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Ethical Limitations on Lawyer-to-Lawyer Online Consultations Regarding Pending Cases

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COMMENT

*Robert W. Derner**

Ethical Limitations on Lawyer-to-Lawyer Online Consultations Regarding Pending Cases

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I. INTRODUCTION

A quarter-century ago, a lawyer in need of professional advice may have gone down the hall to consult with another lawyer or sought out a regional expert at the next local bar chapter meeting. Lawyers have been meeting face-to-face to discuss client matters since the dawn of the legal profession. Now, in the age of the Internet, many lawyer-to-lawyer consultations are conducted on listservs and social media networks.

Many issues associated with lawyers' use of listservs and social media networks relate back to the very nature of the Internet. Because online lawyer-to-lawyer consultations are a relatively recent phenomenon, less technologically-minded attorneys may not fully understand the consequences of discussing client matters online. When an attorney asks a

question online or responds to another lawyer's inquiry, everything typed is stored on a server beyond the lawyer's control, and the attorney remains attached to the question or statement forever. Attempts to permanently remove a post from the Internet will prove futile, as a back-up record of the text remains offsite even when the lawyer deletes the post.¹

Despite these concerns, many lawyer-to-lawyer consultations take place on Facebook and lawyer-to-lawyer listservs.² The arrival of the digital age offers many opportunities to lawyers, but the public and permanent nature of the Internet gives rise to concerns pertaining to lawyers' confidentiality obligations. With some regularity, a consulting lawyer may encounter a roadblock in a given representation and may want to consult with another lawyer who possesses a superior understanding of the underlying practice area relevant to the consulting lawyer's case.

The consulting lawyer and the consulted may or may not be affiliated with the same firm, and often the consulting lawyer may wish to obtain the advice without retaining the consulted lawyer as co-counsel. This scenario may arise when the consulting lawyer is a solo practitioner, or when the consulting lawyer does not have an affiliated attorney within the same firm with the level of expertise to give useful advice as to the practice area or topic that is troubling the consulting lawyer. Lawyer-to-lawyer consultations involving two or more lawyers from different, unaffiliated firms are not uncommon. However, any lawyer-to-lawyer consultation—in-person or online—must take place within the parameters of any relevant confidentiality and disciplinary rules affecting what can be disclosed.

In-person lawyer-to-lawyer consultations have taken place many times at continuing legal education events, seminars, and group events focused on specific legal interests or areas of law. The interplay between online lawyer-to-lawyer consultations and the applicable confidentiality or disciplinary

1. See Angelina Perez, *Campaign to Teach Students Lesson of Internet Permanency*, KFDA NEWS CHANNEL 10 (Mar. 6, 2011, 10:50 PM), <http://www.newschannel10.com/story/14197907/campaign-to-teach-students-lesson-of-internet-permanency> [<https://perma.cc/2JWC-Y3S4>] (highlighting a school district's attempt to show students that everything they put on the Internet will remain there permanently—even if an attempt is made to delete the posted content).

2. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 624–25 (2018) (addressing lawyers' use of Facebook to engage in lawyer-to-lawyer consultations); see also 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, 607–08 (2005) (noting the prominence of lawyer-to-lawyer listservs in the legal profession today).

rules warrants further exploration as an increasing number of lawyers embrace listservs, chat rooms, and even Facebook.³

Bar associations that have addressed online lawyer-to-lawyer consultations have generally concluded that they are acceptable so long as there are no violations to any of the relevant obligations of confidentiality.⁴ In rendering ethics opinions, several bar associations note the growing number of lawyers who consult with unaffiliated lawyers online rather than in-person to explore client-related issues beyond the consulting lawyer's knowledge or expertise.⁵

Regardless of whether a lawyer-to-lawyer consultation takes place in person or online, confidentiality rules apply to all information disclosed by consulting lawyers. To counter the confidentiality challenges posed by the Internet, some listservs used for lawyer-to-lawyer consultations restrict their membership to practicing attorneys and legal scholars. Such listservs include one hosted by the Association of Professional Responsibility Lawyers (APRL).⁶ Listservs like APRL's provide a secure platform where

