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Lawyering in the Time of Coronavirus: Novel Confidentiality Concerns

While confidentiality and the associated evidentiary protections (and the danger of waiver) should always be top-of-mind, during this unprecedented time of coronavirus and remote-working, lawyers—and clients—should be especially sensitive to maintaining these essential protections.

By **Christine Lipsey** | April 16, 2020



Confidentiality is fundamental to the client-lawyer relationship. It encourages candid communication between client and lawyer, and assists the lawyer in more effectively representing the client. Confidentiality not only shapes how lawyers deliver services, but it is a bedrock principle of the lawyer rules of professional conduct in all 50 states.

Related to client-lawyer confidentiality—but not the same—are the attorney-client privilege and the work product doctrine. These evidentiary protections apply in judicial or other proceedings where client evidence is sought to be compelled from a lawyer. While confidentiality and the associated evidentiary protections (and the danger of waiver) should always be top-of-mind, during this unprecedented time of coronavirus and remote-working, lawyers—and clients—should be especially sensitive to maintaining these essential protections.

Confidentiality Framework Informs the Precautions

Rule 1.6 of the American Bar Association's Model Rules of Professional Conduct governs the lawyer's duty to protect confidential client information from disclosure without the client's informed consent. Rule 1.6(c) requires a lawyer to "make reasonable efforts" to prevent "inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

While most lawyers are sensitive to these restrictions as they pertain to client documents or communications, there is sometimes less diligence around "information relating to the representation of a client." For example, a lawyer might take handwritten notes during a phone call with a client that may include material that informs or assists the lawyer—factually, strategically, or otherwise. These notes are confidential, and enjoy evidentiary protections. Likewise, a lawyer might have a copy of a pleading filed on a client's behalf in plain sight in a home work space where family or other third parties may be present. The fact that the pleading may be filed in the public records doesn't mean that it's not confidential information relating to the representation of a client, which is protected from disclosure in this context.

Additionally, Rule 1.6 (c)'s "reasonable efforts" requirement triggers application of additional Model Rules dealing with lawyer competence (Rule 1.1); supervising lawyers' responsibilities (Rule 5.1); and supervision of nonlawyer assistants (Rule 5.3).

Rule 1.6, comment 18, elaborates on the reasonableness component, and addresses sensitivity of the information, cost of implementing safeguards, and difficulty of implementing safeguards, among other factors. Of course, the client may impose additional security measures through an engagement letter, outside counsel guidelines, or some other mechanism. Similarly, the client may give informed consent to overriding security measures that would otherwise be taken; however, a lawyer would want to carefully consider whether such a departure would jeopardize evidentiary protections that otherwise would be available.

Some Confidentiality Concerns and What You Can Do About Them

First, generally speaking, attorneys need to be aware. We're used to thinking about confidentiality in a law office setting, and have built-in structural support to protect client information, documents, and communications in that setting. Away from the office—and sometimes discombobulated in the current environment—we may lose focus of the bigger picture. We need to tweak our perspective, and treat our "new office" as much like the non-remote office as possible.

Law firms should impress upon all their lawyers and professional staff that confidentiality obligations are the same while remote-working as when they're in the office. Firm leadership should provide specific reminders through email, regular intra-firm newsletters or bulletins, or whatever mechanism works for a particular office. Lawyers should also let their clients know that confidentiality is as important in the remote-working environment as it is under any other circumstances. This will remind clients to be sensitive to the possibility that confidentiality (and evidentiary protections) could be breached unless extra care is taken. Law firms should also assure clients that they have impressed upon all lawyers and staff vigilance about confidentiality in the current unusual circumstances.

Following are some specifics that lawyers need to be thinking about:

Computer security—Ensure your computer network is secure by using Virtual Private Networking (VPN). iPads and cell phones should require multi-factor authentication.

Phone calls, conference calls, video conferences, and any verbal discussions containing information related to the representation of a client—Attorneys and staff should not discuss client-related information in the presence of family members or third parties. Likewise, clients should employ the same precautions in order to preserve confidentiality and the attorney-client privilege. Additionally, recent reporting has warned about discussing confidential information in the presence of AI listening devices, for example, Amazon’s Alexa or Google’s voice assistant. These devices may be activated inadvertently, even if trigger words aren’t used. The same applies to video devices such as doorbell cameras, baby monitors, and TVs.

Video conferencing platforms—A fair amount recently has been published regarding the security—or insecurity—of certain video platforms. One of the apparent issues is the lack of end-to-end encryption in some platforms, jeopardizing information as it is in transit and at rest. Do your homework on which platforms provide the necessary protection to preserve confidentiality, and take steps to ensure that you’re using one of those platforms.

Personal computers—Do not email to your personal computer or store on your personal computer any documents from a client, any documentation concerning client information, including pleadings or spreadsheets.

Printed documents—If you have printed documents containing client information—not just documents from a client—they must be maintained in a manner where a third party cannot read them. Also, only print documents at home that you must print to work more effectively and efficiently. Finally, before printing at home a document containing client information, ensure that your client engagement letter (or email), outside counsel guidelines, or any other controlling engagement document does not prohibit doing so. If there is such a prohibition, discuss an exception with your client, which one hopes would be granted under the circumstances.

Document destruction—If you have documents containing client information that are no longer needed and require disposal, shred them at home if possible. If not, store the documents in a safe place, and dispose of them upon your return to the office.

Think about it this way. We now have the unique opportunity to refocus on the reasons for confidentiality and the necessity to preserve client confidences. The current renewed awareness may well foster innovation surrounding our approach to and consideration of confidentiality. Be well, and stay well.

Christine Lipsey *serves as McGlinchey Stafford's general counsel, after more than 35 years in commercial litigation, and years of involvement with various bar associations pertaining to professional issues.*