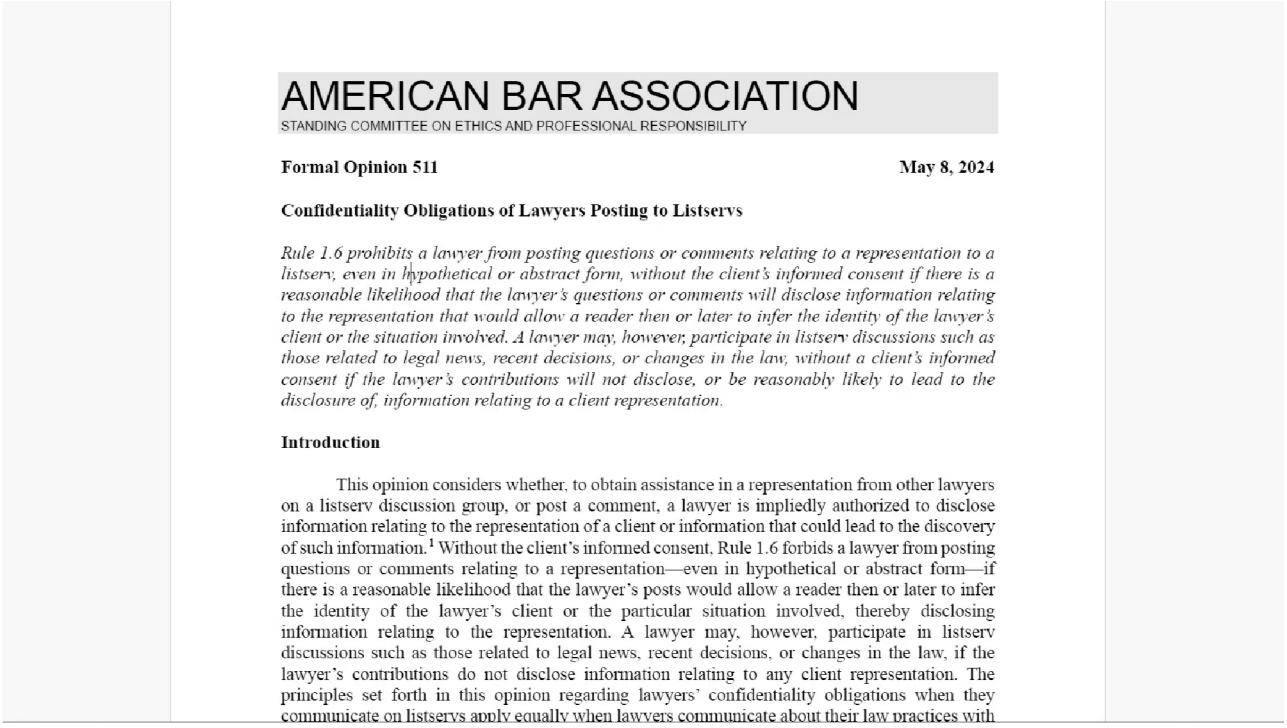
ABA Issues Ethics Opinion on 30-Year-Old Technology whose Use Is Waning. My Question: Why Now?



AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 511 **May 8, 2024**

Confidentiality Obligations of Lawyers Posting to Listservs

Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation.

Introduction

This opinion considers whether, to obtain assistance in a representation from other lawyers on a listserv discussion group, or post a comment, a lawyer is impliedly authorized to disclose information relating to the representation of a client or information that could lead to the discovery of such information.[1] Without the client's informed consent, Rule 1.6 forbids a lawyer from posting questions or comments relating to a representation—even in hypothetical or abstract form—if there is a reasonable likelihood that the lawyer's posts would allow a reader then or later to infer the identity of the lawyer's client or the particular situation involved, thereby disclosing information relating to the representation. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, if the lawyer's contributions do not disclose information relating to any client representation. The principles set forth in this opinion regarding lawyers' confidentiality obligations when they communicate on listservs apply equally when lawyers communicate about their law practices with

*By **Bob Ambrogi** on May 9, 2024*

When the American Bar Association's ethics panel finally got around to issuing an opinion on lawyer blogging in 2018 — a full two decades after lawyers had started blogging — it conjured for me the image of Rip Van Winkle, who fell asleep in 1769 and awoke 20 years later, having slept through the Revolution. (See, **In New Ethics Ruling On Blogging, ABA Opines Like It's 1999**.)

Now, the ABA has done itself one better, coming out with an ethics opinion on lawyers' use of listservs — even though lawyers have been engaging with one another on listservs for roughly 30 years. In fact, one of the most popular lawyer-to-lawyer listservs ever, the ABA's very own **SoloSez**, started in 1996.