3. See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2018) (setting forth a model rule for the various state bar associations to use as guidance in implementing their own respective rules to strike a balance between a lawyer's need to confer with colleagues and the interest of keeping a client's information confidential); see also TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (addressing, in part, the parameters in which Texas lawyers are to operate when disclosing a client's confidential information to unaffiliated lawyers to further the client's case); ILL. RULES OF PROF'L CONDUCT r. 1.6 (2010) (addressing how Illinois lawyers must treat client-provided confidential information); OR. RULES OF PROF'L CONDUCT r. 1.6 (2018) (noting the confidentiality requirements for Oregon lawyers); MD. ATT'Y RULES OF PROF'L CONDUCT r. 1.6 (2016) (encompassing the confidentiality requirements of Maryland lawyers).

4. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (concluding online lawyer-to-lawyer consultations may be conducted on social media networks); see also Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (endorsing lawyer-to-lawyer consultations carried out in online discussion groups so long as reasonable steps are taken to avoid providing information that could impair the consulting lawyer's confidentiality obligations); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) (stating online lawyer-to-lawyer consultations generally do not violate the Maryland Lawyers' Rules of Professional Conduct); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (approving online lawyer-to-lawyer consultations).

5. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (recognizing lawyer-to-lawyer consultations take place both in person and online); Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) ("An online discussion group can serve to educate a lawyer and allows a lawyer to test her understanding of legal principles by asking questions of other lawyers."); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) (acknowledging lawyers "may consult with other lawyers in an online discussion group."); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (approving lawyers seeking advice online).

6. See *Mission*, ASS'N PROF. RESP. LAW., <https://aprl.net/aprl-mission/> [<https://perma.cc/H846-2JJR>] (stating APRL's mission is to provide a listserv to be used by practitioners nationwide in an effort to ensure client representations are carried out in a thorough and ethical fashion).

a consulting lawyer may obtain qualified advice without leaving the office. However, even on secured listservs, consulting lawyers must carefully consider information being revealed in order to avoid violating confidentiality principles.

To date, no court or bar association has concluded that online lawyer-to-lawyer consultations should be categorically banned.⁷ As with all new technology, there is both good and bad associated with lawyers' use of social media and listservs for the furtherance of their client representations.⁸ Websites have gone from casual ways individuals socialize to powerful tools for furthering lawyers' understanding of the law underlying their client representations, and many interactions that used to take place face-to-face between lawyers now occur entirely online.⁹ Because social media is a relatively new phenomenon in the legal profession, the ethical ramifications of its use by the legal profession are still being assessed.¹⁰

In times of old, when lawyers primarily discussed matters on a face-to-face basis, clear lines could be drawn as to the audience privy to the information being shared, and there was not a permanent record preserved forever on the Internet.¹¹ Since the dawn of social media, interactions between attorneys have become much less formal, and now, a virtual

7. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (stressing the importance of complying with confidentiality obligations whenever engaging in online lawyer-to-lawyer consultations); see also Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (noting confidentiality is of the utmost importance for both in-person and online lawyer-to-lawyer consultations); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) (stating online lawyer-to-lawyer consultations must not lead to improper disclosure of confidential information); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (stating the importance of complying with confidentiality obligations when engaging in online lawyer-to-lawyer consultations).

8. See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 150-51 (1999) (discussing advantages and disadvantages of lawyers using the Internet to communicate with other lawyers in seeking information for a client's case); see also David Hricik, *The Speed of Normal: Conflicts, Competency, and Confidentiality in the Digital Age*, 10 COMPUTER L. REV. & TECH. J. 73, 84-85 (2005) (pointing out possible confidentiality issues arising from a lawyer's use of listservs to procure advice from other lawyers about a client's case).

9. See Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 152 (2012) (explaining how many law firms today, large and small, utilize social media to advance client representations and to market their services).

10. See generally Craig Estlinbaum, *Social Networking and Judicial Ethics*, 2 ST. MARY'S J. ON LEGAL MAL. & ETHICS 2 (2012) (addressing legal ethics issues posed by lawyers' use of social media); see also Zachary C. Zurek, Comment, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY'S J. ON LEGAL MAL. & ETHICS 242, 243 (2013) (discussing the rise of social media use within the legal profession).

