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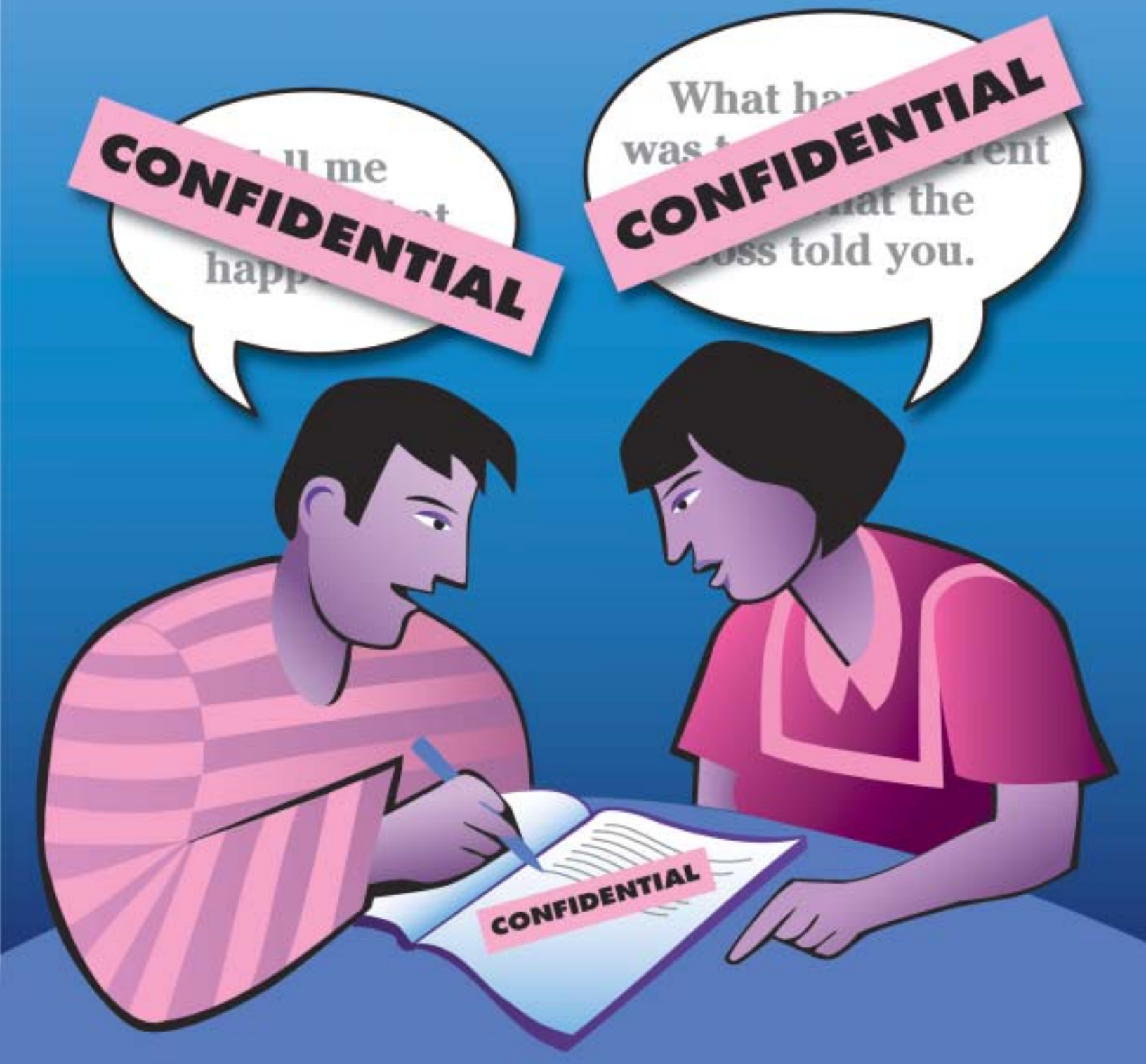
Steward-Member Confidentiality



Steward-Member Confidentiality

Stewards, when they're defending members against an accusation by management, can almost feel like lawyers. So here's the question: do stewards have with members the same confidentiality protections that lawyers have with their clients? Can you legally refuse to tell your employer facts about a workplace situation that are disclosed to you by a member?

