December 2021 DRI *For the Defense*

Discreet Counsel: Navigating Confidentiality in Listserv Posts

By Mark J. Fucile
Fucile & Reising LLP

Lawyers have long sought ideas from peers outside their firms on issues ranging from legal research to insights on experts. When the leading ABA ethics opinion on this topic, Formal Opinion 98-411, was released in 1998, most peer-to-peer consultations were still in person. Now, however, these consultations have moved primarily to electronic platforms—with listservs among the most common. As the 1998 ABA ethics opinion noted, peer-to-peer consultations can present difficult confidentiality issues for both the consulting and consulted lawyers because they do not occur within an attorney-client or co-counsel relationship. The fact that today's consultations are often broadcast across listservs amplifies those concerns. A more recent ABA ethics opinion, Formal Opinion 480 issued in 2018, underscored our confidentiality obligations across all public electronic forums—including listservs. State and local bar opinions from around the country (*see, e.g.,* Colorado Bar Op. 130 (rev. 2018); Illinois State Bar Op. 12-15 (2012); Los Angeles County Bar Op. 514 (2005); Maryland State Bar Ethics Op. 2015-03 (2015); Oregon State Bar Formal Op. 2011-184 (rev. 2016); Texas State Bar Op. 673 (2018)) echo the central tenets of the ABA opinions in the specific context of listservs. Collectively, these opinions note that even when listservs are limited to particular practice groups—such as defense counsel—

there is no inherent confidentiality protection. Although more general forums that may include opposing counsel can also raise conflict issues, confidentiality is a risk management thread that runs throughout lawyer listservs.

In this column, we'll survey the confidentiality issues involved for both the consulting and the consulted lawyers on listservs. From either perspective, ABA Model Rule 1.6 and its state counterparts set out the regulatory standard for confidentiality. The regulatory rule, in turn, reflects the underlying fiduciary duty of confidentiality (*see Parkinson v. Bevis*, 448 P.3d 1027 (Idaho 2019)). Confidentiality under Rule 1.6 is framed in terms of "information relating to the representation of a client[.]" As such, it includes—but is broader than—either the attorney-client privilege or work product standing alone. Comment 3 to Rule 1.6 observes that it "applies not only to matters communicated in confidence but also to all information relating to the representation, whatever its source." Under ABA Model Rule 1.9(c) and state equivalents, the duty of confidentiality generally extends to former clients as well. In fact, the U.S. Supreme Court in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), concluded that the attorney-client privilege reaches beyond even the death of the client. Given scope and duration of the duty, it should not be surprising that lawyers have been disciplined under state counterparts to Rule 1.6 for revealing confidential information in listserv

posts (*see, e.g., In re Quillinan*, 20 D.B. Rptr. 288 (Or. 2006)) and similar electronic platforms (*see, e.g., In re Peshek*, 798 N.W.2d 879 (Wis. 2011) (blog)).

Consulting Lawyer

Although clients can waive confidentiality under Rule 1.6(a)(1), it is rare for clients to do so in the context of a listserv post. Similarly, while lawyers are given implied authorization by Rule 1.6(b)(2) to reveal some information falling within the rule to carry out a representation, the scope implied authority is comparatively narrow.

Given these practical constraints, ABA Formal Opinion 98-411 suggests either framing listserv requests with as little client-specific information as possible or using a hypothetical. An example of the former might be: "I am defending a product liability case and am looking for briefing on personal jurisdiction." An illustration of the latter might be: "Hypothetically, is there personal jurisdiction here for a Delaware corporation headquartered elsewhere?" Even these approaches might not be sufficient, however, if the client or case involved has generated such extensive public notoriety that even a request would effectively reveal the client's identity or the specific circumstances involved. Comment 4 to Rule 1.6 counsels in this regard that "[a] lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no

reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."

Consulted Lawyer

Answering a listserv post (whether on or offline), presents its own nuanced confidentiality issues. Depending on the circumstances, ABA Formal Opinion 480 notes that even some public information may remain subject to the confidentiality obligations reflected in Rule 1.6. For example, a lawyer may have handled a sensitive personal matter quietly for a client that, nonetheless, generated public court records. Formal Opinion 480 suggests that kind of sensitive information remains confidential and should not be posted in a public forum like a listserv. Colorado Bar Opinion 130 applies that same logic to unredacted briefing and deposition transcripts that might be shared on a listserv. The Colorado opinion also cautions that some case materials may be subject to confidentiality agreements or court orders. By contrast, responding with a dispositive reported decision of an appellate court in a matter in which the consulted lawyer was involved would not ordinarily be subject to the confidentiality constraints the bar opinions address.

Summing Up

Listservs can be a very useful resource in many practice settings. At the same time, both lawyers seeking advice and those providing it need to be sensitive to the practical limitations on their posts imposed by the duty of confidentiality.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.