11. See Perez, *supra* note 1 (discussing the permanency of content posted on the Internet).

conversation between professional colleagues is recorded by the website on which the interaction takes place. This, virtual conversation, is worrying from a confidentiality standpoint, because any off-color or ill-advised questions or statements made by a lawyer may be around *forever*. Worse still, if a lawyer accidentally reveals the confidences of a client, a permanent record of this damaging information may survive, even if the lawyer quickly realizes the mistake and attempts to delete the information.¹² Because it is virtually impossible to delete anything posted on the Internet fully, lawyers must exercise extreme caution when posting information on the Internet.

Regardless of how a lawyer-to-lawyer consultation takes place, but especially in an online setting, it is wise for consulting lawyers to limit the amount of confidential, client-specific information that is disclosed, and instead, to make use of general or abstract inquiries whenever possible.¹³ However, in situations where general inquiries will not produce useful information for the consulting lawyer, the consulting lawyer can reveal *some* confidential client information—in some jurisdictions such as Texas—¹⁴ when the consulting lawyer believes that offering the confidential information will be helpful to the client.

A balance must be struck between a lawyer's ability to confer with colleagues to obtain useful advice and concerns related to keeping client

12. A lawyer's ability to understand the permanency of the Internet is critical to the ability to comply with confidentiality requirements in the modern world—to be sure, confidential client information which is accidentally posted on a website will remain, even if the lawyer attempts to delete the material. *See id.* (“[W]hat you share online will be there forever, and can be seen by everyone.”).

13. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.6-3, at 274 (2017–2018 ed.) (recommending consulting lawyers keep their inquiries general or abstract in nature to avoid running afoul of confidentiality requirements); *see also* Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (concluding an inquiring lawyer's disclosure of facts not necessarily attributable to one specific client is preferable over disclosure of facts which the consulted lawyer may deduce to decipher the identity of the client on whose behalf the inquiry is being made); SISSELA BOK, SECRETS ON THE ETHICS OF CONCEALMENT AND REVELATION 119–20 (1989) (advising lawyers to avoid confidentiality issues by keeping inquiries made to unaffiliated lawyers as broad as possible).

14. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(d)(1)–(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (giving Texas lawyers the ability to reveal limited amounts of unprivileged confidential information to lawyers outside the inquiring lawyer's law firm, without the client's express consent in certain circumstances); *see also* Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 624 (2018) (noting Texas lawyers may reveal limited unprivileged confidential information without a client's express consent “when the inquiring lawyer reasonably believes that the revelation will further the representation by obtaining the responding lawyers' experience or expertise for the benefit of the client, and when it is not reasonably foreseeable that revelation will prejudice the client.”).

information confidential. This comment will attempt to explain how and when lawyer-to-lawyer consultations are permitted in the online world.¹⁵ Part II of this comment will provide background on the fundamental principle of confidentiality as applied to lawyers and the reasons why lawyers choose to consult with unaffiliated lawyers to further client representations. Part III examines Model Rule 1.6—the American Bar Association’s attempt at guiding the way lawyers should conduct themselves to avoid improperly disclosing confidential information received from clients. Part IV discusses how the American Bar Association has addressed Model Rule 1.6’s applicability to lawyer-to-lawyer consultations and how various bar associations throughout the nation have dealt with the issue. Finally, Part V offers recommendations and solutions for lawyers seeking to consult with other lawyers online without violating confidentiality requirements, namely:

15. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (stating Texas lawyers may use Facebook and other social media sites to engage in lawyer-to-lawyer consultations so long as all applicable confidentiality requirements are adhered to); see also Lauren Alvarez, *Online Informal Lawyer-to-Lawyer Consultations for the Benefit of the Client Are Permissible, Subject to Lawyers' Duty of Confidentiality*, LEGAL ETHICS MOTION (Sept. 27, 2018), <https://www.legaethicsinmotion.com/2018/09/online-informal-lawyer-to-lawyer-consultations-for-the-benefit-of-the-client-are-permissible-subject-to-lawyers-duty-of-confidentiality/> [<https://perma.cc/JW6M-N9AB>] (discussing situations in which lawyers may use social media and other online resources to informally consult with other, unaffiliated lawyers to further a client representation); John Council, *Lawyers May Use Facebook for Legal Questions, Bar Ethics Panel Says*, TEX. LAW. (Aug. 16, 2018, 4:57 PM), <https://www.law.com/texaslawyer/2018/08/16/lawyers-may-use-facebook-for-legal-questions-bar-ethics-panel-says/> [<https://perma.cc/3ZNM-9Z2H>] [hereinafter Council, *Lawyers May Use Facebook*] (discussing the use of Facebook and other social media sources to engage in lawyer-to-lawyer consultations, especially when the consulted lawyer is not a member or an affiliate of the consulting lawyer's firm); Jeanne M. Huey, *Ethics: Keeping Client Confidences: A Look at Texas Ethics Opinion 673*, DALL. B. (Sept. 26, 2018, 10:30 AM), <https://www.dallasbar.org/book-page/ethics-keeping-client-confidences-look-texas-ethics-opinion-673> [<https://perma.cc/44UQ-FWBK>] (offering commentary on a recent Texas ethics opinion which concluded Texas lawyers may engage in online lawyer-to-lawyer consultations involving unaffiliated lawyers without violating the confidentiality requirements to which Texas lawyers must adhere); Brad Johnson, *A Lawyer's Duty of Confidentiality When Using Social Media*, TEX. B. BLOG (Jan. 10, 2018), <https://blog.texasbar.com/2018/01/articles/ethics/a-lawyers-duty-of-confidentiality-when-using-social-media/> [<https://perma.cc/JD6M-EQH4>] (analyzing when Texas lawyers may engage in online lawyer-to-lawyer consultations involving multiple firms in light of Texas Ethics Opinion 673); Dan Schanz, *Think Before You Post: Keeping Listserv Communications Confidential*, SCHANZ LAWLER 2, 2–3 (Oct. 15, 2014), <http://schanzlawler.com/wp-content/uploads/Think-Before-You-Post-Keeping-Listserv-Communications-Confidential-The-Verdict-2014-Issue-4.pdf> [<https://perma.cc/29N6-G4JL>] (discussing online lawyer-to-lawyer consultations involving multiple firms which take place on listservs); Robert Tobey, *Can Lawyers Get Advice About Their Cases on Social Media?*, JOHNSTON TOBEY (Sept. 19, 2018), <https://www.johnstontobey.com/can-lawyers-get-advice-about-their-cases-on-social-media/> [<https://perma.cc/TZE9-QVUZ>] (noting the ramifications of utilizing social media to engage in online lawyer-to-lawyer consultations involving lawyers from different firms).

making use of hypotheticals and disclosing no more information than necessary to receive an adequate response from a consulted lawyer.¹⁶

II. BACKGROUND

Per Model Rule 1.1, “[a] lawyer shall provide competent representation to a client.”¹⁷ Lawyer-to-lawyer consultations provide an avenue for attorneys to reach out to others to ensure clients receive competent representation. Listservs and social media networks can and should be utilized by lawyers to obtain helpful feedback from colleagues. Indeed, these discussion groups offer lawyers the chance to obtain feedback from persons outside of their professional circles. However, a consulting lawyer who decides to use an online discussion group should exercise caution because of the lack of knowledge regarding the other lawyers who will see the posted questions or statements. The use of online lawyer-to-lawyer discussion groups gives rise to two significant public policy issues: protection of confidential client information on one hand, and lawyers’ need to obtain advice on the ongoing representations on the other.¹⁸

Before engaging in an online lawyer-to-lawyer consultation, lawyers should review the disciplinary rules of their jurisdiction, the membership list of any online discussion group the lawyer wants to use, and any additional confidentiality requirements imposed by the courts in the lawyer’s jurisdiction.¹⁹ Before proceeding to engage in online lawyer-to-lawyer consultations, attorneys may also choose to insert language in their representation agreements, informing clients that information learned during the representation may be posted on an online discussion board for

16. Specifically, this Comment addresses when lawyers may engage in online consultations with unaffiliated lawyers, and concludes that such interactions are generally permissible so long as consulting lawyers follow the confidentiality obligations imposed by their jurisdiction.

17. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2018).

