Lawyers Must Be Careful When Using Listservs

By **Deborah Winokur** (July 15, 2024)

Lawyers who find themselves stuck trying to address a tricky legal issue sometimes reach out to others for help by posting a question on a listserv.

Listservs are tremendously popular in the legal community and may help lawyers comply with their legal obligations to stay informed about changes in the practice of law and save valuable time. However, posing questions about specific representations can potentially jeopardize confidential client information.

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These concerns triggered the American Bar Association to issue Formal Opinion 511, regarding confidentiality obligations of lawyers posting to listservs, in May.[1]

The formal opinion highlighted the risk that a client's identity and information may be inferred even if the lawyer poses the question in hypothetical or abstract form, which would violate Rule 1.6's restriction on communications that "could reasonably lead to the discovery of" information relating to the representation without first obtaining the client's informed consent.[2]

The formal opinion concludes that lawyers may not post questions relating to the representation of a client to a listserv without the client's informed consent if the post could disclose information about the client's identity or the representation.

The ABA's position is well taken, but the formal opinion does not go far enough in exploring other potential drawbacks of using listservs for client matters. It also should have recommended that a lawyer obtain a client's informed consent before using a listserv to address a client's legal issue and, just as importantly, highlighted lawyers' other duties with respect to listservs.

Communication With Clients

Effective communication between attorneys and their clients is integral to the relationship. Rule 1.4 of the Rules of Professional Conduct requires lawyers to keep their clients reasonably informed about the status of client matters, and failure to communicate is perhaps the most common client complaint. Moreover, failure to communicate can create mistrust in the relationship and undermine the client's confidence in the lawyer and the lawyer's firm.

Using listservs for advice on client matters is a nontraditional method of legal research. As Formal Opinion 511 makes clear, "[p]articipation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers."

Clients may be hesitant to share their legal issue with a group of unknown lawyers, especially when the issue could be even more widely disseminated by a member of the listserv and go viral. They may also feel cheated that the lawyer they identified to handle their legal needs is not able to answer their questions without "phoning a friend."

A skillful and open discussion can bridge this gap — the client would have the opportunity to voice any objections or concerns, and the lawyer could explain the potential benefits of using the listserv and the ways in which the lawyer will protect the client's interests.

Competence and Diligence

The Rules of Professional Conduct require that lawyers handle matters with the requisite level of skill, thoroughness and diligence necessary for the representation. In broadly posting client questions, lawyers risk violating these duties.

There may be jurisdictional variability in the responses, the responses may not address the nuance or context of the initial question posed, and the quality and experience of lawyers responding may not be adequate to address the question.

These issues are analogous to the issues bar associations are addressing with respect to consulting generative artificial intelligence to answer a legal question. In both instances, lawyers depend on others — who have no legal duty and are not bound by any obligation to the lawyer — to produce answers to legal questions.

Similarly, there is also broad recognition that nontraditional modern legal tools, in the form of listservs or generative AI, can be beneficial to lawyers and their clients as long as appropriate guardrails are in place. Recent guidance from the Pennsylvania Bar Association is instructive — lawyers must ensure that content created using generative AI is truthful, accurate and based on sound legal reasoning.[3]

Perhaps even more important than simply verifying citations for accuracy, however, is the need for lawyers to bring their own creativity and unique problem-solving skills to a legal issue.

Conflicts of Interest

As Formal Opinion 511 points out, when a lawyer posits a legal question to a listserv, the lawyer risks creating a conflict of interest with another lawyer representing an opposing party.

By contrast, a lawyer consulting another lawyer through a personal interaction would be able to eliminate this risk by checking for conflicts prior to the interaction. An alternative option would be for the inquiry to be disseminated by a third party outside of the initial listserv.

Beyond these considerations, there is the possibility that the discussion could evolve in a way that is helpful to the opposing party in a matter. The generative AI analogy is apt here as well.

As the formal opinion points out, there is a potential for conflict when information developed from one representation informs another representation. If lawyers on the listserv work up the issue and assert arguments for or against each other's position, the result could be a final product with refined and sophisticated arguments helpful to the other side of the matter.

Billing

Due to the fact that using a listserv potentially offers tremendous time savings, lawyers must be cognizant that they may not charge an unreasonable fee or violate their jurisdiction's version of Rule 1.5.[4] This is where transparency with clients is essential. If they know and understand that a lawyer is using a listserv to assist with the representation, the bills will be much more comprehensible to the client.

Conclusion

It's clear that technology is continuing to affect and potentially improve the delivery of legal services. Lawyers have the opportunity to broadcast a question to a group of practitioners in a matter of seconds. Some of these discussions have delivered vital educational and practical benefits to lawyers.

Nevertheless, the use of listservs is not without risks to the lawyer and the client — these risks can be reduced by protecting confidential information through strict adherence to Formal Opinion 511, obtaining a client's consent before posting a client's legal issue to a listserv, verifying the accuracy and adequacy of the responses, and considering the broader impact of a discussion of the client's legal issue with respect to conflicts of interest and billing accurately.

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[1] https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-511.pdf.

[2] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/.

[3] https://www.pabar.org/Members/catalogs/Ethics%20Opinions/Formal/Joint%20Formal%20Opinion%202024-200.pdf.

[4] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees/.