

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 98-411**  
**1998**

**August 30,**

## **Ethical Issues in Lawyer-to-Lawyer Consultation**

*When one lawyer consults about a client matter with another lawyer who is not associated with him in the matter, both the consulting lawyer and the consulted lawyer must take care to fulfill their ethical obligations to their respective clients. Hypothetical or anonymous consultations thus are favored where possible. The consulting lawyer is impliedly authorized to disclose certain information relating to the representation without client consent, but may not disclose information that is protected by the attorney-client privilege or that would otherwise prejudice the client. No client-lawyer relationship between the consulting lawyer's client and the consulted lawyer arises as a result of the consultation, but the consulted lawyer may be obligated to protect the confidentiality of the information disclosed to the extent that she expressly or implicitly agrees to do so or to the extent that such obligation is imposed by law. In that event, the consulted lawyer and her firm may be limited in their ability to undertake or continue representation of their own clients if the representation will be materially limited by her duty to protect the consulting lawyer's client information.*

This opinion discusses the ethical issues raised when one lawyer consults about a client matter with another lawyer who is neither a member of the consulting lawyer's firm nor otherwise associated on the matter, and where there

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1. We believe the ethical issues are the same whether the consultation involves the substantive legal or procedural aspects of a client's matter or the consulting lawyer's ethical duties in furtherance of the client's matter. On the other hand, this opinion does not necessarily apply to or discuss all of the ethical issues concerning a consultation in which the consulting lawyer seeks representation for his own benefit regarding a

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This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

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is no intent to engage the consulted lawyer's services.<sup>1</sup> The decision to seek another lawyer's advice may be precipitated by an atypical fact pattern, a knotty problem, a novel issue, or a matter that requires specialized knowledge. A lawyer who practices alone, or who has no colleague in or associated with his firm with the necessary competence will, and indeed often must, seek assistance from a lawyer outside the firm. Even the most experienced lawyers sometimes will find it useful to consult others who practice in the same area to get the benefit of their expertise on a difficult or unusual problem.

Consultations between lawyers take a variety of forms. Some are superficial discussions, such as might occur between an audience member and a continuing legal education ("CLE") speaker, or an inquiry between colleagues to get a research lead or information about a particular judge. Others are lengthy, detailed discussions to obtain substantial assistance with the analysis or tactics of a matter. Many fall somewhere in between. 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.<sup>2</sup> Without careful attention, however, such consultations may create unanticipated consequences for both the consulting lawyer and the consulted lawyer. Bright line rules are difficult to draw in this area; we endeavor here to explore the risks and provide some practical guidance consistent with the lawyer's duties under the ABA Model Rules of Professional Conduct.

## I. Issues for the Consulting Lawyer

The consulting lawyer must take care not to breach his duty of confidentiality under Rule 1.6. That rule expresses the principle that "all information

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grievance or dispute with the client or regarding his own ethical duties vis-à-vis a client. For discussion of the issues specific to ethics consulting, see Drew L. Kershen, *The Ethics of Ethics Consultation*, THE PROFESSIONAL LAWYER, Vol. 6, No. 3 (May 1995). See also *The Ethics of Ethics Consultation*, 1997 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER, SELECTED PAPERS FROM THE 23RD NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY at 7-60 (ABA Center for Professional Responsibility 1997); *Ethics of Ethics Consultation, Center Update*, THE PROFESSIONAL LAWYER, Vol. 8, No. 4 at 18-19 (August 1997).

2. A lawyer has a duty to "provide competent representation to a client" under ABA Model Rules of Professional Conduct Rule 1.1, but Comment [2] recognizes that "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar." As the Comment notes, the necessary expertise can be attained "through association of a lawyer of established competence in the field in question." Consultation with a colleague also can aid a lawyer in attaining the necessary competence.

3. "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Rule 1.6, Comment [5]. The rule does not require the client to indicate what information is confidential, nor does it permit the lawyer to speculate whether

relating to representation of a client” is confidential.<sup>3</sup> No information may be disclosed without client consent, except where the disclosure is “impliedly authorized in order to carry out the representation,” Rule 1.6(a), or in the specific and limited circumstances set forth in Rule 1.6(b).<sup>4</sup> Comment [7] explains: “A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client’s instructions or special circumstances limit that authority.”

We interpret Rule 1.6(a), as illuminated by Comment [7], to allow disclosure of client information<sup>5</sup> to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer’s experience or expertise for the benefit of the consulting lawyer’s client. However, the consulting lawyer’s implied authority to disclose client information in consultation is limited, as our further discussion reflects.