18. See Scott Rothenberg, *Maintaining Client Confidentiality in the Digital Era*, 27 APP. ADVOC. 720, 722–24 (2015) (noting the importance of striking a balance between a lawyer’s need to consult with colleagues to ensure the best possible representation is being provided to the client, and the client’s desire to have information kept confidential); see also Hricik, *supra* note 8, at 84–85 (pointing out possible confidentiality issues arising from a lawyer’s use of listservs to procure advice from other lawyers about a client’s case); Lanctot, *supra* note 8 (discussing advantages and disadvantages of lawyers using the Internet to communicate with other lawyers in seeking information for a client’s case).

19. See Council, *Lawyers May Use Facebook*, *supra* note 15 (cautioning lawyers to check the rules of their jurisdiction before posting client information online to avoid breaching applicable confidentiality obligations).

comment from other attorneys who may not be members of the same firm.²⁰

Before delving further into online lawyer-to-lawyer consultations, some background is warranted about the role confidentiality plays in the legal profession.

A. *The Fundamental Principle of Confidentiality*

All lawyers owe their clients a duty of undivided loyalty.²¹ Aspects of the duty of loyalty include a lawyer protecting a client's confidential information learned during the representation.²² Indeed, if a client cannot be sure communications will be kept confidential, the attorney–client relationship is doomed to fail.²³ A lawyer may not make an unauthorized disclosure of confidential client information, even when the disclosure would reflect positively upon the client.²⁴ Confidentiality is the foundation upon which any successful attorney–client relationship is forged; the client must be able to trust the lawyer with incredibly sensitive information for the relationship to function properly.²⁵ A lawyer is more than a mere counselor: a lawyer is

20. See *id.* (noting attorneys may be wise to inform clients in advance that their information may be shared with outside lawyers online to further the representation); see also Rothenberg, *supra* note 18, at 725 (suggesting lawyers place language in their employment agreements informing clients that information they provide may be used on social media or in informal, online consultations with other attorneys to better serve their interests).

21. See W. Bradley Wendell, *Autonomy Isn't Everything: Some Cautionary Notes on McCoy v. Louisiana*, 9 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 92, 97 (2018) (recognizing a lawyer's duty of loyalty to a client).

22. See Leah M. Christensen, *A Comparison of the Duty of Confidentiality and the Attorney-Client Privilege in the U.S. and China: Developing a Rule of Law*, 34 T. JEFFERSON L. REV. 171, 174 (2011) (“A client must trust that his or her lawyer will not disclose what the lawyer knows about the client's representation during the representation and even long after the representation ends.”).

23. See Lawrence J. Fox, *It's All in the Atmosphere*, 62 FORDHAM L. REV. 1447, 1448 (1994) (explaining when a client believes statements to the attorney will not remain confidential, “the flow of information is cut off and the lawyer loses the opportunity to remonstrate with the client, one of the more valuable benefits confidentiality confers on the profession.”).

24. See Adrienne E. Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 RICH. J. L. & TECH. 5, 55 (2007) (explaining a lawyer's confidentiality obligations apply even when the information being disclosed is positive, such as a lawyer boasting about the successes involved in a given client representation).

25. See ROTUNDA & DZIENKOWSKI, *supra* note 13 (noting the importance of keeping client information confidential); see also Vincent R. Johnson, *The Limited Duties of Lawyers to Protect the Funds and Property of Nonclients*, 8 ST. MARY'S J. ON LEGAL MAL. & ETHICS 58, 61 (2017) (asserting a lawyer's duty of confidentiality is of the utmost importance in an attorney–client relationship).

a confidant in whom the client can trust.²⁶ Because lawyers are *obligated* to keep clients' information confidential, clients may disclose sensitive or embarrassing information to their lawyer knowing, that in almost all circumstances, the information will not be used to inflict harm upon the clients' interests.²⁷

If a lawyer fails to maintain the confidences of clients, the entire attorney–client relationship will fail.²⁸ A lawyer can only adequately represent a client when the lawyer has the client's trust. The lawyer's ability to keep the client's confidences is the means by which trust is earned and kept, regardless of whether the client is rich or poor, young or old, an experienced litigant or not.²⁹

