

# Balancing Confidentiality and Professional Engagement: New ABA Guidance on Listservs

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## Summary

- Professional communities provide attorneys with support, advice, and networking opportunities through various in-person and virtual events.
- ABA Formal Opinion 511 highlights that lawyer listservs pose greater confidentiality risks than personal consultations due to the wider and less identifiable audience.
- Before sharing client information, review your state's rules of professional conduct, obtain the client's informed consent, understand your virtual tools, anonymize personal and sensitive information, and consider consulting colleagues or outside counsel.

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Lawyers talk, debate, and theorize. For most attorneys, discussing and debating the nuances of the law and its practical application has been a core part of their education and training. The legal profession thrives on this exchange of ideas, continuous learning, and professional collaboration. In practice, however, lawyers must balance such conversations with their ethical obligation of confidentiality to clients.

The ABA recently addressed the tension between client confidentiality and professional discussions in [Formal Ethics Opinion 511](#). This guidance focuses on attorney use of listservs (which are essentially email-based discussion groups), but it also offers helpful reminders about ethical obligations in any communications, virtual and in person. Ultimately, Formal Opinion 511 underscores the importance of protecting client confidentiality in online or in-person discussions, and caution is recommended. "Because of the relative ease and informality of communications over email, social media, and the

internet generally, lawyers today need to be even more careful about their communications with nonclients,” notes Craig Hilliard, general counsel of Stark & Stark, P.C. “Even when the only purpose of those communications is to further the laudable goal of improving the legal profession’s delivery of services to clients, all lawyers must think carefully before they speak, to avoid disclosing any information which would undermine their confidentiality obligations to clients.”

## The Value of Professional Communities

“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.” — [ABA Formal Opinion 98-411 \(1998\)](#)

Professional communities offer attorneys space for perspective and advice, learning about news and developments, and challenging traditions and theories. In-person conferences and seminars, continuing legal education (CLE) events, legal workshops, bar association events, and even after-work social hours have long been a valuable source of professional support and networking for legal professionals.

In the virtual world, lawyers have even more opportunities to expand their professional networks and connect with peers, synchronously and asynchronously:

- **Online forums and listservs:** Digital platforms facilitate discussion among legal professionals in focused groups and without geographical limitations. For example, many state bars maintain listservs for different practice areas or attorney groups, and the ABA offers [ABA Communities](#) as an online community platform for discussion among interest groups.
- **Webinars and virtual conferences:** Online events have grown exponentially in recent years, offering lawyers access to global knowledge without leaving their offices or even homes.
- **Social media groups:** Platforms like LinkedIn have groups dedicated to legal professionals where members can share insights, ask questions, and build networks.
- **Niche legal networks:** Organizations like the International Bar Association (IBA) and the American Association for Justice (AAJ) offer dedicated online communities for lawyers in various fields.

# Ethical Considerations and Pitfalls

Attorneys must be aware of the ethical issues that are raised when discussing clients and cases without the client's consent and keep within the ethical boundaries of their state's rules of professional conduct.

## Confidentiality Is Key

Confidentiality is a sacred cornerstone of legal ethics. [Rule 1.6 of the ABA Model Rules of Professional Conduct](#) stipulates: "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 [falls under specific exceptions]."

Every attorney should be aware of this obligation; however, Formal Opinion 511 highlights nuances, such as the fact that even the identity of a client or the existence of an attorney-client relationship may be protected. Responding to a negative online review from a former client, for example, could violate the rules of professional conduct if your response reveals details about the representation or even the existence of the attorney-client relationship itself. Also, an attorney's confidentiality obligation survives the representation; therefore, if you want to tell "war stories" about old cases online or in person, you could be in breach of your confidentiality obligations if you do so without the client's informed consent.

## Explicit and Indirect Client Information Is Protected

Rule 1.6 plainly prohibits explicit discussion of a client's case, mentioning client names, or offering specific facts about a client matter in the absence of informed consent. However, indirect references can also be a breach of your confidentiality obligations. Lawyers commonly present hypothetical fact scenarios in seminars or listserv discussions to illustrate a point or seek advice on a legal question. Formal Opinion 511 is clear that such hypothetical scenarios *must not 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*. Lawyers should be cautious and ensure that the information shared could not identify their case or client.

