

Ethical Duties Pertaining to Lawyers Consulting Other Lawyers About a Client’s Matter

Adopted November 2019

Facts

A lawyer who represents a client in a legal matter consults another lawyer, who works at a different law firm, regarding the client’s matter for the benefit of the client.

Issue

What ethical duties apply to a lawyer when consulting another lawyer working at a different law firm regarding the client’s matter?¹

Analysis

A. The Benefit of Consultation to Lawyers and Clients

Consultation about cases among lawyers of different law firms has the potential to greatly benefit both lawyers and their clients. “[C]onsultations allow lawyers to test their knowledge, exchange ideas, and broaden their understanding of the law, with the realistic goal of benefiting their clients.”² Such consultations may benefit both solo practitioners and lawyers who practice

¹ This opinion is limited to the ethical duties of a consulting lawyer only. It does not address the ethical duties of a consulted lawyer.

² Prof'l Ethics Comm. for the State Bar of Texas, Ethics Op. 673 (2018), available at <https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-673> (Texas Op. 673).

with law firms by allowing quick access to a lawyer with expertise on a difficult or unusual problem.”³

B. Ethical Duties of a Consulting Lawyer

Though consultation with another lawyer is potentially beneficial, lawyers engaging in consultations related to a client’s case or legal matter must comply with the requirements of the Colorado Rules of Professional Conduct (Colo. RPC), including Colo. RPC 1.6, which governs the confidentiality of client information. Both the ABA Standing Committee on Ethics and Professional Responsibility and the Professional Ethics Committee for the State Bar of Texas (Texas Bar Committee) have recognized that consultation with a lawyer at another law firm regarding a client’s matter is appropriate, at least under certain circumstances.⁴ This Committee agrees with the opinions of those committees.

1. Duties Under Colo. RPC 1.6

Colo. RPC 1.6(a) provides that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation....”⁵ The information considered confidential under Colo. RPC 1.6 is broad, including both “matters communicated in confidence by the

³ American Bar Association (ABA) Standing Comm. on Ethics and Prof. Resp., Formal Op. 98-411, “Ethical Issues in Lawyer-to-Lawyer Consultation” (1998),: https://www.americanbar.org/content/dam/aba/publishing/litigation_news/top_stories/docs/ethics-98-411.authcheckdam.pdf (“ABA Formal Op. 98-411”).

⁴ Unlike the ABA Standing Committee, the Texas Bar Committee used the term “informal” consultation without explaining the distinction between “informal” and “formal” consultation. Because the nature of the consultation does not alter the duties of the consulting lawyer under Colo. RPC 1.6 or 1.7, this opinion merely addresses consultation generally, rather than trying to categorize such consultation as “formal” or “informal.”

⁵ Disclosure of information related to the representation of a client is also permissible if “permitted by paragraph (b).” Colo. RPC 1.6(a). The circumstances that permit disclosure under the exceptions in Colo. RPC 1.6(b) are not within the scope of this opinion.

client” and “all information relating to the representation, whatever its source.”⁶ Furthermore Colo. RPC 1.6(c) provides that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

a. Consultations That Do Not Require Informed Consent or Implied Authorization Under Colo. RPC 1.6

It is the Committee’s opinion that a lawyer’s inquiry to a colleague that does not reveal information related to the representation of a client does not implicate Colo. RPC 1.6. General inquiries concerning legal issues in the client’s case, a statute, court rule, court opinion, court procedures, or other similar matters do not raise issues under Colo. RPC 1.6, so long as the inquiring lawyer does not disclose information related to the representation of the client.⁷

Similarly, a lawyer’s questions to a presenter at a Continuing Legal Education course, requests for advice concerning legal research, or requests for information about particular judges or opposing lawyers do not implicate Colo. RPC 1.6, provided the lawyer discloses no information related to the representation of a client.⁸

Furthermore, the comments to Colo. RPC 1.6 expressly permit a lawyer to consult another lawyer, even about issues that relate to the representation of a client, using

⁶ Colo. RPC 1.6, cmt [3]; *see also* CBA Formal Op. 130, “Online Posting and Sharing of Materials Related to the Representation of a Client” (2017), *available at* https://www.cobar.org/Portals/COBAR/Repository/ethicsOpinions/FormalEthicsOpinion_130.pdf (hereinafter CBA Op. 130).