A lawyer cannot properly counsel a client—morally and legally—unless the client provides *all* information to the lawyer, even information that may cast the client in a negative light. Clients will be forthcoming with information about the matter at hand if they can trust the lawyer to keep the information confidential.³⁰ Thus, the only way a lawyer can provide competent representation in both the moral and professional sense is to ensure the lawyer has the client's trust, having the effect of shielding these communications with attorney–client privilege.³¹

26. See Gregory C. Sisk, *Change and Continuity in Attorney–Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 DRAKE L. REV. 347, 356 (2007) (stating while lawyers serve as agents and advocates seeking to advance the legal objectives of their clients, they also act as confidants whom clients can trust their most sensitive information); see also GEOFFREY C. HAZARD, ET AL., *THE LAW OF LAWYERING* § 10.02, 10-11 (Wolters Kluwer 4th ed. 2014 & Supp. 2018) (1985) (arguing confidentiality creates a more effective lawyer–client relationship); William H. Simon, *Attorney–Client Confidentiality: A Critical Analysis*, 30 GEO. J. LEGAL ETHICS 447, 447–48 (2017) (stressing the importance of a lawyer serving as his or her client's confidant); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 525–26 (1999) (stating productive attorney–client relationships can only exist when the client trusts that the lawyer will keep his or her information confidential).

27. See *Priest v. Hennessy*, 409 N.E.2d 983, 985 (N.Y. 1980) (emphasizing the importance of confidentiality).

28. See Sisk, *supra* note 26 (asserting confidentiality is the foundation upon which the attorney–client relationship rests).

29. See *id.* (exclaiming confidentiality and a lawyer's ability to instill trust within clients is the “cornerstone” of a successful attorney–client relationship).

30. *But see* Simon, *supra* note 26, at 447 (contending it is “unlikely that the confidentiality norms induce greater client disclosure.”).

31. See Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney–Client Privilege*, 23 GEO. J. LEGAL ETHICS 201, 216 (2010) (explaining “the free flow of information between lawyer and client depends on the assurance of confidentiality,” and how no client would disclose the information necessary for an attorney to effectively carry out the representation if confidentiality protections were not in place).

The importance of confidentiality transcends the attorney–client relationships; it stands as one of the most respected principles—philosophically and morally—in Western ideology. Indeed, many academics contend that confidentiality in the legal profession is *the* paramount value in attorney–client relationships and is critical in a lawyer’s quest to help clients in their most dire situations.³²

The teachings of Judaism extol the virtue of confidentiality—the *Torah* explains those who keep the confidences of others are valued members of the community, while those who do not, are not to be trusted and should be shunned.³³ Rabbis involved in the codification of Jewish law made it a point to elaborate on the importance of keeping the confidences of others, even in circumstances when one learns accurate yet damaging or embarrassing information from another.³⁴ Jewish leaders made it clear that someone who did not keep the confidences of others was to be regarded as a “tale-bearer”³⁵ who should not be trusted by anyone in the community, and when the principle of confidentiality is not respected, it “leads to the death of many souls”³⁶

In the Jewish tradition, one may avoid keeping the confidences of others only in the rarest of circumstances in order to protect the “absolute spiritual value of life.”³⁷ These circumstances are very limited, given the great importance placed upon confidentiality in Jewish culture.³⁸ Under the principles of Judaism, it would be appropriate to breach the confidences of another only in dire circumstances; for instance, where one’s professional

32. See Smith & Montross, *supra* note 26, at 525 (“Confidentiality is also an essential component of the virtue of fidelity.”).

33. See *Leviticus* 19:16 (“Thou shalt not go up and down as a talebearer among thy people . . .”).

34. See ISADORE TWERSKY, *A MAIMONIDES READER* 63 (1972) (noting the importance of confidentiality in Jewish tradition).

35. *Id.*

36. *Id.*

37. See Arthur Gross Schaefer & Peter S. Levi, *Resolving the Conflict Between the Ethical Values of Confidentiality and Saving a Life: A Jewish View*, 29 *LOY. L.A. L. REV.* 1761, 1767 (1996) (observing Jewish law recognizes that “saving a life takes precedence over preserving a confidential communication”); see also Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 *LOY. L.A. L. REV.* 1771, 1776–79 (1996) (discussing circumstances in which confidential information may be disclosed).

