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Say What? Confidentiality and Conflicts on Listservs

By Mark J. Fucile
Fucile & Reising LLP

Most of us belong to law-related listservs. At their best, listservs offer the electronic equivalent of the wise counsel many of us got from the gray haired partner in the corner office in years past. They also provide a ready forum for lawyers to share ideas, research and camaraderie with colleagues across town or across the country. Earlier this year, the Oregon State Bar issued a helpful opinion addressing the principal ethics issues in using listservs and similar electronic media. The opinion, 2011-184, is available on the OSB web site at www.osbar.org. The new opinion focuses primarily on two areas: confidentiality and conflicts.

On confidentiality, the Oregon opinion is framed from the perspective of lawyers seeking advice. It begins with a reminder that we should not assume that listserv posts are privileged or otherwise confidential simply because they are directed to a group (such as defense or claimants' counsel) that are usually on the same side in similar matters. Rather, the opinion cautions that listservs should ordinarily be regarded as "public" forums. The "public" nature of most listservs leads directly to our duty of confidentiality. Under RPC 1.6, we are broadly enjoined (subject to specific exceptions) from "reveal[ing] information relating to the representation of a client[.]" OEC 511 also addresses the

narrower issue of privilege waiver by voluntary disclosure. Opinion 2011-184 notes that general posts inquiring about recent cases and the like normally shouldn't run counter to our duty of confidentiality. It also recommends using hypotheticals if a factual predicate is necessary for a useful post. The opinion adds, however, that some situations are so unique—and widely known—that even a hypothetical might reveal confidential information.

On conflicts, the Oregon opinion is framed from the perspective of lawyers responding to listserv postings. It begins by noting that simply answering a listserv inquiry should not, in and of itself, create an attorney-client relationship and an accompanying potential conflict with the client of the inquiring lawyer. The opinion cautions, however, that if an initial exchange on a listserv leads to more detailed discussions “off line,” lawyers need to vet conflicts if those later conversations funnel down to the client-specific level.

Both parts of the Oregon opinion offer sound advice. With confidentiality, case-specific confidential information is more prudently shared with co-litigants under formal “joint defense” or “joint prosecution” agreements. The Oregon Court of Appeals discussed the contours of the “common interest” privilege at length last year in *Port of Portland v. Oregon Center for Environmental Health*, 238 Or App 404, 243 P3d 102 (2010). With conflicts, lawyers need to be especially careful with electronic social media that may include non-lawyers who are seeking legal counsel. Under some circumstances, RPC 1.18 includes a

limited duty of loyalty even to prospective clients who don't ever become "full fledged" clients.

Bar associations and courts nationally are grappling with similar issues. Although the rules elsewhere may vary, the questions examined often present useful nuances on the intersection of law practice and technology. District of Columbia Bar Opinion 316 (www.dcbbar.org), for example, surveys the risks of inadvertently forming an attorney-client relationship (with the attendant conflicts) through on-line discussion groups that include non-lawyers who may be seeking legal representation. Los Angeles County Bar Association Opinion 514 (www.lacba.org), in turn, reviews the ramifications of judicial (both full-time and pro tem) participation in listservs that include lawyers who may be appearing before the judges concerned. In *Muniz v. United Parcel Service, Inc.*, No. C-09-01987-CW, 2011 WL 311374 (ND Cal Jan 28, 2011) (unpublished), the party opposing a fee petition sought (unsuccessfully) the petitioning law firm's listserv and social media postings about the case involved as evidence on the firm's skill level and, implicitly, its requested rates.

Listsers have become an electronic fact of practice life. Before hitting "send," however, lawyers should think through the advice offered by the new Oregon opinion.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.