Panic! At the Hypo

A new ethics opinion about lawyers' responsibilities while seeking information and advice about client matters is relevant despite the age of the decades' old technology underlying electronic lists (listservs).

BY STACIE H. ROSENZWEIG

In May, the American Bar Association issued Formal Opinion 511,[1] "Confidentiality Obligations of Lawyers Posting to Listservs" [hereinafter Opinion 511]. Why, in 2024, did the ABA write an opinion about listservs, not tragedies?[2] After all, listservs[3] are an email-based discussion technology created during the Reagan administration (the Iran-Contra affair may have been discussed on an early version).

Listservs Have Not Gone the Way of Landline Phones

Even as online message boards and social media have become ubiquitous ways to communicate, email discussion lists (however branded) are still in widespread use among lawyers. I subscribe to a couple; you probably do, too. If you are one of the many lawyers participating in listservs, you may have discussed Opinion 511 on your listserv. If you are one of the relatively few lawyers participating in a professional responsibility listserv, you may have engaged in (or observed, because after all you may have been in need of column fodder) a bunch of meta-discussion about the implications of Opinion 511, on your listserv.

Listservs are a popular member benefit of many specialty and affinity bar associations and rightly so – they allow quick communication between lawyers in a particular practice or geographic area. It's easy to send a request for a referral or an answer to a quick question and, on the busier listservs, get a few dozen responses within hours, if not minutes.

"Hey, so, hypothetically, if I had a client who inadvertently uploaded the entire contents of *his* client's phone to opposing counsel's cloud server, what should I advise him?"

"Well, tell them not to do what this guy did."[4]

ABA Opinions' Relevance to Wisconsin Lawyers

Although ABA formal opinions are not binding on Wisconsin lawyers, they can be useful guidance in applying Wisconsin's Supreme Court Rules (our version of the ABA Model Rules) to specific scenarios. Opinion 511 primarily addresses rule 1.6, confidentiality, which is similar enough (in the ways that matter here) to SCR 20:1.6. Information relating to representation of a client is presumptively confidential. A question the opinion tries to answer is whether listserv discussions may fall under the "implied authorization" exception – after all, wouldn't it make sense for our clients to want us to bounce issues off other people (perhaps other lawyers in our field) so we can make good decisions?

Of course, it depends.

Opinion 511, and some of the coverage of it,[5] focuses in large part on what lawyers *aren't* supposed to do. Before we get to that, it does seem there are plenty of things a lawyer is allowed to discuss without informed consent.

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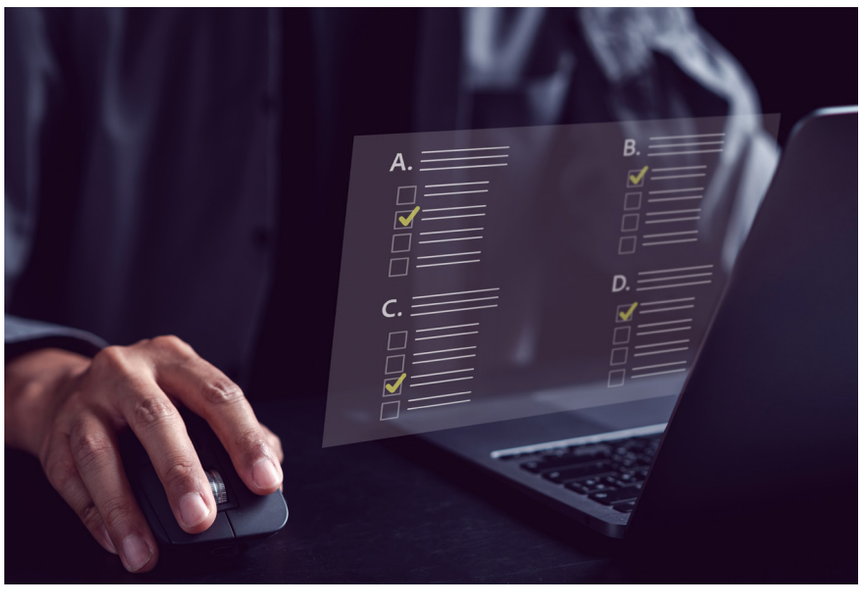

The opinion doesn't take issue with discussions of legal news, recent cases, or changes in the law, so long as lawyers stick to generalities. Under most circumstances, the likelihood is slim that a discussion on a Wisconsin listserv about, for example, a U.S. Supreme Court case arising out of the Ninth Circuit and concerning self-determination contracts with the Indian Health Service[6] would end up with a participant revealing information related to representation of their own client. In that case, chat away.

