

Trust is about relationships. I will trust you if I believe that you’re in this for the long haul, that you’re not just trying to maximize your own short-term benefits of our interactions. Trust is about reciprocity: You help me and I’ll help you. But I need to know that I can rely on you to do your part and that our relationship is built on shared values and principles.”

Also, endeavour to deeply understand the business's goals, challenges, and pressures. This allows you to provide practical legal advice that aligns with business objectives.

8. **Be excellent – not just good advice from "Bill and Ted"**

Gain respect by being excellent, both technically, ethically and commercially. The key to this is continuous personal training and education and also building your external reputation.

The best in-house lawyers are highly respected members of the company team and that respect enables them to deal with pressure situations.

You do not earn that sort of respect simply by being given the title of company in-house lawyer. It is something that you develop over time and that needs to be nurtured.

Successful in-house lawyers undertake continuous self-improvement, and build an excellent reputation internally and externally to the company that employs them. Their reputations enable them to exert the authority that is needed to overcome the sort of pressures referred to above.

Being an in-house lawyer is sometimes not easy. Complying with your ethical obligations in that role can be challenging, especially if you are placed under pressure by people in the business to do things which you should not do. But you can navigate the potential minefield that these situations create by understanding the issues and risks and knowing in advance how to respond to them.

9. **Be Solution-Oriented**

Instead of just saying "no," offer alternative paths that achieve the business goal while minimizing legal risks.

Work with other departments to find a compromise that balances business needs with legal requirements.

10. **Know When to Escalate**

If the pressure to say "yes" involves significant risk or ethical concerns, don't hesitate to escalate the issue to higher management or the board.

If the issue touches on compliance, involve the relevant teams to reinforce your position.

Remember, your client is the company and sometimes you need to "go over the head" of someone if they insist that you engage in behaviour that is inappropriate.

Some concluding remarks

Managing the pressure to say "yes" is part of the delicate balance that in-house counsel must maintain between supporting the business and protecting it from legal risks.

By being a strategic partner and a strong communicator, you can navigate these challenges effectively.

You can also make sure that you protect yourself and make the place you work more enjoyable and the work that you do more rewarding.

We all spend a large part of our lives at work – so it is worthwhile considering some of the strategies that have been explained to help you in your journey as an in-house counsel.