

Does Anyone Still Care About Client Confidentiality?

by Pete Haskel

As governmental entities and public servants, our clients live in fish bowls. They know it. They are used to it. So are we. Yet the vast majority of freedom of information laws still exempt from disclosure most privileged communications between government officials and their lawyers to provide legal services to the government. And most evidence rules still embody the attorney-client privilege as well. Finally, most of us still practice in jurisdictions where the legal ethics rules obligate us to protect even non-privileged client confidential information to the extent permitted by law.[1]

However, the realities of modern legal practice put concerns about client confidentiality a distant second behind efficiency. We are all complicit in silently abandoning the old emphasis on client confidentiality in the interest of trying, with limited success, to handle vast amounts of electronic information while responding to open records and pretrial discovery requests. Adrift in the sea of cyberdata float privileged and non-responsive sensitive files scattered like plankton, that in the old days we would have sifted with fine-mesh nets to shield from disclosure, but that today we let slip through our electronic nets and disclose.

Why?

Because courts, laws, rules, and budgets no longer give us the time or resources, even with modern electronic discovery review tools, to review thoroughly and then withhold all privileged data, not to mention all sensitive information that the client could withhold from specific requests as nonresponsive. And forget about trying to create a privilege log. At the dawn of the e-discovery era in the early 1990's, when most but not all documents were still either made on paper or printed out for later use, I supervised an e-discovery team at a big law firm in a case involving a TV network merger. We used manual data entry to create a privilege log on an early data base program (Q&A I think it was called) for an important hearing. It took about ten of us approximately a week to sift through and log tens of thousands of paper and computer documents. We produced a privilege log of over 100 pages (which we of course served in printed form even though we had it in data base form for our own use). The opposing law firm was highly complementary about our log. There was no subsequent litigation over our client's privileged documents. Our client paid tens of thousands of dollars for that log. Our client did not have to divulge a single privileged or irrelevant document.

That never would have happened today in a case of that nature.

There would have been hundreds of thousands, more likely millions, of documents subject to review. We would have imported all of them in electronic form into a review database and used keyword or intelligent computer-assisted review to protect at least some privileged information. Humans would only have reviewed the records coming from high executives or key witnesses – and maybe only some of those. We would have created a much shorter privilege log and kept our litigation costs much lower in comparison to the volume of documents in question. The actual costs of review, even allowing for inflation, likely would be much higher than for the equivalent case in the early 1990's.

Instead of a thorough review, we would rely on "claw back" rules[2] or agreements that pretrial rules encourage but on which even transactional lawyers are increasingly relying. A claw back contemplates that a lawyer who discovered that he or she has inadvertently disclosed[3] client information to another party's lawyers can get it back, and the receiving lawyer is supposed to destroy or return all copies. That might sound reasonable, but in practice it means that opposing parties and their lawyers get to see, and cannot be prevented from remembering, the confidential information. They can use it to formulate future discovery requests, and questions and depositions, hearings, and trials, even if they cannot overtly rely on or introduce the supposedly-returned document at any proceeding, or claim that the inadvertent disclosure waived any privileges.

Even if the clawed-back document were not privileged and not relevant to litigation, our clients understandably, and sometimes permissibly, would expect us to try to protect the confidentiality of its contents. Examples: email containing irrelevant information about the medical conditions of employees or their family members, home telephone numbers, lunch and vacation plans, or embarrassing personal information. Would the client have been wiser not to put some of that information on government networks? Of course. Does that imprudence excuse us from using ethical and legal means to protect the confidentiality of that information? In the old days, absolutely not. Now, perhaps we could not protect it even if we tried. And frequently we do not even try anymore. We are just becoming used to subordinating client confidentiality concerns to other priorities.

Courts will not be sympathetic to requests for sufficient time to thoroughly review documents before production – pointing to the alternative protection of claw backs.[4] That leaves the client's