# Lawyers Consulting Lawyers On Ethics and Malpractice Problems

**"Can We Talk?"**

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## Part I

Lawyers are advised as a matter of good risk management to find an experienced lawyer they can go to for help, guidance, or just plain sympathy with client problems. If you're in practice with other lawyers, this is easy because lawyers practicing together may ethically discuss firm matters. If, however, you are a sole practitioner or want to talk with a lawyer outside the firm about an ethics or malpractice issue, client confidentiality complicates things in a hurry.

The consulting lawyer must consider the requirement to keep client information confidential and to keep clients informed:

- Is it permissible to tell the consulted lawyer confidential information without getting client consent?
- Must you tell the client after a consultation that you talked to another lawyer about an ethics or malpractice problem?
- Do you now have a conflict of interest with your client?
- By telling the consulted lawyer confidential information have you waived the attorney-client privilege?

From the consulted lawyer's perspective:

- Is there an attorney-client relationship with the consulting lawyer or his client?
- If not, is the information disclosed by the consulting lawyer confidential?
- Does this information create a conflict of interest with other clients of the consulted lawyer?
- May the consulted lawyer use information learned from the consultation?

This is Part I of a two-part article analyzing the professional responsibility issues when consulting or being consulted about an ethics or malpractice problem.[i] This part covers the question from the viewpoint of the consulting lawyer. The second part addresses the issues from the perspective of the consulted lawyer. It also considers confidentiality issues in reporting ethics and malpractice problems to lawyer liability insurance companies. The primary sources for the information and opinions expressed are ABA Formal Opinion 98-411, Ethical Issues in Lawyer-to-Lawyer Consultation (August 30, 1998) and a series of articles appearing in The Professional Lawyer published by the ABA Center For Professional Responsibility.[ii] There is little Kentucky authority to definitively answer lawyer-to-lawyer consulting ethics, but these secondary sources offer

a thoughtful treatment of the issues and provide useful guidance. Unfortunately, they do not cover the question of lawyers consulting with professional liability insurance carriers. I attempt to fill this gap in Part II.

## Lawyer-to-Lawyer Consultation – From The Consulting Lawyer's Viewpoint

### *A Context for Analysis*

Rule of Professional Conduct 1.6 Confidentiality Of Information provides "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…." The rule has no waiver doctrine, but makes three exceptions to this global duty to keep client information secret:

> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (3) to comply with other law or a court order.

What follows is a review of lawyer-to-lawyer ethics consultations that comply with Rule 1.6.

### *The Consulting Lawyer's Options*

Client Consent: The surest way to avoid confidentiality and privilege violations is to get client consent to consult another lawyer. By seeking consent, however, the lawyer risks letting the client drive the professional responsibility decision. If the client refuses consent, the lawyer faces the dilemma of remaining silent and violating his professional responsibility -- or revealing confidential information and being sued for malpractice. One commentator observed that most lawyers do not get client consent before consulting with another lawyer because they do not want to upset the client, are embarrassed by the problem, or want to protect their own interests first.
Implied Consent: Comment 7 to Rule 1.6 provides: "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." In ABA Op. 98-411 implied authority was interpreted "to allow disclosure of client information 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." The opinion makes a distinction between general consultations and implied consent hypothetical case consultations:

> 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.
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> 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.

It is stressed in the opinion and by other commentators that, while implied authority permits hypothetical consultations without client consent, the consulting lawyer proceeds at his risk. Should he reveal too much detail allowing the consulted lawyer to identify the client or the matter, the consulting lawyer has violated Rule 1.6. Critics of using implied authority to consult on ethical issues without client consent argue that these consultations are primarily for the benefit of the lawyer and not the client. This is not what is contemplated by the implied authority provision of Rule 1.6. The consulting lawyer has a personal interest conflict of interest and is being disloyal by not disclosing the conflict to the client.[iii] The counter-argument is that lawyer-to-lawyer consultations do benefit clients by assuring competent and ethical representation.