Here's an example where confidentiality could become an issue.

Let's say one or both of the parties to a workplace shoving match comes to you for advice. The next day, the employer, investigating the scuffle in order to decide whether someone should be disciplined for it — maybe suspended or even fired — asks you what you know about it. Not only does he ask you, in fact, but he demands to know.

Can you refuse to reveal that information?

"Member/steward privilege" protected

The answer is almost always "yes." Administrative agencies, labor boards, courts and arbitrators in both the United States and Canada give legal protection to this "member/steward privilege" — the confidentiality of conversations and other communications between members and their union officials.

Of course, this protection is not unique to the union world. A lawyer can't be compelled to reveal information given by a client in confidence. And disclosures to a physician are protected by confidentiality, as are those to a religious leader or a mental health professional.

These legal protections exist because there are good reasons to shield confidential communications. We want people with medical conditions to feel free to reveal everything to their health-care providers; public health will suffer if patients have to worry about disclosure of matters they might find embarrassing. This extends to mental health care, too, with the U.S. Supreme Court having recognized that a relationship of "trust and confidence" is needed if a patient is to be able to benefit from psychotherapy.

Similarly, we understand that in our adversary system of justice clients must be free to reveal all potentially relevant information to their lawyers, so that lawyers can then advise their clients properly and, if the case proceeds, present the most effective legal case. (Of course, there are common sense exceptions in all these instances, such as when a client reveals plans to commit a new crime. Society recognizes that there is a strong interest in preventing future crimes, and accordingly expects the lawyer to come forward with the information.)

Similar policy reasons apply for protecting the privacy of communications in the union world. While very few stewards are lawyers, in fact one critical function of being a steward is to provide the same kind of representation services that a lawyer provides. (The collective bargaining agreement is the law of the workplace, and the grievance process or a disciplinary proceeding is the equivalent of a workplace court system.)

"Telling all" without fear

So, just as a client wanting to get adequate advice and a proper defense must be able to fully and frankly present all the information at hand to the attorney providing legal representation, a union member facing a disciplinary action or seeking to enforce provisions of the union contract needs to be able to "tell all" to the union rep, without worrying about whether the steward will later be forced to betray those confidences.

And a union steward seeking to protect due process rights of members and to enforce the terms of the collective bargaining agreement must be in a position to assure members that they don't have to hold back on what information they provide.

That said, here are some words of caution: just as with attorneys and their clients and with doctors and their patients, there are limits on the confidentiality of communications between members and their union stewards. An arbitrator or a court may determine that a member's right to confidentiality has been given up, for example, if the communication took place in a setting that one ordinarily would not think was confidential. For example, if a member tells you — and everybody else in the lunchroom — about having thrown the first punch, you won't be able to tell the prying employer that you won't reveal the contents of that conversation.

Be sure it's confidential

Likewise, if you share confidential information from a member with union higher ups or a union attorney on a "need to know" basis, the confidentiality will be preserved. But if the member goes around talking to everyone under the sun, it won't be possible to argue that the information is still confidential.

So, some practical words of advice: first, you can assure a member of the confidentiality of what you are told, but also make clear the limits; second, in whatever notes you make of conversations with a member, make sure to include any assurances you gave him or her that the matter would be kept confidential, or any requests made by the member to that effect. This makes it clear that the expectation at the time was that the matter would remain confidential.

— Michael Mauer. The writer is a labor attorney and author of The Union Member's Complete Guide.

Getting Members to Help Out

Different kinds of unions operate in different kinds of ways, but they all have a lot in common, especially this: understanding that the more people who pitch in, the more effective their union becomes and the better job it can do for everyone.

The question is, how do unions get more people to volunteer their time and energies? How do you find and recruit the people you need to make the union as strong and effective as you know it can be?

A Program that Works

Here's a way that has proven successful in a lot of unions. It may well work for yours.