#### **A. Consult Hypothetically or Limit the Information Revealed**

A consultation that is general in nature and does not involve disclosure of client information does not implicate Rule 1.6 and does not require client consent. For instance, a lawyer representing a client accused of tax fraud might consult a colleague about relevant legal authority without disclosing any information relating to the specific representation. Similarly, a lawyer might consult a colleague about a particular judge’s views on an issue. Neither consultation requires the disclosure of client information.

Somewhat like the general consultations are those that can be done anonymously or in the form of a hypothetical case. The consulting lawyer can “suppose” a set of facts and frame an issue without revealing the identity of his client or the actual situation. Where there is no disclosure of information identifiable to a real client or a real situation, the consulting lawyer does not violate Rule 1.6 when he consults outside the firm.

The consulting lawyer should not assume, however, that the anonymous or

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particular information might be embarrassing or prejudicial if disclosed. So long as the information relates to the representation, it is protected. *See discussion* ABA/BNA LAWYER’S MANUAL ON PROFESSIONAL CONDUCT §55:101. The duty of confidentiality under Rule 1.6 clearly is broader than the scope of the evidentiary attorney-client privilege. Thus, while the client’s name and identity generally are not considered privileged, they may be entitled to protection under Rule 1.6 unless disclosure is necessary or desirable for the representation.

4. Rule 1.6(b) allows disclosure when necessary to prevent the client from committing a crime that will result in imminent death or substantial bodily harm, or to establish a claim or defense on behalf of the lawyer in a matter involving the representation.

5. For purposes of this discussion, we use the short-hand term “client information” to mean “information relating to the representation” as that phrase is used in Rule 1.6.

hypothetical consultation eliminates all risk of disclosure of client information. If the hypothetical facts discussed allow the consulted lawyer subsequently to match those facts to a specific individual or entity, the information is not already generally known, and disclosure may prejudice or embarrass the client, the consulting lawyer's discussion of the facts may have violated his duty of confidentiality under Rule 1.6.<sup>6</sup>

Similarly, the disclosure of privileged information specific to an identifiable client, without the client's consent, violates an attorney's duty under Rule 1.6. If a lawyer reasonably can foresee at the time he seeks a consultation that even the hypothetical discussion is likely to reveal information that would prejudice the client or that the client would not want disclosed, then he must obtain client consent for the consultation. On the other hand, if circumstances that were not reasonably foreseeable by the consulting lawyer at the time of the consultation result in the consulted lawyer subsequently discovering the client information, one cannot in hindsight say that the consulting lawyer has breached his duty under Rule 1.6.

### **B. Obtain the Informed Consent of the Client to the Consultation**

Rule 1.6(a) permits disclosure of client information if the client consents "after consultation."<sup>7</sup> When the consulting lawyer determines that the consultation requires disclosure of client information protected by the attorney-client privilege or that foreseeably might harm the client if disclosed, the lawyer must assure that the client is made aware of the potential consequences of the disclosure and that the client grants permission to consult the other lawyer. The consequences may be significant. A disclosure of privileged communications by the consulting lawyer could be held to waive the attorney-client privilege. Moreover, as discussed in Part II, a consulted lawyer who is not engaged or asked to be engaged may not have a duty under Rule 1.6 to preserve the confidentiality of information obtained in a consultation, nor is she necessarily prohibited from representing a client whose interests are adverse to those of the consulting lawyer's client in the matter.

Some protection for a client may be afforded by obtaining the consulted lawyer's agreement to hold information in confidence, but privileges will be

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6. As mentioned in footnote 3, *supra*, the client's identity may be entitled to protection under Rule 1.6 if the fact of the representation itself should be confidential. For instance, a client may not want it revealed that bankruptcy advice has been sought, and the consulting lawyer must avoid disclosing the identity of the client to the consulted lawyer. On the other hand, if it is public knowledge that a lawyer represents a particular criminal defendant, the defense lawyer may reveal that fact in a consultation without violating Rule 1.6, although disclosure of other facts not publicly known may be a violation.

7. "Consultation" is defined in the Terminology section of the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

preserved only if the circumstances of the consultation are such that the privilege is not waived under applicable law. The consulting lawyer's client should be informed of those possibilities and their potential adverse effect on the client's interest in the matter when being asked to consent to the consultation.

