

Confidentiality on Section Listservs

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Ethics Corner: Guidance Offered on Posting to Listservs

Dear Ethics Committee: I am a solo practitioner who currently is representing one of several beneficiaries in a contentious, litigated estate administration involving a veff} prominent family in New Hampshire. I would like to seek assistance from fellow lawyers who may have expertise and knowledge of the specific issues presented in my case, by posting a hypothetical case scenario on the NHBA Elder Law, Estate Planning & Probate Law (ELEPP) Section Listserv. Can I do this?

A professional Listserv offers lawyers an economical and efficient forum in which to share and learn information about specialized practice areas. While a Listserv might provide easy access to information concerning case management approaches, professional referrals, and recent developments in the law, the online forum never should be used as a substitute for a lawyer undertaking legal research independently to establish his or her professional competency to handle a particular case.

It is not uncommon for a lawyer to discuss legal issues more specifically with colleagues and in some instances, obtain outside assistance from a fellow lawyer to provide effective client representation. Collaboration with colleagues generally is encouraged under Rule of Professional Conduct (RPC) 1.1(c)(4) (Competence), which states that a lawyer may "undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation."

Regardless of the method of communication the lawyer uses to consult with a colleague under RPC 1.1(c)(4), (e.g., in person versus Listserv), such discussions always raise concerns regarding a lawyer's duties to protect confidential client information under RPC 1.6 (Confidentiality of Information) and avoid potential conflicts of interest under RPC 1.7 (Conflicts of Interest) and 1.9 (Duties to Former Clients). However, the use of a Listserv to communicate with other lawyers on a client-related matter is particularly fraught with risks, due to the public nature of the conversation. The lawyer simply cannot make information posted on a Listserv secure from unwanted interception or use either by a member of the Listserv or any individual who might receive the information by retransmission. Even if a Listserv is restricted to a private organization or group, you should always treat it as being potentially available to the public.

Posting a "hypothetical" question on a Listserv might seem innocuous and, at first blush, appear not to contain confidential client information protected under RPC 1.6. However, the posting lawyer neither knows the identity of all prospective readers, nor what information a prospective reader already may have in his or her possession concerning the lawyer's client or the case at issue. Thus, even a Listserv posting that is loosely based on a client matter potentially may disclose, albeit unintentionally, client confidential information in violation of RPC 1.6.

RPC 1.6 mandates that (1) "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent[;]" (2) disclosure is otherwise impliedly authorized (see, RPC 1.6(a)); or (3) a specific exception to disclosure exists under RPC 1.6(b)). It is important to remember that "information relating to the representation of a client" is much more expansive than information received, in confidence, from the client. RPC 1.6 not only protects specific information related to the client representation, but also prohibits a lawyer from making more general statements, if the information disclosed might lead a third party to protected client information. ABA Comment 4 to

Rule 1.6 specifically is relevant to the use of a hypothetical based on a client's case, and states:

"Paragraph (a) [to Rule 1.6] prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to 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."

Obviously, the more case-specific facts that are included in a hypothetical inquiry posted on a Listserv, the greater the risk of disclosure of "information relating to the representation of a client," in violation of RPC 1.6. In your situation, the facts are extremely problematic, because your case involves a prominent family embroiled in existing and contentious estate administration litigation.

Should you attempt to craft an effective hypothetical to obtain guidance on your case, the facts posted very well could lead opposing counsel, if a member of the ELEPP Listserv, to discover confidential information pertaining to your client or the litigation. Before even considering posting an inquiry on a public Listserv, particularly one involving ongoing litigation, you should presume that opposing counsel subscribes to the Listserv and can and will use the information to the detriment of your client.

Your conduct in posting such a hypothetical on the Listserv may not only constitute a violation of Rule 1.6 on your part, but also may be extremely prejudicial to your client. Remember, Rule 1.6 is broadly interpreted and clearly covers any published information that could reasonably lead to protected client information.

There certainly are other options to a Listserv posting that you should consider. One would be consulting with your client to obtain his or her consent, as authorized by Rule 1.6(a), if the Listserv posting may contain case-specific facts in a hypothetical format that reasonably could result in the disclosure of confidential client information.

However, this consent only may be obtained from your client after you have communicated "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct" necessary to fully comply with the requirements of an "informed consent" under Rule 1.0(e).

Certainly a safer approach to a Listserv posting would be to obtain your client's informed consent to speak directly with another lawyer for assistance, after ascertaining that no potential conflicts of interests exist. This latter option affords you the opportunity to control the recipient of the information and potentially obtain an agreement of confidentiality from the receiving lawyer to ensure that no information could be used to the detriment of your client.

In summary, while the ELEPP Listserv is a valuable and convenient forum in which to quickly and inexpensively share and discover information concerning specific practice areas, a participating lawyer always must weigh its effective use against any possible disclosure of client confidential information. In your situation, posting a hypothetical question on a Listserv, even a question loosely based on existing client litigation, could be extremely risky and is not recommended.

The NH Bar Association Ethics Committee provides general guidance on the New Hampshire Rules of Professional Conduct and publishes brief commentaries in the New Hampshire Bar News. New Hampshire lawyers may contact the committee for confidential and informal guidance on their own prospective conduct or to suggest topics for Ethics Corner commentaries by emailing Robin Knippers.