THE Legal Ethics & Malpractice Reporter

A monthly commentary on current ethical issues in law practice for members of the Kansas and Missouri Bars

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Contents

About This Publication

The Legal Ethics & Malpractice Reporter (LEMR, for short) is a free, monthly publication covering current developments in ethics and malpractice law—generally from the perspective of the Kansas and Missouri *Rules of Professional Conduct*. Founded in 2020, this publication was envisioned by KU Law professor Dr. Mike Hoeflich, who serves as its editor in chief. In partnership with Professor Hoeflich, JHC's legal ethics and malpractice group is pleased to publish this monthly online periodical to help attorneys better understand the evolving landscape of legal ethics, professional responsibility, and malpractice.

In addition to the digital format you're presently reading, we publish LEMR as mobile-friendly blog articles on our website. We also share a digest newsletter to our LEMR email subscribers whenever a new issue is published. (You may subscribe here if you aren't already a subscriber.)

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FEATURE ARTICLE

Attorney Listservs, Advice, & Rule 1.6: Applying ABA Formal Opinion 511

At some point in their careers, most lawyers will find that they need assistance from another lawyer concerning an issue that has arisen in a case. They may not have anyone in their firm who can help them, or they might be solo practitioners. Thus, they may decide that they need to get outside help. Model Rule 1.1 encourages lawyers to seek assistance from other lawyers through "affiliation" to maintain the required standards of competence. However, there are times when a lawyer wants to discuss a difficult issue with another lawyer without affiliating with them formally. Indeed, a lawyer may wish to consult a group of lawyers if the problem she faces is of considerable complexity or difficulty. If a lawyer does so, then she must be sure to maintain client confidentiality.

In Formal Opinion 511, released May 8, 2024, the American Bar Association Standing Committee on Ethics and Professional Responsibility provides guidelines for this. Opinion 511 observes that Rule 1.6 prohibits lawyers from disclosing confidential client information unless the client specifically or implicitly authorizes the disclosure as integral to the representation. Comment 3 to the Rule makes it clear that this prohibition applies even to publicly available information (and guides the reader to see ABA Formal Opinion 04-433 (2004)). Comment 4 to Rule 1.6 specifically prohibits lawyers from revealing information that, while anonymous, might lead others to discover the identity of and other information about the client.

After permitting a lawyer to reveal confidential client information with informed consent, the opinion addresses whether a lawyer may share such information without client consent through hypothetical examples. It begins with a prior opinion regarding a direct lawyer-to-lawyer consultation:

> ABA Formal Opinion 98-411 (1998) addressed whether a lawyer is impliedly authorized to disclose information relating to the representation to another lawyer, outside the inquiring lawyer's firm and without the client's informed consent, to obtain advice about a matter when the lawyer reasonably believes the disclosure will further the representation. The opinion contemplated that the

> lawyer seeking assistance would share information relating to the representation, in anonymized form, with an attorney known to the consulting lawyer. It further contemplated that the consulted attorney would both ensure there was no conflict of interest between the consulting lawyer's client and the consulted attorney's clients and would keep the information confidential even in the absence of an explicit confidentiality obligation. The opinion concluded that, in general, a lawyer is impliedly authorized to consult with an unaffiliated attorney in a direct lawyer-to-lawyer consultation and to reveal information relating to the representation without client consent to further the representation when such information is anonymized or presented as a hypothetical and the information is revealed under circumstances in which "the information will not be further disclosed or otherwise used against the consulting lawyer's client." The opinion explained, "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development. Testing ideas about complex or vexing cases can be beneficial to a lawyer's client." However, the opinion determined that the lawyer has implied authority to disclose only non-prejudicial information relating to the representation for this purpose and may not disclose privileged information.

Then Opinion 511 explains why the rules applicable to a direct lawyer-to-lawyer consultation cannot be extended to consultations of a broader audience, like a group of lawyers participating in a listserv:

> In this opinion, the question presented is whether lawyers are impliedly authorized to reveal similar information relating to the representation of a client to a wider group of lawyers by posting an inquiry or comment on a listserv. They are not. Participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter. 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. Additionally, there is usually no way for the posting lawyer to ensure that the client's information will not be further disclosed by a listserv participant or otherwise used against the client. Because protections against wider dissemination are lacking, posting to a listserv creates greater risks than the lawyer-to-lawyer consultations envisioned by ABA Formal Ethics Opinion 98-411. [emphasis added]
>
> Without informed client consent, a lawyer participating in listserv groups should not disclose any information relating to the representation that may be reasonably connected to an identifiable client. Comment 4 to Rule 1.6 envisions the possibility of lawyers using hypotheticals to discuss client matters. However, 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.