### **C. Avoid Consulting with a Lawyer Who May Represent the Adverse Party**

In selecting another lawyer with whom to consult, the consulting lawyer should exercise care to avoid consulting a lawyer who is likely to be or to become the adverse party's lawyer.<sup>8</sup> For example, a lawyer representing management in a labor dispute should exercise caution in consulting with a lawyer whose practice is limited to representing unions to minimize the risk that the information subsequently might be used adversely to the consulting lawyer's client.

### **D. Obtain Assurances of Confidentiality**

The consulting lawyer should consider requesting an agreement from the consulted lawyer to maintain the confidentiality of information disclosed, as well as an agreement that the consulted lawyer will not engage in adverse representations. As discussed above, in the absence of such agreement, the consulting lawyer discloses client information at some peril to the client. If the client's consent to the consultation was sought and obtained, the client may have a reasonable expectation that the disclosure will go no further than the consulted lawyer and will not be used adversely. If the consulted lawyer is unwilling to make such an agreement or offer adequate assurances, the consulting lawyer may wish to reevaluate whether the consultation should take place.

## **II. Issues for the Consulted Lawyer**

The ethical responsibilities of the consulted lawyer are less clearly expressed by the Model Rules. The consulted lawyer does not have a client-lawyer relationship with the consulting lawyer's client by virtue of the consultation alone. Nevertheless, the consulted lawyer may acquire a duty of confidentiality regarding the information received; she must also be sensitive to her duty of loyalty to her own clients when consulting for the benefit of the clients of another.

### **A. Ask Whether the Information to be Disclosed is Confidential**

In Formal Opinion 90-358, we concluded that a lawyer has a duty under Rule 1.6 to preserve the confidentiality of information received in a consultation with a would-be client even if no legal services are provided and the rep-

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8. A consultation for the deliberate purpose of disqualifying potential adversaries would violate Rule 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation, and possibly Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice.

resentation is declined. Under some circumstances, the Rule would protect not only the information disclosed by the would-be client, but also the would-be client's identity and the nature of the matter for which representation was sought. We also concluded that Rule 1.7 (b) might, absent client consent, disqualify the lawyer from a current or future representation if that representation would be materially limited by the lawyer's duty to protect the would-be client's information.

The Committee does not extend the analysis of Formal Opinion 90-358 to a consultation between lawyers where there is no expectation of an engagement. To do so, we believe, would discourage lawyers from agreeing to share knowledge and experience with others, and would thereby diminish the overall quality of legal services rendered to clients. The reasonable expectations of a prospective client that support the imposition of a duty of confidentiality when the lawyer is consulted about a possible representation cannot be said to exist in lawyer-to-lawyer consultations in which the client is not directly involved. Like a CLE panelist answering questions from the audience, the consulted lawyer does not, as a matter of ethics, automatically assume any duties to the consulting lawyer's client, particularly where consultation is general or hypothetical, or otherwise does not involve the direct disclosure of client information.

This is not to suggest, however, that the consulted lawyer never will be found to have duties with respect to a consultation. A consulting lawyer may request and obtain the consulted lawyer's express agreement to keep confidential the information disclosed in the consultation. There also may be situations in which an agreement to preserve confidentiality can or should be inferred from the circumstances of the consultation. If the consulting lawyer conditions the consultation on the consulted lawyer's maintaining confidentiality, the consulted lawyer's agreement should be inferred if she goes forward even in the absence of an expression of agreement. Similarly, the information imparted may be of such a nature that a reasonable lawyer would know that confidentiality is assumed and expected.

A consulted lawyer who has not expressly or implicitly agreed to maintain the confidentiality of client information acquired in a consultation should not be found to have breached an ethical duty under Rule 1.6 if she later discloses or uses the information, although the disclosure may have consequences under other law.<sup>9</sup> Further, in the absence of an express or implied agreement to preserve confidentiality, the consulted lawyer will not be subject to a "springing" duty of confidentiality under Rule 1.6. For instance, assume a lawyer is consulted anonymously about a tax issue; she discusses the matter only hypotheti-

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9. One who agrees with an agent to act for the principal in a matter becomes a subagent and owes to the principal all the duties of a fiduciary to a beneficiary. RESTATEMENT (SECOND) OF THE LAW OF AGENCY §428 cmt. a. We do not believe such duties arise in the absence of an express agreement.

cally and makes no promise to maintain the confidentiality of the information. Later, the consulted lawyer meets with a new client about a divorce and in the course of the first meeting realizes that the tax issue consultation was on behalf of the new client's spouse. The consulted lawyer has no duty of confidentiality under Rule 1.6 or a conflict of interest under Rule 1.7 in representing her new client merely because she has learned, after the consultation, the identity of the consulting lawyer's client. This is true regardless of how obvious it seems after the fact that the consulting lawyer should have insisted on a confidentiality agreement if he had intentionally disclosed the information or anticipated it could be ascertained from the "hypothetical" facts.

