



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-15
May 2012

Subject: Confidentiality

Digest: Use of a lawyer listserv or bar association online discussion group can be a useful and effective means to educate lawyers and can provide a resource when lawyers engage in research and decision-making. However, when lawyers consult with other lawyers who are not associated with them in the matter, both the consulting lawyer and the consulted lawyer must take care to protect client confidentiality and the attorney-client privilege and take care to avoid creating a conflict of interest with existing clients. In addition, an online discussion group is not a substitute for the consulting lawyer's legal research.

References: Illinois Rules of Professional Conduct, Rules 1.0(e), 1.1, 1.4, 1.6, 1.7, 1.9
ABA Formal Ethics Op. 98-411 (1998)
Maine Ethics Op. 171 (1999)
Oregon Formal Ethics Op. 2011-184 (2011)

FACTS

A bar association provides several subject-based online discussion groups for members to pose questions to, and share information with, other lawyer members. Lawyer A is a member of that association, and also a solo practitioner. Lawyer A encounters an issue related to discovery of information in a divorce proceeding, and would like to post a question to the e-mail discussion group to try to gain information as to how Lawyer A should proceed.

QUESTION

May Lawyer A post a question on the family law e-mail discussion group explaining her discovery dilemma to seek the advice of other bar association members?

OPINION

An online discussion group can serve to educate a lawyer and allows a lawyer to test her understanding of legal principles by asking questions of other lawyers. Such a service can help a lawyer to provide competent representation pursuant to Rule 1.1 of the Illinois Rules of Professional Conduct, particularly when the lawyer does not have a partner or co-counsel to whom she can turn to for advice. However, both the consulting lawyer and the consulted lawyer must abide by their professional responsibilities.

The consulting lawyer must take care to maintain client confidentiality pursuant to Rule 1.6 when asking for advice about a client's matter. Rule 1.6(a) provides, "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 paragraph (b) or required by paragraph (c)."

Comment 5 to Rule 1.6 states that lawyers in a firm are impliedly authorized to discuss with each other information regarding a firm client "unless the client has instructed that the particular information be confined to specified lawyers." As Lawyer A is a solo practitioner, she must seek the needed advice from other lawyers who are not associated with the client's matter.

Comment 5 to Rule 1.6 provides, "Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation." The comment does not suggest what disclosures might be impliedly authorized. An ABA opinion, ABA Formal Ethics Opinion 98-411 (1998) suggests that Rule 1.6 permits disclosures of information relating to the representation of a client "to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client."

Thus, a consultation or inquiry that is general or abstract in nature and that does not involve the disclosure of information relating to the representation of the client does not violate Rule 1.6. Similarly, a question posed as a hypothetical may not generally violate Rule 1.6, as long as there is not a reasonable likelihood from the question or the discussion that the identity of the client could be determined. *See, e.g., Oregon Formal Ethics Op. 2011-184.*

If the consulted lawyer or other persons viewing the inquiry could determine the identity of the client or if the inquiry otherwise risks disclosure of information relating to the representation that could harm the client, then the lawyer must consult with the client pursuant to Rule 1.4 and obtain the client's informed consent. "Informed consent" is

defined by Rule 1.0(e) as denoting “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.” As set forth in ABA Formal Ethics Opinion 98-411, informed consent might include an explanation as to how the disclosure could harm the client, including that the disclosure may constitute a waiver of the attorney-client privilege. *See also* Maine Ethics Op. 171 (1999).

A consulting lawyer should also be cautious about seeking advice from another lawyer who is or is likely to be counsel for an adverse party in the matter. In situations where the identity of the consulting lawyer’s client is not adequately protected, the consulting lawyer risks that the information disclosed in the inquiry may be used adversely to the consulting lawyer’s client. Additionally, some listserv discussions may be searchable, depending on how the listserv is set up. And even in ‘closed’ discussion groups, there is little to prevent someone from forwarding a particular message to another person outside the group.

Finally, the consulting lawyer should not view the consultation as a substitution for the lawyer’s legal research and judgment. As set forth in Comment 5 to Rule 1.1, competent handling of a client’s matter “includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”

The consulted lawyer in an online discussion group must also heed his or her professional obligations. Generally, a consulted lawyer does not create a client-lawyer relationship with the consulting lawyer’s client by virtue of the consultation alone. However, the consulted lawyer must consider the duty of loyalty to his or her own clients when consulting for the benefit of the clients of a consulting lawyer. *See* ABA Formal Ethics Opinion 98-411. As noted in the ABA opinion, the duties of a lawyer to provide competent representation of a client suggest that the lawyer must take reasonable steps to avoid knowingly engaging in conduct adverse to his or her own client’s interests. *See also* Illinois Rules of Professional Conduct, Rules 1.7 and 1.9. In a situation where the identity of the consulting lawyer’s client is not protected, the consulted lawyer will need to check for possible conflicts of interest. In all other situations, the consulted lawyer should take reasonable steps to insure that the information provided to the consulting lawyer will not impair the obligations to the consulted lawyer’s current or former clients.

CONCLUSION

Lawyer A may consult with other lawyers in an online discussion group. If the nature of the discovery dilemma is general and abstract, if there is no risk that Lawyer A’s client can be identified from the inquiry, and if Lawyer A does not disclose information relating to the representation of the client, then Lawyer A will not need to obtain her client’s informed consent to engage in the consultation. If however, Lawyer A’s client can be identified from the inquiry or if Lawyer A needs to disclose information relating to the representation, then Lawyer A must confer with the client and obtain the

client's informed consent. Lawyer A must also take reasonable steps to avoid consulting with counsel for the adverse party in the discovery dispute.

The consulted lawyer should also take reasonable steps to avoid providing information to Lawyer A that could impair any obligations to the consulted lawyer's clients.

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