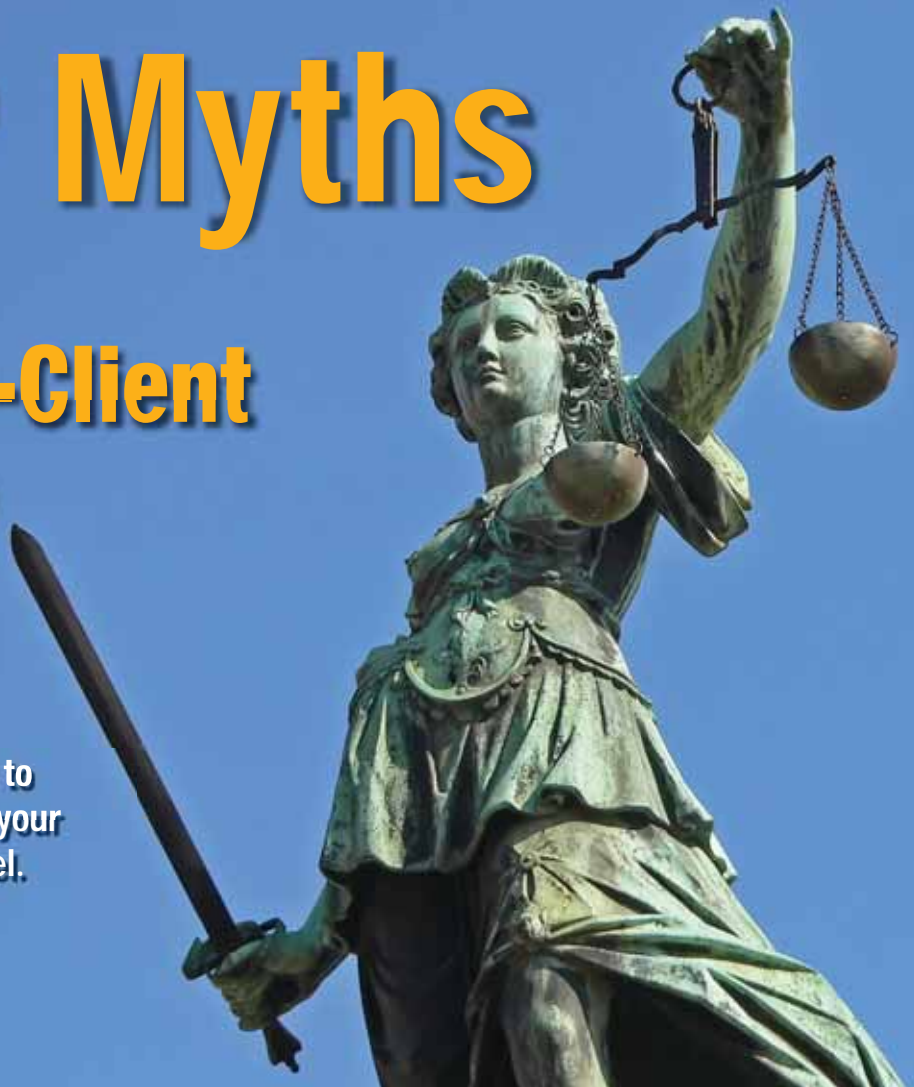




Four Myths about Attorney-Client Privilege

Here's what you need to know when you talk to your organization's counsel.



By Francine Friedman Griesing

Let's test your understanding of the attorney-client relationship:

1. True or False? Corporate counsel represents you personally in work-related matters because you're an executive of the organization.

False. Corporate counsel represents the corporation, not you as an individual. Confidential information about the nonprofit's activities told to its counsel may be privileged, but that privilege belongs to the nonprofit, not you. If you seek advice from corporate

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counsel about your own actions, you can create conflicts of interest that may expose you and the organization to liability.

2. True or False? Anything you discuss with corporate counsel is protected by attorney-client privilege and must be kept confidential.

False. The fact that you tell your attorney something doesn't make that information eligible for protection. The information must be confidential. Even then, the information isn't privileged unless it's directly related to advice the attorney gives you. The failure to delineate the different parts of the exchange with counsel may jeopardize privilege protection for the entire conversation.

3. True or false? You may tell your colleagues the substance of your communications with counsel without jeopardizing the privilege.

A spate of high-profile scandals has encouraged prosecutors to ferret out confidential information.

False. Including extraneous employees in legal discussions can undermine protection that might otherwise exist. E-mailing legal memoranda to a broad audience will also trigger a waiver. Only those who have a legitimate right to know should be party to privileged communications.

4. True or false? Neither the nonprofit nor its counsel may reveal the substance of your communications without your express consent.

False. It's up to the organization to determine whether to preserve or waive the confidentiality of your communications with corporate counsel. Should the organization elect to waive the protection, it may reveal confidential information that you, as an employee, conveyed to counsel, even if doing so may expose you individually to criminal or civil consequences.

Although government agencies conducting an investigation may offer to keep privileged information confidential and agree not to disclose it to private litigants, courts may reject these arrangements. There is considerable disagreement on whether providing confidential information to prosecutors in exchange for leniency amounts to waiving the privilege, thus entitling private adversaries to the same information. Once an organization shares information with the government, it runs the risk that a court will compel its disclosure to a private litigant. Since you aren't the client, you don't have standing to block disclosure to the government or adversary.

Strategies for Safeguarding Confidential Information

It's imperative that nonprofit executives recognize the above four statements as falsehoods. The expectation that an executive's communications with corporate counsel about confidential matters are protected by attorney-client privilege can get both the executive and the organization into trouble. At the heart of the issue is the fact that, when you consult with corporate counsel, attorney-client privilege belongs to the corporation, not to you personally. Consider whether you need independent counsel to protect your personal interests.

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Clarify with corporate counsel any questions about document retention policies.

Recently, a spate of high-profile scandals has encouraged prosecutors to ferret out confidential information in the interest of having organizations come clean. Here are steps you can take to reduce the risk that a court will compel disclosure of confidential information:

- **Distinguish** between communications addressing legal and business matters. Privilege applies only to legal advice.
- **Segregate** confidential attorney-client communications from general business materials, and clearly identify privileged information.
- **Limit access** to confidential counsel communications to those who need to know.
- **Don't discuss** confidential matters in public places.
- **Remind employees** of their duty to safeguard confidential information.
- **Clarify** with corporate counsel any questions about document retention policies.
- **Engage** outside counsel to conduct or oversee internal investigations. ■

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