AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 511 **May 8, 2024**

Confidentiality Obligations of Lawyers Posting to Listservs

Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation.

Introduction

This opinion considers whether, to obtain assistance in a representation from other lawyers on a listserv discussion group, or post a comment, a lawyer is impliedly authorized to disclose information relating to the representation of a client or information that could lead to the discovery of such information.[1] Without the client's informed consent, Rule 1.6 forbids a lawyer from posting questions or comments relating to a representation—even in hypothetical or abstract form—if there is a reasonable likelihood that the lawyer's posts would allow a reader then or later to infer the identity of the lawyer's client or the particular situation involved, thereby disclosing information relating to the representation. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, if the lawyer's contributions do not disclose information relating to any client representation. The principles set forth in this opinion regarding lawyers' confidentiality obligations when they communicate on listservs apply equally when lawyers communicate about their law practices with individuals outside their law firms by other media and in other settings, including when lawyers discuss their work at in-person gatherings.[2]

Relevant Principles Regarding the Duty of Confidentiality

Subject to exceptions not applicable here,[3] ABA Model Rule of Professional Conduct 1.6(a) provides that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023.
[2] *See* ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 480 (2018) for a discussion of other forms of lawyer public commentary including blogs, writings, and educational presentations.
[3] This opinion does not discuss the exceptions to the confidentiality obligation provided for in paragraph (b) because we cannot envision a recurring situation in which any of the exceptions are likely to authorize disclosures of information relating to a representation on a lawyer's listserv.

out the representation or the disclosure is permitted by paragraph (b)."[4] Comment 3 explains that Rule 1.6 protects "all information relating to the representation, whatever its source" and is not limited to communications protected by attorney-client privilege.[5] A lawyer may not reveal even publicly available information, such as transcripts of proceedings in which the lawyer represented a client. As noted in ABA Formal Opinion 04-433 (2004), "the protection afforded by Model Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer." Among the information that is generally considered to be information relating to the representation is the identity of a lawyer's clients.[6]

Because Rule 1.6 restricts communications that "could reasonably lead to the discovery of" information relating to the representation,[7] lawyers are generally restricted from disclosing such information even if the information is anonymized, hypothetical, or in abstracted form, if it is reasonably likely that someone learning the information might then or later ascertain the client's identity or the situation involved.[8] Comment 4 explains, that without client consent, Rule 1.6 prohibits:

> disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. 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.

The breadth of Rule 1.6 was emphasized in ABA Formal Opinion 496 (2021), which cautioned lawyers about responding to online criticism: Lawyers "who choose to respond online must not disclose information that relates to a client matter *or that could reasonably lead to the discovery of confidential information by another*." (Emphasis added).

Lawyers may disclose information relating to the representation with the client's informed consent. "Informed consent" is defined in Rule 1.0(e) to denote "the agreement by a person to a

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[4] Comment 2 to Model Rule 1.6(a) emphasizes that a "fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

[5] The attorney-client privilege is an evidentiary rule applicable to judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence about a client. The duty of client-lawyer confidentiality is not limited to those circumstances, nor is it limited to matters communicated in confidence by the client. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [3].

[6] Comment 2 to Rule 7.2, for example, notes that in lawyer advertising, client consent is required before naming regularly represented clients. *See also* Wis. Formal Op. EF-17-02 (2017) (lawyer may not disclose current or former client's identity without informed consent; not relevant that representation is matter of public record or case is long closed); Ill. State Bar Ass'n Advisory Op. 12-03 (2012) (lawyer must obtain informed consent before disclosing client names to professional networking group); Ill. State Bar Ass'n Advisory Op. 12-15 (2012) (lawyer may take part in an online discussion group if no information relating to the representation is disclosed and there is no risk that the client could be identified); ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 133-134 (10th ed. 2023).

[7] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [4].