⁷ As the Texas Bar Committee stated: “For example, confidential information is not revealed merely by asking general questions about a particular statute, rule or legal procedure. A general or abstract inquiry that does not identify the client and does not disclose information relating to the representation does not implicate Rule 1.05 and does not require client consent.” Texas Op. 673.

⁸ ABA Formal Op. 98-411 (describing these sorts of consultations as “superficial”).

hypotheticals.⁹ Consultations using hypotheticals do not implicate Colo. RPC 1.6 provided that the hypotheticals do not create a “reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”¹⁰

b. Consultations That Require Informed Consent or Implied Authorization
Under Colo. RPC 1.6

Some consultations require more than an abstract or hypothetical inquiry. Depending on the circumstances, the consulting lawyer may need to reveal information related to the representation of a client to obtain useful guidance concerning a legal or factual issue in the client’s case. As noted in ABA Formal Opinion 98-411, some lawyer-to-lawyer consultations “are lengthy, detailed discussions to obtain substantial assistance with the analysis or tactics of a matter.”¹¹ Where the consulting lawyer discloses information related to the representation of a client, the consulting lawyer must comply with the requirements of Colo. RPC 1.6. That requires that the consulting lawyer either obtain the client’s informed consent prior to the consultation, or that the consultation is impliedly authorized by the representation.

In obtaining the client’s informed consent, a lawyer must recognize that it is the client’s decision whether to disclose confidential information. The client may decline to authorize any disclosures or may place limitations on the disclosures. “The information a lawyer seeking informed consent should provide to the client will vary depending on the circumstances.”¹² To

⁹ Colo. RPC 1.6, cmt [4].

¹⁰ *Id.*; *see also* ABA Formal Op. 98-411, p. 3 (consultations that can be done anonymously or in the form of a hypothetical in which “there is no disclosure of information identifiable to a real client or a real situation” do not violate Colo. RPC 1.6).

¹¹ *Id.*.

¹² CBA Formal Op. 130.

obtain a client's informed consent, a lawyer must communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."¹³ Benefits to disclosure may include reduced expense for the client or simplified case preparation for the lawyer. Potential risks of disclosure may include the risk that the consulted lawyer may disclose the information further,¹⁴ and, if any information to be disclosed is privileged, the risk the privilege will be waived. Alternatives may include not consulting anyone about the client's case.

Consultation involving the disclosure of information related to the representation of a client is also permissible if impliedly authorized by the representation.¹⁵ However, the Committee believes it is preferable to obtain a client's informed consent to consultation rather than relying on implied authorization for at least three reasons. First, the only examples provided in the comments to Colo. RPC 1.6 of information a lawyer has implied authority to disclose, are facts "that cannot properly be disputed" or information "that facilitates a satisfactory conclusion to a matter," and the comments make clear that even implied authorization to disclose that information depends on the circumstances.¹⁶ Accordingly, the comments suggest that the information a lawyer is impliedly authorized to disclose is extremely limited. Second, it is risky for a consulting lawyer to rely on implied authorization, rather than

¹³ Colo. RPC 1.0(e); *see also* CBA Op. 130 (Noting that, in obtaining a client's informed consent to post or share client information via the internet, "the lawyer should ensure the client understands exactly what information the lawyer proposes to publish, the manner of publication, to whom the information will be available, and the foreseeable ramifications to the client and the client's case.").

¹⁴ CBA Op. 130 ("A lawyer must consider and advise the client that once the lawyer discloses the information, those receiving the information may distribute it further.").

¹⁵ Colo. RPC 1.6(a).

