

# Attorney-client confidentiality

How to assure the confidentiality of your company's legal records **Interviewed by Leslie Stevens-Huffman**

**M**ost executives are familiar with the privilege that applies to conversations between themselves and their attorneys, the so-called "attorney-client privilege" frequently portrayed on television, in the movies and in novels as protecting one's communications with one's lawyer. But confidentiality is actually a legal principle that extends far beyond conversations you have with your lawyer.

The duty of confidentiality in California is as strong as any in the professional world. A California lawyer must protect client confidences at "every peril to himself or herself," says Bob Russell, partner with Procopio, Cory, Hargreaves & Savitch LLP and chair of the firm's Professional Standards Committee.

"Everyone in the law firm who has access to client records, e-mails, memos or letters must hold the information contained in those documents and all communications confidential," says Russell. "Even if the information is a matter of public record somewhere, unless the information is generally widely known, the client information that comes into the firm must be treated as confidential."

*Smart Business* spoke with Russell about what CEOs should know about an attorney's duty of confidentiality.

## What does the attorney confidentiality duty cover?

Every bit of information has to be treated confidentially, even if it's public information. For example, if your company completes a study that is released to other parties, but is not generally available to the public, and then you subsequently submit that report to your lawyer for litigation purposes, your lawyer and the law firm's employees must treat the study's contents as confidential. This is also true if the executive simply has a consultation with his or her lawyer about the possibility of filing a lawsuit, filing for bankruptcy or a potential merger or acquisition — documents submitted to the lawyer as part of that consultation must be kept confidential even though those documents may already have been shared with other parties. The same duty that applies to your lawyer extends to all of the employees of the law firm. So a paralegal, an associate or a secretary who works on your case must keep all informa-



**Bob Russell**

Partner and chair of the firm's Professional Standards Committee  
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tion confidential, including even the identity of the client.

## How does a law firm assure that its employees uphold the firm's duty toward client confidentiality?

Many firms, like Procopio, conduct continuing legal education seminars emphasizing the duty of confidentiality and require employees to sign an agreement acknowledging their responsibility with respect to client information and agreeing that they will not breach the confidentiality of the firm's clients. In addition, law firms have a responsibility to secure their files and must ensure that vendors they hire understand the need for security. For example, law firms frequently rely on off-site records storage vendors or document shredding firms. Law firms are required to contract with vendors who know how to handle the storage and shredding of secure legal documents, because outsourcing doesn't waive the requirement for maintaining client confidentiality.

## What should CEOs ask a prospective law firm about its client confidentiality practices?

First of all, be sure to ask the tough questions about how the firm will ensure confi-

dentiality when you are interviewing a lawyer prior to representation. I also wouldn't hire a lawyer who seems more interested in feathering his or her own nest than representing you. Any time a lawyer goes public with information about representing a client, whether it's simply a reference on a Web site or speaking to the media about the case, that communication needs to be approved by the client. Sometimes it's the right strategy for a lawyer to come forward during a press conference and make certain representations about you or the case, but the strategy and content of such a public communication needs to be approved by the client in advance.

To convey very sensitive information, consider requesting that your attorney communicate with you in ways other than e-mail. Unfortunately, accidents do happen and sometimes an attorney can hit the wrong e-mail command or address and send your information to another party with no way to retrieve it. Also, it is not unusual for an executive to give others (such as an assistant) access to his or her email, and sometimes communications are too sensitive, even for assistants.

Lastly, consider asking that all of the documents pertaining to the matter be returned to you once the case is concluded. This is particularly important if you wish to maintain the files, since most firms destroy client files after a set number of years established in the engagement agreement.

## How does a lawyer representing a client in court deal with the duty of confidentiality?

Once you are in the courtroom, the information that is presented is governed by a different set of standards, and confidentiality is waived to the extent the lawyer is required to present the information necessary to the client's case. However, communications between the client and his or her lawyer are still privileged; therefore, except in exceptional cases or upon approval by the client, discussions between the lawyer and the client remain confidential, may not be inquired into and won't become part of the public record.

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