[8] *See, e.g.*, Colo. Bar Ass'n Formal Op. 138 (2019) ("Consultations using hypotheticals do not implicate [Rule] 1.6 provided that the hypotheticals do not create a 'reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.'").

proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comments 6 and 7 to Rule 1.0 advise that the necessary communication will ordinarily require the lawyer to confer with the client and explain the advantages and disadvantages of the proposed course of conduct. And obtaining consent will usually require a client's affirmative response; a lawyer generally may not assume consent from a client's silence.[9]

Additionally, Rule 1.6(a) permits a lawyer to reveal information relating to the representation of a client if "the disclosure is impliedly authorized in order to carry out the representation."[10] Comment 5 to Rule 1.6 explains that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." Conversely, lawyers are generally not authorized to disclose information relating to the representation to lawyers outside the firm, including lawyers from whom the engaged lawyers seeks assistance. Rather, as a general matter, lawyers must obtain the client's informed consent before engaging lawyers in the representation other than lawyers in their firm.[11]

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[9] Lawyers who anticipate using listservs for the benefit of the representation may seek to obtain the client's informed consent at the outset of the representation, such as by explaining the lawyer's intention and memorializing the client's advance consent in the lawyer's engagement agreement. Rule 1.0(e) provides that for a client's consent to be "informed," the lawyer must "communicate[] adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Therefore, the lawyer's initial explanation must be sufficiently detailed to inform the client of the material risks involved. It may not always be possible to provide sufficient detail until considering an actual post.

[10] Comment 5 to Rule 1.6 explains that a lawyer is impliedly authorized to make disclosures "when appropriate in carrying out the representation." In many situations, by authorizing the lawyer to carry out the representation, or to carry out some aspect of the representation, the client impliedly authorizes the lawyer to disclose information relating to the representation, to the extent helpful to the client, for the purpose of achieving the client's objectives. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.3, cmt. [5] ("In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation."). For example, when a client authorizes a lawyer to conduct settlement negotiations or transactional negotiations, the client impliedly authorizes the lawyer to disclose information relating to the representation insofar as the lawyer reasonably believes that doing so will advance the client's interests. What is impliedly authorized will depend "upon the particular circumstances of the representation." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 135. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (lawyer experiencing data breach may reveal information relating to representation to law enforcement if lawyer reasonably believes disclosure is impliedly authorized, will advance client's interests, and will not adversely affect client's material interests); N.C. Formal Op. 2015-5 (2015) ("[p]roviding a client's new appellate counsel with information about the client's case, and turning over the client's appellate file to the successor appellate counsel, is generally considered appropriate to protect the client's interests in the appellate representation" and impliedly authorized); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insured's interests); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 61 (3d ed. 2001) (A lawyer is impliedly authorized to disclose information that "will advance the interests of the client in the representation."). In at least one situation, the Rules themselves impliedly authorize the disclosure, even without the client's implicit approval. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. [8] ("When taking protective action" on behalf of a client with diminished capacity pursuant to MODEL RULES OF PROF'L CONDUCT R. 1.14(b), "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.").

[11] Comment 6 to Rule 1.1 states that "[b]efore a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent…"

Seeking Advice or Assistance from a Listserv Discussion Group

ABA Formal Opinion 98-411 (1998) addressed whether a lawyer is impliedly authorized to disclose information relating to the representation to another lawyer, outside the inquiring lawyer's firm and without the client's informed consent, to obtain advice about a matter when the lawyer reasonably believes the disclosure will further the representation. The opinion contemplated that the lawyer seeking assistance would share information relating to the representation, in anonymized form, with an attorney known to the consulting lawyer. It further contemplated that the consulted attorney would both ensure there was no conflict of interest between the consulting lawyer's client and the consulted attorney's clients and would keep the information confidential even in the absence of an explicit confidentiality obligation. The opinion concluded that, in general, a lawyer is impliedly authorized to consult with an unaffiliated attorney in a direct lawyer-to-lawyer consultation and to reveal information relating to the representation without client consent to further the representation when such information is anonymized or presented as a hypothetical and the information is revealed under circumstances in which "the information will not be further disclosed or otherwise used against the consulting lawyer's client." The opinion explained, "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development. Testing ideas about complex or vexing cases can be beneficial to a lawyer's client." However, the opinion determined that the lawyer has implied authority to disclose only non-prejudicial information relating to the representation for this purpose and may not disclose privileged information.