## Client Confidentiality Is Distinct from Attorney-Client Privilege

The ABA reiterates that client confidentiality and attorney-client privilege are separate and distinct obligations. Rule 1.6 prohibits an attorney from revealing any information relating

to the representation without consent, no matter the source. If the attorney shares information that they received from a nonclient third party or that is publicly available, it usually does not fall within attorney-client privilege, but it may still be protected by client confidentiality obligations. Celebrating a verdict on social media or posting a publicly available court filing to your law firm blog without client consent could breach ethical rules. (Typically, attorneys can obtain sufficient consent for these situations in a client engagement letter.)

A promotional banner for Clio. On the left is the Clio logo (a checkmark in a circle). To its right, the text reads "ABA member exclusive: 10% off Clio products". Further right is an illustration of a green wallet with a gold card. On the far right, there is a dark blue box containing the text "Save on the complete solution to manage and scale your practice." and a white button that says "Unlock exclusive savings". A small question mark icon is in the top right corner of the dark blue box.

 ABA member exclusive:  
10% off Clio products

Save on the complete solution to manage and scale your practice. 

Unlock exclusive savings

## Listservs Pose Greater Risks Than In-Person Communications

In Formal Opinion 511, the ABA expressly states that “[p]articipation 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.” In a person-to-person conversation, confidentiality must still be preserved, but the reasonable likelihood of one known listener inferring the identity of the client or matter is reduced. Listservs involve groups of sometimes unidentified participants, and there is greater risk of wider dissemination of any shared information. Although the same fundamental ethical principles apply, guidance related to in-person communications may not be transferable to listservs.

## Informed Consent Requires Explanation, Not Assumptions

A lawyer should never assume a client’s consent to disclosure of information relating to their representation. Instead, the lawyer must fully explain the intended disclosure of client information, the material risks of such disclosure, and any reasonably available alternatives. It is possible to obtain informed consent for some disclosures in a standard client engagement letter; however, this may not be sufficient for all purposes. In the context of listservs, it may only be possible to get a client’s consent to a listserv post when the context of the post is known.

## Practical Guidelines for Ethical Engagement

While attorneys may love a good theoretical discussion, everyone has to practice in the real world. Whether attending your bar association’s summer social or sending an email to your industry group listserv, here are a few practical tips to protect yourself and your client:

## **Know Your Rules of Professional Conduct**

The basic rule of client confidentiality is well-known, but the nuances can trip some attorneys up. Technological advancements complicate this further as attorneys explore new ways of communicating that they may not fully understand. Stay on top of any ethical guidance from the ABA or your state bar. (Listservs can be a useful way to do this!)

## **Get Informed Consent**

The simplest defense to an allegation of breach of confidentiality is that you had the client's informed, written consent. "Informed consent of the client in writing is the precondition to every lawyer's decision to share information about a client or client matter," says Mr. Hilliard of Stark & Stark. Include general consent to disclosures for the purposes of the representation in your standard client engagement letter (although many of these will be covered by implied authorization). If you have a specific or sensitive disclosure, discuss the extent of the disclosure, the risks, and alternatives with your client, and get their written consent.

## **Understand Your Virtual Tools**

If you are communicating online using chatbots, listservs, LinkedIn, or other social media or virtual tools, you need to understand how to use these tools and where your communications are seen and stored. We all know someone who has made the mistake of posting on a public Facebook wall when they thought they were sending a private message. Even when you are communicating directly with another person, your conversations may not be private. Understand the privacy and confidentiality policies of any tool that you are using.

## **Anonymize, Anonymize, Anonymize**

When discussing client matters online or in person, anonymize and redact thoroughly to ensure that all personal identifiers and sensitive information are protected. Double-check for hidden data, such as document metadata, that might still contain confidential information. In hypothetical scenarios, change names, locations, and any other information that might lead to the disclosure of the client's identity or engagement in this context.

## **Consult Internal Colleagues or Outside Counsel**

Consider alternative means of seeking advice, such as consulting colleagues within your firm or engaging outside counsel, where client confidentiality can be better protected. Generally, Rule 1.6 allows attorneys to disclose information relating to a client to other lawyers at their own firm unless the client has instructed otherwise. When outside counsel is formally engaged, the client will consent to the disclosure of information, and the consulting attorney will also be bound by ethical obligations of client confidentiality.

## Maintaining Ethical Balance in Professional Engagement

ABA Formal Ethics Opinion 511 serves as an essential reminder of the delicate balance lawyers must maintain between participating in professional communities and upholding their ethical duties. By following stringent confidentiality protocols and remaining vigilant about the information shared, lawyers can benefit from the collective wisdom of their peers while safeguarding their clients' interests.

Engage responsibly and ethically, and your participation in professional communities can continue to be a valuable asset in your legal practice.

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