38. See Schaefer & Levi, *supra* note 37 (noting confidential information should rarely be disclosed); see also Pearce, *supra* note 37 (illustrating circumstances in which confidential information may be disclosed).

obligations were superseded by a moral necessity to make an immediate disclosure in order to stop a heinous act of violence.³⁹

Catholicism, like Judaism, also acknowledges the importance of confidentiality—from the first days of the religion, clergymen were called upon to keep the confidences of their parishioners. The relationship between the law and the clergy goes back to the origins of the Roman Catholic Church, with the clergy being among the first professions created within Catholic communities.⁴⁰ Since the early days of Catholicism, there has been a “seal of confession”⁴¹ amongst clergymen and parishioners, which forbids clergymen from revealing information offered during confessions—even if the account shared by the parishioners contains highly damaging information.⁴² Indeed, if a clergyman breaches his duty of confidentiality to a parishioner, he may be expelled from the Catholic Church.⁴³

Even in a secular sense, confidentiality is an important thread in the fabric that forms a culture that respects individual freedom.⁴⁴ A society that respects confidentiality allows for “zone[s] of privacy that cannot be breached by a too-inquisitive government, and thus enhances the autonomy and individual liberty of citizens.”⁴⁵ Indeed, in societies that respect confidentiality, “[t]he promise of confidentiality further enhances individual autonomy by permitting effective use of legal expertise in determining a lawful means to individual ends.”⁴⁶

39. See Alex Kozinski & Leslie A. Hakala, *Keeping Secrets: Religious Duty vs. Professional Obligation*, 38 WASHBURN L.J. 747, 748 (1999) (explaining the allowances made in Judaic tradition for breach of confidences to another in dire circumstances).

40. See Anthony Cardinal Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733, 1734–35 (1996) (noting the relationship between the law and the clergy in Catholic tradition).

41. See *id.* (discussing the “seal of confession” which binds clergymen to keep the matters disclosed by parishioners confidential).

42. See *id.* at 1735 (emphasizing the seemingly absolute bar against clergymen revealing information learned during sacramental confessions).

43. See *id.* at 1740 (addressing the importance of confidentiality for clergymen).

44. See HAZARD, ET AL., *supra* note 26, at 10–12 (“[T]he confidentiality principle . . . enhances the autonomy and individual liberty of citizens.”).

45. *Acord id.* (explaining the importance of confidentiality); see also BOK, *supra* note 13 (stating the “first and fundamental premise” for confidentiality is “that of individual autonomy over personal information,” thus suspecting individuals and maintaining privacy).

46. See Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 947 (1995) (stating confidentiality is necessary for the effective representation of clients).

Legal scholars often debate which circumstances allow for the disclosure of confidential client information, weighing the interests of clients, lawyers, and the public. However, among these competing interests, it is virtually settled that situations warranting the disclosure of confidential client information should be kept to a minimum, and even then, narrow in scope.⁴⁷ Initiatives seeking to increase the number of situations where confidential client information may be revealed are often slippery slopes: under such thinking, the risk to the integrity of attorney–client relationships is great, while the benefit to the general public is relatively insignificant by comparison.⁴⁸

Policy initiatives that would incentivize lawyers to leak virtually everything said to them by clients is a dangerous proposition; clients must feel safe to express themselves to their attorneys. Attorney–client relationships would deteriorate if clients felt they could only tell their lawyers about the facts that painted them in a positive light while holding back on details that would reflect poorly upon them. The danger of allowing an attorney to disclose confidential information provided by a client includes the client’s reluctance “to confide in his lawyer and it would be difficult to obtain fully informed legal advice.”⁴⁹ The drafters of the Model Rules of Professional Conduct took this danger into account when they penned Model Rule 1.6, which calls for the protection of confidential client information and provides only a few narrow circumstances in which a lawyer may disclose a client’s confidential information.⁵⁰

47. See Sisk, *supra* note 26, at 359 (suggesting confidential client information should be disclosed as infrequently as possible).

48. See *id.* (explaining the delicate balance between public interest and fiduciary trust in attorney–client relationships).