In this opinion, the question presented is whether lawyers are impliedly authorized to reveal similar information relating to the representation of a client to a wider group of lawyers by posting an inquiry or comment on a listserv. They are not. Participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter. Typical listserv discussion groups include participants whose identity and interests are unknown to lawyers posting to them and who therefore cannot be asked or expected to keep information relating to the representation in confidence. Indeed, a listserv post could potentially be viewed by lawyers representing another party in the same matter. Additionally, there is usually no way for the posting lawyer to ensure that the client's information will not be further disclosed by a listserv participant or otherwise used against the client. Because protections against wider dissemination are lacking, posting to a listserv creates greater risks than the lawyer-to-lawyer consultations envisioned by ABA Formal Ethics Opinion 98-411.

Without informed client consent, a lawyer participating in listserv groups should not disclose any information relating to the representation that may be reasonably connected to an identifiable client. Comment 4 to Rule 1.6 envisions the possibility of lawyers using hypotheticals to discuss client matters. However, a lawyer must have the client's informed consent to post a hypothetical to a listserv if, under the circumstances, the posted question could "reasonably lead to the discovery of" information relating to the representation because there is a "reasonable likelihood" that the reader will be able to ascertain the identity of the client or the situation involved. Although this opinion focuses on lawyers' efforts to obtain information from other lawyers for the benefit of a legal representation, the obligation to avoid disclosing information relating to a representation applies equally when lawyers post on listservs for other purposes, such

as to reply to requests for help, to develop their practices by networking, or simply to regale their professional colleagues with "war stories."[12]

Not all inquiries to a listserv designed to elicit information helpful to a representation will disclose information relating to the representation. In some situations, because of the nature of the lawyer's practice, the relevant client or the situation involved will never become known, and therefore the lawyer's anonymized inquiry cannot be identified with a specific client or matter. In other cases, the question may be so abstract and broadly applicable that it cannot be associated with a particular client even if others know the inquiring lawyer's clientele. In circumstances such as these, a lawyer may post general questions or hypotheticals because there is no reasonable possibility that any listserv member, or anyone else with whom the post may be shared, could identify the specific client or matter.[13]

Illustratively, the authors of Oregon Bar Opinion 2011-184 explained that "[c]onsultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client" do not require client consent under Rule 1.6. Careful lawyers will often be able to use listservs to ask fellow practitioners for cases and articles on topics, for forms and checklists, and for information on how various jurisdictions address a court-connected concern without enabling other lawyers to identify the lawyer's client or the situation involved. Posting this sort of inquiry on a listserv, to the extent possible without disclosing information relating to the representation, may have advantages over a lawyer-to-lawyer consultation precisely because it is broadly disseminated. Maryland State Bar Association Ethics Opinion 2015-03 described peer-to-peer lawyer listservs as a "powerful tool" providing "the opportunity for a

[12] Lawyers should keep in mind that the confidentiality obligation continues after the representation ends. *See* Rule 1.9(c)(2) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client."). This restriction on the disclosure of information relating to a former representation applies even if the information is generally known. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) (discussing the "generally known" exception to the use of confidential information adversely to a former client allowed under Rule 1.9(c)(1) and distinguishing it from the broader prohibition against disclosure of that information). Unlike the counterpart provision (Disciplinary Rule 4-101) of the earlier Code of Professional Responsibility, Rule 1.6 does not permit disclosure of non-privileged information relating to a representation or former representation if its disclosure would not embarrass or harm a client and the client has not specifically asked the lawyer not to disclose it. Consequently, lawyers may not tell "war stories" about a former representation without the former client's consent if the former client or situation can be identified. As we have noted in the past, the restriction imposed by Rule 1.6 may have First Amendment implications, but the constitutional right to freedom of speech has historically been interpreted consistently with lawyers' confidentiality obligations to clients. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) (commenting on First Amendment considerations when lawyers act in representative capacities).