- Lawyer Defense (Rule 1.6(b)(2)): The lawyer defense exception to client confidentiality is the clearest and most frequently used exception. It allows lawyers to disclose confidential information to defend against bar complaints, malpractice claims, and criminal and civil actions concerning a representation. This exception is based on fairness and client waiver of confidentiality and attorney-client privilege when accusing a lawyer of misconduct or malpractice.
- Kentucky Bar Association Ethics Hotline: SCR 3.530 permits lawyers in emergencies to telephonically request informal ethics advisory opinions from the district committee member for the requestor's Supreme Court district. The rule provides that the request is confidential, but an attorney-client relationship is not created. It does not directly refer to Rule 1.6, indicate whether client consent is required, or whether the client should be informed of the call. Rule 1.6 excepts disclosures made "to comply with other law or a court order." SCR 3.530 is reasonably construed as either other law or court order. In the alternative it may be construed as a fourth exception to Rule 1.6 even though not expressly

identified as such. In my opinion Ethics Hotline consultations as an exception to Rule 1.6 do not require client consent. Additionally, Ethics Hotline confidentiality permits disclosure beyond hypothetical cases. Informing the client of the consultation may be appropriate depending on the circumstances (see below). The intent of SCR 3.530 is to encourage Kentucky lawyers to seek help when they need it without fear of prejudicing the rights of clients. For that reason my best guess is our courts will not hold waiver of the attorney-client privilege by disclosure in an Ethics Hotline call.

***Informing the Client of the Consultation***

The leading commentator on ethics consultations opines that while the "aspirational goal should be for the lawyer to have a relationship with the client which nurtures the revelation of the ethics consultation, no duty to inform the client of the ethics consultation should exist."[iv] Others disagree strongly citing a lawyer's duty to consult with the client about the means to carry out the representation,[v] the duty to keep the client informed about the status of a matter,[vi] and the duty to consult with the client concerning a conflict of interest.[vii] They complain that failure to get client consent for the consultation or inform the client after the fact is disloyal, paternalistic, and deprives the client of control over the case.

Kentucky lawyers have considerable flexibility about keeping clients informed because our Rule 1.4 Communication only encourages lawyers to communicate with clients by providing that a lawyer "should keep a client reasonably informed." Thus, in my opinion there is no per se requirement in Kentucky to inform the client of a consultation. Under a theory of implied consent or by calling the Ethics Hotline a lawyer has discretion to consult another lawyer without getting client consent or informing the client after the fact.

The value of this approach is the client does not control the initial evaluation of a professional responsibility or malpractice question. Provided the lawyer acts responsibly after the consultation, the client is not deprived of any lawful advantage. If the consultation fails to resolve the problem on a benign basis, the lawyer must take appropriate action. The lawyer may decide withdrawal from representation is necessary or inform the client of the problem and attempt to resolve it. A lawyer's fiduciary obligation of client loyalty is critical to the decision to inform. If the lawyer has malpracticed or otherwise prejudiced the client, loyalty requires disclosure even if Rule1.4 does not.

*Summing Up*

ABA Op. 98-411 suggests these measures when consulting with a non-affiliated lawyer:

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

- 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.

- 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.

Kentucky's Ethics Hotline service gives Kentucky lawyers an additional basis for consultation not contemplated by the ABA opinion. It nicely balances client fiduciary obligations with the need for lawyer professionalism autonomy. It is an ethical and sure way of getting the help you need with a sudden ethical problem.

*To Be Continued: Part II --The Perspective Of The Consulted Lawyer And Reporting Ethics And Malpractice Problems To Lawyer Liability Insurance Companies*

## Endnotes

[i]The views expressed in this article apply equally to substantive and procedural consultations.
[ii]*See* Drew L. Kershen, *The Ethics of Ethics Consultation*, THE PROFESSIONAL LAWYER, Vol. 6, No. 3 (May 1995); *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).
[iii]Rule 1.7(b) Conflict of Interest: General Rule.
[iv]Kershen, *The Ethics of Ethics Consultation*, THE PROFESSIONAL LAWYER, Vol. 6, No. 3 at 10 (May 1995).
[v]Rule 1.2(a) Scope of Representation.
[vi]Rule 1.4(a) Communication.
[vii]Rule 1.7(b) Conflict of Interest: General Rule