After a discussion of several state ethics opinions on this subject, Opinion 511 concludes:

> Rule 1.6 prohibits a lawyer from posting comments or questions 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 posts will disclose information relating to the representation that would allow a reader then or later to recognize or 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 consent if the lawyer's contributions will not disclose information relating to a client's representation.

Anonymization is a tricky business. As Opinion 511 points out, the more difficult a problem and the more unusual the facts, the easier it will be for another lawyer to discover the actual case and client. Further, while it is generally possible to discover

whether a specific lawyer may have a conflict, it is almost impossible to assure that every lawyer on a listserv is free of conflicts.

ABA Formal Opinion provides an important caution to lawyers who wish to "group source" legal questions that apply to specific client issues to gain information to help them in a representation. Overall, it is not a good idea when dealing with specific cases.

OPINION

Supreme Court Soap Opera Reaches New Dramatic Low

I would not want to be Chief Justice Roberts right now. Even the staggering power he possesses, the incredible perquisites of the job, and the fact that he gets to judge from a really cool chair could not convince me to swap jobs with the Chief Justice.

I might have already thought this way after the Court began dealing with the continuing inquiries into Justice Thomas' finances (and his refusal to show any concerns about them), was scandalized by the leak of a draft opinion (and an investigation that never seems to have been resolved), and was forced by public opinion to adopt an ethics code (albeit one with virtually no teeth). But the events of the past few weeks have somehow escalated the Supreme Court's soap opera dramatics to even greater heights. There have been not one, but two, questionable flag-flying incidents at Justice Alito's homes. And to top it all off, Justice Sotomayor announced during an award ceremony that she cried after the Court issued some recent opinions. One wonders what former Chief Justice John Marshall would have said about the current Court.

Here are the first three Canons established for Justices in the new Code of Conduct issued in 2023:

> CANON 1: A JUSTICE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.
>
> CANON 2: A JUSTICE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES.
>
> CANON 3: A JUSTICE SHOULD PERFORM THE DUTIES OF OFFICE FAIRLY, IMPARTIALLY, AND DILIGENTLY.

Underlying the Canons and the behavior of the Supreme Court for more than two centuries has been a common consensus that the Supreme Court is an unelected body that has immense power over virtually every aspect of American life. Americans expect fairness and impartiality from the Justices—a small price to pay in exchange for the power and prestige we bestow upon them. We also expect dignity. We expect the Justices to behave in a manner that represents the profound importance of the Court and its business. There is a reason why the Justices wear somber black robes and not clown suits.

The point of having an ethics code, even if it is toothless, is to assure the public that the Court plays by the rules. The introduction to the new Code of Conduct makes this clear:

> The absence of a Code, however, has led in recent years to the misunderstanding that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules. To dispel this misunderstanding, we are issuing this Code, which largely represents a codification of principles that we have long regarded as governing our conduct.

Nevertheless, how are we, members of the legal profession strictly bound to the Rules of Professional Conduct, to comprehend—let alone condone—Justices behaving contrary to their own Code? Even if the Justices' behavior does not violate the Code, doesn't it bring the dignity of the Court into question? I am sure that many accept Justice Alito's explanation that "my wife did it" and feel that Justice Sotomayor's tears demonstrate how much she cares. However, I find this behavior undignified for a Supreme Court Justice, and I believe that many Americans feel the same way.

ETHICS & MALPRACTICE RESEARCH TIP

Student Article from the *Georgetown Journal of Legal Ethics*

It has been another quiet month on the ethics article front. However, this gives the LEMR a chance to feature this thought-provoking student note from 2023:

> Cahn-Gambino, Abigail L., "Under Pressure: The Effects of *Dobbs* on Lawyers Advising Abortion Providers," 36 Geo. J. Legal Ethics 597 (2023).

There has been a good deal of discussion of the ways in which the *Dobbs* decision impacts physicians. There has been precious little discussion of how the decision impacts lawyers who represent doctors. This note helps to fill that gap.

A BLAST FROM THE PAST

Accountability to the Highest Standards

It has been well said that the customary presence of attorneys and counselors in courts of justice and their habitual participancy in the most solemn and interesting judicial proceedings, have naturally caused them to be considered a constituent part of the court itself; that, as to many of the functions which they take upon themselves, for failure to discharge these with fidelity and efficiency they are properly held amenable to severe punishment, and that court of justice will, therefore, see to it that their clients are protected against over-reaching by the shrewd and dishonest lawyers, whom they may employ. Certainly lawyers should be held to as strict accountability to their clients as physicians and surgeons to their patients. It was, doubtless, these impressions that induced Chancellor Lansing to pursue and promptly imprison a counselor at law and a high official for what he deemed malpractice and contempt of court.

—L.B. Proctor, *Lawyer and Client* 148-149 (1882)

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