

Advisory Opinion 2001-1

RE: Application of Rules of Professional Conduct to Lawyer's Use of Listserve-type Message Boards and Communications

The Advisory Opinions Committee is constituted for the purpose of advising inquiring lawyers on the interpretation of the Rules of Professional Conduct, as applied to the inquiring lawyer's duties. The Committee's opinions are not binding. The opinion expressed is the consensus of the members of the Committee who considered the matters addressed herein. The opinion is meant to assist lawyers in their course of conduct.

Questions Presented

This opinion addresses the following questions:

1. Would a lawyer who answers questions on the Listserve violate Rule 16-106 NMRA 2001?
2. Would a lawyer who answers questions on the Listserve violate Rule 16-107 NMRA 2001?
3. Does a lawyer who answers questions on the Listserve risk violation of other of the Rules of Professional Conduct?
4. Does a lawyer who posts an article on the Listserve (such as "The Pros and Cons of Selecting an Business Entity") risk violation of the Rules of Professional Conduct?

The Committee addresses each of these queries below.

DISCUSSION AND ANALYSIS

For purposes of this opinion, the Committee defines "listserve" as follows:

The term "listserve" derives from LISTSERV (a registered tradename), and in some respects is similar to referring to a tissue as a "kleenex" or to a refrigerator as a "fridgidaire." We consider the Listserve to include an electronic mail servicing system, similar to or including LISTSERV, which allows messages to be sent and retrieved by members of a group. The Listserve would permit persons to post messages and responses similar to a bulletin board service (or BBS).

Would a lawyer who answers questions on the Listserve violate Rule 16-106 NMRA 2001?

There is no single answer to this question. It is one that is dependent upon specific facts and circumstances. The Committee strives to provide the following general guidelines and considerations.

Rule 16-106(A) NMRA 2001 provides that a lawyer:

shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation [or as otherwise provided by this rule]. Questions, answers and commentary would be at least accessible by members of the Listserve group and perhaps others.

On the outset, the Committee recognizes that the party placing the question on the Listserve has already divulged information in a less than private setting. As such, the confidentiality of any information in an initial query is unlikely to exist. However, the party's expectation of privacy may be based upon a misunderstanding of the nature of the Listserve. The expectation of privacy may exist, rightly or wrongly, in the mind of the party. Any lawyer proceeding to respond to such a question should be mindful of this and cautious with regard to any response. Specifically, the lawyer should not respond in any fashion which solicits additional information of a confidential character. An appropriate disclaimer of the attorney-client relationship should accompany any response. However, any statement which would suggest to a reasonable person that, despite the disclaimer, a relationship is being or has been established, would negate the disclaimer. In short, the lawyer must be vigilant and cautious if the intention is to not create an attorney-client relationship.

By its very nature, Rule 16-106 NMRA 2001 is triggered only when an attorney-client relationship has been developed ("representation of a client"). Thus, the threshold question is whether a lawyer who answers questions on the Listserve has established such a relationship.

The answer to this question depends in part upon the type of questions being presented by persons utilizing the Listserve and the type of answers being provided by the lawyer. General legal questions, such as "What are the pros and cons of an LLC versus a corporation?" might be answered by general responses (e.g., "An LLC might provide certain tax benefits unavailable to a corporation"). This type of general statement is unlikely to involve the transfer of confidential information and therefore would not invoke Rule 16-106 NMRA 2001. Nonetheless, lawyers involved in such communications may be wise in insisting that the Listserve indicate that only general information of a legal nature should be sought and that information provided in a question or answer would not be protected by the attorney-client privilege.

Specific questions (e.g., "I have failed to inform my partners of my borrowing of funds from the partnership ... what do I do now?") create more difficult situations. The difficulty is that, by making legal information available on its Listserve, such access to Listserve lawyers may unintentionally encourage the placement of confidential information on the Listserve thereby causing the information to lose its confidential character.

The Internet remains a relatively new frontier. To date, there also remains various concepts of the level of privacy resulting from use of the Internet. As a result, it would be important for any lawyer involved in such a Listserve arrangement to insist that the Listserve administrator clearly and unambiguously inform users that any material placed on the service will or may lose its confidential character.

If a lawyer begins a dialogue on the Listserve, it is possible that an attorney-client relationship may come into existence. It would be important for the lawyer to inform the person that no confidential information should be disclosed via the Listserve as well as the consequences of doing so. Further, it is incumbent upon the lawyer to retain as confidential any matters the person intends to be confidential.

Would a lawyer who answers questions on the Listserve violate Rule 16-107 NMRA 2001?

This question raises similar issues to the preceding question. There is no set "yes" or "no" answer. However, there are some guidelines and considerations offered by the Committee.

Once again, the rule in question involves "representation." In the Committee's view, response to general legal issues would not amount to representation of the inquiring party. This is similar to answering general legal questions at a forum such as a seminar on choosing a business entity.