[13] For example, a general question requesting case law on whether a warrantless search of a garbage bin outside a residence violates the Fourth Amendment is less likely to allow a reader to infer the client's identity than a hypothetical revealing the precise facts of a specific search. But if there is a reasonable likelihood that readers can correctly infer the client's identity, then even the general question discloses information relating to the representation, requiring informed consent. For example, a reader could infer that a lawyer who posts a question to a listserv about the constitutionality of searches of garbage bins located outside of a residence is representing a client whose garbage bin was searched, evidence was found, the lawyer would like to move to suppress the evidence, and the lawyer is unsure of all the relevant case law. Regardless of whether the implicit disclosure of this "information relating the representation" is prejudicial to the client, Rule 1.6 provides that if the client's identity could be ascertained, it is the client's decision whether to disclose this sort of information broadly via a listserv to assist the lawyer in conducting useful legal research.

lawyer to test his or her understanding of legal principles and to clarify the best way to proceed in unique situations."

The more unusual the situation, however, the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6. Oregon Bar Opinion 2011-184 makes the point. Matters "[w]hen the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named," are among those in which "the lawyer must first obtain the client's informed consent for the disclosures."

Additionally, when lawyers represent only one client (as in the case of in-house counsel or government lawyers) or their client's identity can be readily inferred (as in the case of a litigator seeking assistance with a pending or contemplated action), "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts."[14] Also, if a matter is receiving media coverage or the group of listserv participants is comprised of a small, closely connected legal community, the risk of a Rule 1.6 violation is likely to be too great to permit the lawyer to post a hypothetical relating to the matter without the informed consent of the client. For example, where the listserv participants are familiar with each other's practice because they practice in a limited geographic area or a specialized practice setting, posting a hypothetical based on information relating to the representation of the client will be more likely to lead to disclosure of the client's identity to some other participant on the listserv. The lawyer should err on the side of caution and avoid specific hypotheticals, refrain from posting, or obtain the client's informed consent if there is any reasonable concern.[15]

Finally, it bears emphasizing that lawyer listservs serve a useful function in educating lawyers without regard to any particular representation. Lawyers use listservs to update one another about newly published decisions and articles or to share recommendations for helpful contractors or fellow practitioners. Comment 8 to Rule 1.1 advises lawyers to "keep abreast of changes in the law and its practice," and lawyer listservs can help in doing so. These uses, unrelated to any particular representation, would not require a lawyer to secure the informed consent of a client. A lawyer must, however, remain aware of the possible risks to confidentiality involved in any posts to a listserv. Even a general question about the law, such as a request for cases on a specific topic, may in some circumstances permit other users to identify the client or the situation involved. Therefore, before any post, a lawyer must ensure that the lawyer's post will not jeopardize compliance with the lawyer's obligations under Rule 1.6.

[14] Md. State Bar Ass'n Ethics Comm. Op. 2015-3 (2015).

[15] When seeking a client's informed consent to post an inquiry on a listserv, the lawyer must ordinarily explain to the client the risk that the client's identity as well as relevant details about the matter may be disclosed to others who have no obligation to hold the information in confidence and who may represent other persons with adverse interests. This may also include a discussion of risks that the information may be widely disseminated, such as through social media. A lawyer should also be mindful of any possible risks to the attorney-client privilege if the posting references otherwise privileged communications with the client. Whether informed consent requires further disclosures will depend on specific facts.

Conclusion

Rule 1.6 prohibits a lawyer from posting comments or questions relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's posts will disclose information relating to the representation that would allow a reader then or later to recognize or infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's consent if the lawyer's contributions will not disclose information relating to a client representation.
