

Educating Executives on the Role of In-House Counsel

By Jonathan A. Segal

All organizations invest time and money on orienting employees, about everything from how to reserve a conference room to where to call for help if their Blackberry service gets interrupted. But most organizations do not orient employees – and most significantly, do not orient senior management – on the role of in-house counsel, when they should consult with them and how to interact with them when they do. As a result, senior managers may operate with erroneous assumptions that later create ethical or legal problems, or both.

In-house counsel should provide guidance to their core constituents on the nature of this important relationship. This can be done by way of a quick training of all senior managers and then periodic training for executives who are hired or promoted thereafter. Specifically, we recommend that a training program address these primary issues:

- **REPRESENTATION OF THE EMPLOYER.** All in-house lawyers know they represent the employer and not the CEO, the CFO, the COO or any other senior person (although there may be cases in which the in-house lawyer, along with outside counsel, could represent both, subject to appropriate conflicts waivers).

Nonetheless, it is not uncommon for executives to refer to in-house counsel as “my lawyer,” the more so as the relationship grows.

A strong relationship between in-house counsel and senior leadership is a good thing, but confusion over the legal nature of that relationship is not good. But as in-house counsel, you don’t want to correct the chief each time he or she uses the term with an “actually, I am not your lawyer.” You may end up not being their

colleague either. Instead, make this relationship clear during the orientation. Then raise it again if you have reason to believe, in a particular situation, that the executive may think that you are representing him or her as an individual.

For example, if you are interviewing an executive who is accused of wrongdoing, as part of your internal investigation, as part of your “Upjohn warning,” you should remind that individual that you represent the company. When executives refer to you as their lawyer in that context, you must make clear that is not the case.

A related issue is what to do when executives ask you whether they should retain their own attorney. Unfortunately, from an ethical stand point, answering even that one question may be seen as providing legal advice. Explain to the executive that there are ethical restrictions that preclude you from advising on that question. You may suggest that, if they are not sure whether they need legal counsel of their own, it is a good idea to obtain counsel on that issue.

- **PRIVILEGED COMMUNICATIONS.** Some constituents believe that everything they share with in-house counsel is privileged. Again, not so. Conversations are privileged only if the constituent is seeking legal advice.

You want your constituents to be open with you. But you don’t want to have to testify against them. Educate your constituents in advance as to the scope of the privilege so that they don’t share with you what you don’t want to know. You also may need to remind them of that periodically.

For example, assume an executive starts to tell you a dirty joke or confide in you which new employee she finds attractive. As awkward as it may feel, stop her before she says too much. A little humor can go a long way: “I like you so much that I really don’t ever want to have to testify against you.” By interrupting her, you are protecting her (and your employer).

The same counsel applies to strictly personal matters. While it is fine to have personal friendships with executives, you don’t want them to be lulled into a false sense of security with regard to the scope of the privilege.

- **WAIVER OF PRIVILEGE.** As in-house counsel knows, the employer holds the privilege. However, executives potentially may waive

the privilege if they disclose publicly advice they are given. We have all seen the broadcast e-mails to the effect, "I told you that's illegal. Just ask..."

We need to educate constituents that they must keep confidential the advice we give them. More specifically, executives should be told that they generally should not disclose the advice given to them by in-house counsel without first consulting with in-house counsel regarding what they may disclose and how.

However, executives also need to understand that the converse is not true. More specifically, in-house counsel has the right (and sometimes the duty) to disclose to others what the executives tell them, as discussed below.

- **CONFIDENTIALITY.** Because the employer and not the executive is the client, in-house counsel's duty to retain information as confidential relates to the employer and not the executive. More specifically, in-house counsel cannot protect the confidences of an executive to the detriment of the client.

For that reason, in-house counsel needs to explain that confidentiality is not mutual. While the advice given by counsel must be retained as confidential by the constituent, in-house counsel has the right and sometimes duty to disclose to others the confidential information shared by a constituent.

For example, if an executive confides that he or someone else has engaged in wrongdoing, in-house counsel cannot safeguard the secret. To the contrary, in-house counsel must disclose it to the extent necessary to protect the actual client. The lack of mutuality can be a hard pill to swallow for many executives, if not explained carefully. That is why it is best to explain it during an orientation program before any particular issue arises.

Even if you raise the issue up front, there may be times when you will need to remind executives about this reality. For example, if an executive asks you to keep something strictly confidential, you may need to remind the executive before the disclosure is made that you can't promise absolute confidentiality. Similarly, if you are investigating alleged wrong-doing, before you interview the executive (as part of your Upjohn warning) remind the executive that, consistent with your representing the employer, you have the right and possibly the obligation to share with others what is disclosed.

- **E-MAIL.** Some of my favorite e-mails include comments like, "Help, I'm going to jail" and "I told you it was only a matter of time before we got caught." Or, "The regulators are going to fry us when they discover that ..."

Because in-house counsel often play both a business and a legal role, it will not always be clear which e-mails are privileged and which are not. Accordingly, in-house counsel should encourage their constituents to raise legal concerns orally (at least initially) and not by e-mail. In-house counsel can request additional information from the constituent by e-mail in order to provide legal advice (maximizing the likelihood that the communications that follow will be privileged).

In-house counsel also needs to be very careful of the e-mails that they send (or do not send). E-mails laced with sexual innuendo have felled more than a few in-house counsel. Not respond-

ing appropriately to offensive e-mails by others also may be seen as condoning them.

- **DOCUMENTATION.** In addition to the hazards of e-mails, in-house counsel should provide general advice on document creation and maintenance relative to legal advice. In particular, the guidance should address the following issues:

- If an executive prepares any documents (including e-mails) at the request of in-house counsel in order for in-house counsel to provide legal advice, the document should be labeled "privileged and confidential – prepared at the request of counsel."

- If e-mail is used to request legal advice, the subject matter line should be "privileged and confidential" and not the issue discussed.

- Notes taken of meetings with counsel on legal issues should be appropriately labeled as privileged and confidential.

It's best to explain these issues during orientation programs, before any particular issue arises.

- And, of course, privileged and non-privileged documents (whether hard copy or electronic) should be retained separately.

Taking the time to address these issues up front may avoid expensive battles over whether documents are privileged or being compelled to disclose documents that otherwise could and should be undiscoverable.

- **ABUSE OF PRIVILEGE.** The privilege is designed to facilitate honest disclosure so that appropriate legal counsel can be provided. It is not intended to protect business communications from discovery. Nonetheless, some executives may believe that if they put privilege on a business document, it won't be discoverable. This isn't so, and in fact it may call into question other documents where the label actually is appropriate.

Sometimes an executive may cc you on an e-mail, assuming that makes the e-mail privileged. It doesn't. However, it may make you a witness to what the executive wants to be confidential.

The relationship between in-house counsel and their executive constituents is a critical relationship that must be developed and protected. One of the keys to ensuring the strength of the relationship is to discuss the legal and ethical nature of the relationship so that executives do not say or do things based on understandable but still erroneous assumptions. Address these issues up-front so that you don't have to clean things up in the context of litigation or a government investigation.



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