In Small Circles, Details Can Reveal Too Much

The problem, at least according to Opinion 511, is when what is suggested "hypothetically" may be recognizable as the participant's own case and own client. Comment 4 to Model Rule 1.6 permits discussions of hypotheticals, "to discuss issues relating to the representation … 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."

And therein lies the rub.

This is Wisconsin, where we're all up in each other's business. "Smallwaukee" and "Six Degrees of Cheese" are things people say here. Knowing when you're going to say something recognizable to someone else isn't always simple.

Opinion 511 differentiates discussion on a listserv from one-on-one, lawyer-to-lawyer conversations, which were explored in an older opinion.[7] The earlier opinion concluded that a lawyer had implied authority to disclose anonymized, non-prejudicial, non-privileged information related to representation, outside the lawyer's own firm, for the purpose of "seeking advice from knowledgeable colleagues" and "testing ideas about complex or vexing cases," so long as there was no conflict of interest involved. The older opinion assumed the lawyers would keep the discussion confidential as well.

But Opinion 511 concluded that having that same discussion on a listserv is far more perilous – after all, you don't always know who else is reading and can't guarantee they won't entertain (or bore) their spouses with a discussion of something salacious that they have no duty to maintain in confidence. I would imagine certain practice area listservs – think family law, trusts and estates, and transactional law – would be rife with conflicts and confidentiality traps because there is no clear delineation between who represents clients at the top of the caption versus the bottom. Opposing counsel might be right there on the listserv with you, and then all but the most generic of queries may be recognizable.

Consider Asking Clients for Informed Consent

Lawyers can still participate with more detailed hypotheticals, with informed consent. I've gotten informed consent before – "hey, client, somehow, despite all of the incredibly weird situations I've seen, I've never seen your weird situation before. Mind if I bounce it off my ethics nerd listserv?[8] I wouldn't use your name or identifying details, and it's unlikely anyone would recognize you, but here are the material risks and reasonably available alternatives."[9]

Can this informed consent be given ahead of need, such as in or with the fee agreement? Opinion 511 (note 9) suggests it might be possible, but "the lawyer's initial explanation must be sufficiently detailed to inform the client of the material risks involved." Perhaps if your listserv is small in user base, narrow as to focus, and broad as to geography, the specific risks are more easily foreseen, but, as the footnote cautions, "[i]t may not always be possible to provide sufficient detail until considering an actual post."

Conclusion

You might decide to ask all clients, for example in the fee agreement, to provide consent for you potentially seeking advice on listservs, proceed on a case-by-case basis, or both. But don't ignore the possibility of inadvertent breaches of confidentiality. After all, "it's much better to face these kinds of things with a sense of poise and rationality."[10] **WL**

ENDNOTES

[1]Available at time of publication at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-511.pdf. ABA opinions are publicly available for a limited time after release and are paywalled after that.

[2]*See* Panic! At the Disco, *I Write Sins Not Tragedies, on A Fever You Can't Sweat Out* (Decaydance/Fueled by Ramen 2005).

[3]LISTSERV® is now a registered trademark of licensee L-Soft International Inc., https://www.lsoft.com/products/listserv.asp. The ABA opinion uses the term "listserv" in lower-case letters as a generic (and, given that its advice seems applicable regardless of what email distribution list platform one uses, I do too).

[4]This is what happened in the 2022 trial of Infowars host Alex Jones. David L. Hudson Jr., *Alex Jones Case Shows Inadvertent Disclosure of Electronically Stored Information Is a Real Risk*, ABA J. (Oct. 27, 2022), https://www.abajournal.com/web/article/alex-jones-case-shows-inadvertent-disclosure-of-electronically-stored-information-is-a-real-risk (behind paywall for some readers).

[5]E.g., Sam Skolnik, *ABA Issues Opinion on Disclosing to Clients When Using Listservs*, Bloomberg L. (May 8, 2024), https://news.bloomberglaw.com/business-and-practice/new-aba-opinion-on-disclosing-to-clients-when-using-listservs.

[6]*Becerra v. San Carlos Apache Tribe*, 144 S. Ct. 1428 (U.S. June 6, 2024).

[7]ABA Formal Op. 98-411 (1998).

[8]Association of Professional Responsibility Lawyers, www.aprl.net. I have an "ethics nerd" branded hoodie.

[9]I assure you that I am a bit more professional in my informed consent discussions, but if I recited my professional informed consent discussions verbatim, someone might recognize them, and however SCR 20:1.6 applies to listservs would probably apply double to a 25,000-circulation magazine.

[10]*See supra* note 2. **WL**