

FORMAL OPINION NO 2011-184

Confidentiality, Conflicts of Interest: Consulting between Lawyers Not in the Same Firm

Facts:

Lawyer *A* participates in a mentoring program for new lawyers. Lawyer *B* is Lawyer *A*'s mentor and is not in Lawyer *A*'s law firm. Lawyer *A* wishes to discuss a matter concerning one of his clients with Lawyer *B*.

Lawyer *C* is a sole practitioner. She is a member of an e-mail *LISTSERV* maintained by a professional organization that provides members the opportunity to exchange ideas and respond to questions about problems and issues that arise in their practices. Lawyer *C* encounters an unusual situation in a case she is handling and wishes to receive advice on how to proceed from knowledgeable colleagues who participate in her *LISTSERV*.

Questions:

1. May Lawyer *A* disclose information relating to the representation of his client with Lawyer *B*?
2. May Lawyer *B* consult regarding Lawyer *A*'s client matter without first checking for conflicts of interest between Lawyer *A*'s client and any client of Lawyer *B*'s firm?
3. May Lawyer *C* relate the details of the unusual situation she has encountered to other lawyers who participate in her professional organization's *LISTSERV*?

Conclusions:

1. Yes, qualified.
2. See discussion.
3. Yes, qualified.

Discussion:

Oregon RPC 1.6(a) provides, in pertinent part:

(1) 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).

Oregon RPC 1.7(a) provides, in pertinent part:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer

It is not uncommon for a lawyer working on a client matter to seek the guidance or assistance of a knowledgeable colleague. Except when the client has specifically instructed otherwise, lawyers may consult with colleagues within their own firms or who are formally associated on a client's matter without violating the duties to safeguard confidential information and avoid conflicts of interest.

A lawyer may also on occasion seek the advice of colleagues who are not members of the lawyer's firm or associated on a client matter. Whether those discussions arise in the context of a formal mentoring relationship or through informal discussions, such as on a professional LISTSERV or in casual conversation, both the lawyer seeking advice and the lawyer giving the advice must exercise care to avoid violating their duties to their respective clients.

The American Bar Association's Standing Committee on Ethics and Professional Responsibility Formal Opinion 98-411, "Ethical Issues in Lawyer-to-Lawyer Consultation," provides practical guidance on this

subject.¹ Even though the ABA opinion was adopted before LISTSERVs and other electronic discussion tools² were commonly used by lawyers and makes no reference to them or to lawyer mentoring programs, the principles it discusses and the guidance it provides are applicable in these contexts.³

I. *Considerations for the Consulting Lawyer.*

Oregon RPC 1.6 safeguards “all information relating to the representation of a client,” and prohibits disclosure of such information without the client’s informed consent or as provided in one of the specific exceptions to the rule. There is no exemption for lawyers participating in mentorship programs or for other lawyers seeking assistance on behalf of clients. Oregon RPC 1.6(a) permits disclosure of confidential information, without the informed consent of a client, when the disclosure is “impliedly authorized to carry out the representation.” The rule does not suggest what kind of disclosures might be impliedly authorized; the ABA opinion interprets Oregon RPC 1.6 “to allow disclosures of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by

¹ ABA Formal Ethics Op No 98-411 (1998), *available at* <www.abanet.org/media/youraba/200911/98-411.pdf>.

² For purposes of this opinion, when reference is made to LISTSERVs the same considerations apply to discussions on blogs, online community bulletin boards, or similar electronic discussion venues.

³ The ABA opinion purports to apply equally to consultations about the substance or procedure of a client’s matter and to consultations about the consulting lawyer’s own ethical responsibilities in the matter. However, since the ABA opinion was issued, both the ABA and Oregon have adopted rules that expressly permit disclosure of otherwise confidential information to the extent reasonably necessary “to secure legal advice about the lawyer’s compliance with these Rules.” ABA Model RPC 1.6(b)(4); Oregon RPC 1.6(b)(3). Comment [9] to ABA Model RPC 1.6(b)(4) suggests that such disclosures may be impliedly authorized for the lawyer to carry out the representation but, even if not, are permitted “because of the importance of a lawyer’s compliance with the Rules of Professional Conduct.” This opinion is limited to consultations between lawyers unrelated to the lawyer’s own professional conduct.

obtaining the consulted lawyer’s experience or expertise for the benefit of the consulting lawyer’s client.”

Consultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client do not implicate Oregon RPC 1.6. For instance, there would be no violation of the rule in a LISTSERV inquiry seeking the name or citation for a recent case on a subject relevant to a client matter or to discussions about an issue of law or procedure that might be present in a client matter. Similarly, inquiries or discussions posed as hypotheticals generally do not implicate Oregon RPC 1.6. Accordingly, Lawyer A might safely pose a question to Lawyer B, or Lawyer C might post an inquiry on a LISTSERV, as a hypothetical case.

Framing a question as a hypothetical is not a perfect solution, however. Lawyers face a significant risk of violating Oregon RPC 1.6 when posing hypothetical questions if the facts provided permit persons outside the lawyer’s firm to determine the client’s identity. When the facts are so unique or when other circumstances might reveal the identity of the consulting lawyer’s client even without the client being named, the lawyer must first obtain the client’s informed consent for the disclosures.

