



Getting Help: Conflicts, Confidentiality, and Consulting Your Colleagues

Whether you are a new lawyer who is unsure about a matter or an experienced practitioner handling an unusual situation, odds are you've reached out for help. Maybe you picked up the phone to talk to your mentor or you posted a question on a LISTSERV. Whatever you did, you may not have given much consideration to confidentiality or conflicts of interest.

Newly adopted [Oregon Formal Opinion 2011-184](#) seeks to address these issues. Here is the scenario laid out in the opinion:

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 this 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.

- May Lawyer A disclose information relating to the representing of his client with Lawyer B?
- 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?
- May Lawyer C relate the details of the unusual situation she has encountered to other lawyers who participate in her professional organization's LISTSERV?
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Resolving the Dilemma

Lawyers who seek advice and lawyers who give advice "must exercise care to avoid violating their duties to their respective clients." It does not matter how the discussion arises: in a formal mentoring relationship, in casual conversation, or on a LISTSERV.

Considerations for the Consulting Lawyer

"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 posted 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 faces (sic) 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. Where the facts are so unique or where 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."

A lawyer should avoid consulting with another lawyer who is likely to be or 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. **The consulting lawyer thus risks 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.**" (Emphasis supplied.)

What Should a Consulting Lawyer do to Minimize the Risks?

Obtain an agreement that the consulted lawyer will maintain client confidentiality and not engage in representation adverse to the consulting lawyer's client.

Considerations for the Consulted Lawyer

A consulted lawyer assumes no obligations to the consulting lawyer's client by virtue of the consultation. However, even a consultation premised on hypothetical facts can cause problems. Assume new Lawyer A asks experienced Lawyer B how a tenant can void a lease. Lawyer B advises Lawyer A how to proceed and Lawyer A's client repudiates the lease. Lawyer B later learns that the landlord whose lease was repudiated is a client of his firm. If Lawyer A and Lawyer B have no confidentiality agreement, Lawyer B must tell the firm's client about the consultation and its possible consequences. If Lawyer A and Lawyer B entered into a confidentiality agreement, then Lawyer B and his firm would be disqualified from continuing to represent the landlord.

What Should the Consulted Lawyer Do?

- Get the identity of Lawyer A's client prior to consultation
- Run a conflict check
- Seek an agreement from Lawyer A that the consultation will not create any obligations by Lawyer B to Lawyer A's clients.

Oregon bar members are encouraged to [read the opinion in its entirety](#). If you need help setting up a conflict of interest system, contact the Practice Management Advisors at the [Professional Liability Fund](#) for assistance.

Return to [Oregon Law Practice Management](#) on Monday for a post concerning newly adopted [Oregon Formal Opinion No. 2011-183](#) regarding scope of representation in the provision of [unbundled legal services](#).

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