**B. The Consulted Lawyer Should Reasonably Assure that the Advice Given is Not Adverse to an Existing Client**

Although a consulted lawyer need not be concerned about confidentiality issues in the typical anonymous or hypothetical consultation, she must be sensitive to how the consultation may affect her responsibilities to her existing and future clients. Loyalty is an essential element in the lawyer's relationship to a client. Rule 1.7, Comment [1]. Loyalty to a client is impaired when a lawyer advocates a course of action for another that is contrary to the interests of her own client, or when a lawyer cannot consider, recommend or carry out an appropriate course of action for a client because of the lawyer's responsibilities to others, including non-client third parties. Model Rule 1.7, Comments [3] and [4]. The duties of a lawyer to be a competent, diligent, and zealous advocate for the interests of her clients<sup>10</sup> also suggest that she must take reasonable steps to avoid engaging in conduct adverse to her own client's interests.

The need for caution is illustrated by the following example. A lawyer skilled in real estate matters is consulted for ideas to help the consulting lawyer's tenant client void a burdensome lease. No information about the identities of the parties is exchanged, nor does the consulting lawyer reveal any confidential information about his client. Based on the consulted lawyer's ideas, as implemented by the consulting lawyer, the tenant repudiates the lease and abandons the leased premises. The consulted lawyer subsequently learns that the landlord is a long-time client of the firm who wants the firm to pursue a breach of lease action against the former tenant. Because the consulted lawyer did not know the identities of the consulting lawyer's client or the landlord, she has, albeit unwittingly, helped the consulting lawyer's client

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10. See Rule 1.1 Competence ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Rule 1.3 Diligence ("A lawyer shall act with reasonable diligence and promptness in representing a client."); and Rule 1.3, Comment [1] ("A lawyer should act with commitment and dedication to the interest of the client and with zeal in advocacy upon the clients' behalf."). See also Preamble: A Lawyer's Responsibilities [2] ("As advocate, a lawyer zealously asserts the client's position . . .").

engage in conduct adverse to the interest of her own client in a way that Rule 1.7(a) would have prevented her from doing if the tenant had sought her advice directly as a prospective client.<sup>11</sup>

Counseling against a client's interests is the antithesis of the client-lawyer relationship. We do not believe the consulted lawyer violates any ethical rule by inadvertently doing so, but the consultation may have affected the landlord client adversely and may well affect the consulted lawyer's relationship with her landlord client adversely if the consultation comes to light. The consulted lawyer who failed to clear conflicts may find herself in the intractable position of having given advice to and received information from both parties to a dispute. When a lawyer learns that this has occurred, and assuming no agreement was made to keep the consultation confidential, Rule 1.4 requires the consulted lawyer to inform her client of the consultation and the possible consequences of it.

Among these consequences, she may be charged with a violation of Rule 1.7(b) for failure to employ reasonable measures to avoid conflicts of interest, sued by her landlord client for malpractice, or at the least find her representation challenged on the ground that information about the adverse party obtained in the consultation is entitled to protection. Moreover, if the consulted lawyer agreed to keep the consultation confidential, the consulted lawyer may have to decline representation of the landlord in the matter.

These problems can be avoided if the consulted lawyer ascertains the identity of the consulting lawyer's client or the other parties involved in the matter and checks for conflicts before engaging in the consultation. They also likely can be avoided if, without learning the identity of the consulting lawyer's client, the consulted lawyer obtains sufficient information reasonably to assure herself that the matter is not one affecting the interest of an existing client.

### **C. The Consulted Lawyer Should Ask the Consulting Lawyer to Waive Conflicts**

Even though a client-lawyer relationship is not created between the consulted lawyer and the consulting lawyer's client because of the consultation (and hence, no duty of confidentiality under Rule 1.6), a duty of confidentiality undertaken or imposed outside the client-lawyer relationship nevertheless can limit the consulted lawyer in representing others. The consulted lawyer who agrees expressly or impliedly to preserve confidentiality in connection with the consultation cannot, under Rule 1.7(b), continue or undertake a representation that will be materially limited by her responsibilities to the consulting lawyer's client unless she reasonably concludes the representation will not be adversely affected and obtains her client's consent after consultation

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11. The result would be the same even if the consulting lawyer's client was identified, if the consulted lawyer was unaware that the landlord was her own client.