To obtain “informed consent,” a lawyer must provide a client with “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁴ As noted in the ABA opinion, that may include an explanation that the disclosure may constitute a waiver of attorney-client privilege or might otherwise prejudice the client’s interests.

A lawyer should avoid consulting with another lawyer who is likely to be or to become counsel for an adverse party in the matter. In the absence of an agreement to the contrary, the consulted lawyer does not assume any obligation to the consulting lawyer’s client by simply participating in the consultation.⁵ The consulting lawyer thus risks

⁴ Oregon RPC 1.0(g).

⁵ The ABA opinions suggests that an agreement to maintain confidentiality might be inferred in some situations, such as when the consulting lawyer puts conditions on the consultation or when the information discussed is of a nature that a

divulging sensitive information to a client's current or future adversary, who is not prohibited from subsequently using the information for the benefit of his or her own client. This should be a particular concern to Lawyer C if she posts her inquiry to a LISTSERV, whose members may represent parties on all sides of legal issues. Moreover, no LISTSERV, regardless the restrictions and limitations upon those who participate in it, can insure that messages will be read only by persons aligned with the interests of the lawyer posting an inquiry. Lawyer C, in seeking to consult about an unusual fact pattern, must be careful about using a LISTSERV to obtain assistance from other attorneys, at least not without the informed consent of her client about the potential risks of the consultation.

One way for a consulting lawyer to avoid some of the foregoing risks is to obtain an agreement that the consulted lawyer will both maintain the confidentiality of information disclosed and not engage in representation adverse to the consulting lawyer's client.

II. *Considerations for the Consulted Lawyer.*

As discussed above, a consulted lawyer assumes no obligations to the consulting lawyer's client by the mere fact of the consultation. Lawyer B will not have violated any duty to Lawyer A's client under Oregon RPC 1.6 if Lawyer B later discloses or uses information received from Lawyer A, including in circumstances when Lawyer B undertakes representation adverse to Lawyer A's client.

Even a consultation premised on hypothetical facts can have practical implications for the consulted lawyer if the guidance provided to the consulting lawyer is used to harm a client of the consulted lawyer. The ABA opinion illustrates this point with the example of a lawyer skilled in real estate matters, like our Lawyer B, who is consulted by a less experienced lawyer, such as our Lawyer A, about how a tenant might void a lease. As a result of Lawyer B's guidance, Lawyer A's client

reasonable lawyer would assume its confidentiality. In the absence of any authority, however, practitioners should not assume a confidentiality agreement will be inferred.

repudiates a lease. Lawyer *B* subsequently learns that the landlord whose lease was repudiated is a client of Lawyer *B*'s firm.

In that situation, if there was no confidentiality agreement between the lawyers, Lawyer *B* has a duty to inform the landlord client about the consultation and its possible consequences. While doing so does not breach any duties to Lawyer *A*'s client or to Lawyer *B*'s client, the practical result may be allegations of negligence or ethical misconduct by the landlord client and the destruction of the relationship. Had Lawyers *A* and *B* entered a confidentiality agreement regarding the consultation, then Lawyer *B* and his firm could be disqualified under Oregon RPC 1.10, if Lawyer *B*'s obligations under that agreement would materially limit his ability to represent the landlord in the matter.⁶

Lawyer *B* can avoid the problems posed by the above example by insisting, prior to any consultation with Lawyer *A* about a client matter, that Lawyer *A* provide the identity of the client so that Lawyer *B* can check for possible conflicts with clients of Lawyer *B*'s firm. In addition to checking for possible conflicts, Lawyer *B* might seek an agreement from Lawyer *A*, on behalf of Lawyer *A*'s client, that the consultation will not create any obligations by Lawyer *B* to Lawyer *A*'s client.

Consultations among lawyers, whether during the course of a mentorship program, on LISTSERVs and other "social media," during continuing education programs or in more informal settings, are an important part of a lawyer's professional development and a critical component in representing clients. Indeed, such consultations may be one way in which lawyers fulfill their ethical duty, under Oregon RPC 1.1, to provide competent representation. But lawyers who are not members of the same firm or affiliated on a particular case must be mindful of other ethical obligations to clients. For the consulting lawyer, like Lawyers *A* and *C* herein, care should be taken not to violate the duty to maintain the confidentiality of information relating to the representation of a client.

⁶ Oregon RPC 1.7(a)(2) prohibits a lawyer from representing a client if there is "a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to . . . a third person," except when the affected client gives informed consent, confirmed in writing.

For the consulted lawyer, like Lawyer *B*, the duty of loyalty to existing clients must be considered. Even though a consultation will not create an attorney-client relationship between the client of the consulting lawyer and the consulted lawyer, there may be circumstances, as illustrated above, in which the consulted lawyer will need to check for possible conflicts of interest, or take other prophylactic measures, to ensure that an obligation to current clients is not impaired.

Approved by Board of Governors, March 2011.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-1 to § 6.2-2 (basic components of duty of confidentiality), § 6.3-1 (client consent), § 10.2 (multiple-clients conflicts rules) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 62, 121–122 (2000) (supplemented periodically).

