

Navigating the Ethical Pitfalls of Lawyer Listservs

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Criminal defense attorneys in many jurisdictions have found listservs created by national organizations and those created at a state level to be of assistance in representing their clients. A listserv may facilitate a lawyer's research and offer an opportunity to brainstorm his or her case with a multitude of lawyers. Although a listserv seems to be a valuable litigation tool, a criminal defense counsel's use of a listserv may be fraught with ethical pitfalls. In May 2024, the American Bar Association issued Formal Opinion 511, "Confidentiality Obligations of Lawyers Posting to Listservs," to provide ethical guidance to lawyers who ask questions on a listserv about their cases. ABA Comm. on Ethics & Pro. Resp., Formal Op. 511 (2024).

As the ethics opinion explains, "[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 out the representation or the disclosure is permitted" by a specific exception. Model Rules of Pro. Conduct r. 1.6(a), *Confidentiality of Information* (Am. Bar Ass'n 2024). Additionally, "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." *Id.*, r. 1.6(c).

Comment 3 to Rule 1.6 explains that ethical confidentiality covers all information relating to the representation whatever its source and is not restricted to communications protected by the attorney-client privilege. Ethically, confidentiality also applies to even publicly available information.

Formal Opinion 511 also emphasizes that "[b]ecause Rule 1.6 restricts communications that 'could reasonably lead to the discovery of' information relating to the representation, 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." ABA Formal Op. 511, *supra*, at 2. Even efforts to disguise or camouflage the case in the listserv inquiry may be fatally deficient as the name of the attorney asking the question could telegraph the identity of the case. The nature of the inquiry or the identity of the court involved could trigger one or more of those reading the listserv inquiry to determine the case in question. This is especially possible when the criminal defense listserv is local, regional, or state-wide or the case in question has received national media attention.

Often a lawyer using a listserv believes that all those who will receive the inquiry are also criminal defense attorneys who can be trusted with information about the inquirer's case. This is a mistake. One of those recipients could be, at present or in the future, your client's co-defendant, whom neither the client nor the defense attorney would want to have this information. Similarly, a defense attorney reading the listserv inquiry could switch from the defense to the prosecution in the near future and be free to use the information in the inquiry against the client. Additionally, when ethically confidential information is disclosed to third parties on the listserv, those recipients are under no ethical confidentiality requirement precluding them from revealing that information gleaned from the context of the listserv question. This is true whether the information disclosed in the listserv was inadvertent or intentional.

Although not directly discussed in ABA Formal Opinion 511, intentional or inadvertent disclosure of client information via a listserv could result in that information losing the protection of the attorney-client privilege, if covered, as its confidential nature is compromised by disclosure to third persons on the listserv. The attorney-client "privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).

Criminal defense lawyers are not impliedly authorized by their clients to disclose ethically confidential information on a listserv in order to carry out the representation. With the client's informed consent, a defense lawyer could ethically disclose confidential information as part of a listserv question. But the danger of a general client waiver to authorize disclosing ethically confidential information to be used in making inquiries on a listserv would hardly be consistent with informed consent. "Informed consent" denotes the agreement by a person to a 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." Model Rules of Pro. Conduct r. 1.0(e), *Terminology*.

Despite these ethical problems with using defense listservs as explained in ABA Formal Opinion 511, few criminal defense listservs provide ethical guidelines to their users to aid them in avoiding ethical pitfalls. Defense listservs could and should provide user guidelines.

A possible set of listserv guidelines could include the following:

- The ethical duty of confidentiality applies to all information relating to the representation of a client, whether privileged or not, regardless of its source and even though

otherwise accessible from other sources, including public ones, unless limited in scope by a jurisdiction's ethical rules.

- Absent the client's informed consent to the disclosure of confidential information, a lawyer using a listserv must not offer any information about the client's case *if there is a reasonable likelihood* the post will allow a reader to recognize or deduce the client's identity or the situation involved.
- Merely anonymizing or hypothesizing a situation in a post will often be insufficient to camouflage the client or the litigation. The post must be stripped of details that could disclose ethically confidential information or that could lead to the discovery of such information.
- Such revealing information could be, in certain situations, the court in question, the geographical location of the posting attorney, even the litigation question asked, to name but a few.
- A general client waiver allowing the disclosure of ethically confidential information on listservs would be insufficient as such informed consent must follow the attorney advising the client of both the benefits and disadvantages of the particular disclosure on the listserv, which would seem to require not only the nature of listservs in general, but also the specifics of the listserv to be used. The client's informed consent to disclosure should be limited to the specific post the lawyer wishes to make and its contents.

To camouflage the question posed, consider revisions such as changing the gender of the client or other key players, the jurisdiction to another with comparable law, the law-enforcement agency involved or the crime(s) at issue, but whatever modifications are made must ensure there is no reasonable likelihood that a reader will be able to extrapolate the client's identity or the litigation involved. If potential readers of the post know the questioner's clientele or the nature of that practice, it may be extremely difficult to conceal either the client or the proceeding.

The client's informed consent to disclosure is unneeded when the lawyer's post is scrubbed of any information that reveals or leads to the revelation of any of the client's ethically confidential information.

None of the above is meant to denigrate the value of listservs, whether for criminal defense attorneys or other specialized practitioners, as a researching, brainstorming and strategizing tool. But the use of listservs must be regulated by the ethical rules to protect the client's right to confidentiality in dealing with counsel.

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