12. In Formal Opinion 90-358, we concluded that a lawyer's interview with a prospective client might also trigger Rule 1.9(c), which prohibits the use of a former

regarding the limitations on the representation created by her duty to the consulting lawyer's client.<sup>12</sup> As a practical matter, the consulted lawyer who undertakes to maintain confidentiality in a consultation will have to include the name of the consulting lawyer's client in her own client database in order to avoid inadvertently undertaking an adverse representation that implicates Rule 1.7(b). Moreover, we note, as we discussed in Formal Opinion 90-358, that in some circumstances, the obligation to maintain confidentiality may prevent the consulted lawyer from providing sufficient information to obtain informed consent from her own client.

On the other hand, there should be no disqualification under Rule 1.7(b) if the consulted lawyer secured the agreement of the consulting lawyer, on behalf of his client, that the consultation will not create any obligations to the consulting lawyer's client, where the consulting lawyer is authorized by his client to make such an agreement. If that is not possible, the consulted lawyer might ask that the consulting lawyer's client consent to a form of screening to avoid disqualification of other members of the consulted lawyer's firm.<sup>13</sup>

### III. Conclusion

Despite their indisputable value to practitioners of every experience level, consultations with colleagues can be risky if undertaken without careful consideration. This opinion is not intended and should not be interpreted to discourage the practice of consulting between lawyers. However, both the consulting lawyer and the consulted lawyer should proceed with caution. A consulting lawyer must be careful to avoid disclosing client information, especially privileged information, without permission and in circumstances where the information will not be further disclosed or otherwise used against the consulting lawyer's client. The consulting lawyer must also exercise caution in consulting with lawyers who are likely to represent adverse interests. Although the consultation does not create a client-lawyer relationship between the consulting lawyer's client and the consulted lawyer, the consulted lawyer is obligated to protect information she receives that she has agreed explicitly or implicitly to keep confidential. Moreover, if the obligation to

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client's confidential information to the disadvantage of the former client. Although we conclude here that a consulted lawyer may be obligated to protect the confidential client information acquired in the consultation, the consulting lawyer's client does not thereafter have the status of a former client to the consulted lawyer such that Rule 1.9 would be applicable.

13. Screening as a matter of right to avoid disqualification of an entire firm is available in only a few jurisdictions and is not allowed under Rule 1.10. However, there is no reason why a "third person" who otherwise could disqualify the consulted lawyer cannot consent to other lawyers in the consulted lawyer's firm representing an adverse interest if the consulted lawyer does not participate in the representation or disclose confidential information.

protect that information will materially limit her ability to represent her own clients, she can proceed with those representations only with consent. We believe these risks can be minimized if the lawyers take some or all of the following measures:

1) The consultation should be anonymous or hypothetical without reference to a real client or a real situation.

2) If actual client information must be revealed to make the consultation effective, it should be limited to that which is essential to allow the consulted lawyer to answer the question. Disclosures that might constitute a waiver of attorney-client privilege, or which otherwise might prejudice the interests of the client must not be revealed without consent. The consulting lawyer should advise the client about the potential risks and consequences, including waiver of the attorney-client privilege, that might result from the consultation.

3) The consulting lawyer should not consult with someone he knows has represented the opposing party in the past without first ascertaining that the matters are not substantially related and that the opposing party is represented by someone else in this matter. Similarly, a lawyer should exercise caution when consulting a lawyer who typically represents clients on the other side of the issue.

4) The consulted lawyer should ask at the outset if the consulting lawyer knows whether the consulted lawyer or her firm represents or has ever represented any person who might be involved in the matter. In some circumstances, the consulted lawyer should ask the identity of the party adverse to the consulting lawyer's client.

5) At the outset, the consulted lawyer should inquire whether any information should be considered confidential and, if so, should obtain sufficient information regarding the consulting lawyer's client and the matter to determine whether she has a conflict of interest.

6) The consulted lawyer might ask for a waiver by the consulting lawyer's client of any duty of confidentiality or conflict of interest relating to the consultation, allowing for the full use of information gained in the consultation for the benefit of the consulted lawyer's client.

7) The consulted lawyer might seek advance agreement with the consulting lawyer that, in case of a conflict of interest involving the matter in consultation or a related matter, the consulted lawyer's firm will not be disqualified if the consulted lawyer "screens" herself from any participation in the adverse matter.