To begin with, think of your own work area and the tasks you face as a steward. Think of all the things that could make the union more effective. With that as a starting point, talk with your union leadership, grievance committee, executive board, brother and sister stewards — whatever and whoever is appropriate in your setting — and ask for help in identifying the members in your workplace who may be potential new activists.

This program for identifying and recruiting activists can help you build a stronger, more effective union

At the first meeting of this leadership group, discuss what type of assistance is needed: newsletter writers, social, health and safety, community outreach or other committee members, additional stewards, and so forth. Once these needs have been established, distribute to everyone in the group a membership list of the local, the various work areas, shifts or whatever membership breakdown is appropriate in your situation. Go through members' names, one-by-one, and talk about each person, looking at each for the qualities you need in an activist. Try to remember if anyone on the list has ever expressed an interest in getting more involved. (Almost every time I have done this exercise, participants have found at least one member who has indicated a desire to play a more active role in the union, but no one had ever followed up and recruited him or her to a specific task.) Put a check by the name of each member who is a prospective new union activist.

Develop a Plan

Next, develop a plan to talk to every possible activist on a one-on-one basis. Divide their names among your group. Don't take more people than you think you can reasonably handle.

Schedule a period of time, usually between one and two weeks, to talk to the prospective activists. These individual discussions can take place during lunch breaks, before or after work, or during visits to their homes.

How do you make the approach? One way to start the discussion with each person is by asking how he or she feels things are going in the workplace or the union. What issues are of concern? Whatever the response, listen! Too often we talk too much to actually hear what members are really thinking.

Make the connection between whatever it is that concerns the member and how the member's increased participation would help resolve the problem. For instance, if the member is concerned with the speed of grievance processing, and you know for a fact that the union is being hampered by having too few stewards, you might say: "I understand what you mean. I think we are doing a pretty good job considering the number of stewards we have. We are all working hard. But we have a number of unfilled steward positions. If someone like you were to agree to become a steward, we could do an even better job handling grievances."

Keep in mind that members may have skills to offer that might not match the positions you need to fill. Be flexible — never reject someone who's willing to help the union cause. If someone is artistic, you might ask him to help keep the union bulletin board up to date and looking neat, or to draw a picture or cartoon for the newsletter. If someone only has a little bit of time to commit, ask her to hand out leaflets or help make phone calls for a union project every so often. Remember, the more members who are active, even in a small way, the more effective the union.

Keep in mind that the members may need time to think about your request. Don't pressure them: when people volunteer for a job they really don't want, they frequently don't perform very well. If necessary, give the people you are talking to time to decide, and follow up with them after an agreed upon period.

At the next meeting of your leadership group discuss each person with whom you talked. Who decided to volunteer on the spot? What has to be done to get him or her started in the position? Which approaches worked and which did not? What would the group recommend to convince individuals who seem interested in helping but haven't quite committed? Would it help if someone else in the group, or another union leader, came with you the next time you spoke to the individual? If someone was unable to talk to everyone on their list, can someone else in the group help out?

Set a period of time for follow-up discussions or uncompleted contacts and schedule another meeting of the group in a week or two.

This program takes a little time and effort, but it can pay off in huge dividends. When you realize that the whole exercise can be planned and executed in a matter of weeks, and that you can emerge from it with a bunch of new people willing to help the union do its vital work, you'll see it's well worth your investment.

— Carl Goldman. The writer is executive director of AFSCME Council 26.

Lie Detectors in Discipline Cases

It can be tempting for an innocent worker to agree to a lie detector test if accused of wrongdoing on the job, just as it can be tempting for an employer, convinced that a worker did something wrong, to insist on a test to lend muscle to a decision to discipline. It's the wise steward who counsels against workers cooperating with these polygraph tests. The fact is, most federal courts and most arbitrators do not have any faith in them as a means of scientifically establishing guilt or innocence.

As you'll see in the following arbitration decisions, most arbitrators give polygraph tests little weight.

