
P R E S I D E N T ' S M E S S A G E

B Y D A N S C H A N Z

Think Before You Post: Keeping Listserv Communications Confidential



ost, if not all, professional legal organizations and associations use listservs as the central way to communicate between members. The power of a listserv is that it helps to educate members, answer practice-related questions, and—some have argued—guide the professional development and ethical decision-making of their members.¹

OADC's listserv is one of the most useful tools available to its members. The listserv facilitates almost immediate access to the 700 other members of the OADC. Most of us have received or provided helpful information through our participation in the listserv.



Dan Schanz

When we respond to questions, most of us do so with a certain expectation of privacy—an expectation that our responses are confidential. In fact, many inquiries from colleagues end with the assurance that “responses will be kept confidential.” Unfortunately, depending on the question asked, that is not a promise that can always be kept.

Recently, an OADC member sent an inquiry through the listserv about a plaintiff who also happened to be an

Oregon attorney. The member made the inquiry on behalf of his insurance client. The member's inquiry found its way into the hands of the plaintiff's lawyer. Three other OADC members responded via email, outside the listserv, to the inquiry. The plaintiff's lawyer eventually served a subpoena on the inquiring member, who was not the carrier's defense counsel at that point, demanding a deposition and production of any emails responsive to the inquiry. When the member claimed privilege and refused to produce the responsive emails, the plaintiff's counsel filed a motion to compel.

The PLF appointed counsel to represent the OADC member who had sent the inquiry.² A motion to quash the subpoena was filed and arguments were made that the emails between OADC members, outside the listserv, were protected by the attorney/client privilege and the work-product doctrine. In addition, the members who had responded to the inquiry also filed an objection to their responses being produced. That objection was filed jointly with the participation of OTLA, which was equally concerned as to how a ruling could impact its own listserv communications.

A highly respected federal judge heard the motion and ruled that the

email responses were not protected by the attorney/client privilege and were not the work-product of our member who submitted the inquiry. The email responses were required to be produced.

To my knowledge, there is no appellate case law addressing the confidentiality of communications sent over a listserv. When you join OADC and are granted access to the listserv, you are notified that emails are not confidential. Even if OADC were to create an internal policy and inform members that emails sent over the listserv are confidential, it would likely not be of any legal significance under Oregon law.

There are several different categories of communications on the listserv. The category of communications most susceptible to being required to be turned over to an opponent are those communications which could be construed as “discovery” related. Members should be careful about questions related to a party in the litigation, experts, or witnesses. One author, in cautioning listserv members regarding questions about experts, has opined:

For example, if an attorney offered his [or her] impressions of an expert publicly over an electronic mailing list, this could

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effect a waiver of the work-product protection that would otherwise be granted in that attorney's litigation in which that expert was involved. Should an opposing party's attorney receive the communication and find the information or impressions contained in it beneficial to his client, the work-product doctrine may not protect against disclosure of that communication in court proceedings.³

Both the OSB and the ABA have ethical rules that arguably extend to communications between lawyers via listserv. The Oregon rule is OSB Formal Ethics Opinion No. 2011-184. This rule governs confidential communications as they relate to consulting with lawyers outside one's firm. Similarly, the ABA Formal Opinion 98-411 governs "Ethical Issues in Lawyer-to-Lawyer Consultation." Both rules are worth reviewing.

Here are some ideas that may help protect yourself, and potentially your client, from listserv communications becoming discoverable:

- When asking a question on listserv, limit the information revealed or ask the question hypothetically. In all probability, your initial post is not confidential.
- Remember that the ethical rules may require that you obtain client consent before disclosure of client information.
- When responding to a question, pick up the telephone. Arguably, a lawyer's notes regarding a telephone call would contain his or her mental impressions and would be more likely to fall within the work-product protections than a responsive email.

- If you are going to use email to respond to a question on the listserv, make sure that you are comfortable with the content being read in a public setting, if such an email were required to be produced.

With regard to this particular issue, if OADC listserv communications are discoverable, then OTLA listserv communications may also be subject to discovery. There may be options for ensuring that no communication on a listserv would ever be discoverable. That would likely require that a privilege be created through the Council on Court Procedures. In my opinion, it is worth consideration, given the benefits to members of the Bar who utilize these valuable resources.

The likelihood of an opponent requiring disclosure of a communication between members is extremely low. This President's Message is not intended

to, and should not be interpreted to, discourage active participation in the listserv. However, members who set forth questions on the listserv, and members who respond, should do so thoughtfully.

Endnotes

- 1 Leslie C. Levin, "Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers," 37 Ariz. St. L.J. 589.
- 2 Very often, the PLF will appoint an attorney to represent a member of the Bar who has been served with a subpoena.
- 3 Caroline D. Buddensick, "Current Development 2008-2009; Risks Inherent in Online Peer Advice: Ethical Issues Posed by Requesting or Providing Advice via Professional Electronic Mailing Lists," 22 Geo. J. Legal Ethics 715.



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