However, the lawyer must avoid answering specific questions of such a nature that they might create an attorney-client relationship and thereby trigger "representation." Committees of other states which have looked at similar questions have noted that the answering of specific legal questions probably creates such a relationship and all of the duties and obligations that come with it. See, e.g., Illinois State Bar Ethics Opinion 96-10 ("... recipients of such advis[c]e are the lawyer's clients, with the benefits and burdens of the relationship"); Kentucky Bar Association Ethics Opinion 403 (citing the Illinois State Bar Ethics Opinion 96-10); State Bar of Arizona Opinion No. 97-04 (answering the question of whether a lawyer should answer specific questions from chat rooms as "probably not"). This Committee agrees with that general conclusion. This would include the need to conduct conflicts checks regarding other clients and the lawyer's own interests, and other reasonable assurances that a conflict prohibited by Rule 16-107 NMRA 2001 is not created.

Does a lawyer who answers questions on the Listserve risk violation of other of the Rules of Professional Conduct?

Dependent upon the types of communications involved, there is the potential for violating any number of the Rules, just as is true with any other communications between a lawyer and a client or a non-client.

Among other rules to consider are the following:

Rule 16-101 NMRA 2001 requires that lawyers have and provide the legal knowledge, skill, thoroughness and preparations necessary to provide competent representation

Rule 16-108(B) NMRA 2001 provides that a lawyer may not use information relating to representation of a client to the disadvantage of the client unless consent is given after consultation or the Rules otherwise require such use

Rule 16-108(I) NMRA 2001 prohibits representation of a client against another person represented by a lawyer who is a parent, sibling, child or spouse of the first lawyer except after consultation regarding the relationship

Rule 16-109(A) NMRA 2001 prohibits representation adverse to former client in same or substantially related matters

Rule 16-109(B) NMRA 2001 prohibits use of information acquired from a former client to the disadvantage of the former client

Rule 16-110 NMRA 2001 regarding disqualification imputed to the firm

Rule 16-111 NMRA 2001 regarding lawyers who have or are serving as lawyers in public employment

Lawyers involved in such communications will also need to be aware of and follow the rules in Article 7 of the Rules of Professional Conduct regarding advertisements. In particular, compliance with Rules 16-701 (Communications concerning a lawyer's services), 16-702 (Advertising and solicitation) and 16-703 NMRA 2001 (Direct in-person or telephone contact with prospective clients) should be considered. For example, the Board of Commissioners on Grievances and Discipline for the Supreme Court of Ohio has determined that quoting clients on a firm website violates the prohibition against client testimonials of ABA Model Rule 7.1 (cf. 16-701(A)(2) NMRA 2001). Bd. of Comm'ners on Grievances & Discipline for the Sup. Ct. of Ohio Op. 2000-6 (December 1, 2000).

The Committee believes that consideration of Rule 16-505 NMRA 2001 is also warranted. Paragraph A of that rule forbids practicing law in a jurisdiction "where doing so violates the regulation of the legal profession in that jurisdiction." Depending upon the nature of the Listserve and the location of the party making inquiry, the lawyer should exercise caution by determining the location of the inquiring party and whether responding to the query would constitute the unauthorized practice of law in that jurisdiction.

Further, Rule 16-505(B) NMRA 2001 forbids lawyers from assisting a person who is not licensed to practice law "in the performance of an activity that constitutes the unauthorized practice of law." The Committee is not able to provide a definition of "unauthorized practice of law" as that is a substantive matter outside the scope of the Committee's activities. However, lawyers who are aware that the contributions may be used by others in the unauthorized practice of law may need to take reasonable precautions in an effort to minimize this activity (e.g., an appropriate disclaimer regarding the use of the answer or other material as to it being general legal information rather than advice, based upon New Mexico legal principles and not that of any other jurisdiction, and suggesting that legal counsel be sought with regard to specific circumstances).

As with the lawyer's other activities, he or she must be mindful of the Rules of Professional Conduct in their entirety. In discussing these specific rules, the Committee does not intend to suggest that the other Rules are not to be considered in this or any other form of electronic communication.

Does a lawyer who posts an article on the Listserve (such as "The Pros and Cons of Selecting an Entity") risk violation of the Rules of Professional Conduct?

Again, the answer to this question depends upon the content and nature of the article. The Committee believes that the posting of such an article is not greatly different from publishing such an article in a newspaper, magazine or other non-scholarly publication. The lawyer must review Chapter 7 of the Rules of Professional Conduct regarding advertising to ensure that there has been no violation of the rules. The lawyer is encouraged to also include a disclaimer indicating that the article does not constitute nor intend to be legal advice vis-a-vis specific problems of the reader. To the extent further legal advice is suggested and the article will be read by persons including those who are not existing clients or who do not have existing relationship as described in 16-703(A) NMRA 2001, the article must indicate that the party should inquire of "a lawyer" and not that the party should contact the author. An analysis of whether the article should first be submitted to the Advertising Committee must also be conducted by the lawyer.

Finally, the Committee is mindful that the New Mexico Supreme Court and State Bar continue to work on matters related to pro se challenges in the law which may impact the issues addressed in this opinion. There is discussion of some modification of both the model rules as well as our own state Rules with regard to issues created by the Internet. A lawyer involved in this area of conduct will need to be particularly vigilant in considering the evolution of Rules of Professional Conduct and general ethics affecting that practice.