Employees are under no obligation to submit to a polygraph test to prove their guilt or innocence

Threats

A nursing technician was fired for writing threatening letters to his head nurse. The company said the polygraph test indicated he was guilty. The arbitrator put him back on the job with back wages and all benefits. He said that polygraph results alone are not sufficient to prove guilt; he wanted corroborating information and the employer only offered circumstantial evidence. He noted that most arbitrators put little weight in lie detector results.

Another worker was fired for making a bomb threat. The union challenged the employer's introduction of lie detector results to resolve a question of credibility. The arbitrator refused to admit the test results, but found sufficient other evidence to sustain the discharge, so the worker stayed fired.

Refusal to take a test

An airline flight attendant was fired after marijuana was found in her luggage and she refused to take a lie detector test. She denied she knew about the presence of the substance. The arbitrator reinstated her with back pay and benefits, saying that the grievant was not required to prove her innocence by taking a lie detector test, and there was reasonable doubt whether she knew that the drug was in her possession.

Two nurse's aides were dismissed for supposedly fracturing the knee of a 91-year-old patient who said she was hurt while being taken to a shower. The aides refused to take a polygraph test. The arbitrator reduced the penalty to a disciplinary layoff without back pay because, he said, an employee should not be penalized for refusing to take a lie detector test. Additionally, the hospital never met its burden of proving the grievants gave the patient a shower on the date she was injured. He also noted that the employer did not make a case that the injury was due to an intentional act or even negligence on the part of the two nurse's aides. He also said most arbitrators give little or no weight to use of lie detectors.

Theft

A home for the elderly had a problem with theft in the workplace. Management established a rule requiring polygraph testing of all employees, and suspended several employees and fired another for refusing to take the test. The arbitrator reversed all disciplines and the dismissal, saying that the testing would be involuntary and, possibly, contrary to the ethical code of conduct for polygraphists. He further noted that federal authority establishes that tests are not admissible in federal court or arbitration proceedings without the permission of both parties.

A car rental agency fired an employee for the theft of $4,802 from a safe. She was examined by two different polygraph operators within a one-week period. One said she was truthful and the other said she was deceptive. The arbitrator put her back on her job with full benefits because the only evidence submitted was based on a negative lie detector test. He said the company did not establish guilt beyond a reasonable doubt.

Drugs on the job

Four employees were fired for possessing marijuana on the job. The company introduced an undercover detective's testimony to prove its case, and had the detective take a lie detector test to prove he was truthful. The arbitrator upheld the discharges in spite of the union raising the question of entrapment. In upholding the discharges, he said that the undercover detective's testimony regarding each grievant's use of drugs was first hand information and "rang true," but he gave no weight to the polygraph test taken by the undercover agent.

Some principles to bear in mind when lie detectors are used in discipline cases:

- Always object to their use and don't let employees or the union agree to them.
- Employees are under no obligation to submit to a polygraph test to prove their guilt or innocence.
- Remember that polygraph tests accurately identify innocence or guilt in no more than 50-60% of cases.
- If a polygraph test is used, over the union's objections, always check the qualifications of the polygraph operators.
- The employer should always introduce additional corroborating evidence to back up a claim of guilt.
- The employer is obliged to prove the accused worker is guilty beyond a reasonable doubt.

— George Hagglund. The writer is professor emeritus of labor education at the School for Workers, University of Wisconsin - Madison

Assertive Grievance Presentation

One of the most frustrating experiences you can have as a steward is to meet with management over a good grievance, even a very strong grievance, something really important to the members — yet management barely listens, let alone settles.

The reason may be management's hard-headedness. They may think by stonewalling on every grievance they can make them go away, or even undermine the members' support for the union. Maybe they don't feel any heat from the members, so they figure they don't have to be reasonable.

Maybe the problem isn't in the strength of your grievance, but in your presentation

But maybe the problem isn't any of the above. Just maybe the problem is the way you present your case.

Stewards who find they are getting nowhere with management on grievances might benefit from standing back a few feet and looking at the way they approach the process of actually presenting the grievance. Because having truth and justice and right and virtue and the facts on your side sometimes may not be enough, if your presentation needs work.

