

How Much Can You Tell your In-house Counsel?

Any company or employer who can use a good in-house counsel to full effect benefits enormously, but many employers trip up during that exercise. Many HR employees as well as managers take it as granted that anything told or communicated to an in-house counsel is automatically confidential and under attorney-client privilege. However, and regrettably, it is not so.

In-house counsel require special attention with regard to what they learn

The in-house counsel is an employee who is especially disturbed as torn between two often-conflicting sets of standards - that of pursuing what is best for your business, and that of safeguarding his professional career from claims of misconduct. As a lawyer he has to remain loyal to rules of conduct governing his professional license and as your employee, he also has to remain loyal to the company. So, in order to make best use of an in-house counsel, it falls upon the employer to make things easy by training his staff as to where the lines should be drawn regarding communications with in-house counsel.

Quite often, what ordinary people would view as being under attorney-client privilege would be found as business conversations not fit for confidentiality. Since in-house counsel are involved in providing advice on many issues that are intricately entwined with business issues, unless a communication can be clearly marked as seeking legal advice, it does not earn the attorney-client privilege.

When are communications with in-house counsel truly protected by attorney-client privilege?

Though nothing is absolute, and we would begin with the disclaimer that this is not legal advice and you are better off consulting a legal practitioner before deciding on anything, generally established rules say corporate communications with an in-house counsel enjoys the attorney-client privilege, when"

1. The communication has been made to the in-house counsel in his/her capacity as a lawyer
2. The communications made to the in-house counsel falls within the scope of official duties of the person who made such communications
3. The person who made the communication to the in-house counsel was aware that the communication was being made for the purpose of seeking legal advice for the company
4. The communication with the in-house counsel was clearly of confidential nature and its confidentiality was maintained otherwise than being in the knowledge of the in-house counsel

Problems of communicating with in-house counsel

The bottom line of confusion in communicating with in-house counsel begins with the notion of

automatic privilege as communication made to a lawyer. This is as far from the truth as it can be. Not all communication comes under the protection of attorney-client privilege, and where it does not, the attorney can be compelled to disclose evidence against you.

Another quick and easy way to determine the bindings on your in-house counsel is to ask for a copy of his professional malpractice insurance contract, just to make sure that he is covered. Usually, professional malpractice insurance contracts and policies for in-house counsel spell out in detail the conditions under which an in-house counsel would not receive insurance - they are good pointers to the limitations of an in-house counsel.

The last word

Rather than use my own words, I would like to quote from one of the first articles I had ever read on the issue, by Gillian Flynn: *"The walls have ears. [People] get to thinking-especially when doing e-mail or sending memos-that what they're sending is really private. If there's going to be any kind of dispute down the road, the odds are it's not going to be private. You hate to say this to people, but whenever you're sending an e-mail or writing a memo, you should take a minute and think what it would look like if somebody saw it other than the person you're sending it to. How would it look for you and the company?"*

Believe it or not, the scenario hasn't changed much in the last fifteen years since I read that article.

Ref: Gillian Flynn, "How Much Can You Share Safely with Legal Counsel?," Workforce Aug. 1997.