But the glory days of lawyer listservs are long past. By Internet standards, listservs are leftovers from prehistoric times. Yes, a few still wander the landscape, but what makes this opinion so glaringly untimely is not that they have been around for 30 years, it is that they are nearing extinction. Over the past decade, lawyers' use of listservs has declined dramatically, to the point where lawyer-only listservs are mostly confined to small specialty areas of law.

So why now, ABA? Why now come out with an opinion on a 30-year-old technology that is nearing its final days? That, we will never know.

Conservative Approach

Timing aside, the new opinion, **Formal Opinion 511**, issued May 8, 2024, takes a constrictive and conservative approach to the issue, cautioning that even a general question about the law, such as a request for a case on a specific topic, "may in some circumstances permit other users to identify the client or the situation involved."

The focus of the opinion is on lawyers who turn to lawyer-to-lawyer listservs to seek help on a matter they are currently handling. These sorts of inquiries were long the fodder of the Solosez group I mentioned above, and of other listservs devoted to specific areas of law or jurisdictions.

The ethical concern here is Model Rule 1.6, which prohibits a lawyer from revealing information relating to the representation of a client, unless the client gives informed consent. That prohibition applies not only to confidential information, but to all client information, including even the client's identity.

With Rule 1.6 in hand, the ABA panel answers the question categorically and perhaps even heavy-handedly:

> *"Without the client's informed consent, Rule 1.6 forbids a lawyer from posting questions or comments relating to a representation—even in hypothetical or abstract form—if there is a reasonable likelihood that the lawyer's posts would allow a reader then or later to infer the identity of the lawyer's client or the particular situation involved, thereby disclosing information relating to the representation."*

In reaching that opinion, the ABA panel distinguished an opinion it issued in 1998 (ABA Formal Opinion 98-411) that found that a lawyer has implied authorization to discuss a case with an outside lawyer in order to obtain advice about the case, when the lawyer reasonably believes the disclosure will further the representation. The difference with a listserv, the panel pointed out, is that the lawyer is revealing the information to a group of lawyers.

> *"Typical listserv discussion groups include participants whose identity and interests are unknown to lawyers posting to them and who therefore cannot be asked or expected to keep information relating to the representation in confidence. Indeed, a listserv post could potentially be viewed by lawyers representing another party in the same matter."*

On top of that, the panel said, there is no way for the posting lawyer to ensure that the client's information will not be further disclosed beyond the listserv or used in some way against the client.

This reasoning extends even to the posting of hypotheticals, the ABA panel said.

> *"[A] lawyer must have the client's informed consent to post a hypothetical to a listserv if, under the circumstances, the posted question could 'reasonably lead to the discovery of' information relating to the representation because there is a 'reasonable likelihood' that the reader will be able to ascertain the identity of the client or the situation involved."*

All of that said, some forms of inquiries to a listserv do not cross ethical bounds, even when designed to elicit information helpful to a representation.

> *"In some situations, because of the nature of the lawyer's practice, the relevant client or the situation involved will never become known, and therefore the lawyer's anonymized inquiry cannot be identified with a specific client or matter. In other cases, the question may be so abstract and broadly applicable that it cannot be associated with a particular client even if others know the inquiring lawyer's clientele."*

The opinion also mentioned other ways in which "careful lawyers" can use listservs, including to ask for cases and articles on topics or forms and checklists, or to ask for information on how various jurisdictions address court-connected concerns.

So, given all this, just what sort of consent is needed from the client in order to post to a listserv? Here is what the opinion advises:

> *"When seeking a client's informed consent to post an inquiry on a listserv, the lawyer must ordinarily explain to the client the risk that the client's identity as well as relevant details about the matter may be disclosed to others who have no obligation to hold the information in confidence and who may represent other persons with adverse interests. This may also include a discussion of risks that the information may be widely disseminated, such as through social media."*

For lawyers who regularly use listservs, they may wish to seek the client's informed consent at the outset of the representation, the panel says. This could be done by explaining the lawyer's intention and memorializing the client's consent in the engagement agreement. "The lawyer's initial explanation must be sufficiently detailed to inform the client of the material risks involved," the opinion says, adding that may not always be possible until considering an actual post."

To my thinking, this opinion takes an overly heavy-handed approach to an issue it should have addressed, if at all, maybe 20 years ago. In other words it is too much, too late.

Bob Ambrogi

Bob is a lawyer, veteran legal journalist, and award-winning blogger and podcaster. In 2011, he was named to the inaugural Fastcase 50, honoring "the law's smartest, most courageous innovators, techies, visionaries and leaders." Earlier in his career, he was editor-in-chief of several legal publications, including The National Law Journal, and editorial director of ALM's Litigation Services Division.