¹⁶ Colo. RPC 1.6, cmt. [5].

informed consent, because, particularly in the absence of a discussion and mutual understanding between the lawyer and client, the client may dispute the existence or scope of a lawyer's authority to disclose the confidential information after the consultation occurs. Third, obtaining informed consent prior to consultation reinforces "the trust that is the hallmark of the client-lawyer relationship"¹⁷ by keeping the client informed about the lawyer's work on the client's matter, as well as the use of confidential information learned during the representation of the client. Reminding the client that the client has the ability to exercise control over the lawyer's revelation of confidential information likewise encourages the client to disclose "embarrassing legally damaging subject matter,"¹⁸ a central purpose of the Rule.

To the extent a lawyer discloses information related to the representation of a client based on implied authorization, Comment 5 to Colo. RPC 1.6 provides that "[e]xcept to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation." Thus, a consulting lawyer may not rely on implied authorization as a justification for disclosing information related to the representation of a client if the client has expressly limited the lawyer's authority to disclose such information.

2. Preventing Inappropriate Disclosures

If, the client gives informed consent to the consultation, or the consultation is impliedly authorized, the lawyer may consult another lawyer subject to any limitations imposed by the client. However, the consulting lawyer must still take steps to prevent inappropriate disclosures as required by the Rules of Professional Conduct. Colo. RPC 1.6(c) requires the consulting

¹⁷ Colo. RPC 1.6, cmt [2].

¹⁸ *Id.*

lawyer to take reasonable efforts to prevent inadvertent or unauthorized disclosures of information related to the client's representation. Depending on the circumstances, a consulted lawyer may not owe a duty of confidentiality to the consulting lawyer's client. Therefore, the Committee believes that a consulting lawyer should limit the information disclosed during the consultation to that reasonably necessary to carry out the purpose of the consultation. Client information that is not necessary to the consultation should not be disclosed. Depending on the client's wishes, the consulting lawyer may need to take additional steps to maintain the confidentiality of any information disclosed to the consulted lawyer. If it is not important to the client that the disclosed information remain confidential, additional steps may not be necessary. However, if the client wishes to maintain the confidentiality of any disclosed information, the consulting lawyer should obtain the consulted lawyer's agreement to maintain the confidentiality of any information disclosed at the outset of the consultation. If the consulted lawyer will not agree to maintain the confidentiality of the disclosed information, the consulting lawyer should consult a different lawyer who will agree to maintain confidentiality.

A consulting lawyer should also consider whether conflicts do or may exist in consulting another lawyer about a client's case. Colo. RPC 1.7 prohibits a lawyer from representing a client "if the representation involves a concurrent conflict of interest."¹⁹ Such a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."²⁰ In *Liebnow by & through Liebnow v. Bos.*

¹⁹ Colo. RPC 1.7(a).

²⁰ Colo. RPC 1.7(a)(2).

Enterprises Inc., 2013 CO 8, the Colorado Supreme Court recognized that Colo. RPC 1.7, governing conflicts of interest, applies to consultations that take place even when no lawyer-client relationship is formed.²¹

A consulting lawyer should be cognizant of the risk that the consulted lawyer or the consulted lawyer's law firm may have a conflict of interest that may pose risks to the client and should take steps to avoid exposing the client to such risks. Before sharing confidential information, the consulting lawyer should take reasonable steps to ensure that the consulted lawyer and the consulted lawyer's law firm do not represent a party adverse to the client.²² If the matter is in litigation, the consulting lawyer may wish to consider checking the docket or register of actions in order to determine whether the consulted lawyer or other lawyers from the consulted lawyer's law firm, are counsel of record in the case. Depending on the circumstances, the consulting lawyer also may wish to disclose additional information, including general information about the nature of the dispute or the information about the identity of his or her client's opposing party to ensure that no conflict of interest exists. To the extent that such information would reasonably permit the consulted lawyer to determine the client's identity or situation involved, the consulting lawyer must obtain the client's informed consent or be impliedly authorized before making such a disclosure.

²¹ *Liebnow by & through Liebnow*, 2013 CO 8, ¶ 24.

²² ABA Formal Op. 98-411. The ABA Opinion provides the following 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."