Examine your tactics

What can add up to "needs work"?

- You present a grievance so aggressively that your management counterpart reacts to your tone, not your content. Your management counterpart is so irritated or defensive at your approach that all he can focus on is giving you a big fat "No!" as a payback.
- On the other hand, you can present a grievance too passively. You can be so calm, so even-toned and mellow and eager to keep things peaceful that you end up being unclear about what happened and what you want — and if management doesn't know what the union wants, there's no way the union can get it.

At the same time, totally passive presentations also lack any passion that tells management how important the issue is to the members. If you're so laid back and cool, management will think, "It's really no big deal, so why bother responding?"

So, what does a good presentation sound like? A solid, assertive presentation that does the job but stops short of being too aggressive?

Here are three basic steps. Not only will they work in grievance presentation, but in everyday life as well.

1. Make a simple but specific and factual statement of the issue.

You don't want to go to management and say something like, "The air's lousy, people don't like it."

You do want to go to management with a specific issue and a specific course of action:

"The union is concerned about the air quality on the third floor of the annex building. I and four of the workers who are being directly affected by this want to meet with you at noon tomorrow to talk about this and find a way to fix things."

You must state your case clearly and firmly and be specific about what you want

2. Firmly say how you feel about the issue and why.

You don't want to get to a meeting and say something like "See, smell that? We don't like it."

You do want to get to a meeting and say something like, "As you can tell, the smell is obvious. We can't tell from the odor what it is, but because there are so many potentially dangerous chemicals and solvents in use around here we are concerned about possible ill effects. People are worrying that this has gone on for several weeks now with no sign of letup."

3. Say specifically what you want done about the issue.

You don't say, "Do something." That leaves the door open to management's "solution" being the distribution of bathroom air fresheners or something equally unsatisfactory.

What you do say is something like this: "We believe it may be coming from the vent over that storage unit. We want you to direct Maintenance to explore the issue and, if necessary, bring in an outside engineering firm to help stop the flow of bad air. We also want an outside lab to take air samples and report back to the union and management on what they find. Let's talk about a schedule for these actions."

The goal is to be factual, direct and forceful: know what you want and get across to management in an understandable, serious way what you want to see accomplished.

Keep in mind, of course, that this is only one part of grievance handling. You still have to do a good investigation, check the contract, organize and prepare your arguments and deal with management's counter-arguments as well as build member support around the issue.

But all those steps will do you little good, at least in the short run, if management doesn't hear what you're trying to say.

— Ken Margolies. The writer is on the labor education faculty at Cornell University.

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OFFICE OF THE INTERNATIONAL PRESIDENT

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Dear Sisters and Brothers:

As an IAM Shop Steward, you are much more than just an authoritative voice on matters of contract interpretation or the first person fellow workers turn to in times of trouble.

On any given day, a shop steward can be part lawyer and part priest; part soldier and part social worker. There is no other position in our union quite like it. Only those who have held the job know how rewarding, fulfilling and at times thankless it can be.

With a strong support network of fellow stewards, local committee members and local lodge officers, a steward's job can be more manageable. The William W. Winpisinger Center, the IAM's college-level training facility, is pleased to announce a program designed to provide stewards with an additional resource.

Beginning with this issue, all 20,000 IAM Shop Stewards will receive this bi-monthly publication, IAM Educator. It will be prepared with the cooperation of the teaching staff at the Winpisinger Center and is dedicated to issues that stewards confront on a daily basis.

Contract administration, grievance handling, effective communication skills and a steward's legal rights are just some of the topics that will be examined in upcoming issues of IAM Educator. Every subject will include input from experts in the field with decades of shop floor experience.

I hope you find this new publication to be helpful, entertaining and informative. For so many IAM members, the shop steward is the face, the voice and the backbone of the Machinists Union. On behalf of the IAM Executive Council and IAM members everywhere, please accept our thanks for the extraordinary job you do every day.

Respectfully and in solidarity,

R. Thomas Buffenbarger

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International President

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