49. Fisher v. United States, 425 U.S. 391, 403 (1976).

50. See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2018) (proffering a model rule for adoption by state bar associations in connection with attorney confidentiality requirements); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) (concluding lawyers who blog or otherwise interact online on their own behalf or on a client's behalf “may not reveal information relating to a representation that is protected by Model Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the Model Rules.”); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (stating consulting lawyers must take care not to breach their duty of confidentiality under Model Rule 1.6 when engaging in lawyer-to-lawyer consultations involving lawyers from an outside firm); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-358 (1990) (holding an attorney must protect information received from a client when making an inquiry to other attorneys in an effort to further the client's representation).

B. *Model Rule 1.6*

Model Rule 1.6(a) states a lawyer must keep information provided by a client confidential, barring the disclosure of such information, unless a lawyer obtains the client's consent or is authorized to disclose the information.⁵¹ Confidential client information is broadly protected by Model Rule 1.6:

Rule 1.6(a) makes clear that . . . lawyers have an obligation to refrain from revealing all “information relating to representation of a client” that their clients have not consented to have revealed. The comments and comparison sections to Rule 1.6 underscore the remarkable breadth of the confidentiality notion, explicitly noting, among other things, that the confidentiality label attaches irrespective of the source of the information, irrespective of whether the client has requested the lawyer to respect the privacy of the information, and irrespective of whether dissemination of the information would cause harm to the client.⁵²

Clearly, the drafters of the Model Rules placed great importance on lawyers not betraying the confidences of their clients and allowing disclosure of such information only under extreme circumstances.⁵³ Model Rule 1.6 is the drafters' attempt to strike a balance between the interests of clients with those of the lawyers representing them.⁵⁴

Lawyers routinely seek advice from colleagues when working on particularly difficult representations.⁵⁵ Lawyers may confer with colleagues within their respective firms to seek guidance as to a client matter unless the client expressly forbids the matter to be discussed with other lawyers.⁵⁶

51. MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2018).

52. Peter K. Rofes, *Another Misunderstood Relation: Confidentiality and the Duty to Report*, 14 GEO. J. LEGAL ETHICS 621, 627–28 (2001); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client. . .”).

53. *See* Rofes, *supra* note 52, at 627 (interpreting Model Rule 1.6 as allowing lawyer disclosure of client information in narrowly-defined circumstances); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (listing situations in which client information may be revealed).

54. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998).

55. *See* Or. State Bar, Formal Ethics Op. 2011-184 (2011) (emphasizing the importance of lawyer-to-lawyer mentoring, whether face-to-face or online).

56. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(d)(1)–(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (allowing Texas lawyers to disclose unprivileged client information unless expressly told by the client not to do so); *see also* Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (noting Texas lawyers may reveal limited unprivileged confidential information unless expressly disallowed from doing so by the client).

Similarly, a lawyer may also consult with a lawyer unaffiliated with the firm without violating confidentiality principles unless the client expressly told the lawyer not to do so.⁵⁷ Regardless of whether the consultation between unaffiliated lawyers takes place at a continuing legal education event, a social gathering, or online, both the consulting lawyer and the consulted lawyer must take care to avoid violating confidentiality principles.⁵⁸

C. *Lawyers Consulting with Other Lawyers from Different Law Firms When They Are Not Associated in a Matter*

Lawyers from the same law firm may and almost always meet to discuss client matters, both online and in-person (this is the case even when the client employs one lawyer from the firm and the client is never told that the hired lawyer plans on conferring with another affiliated lawyer to discuss the client's matter).⁵⁹

Furthermore, when a client grants permission, a lawyer may choose to deal with another lawyer from an outside firm to aid in the representation.⁶⁰ A lawyer often chooses to take this course of action when the outside lawyer

57. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (concluding lawyer-to-lawyer consultations involving lawyers from two or more unaffiliated firms are generally permissible); see also Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (permitting Illinois lawyers to speak with outside lawyers about client representations—both in-person and online); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) (reasoning lawyers may consult with other lawyers from outside firms without committing a confidentiality violation); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (finding lawyers may consult with other, unaffiliated lawyers without violating confidentiality obligations); Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (concluding multi-firm lawyer-to-lawyer consultations do not violate confidentiality requirements).

58. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (cautioning lawyers to proceed with lawyer-to-lawyer consultations in a manner which respects confidentiality obligations); see also Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (concluding lawyer-to-lawyer consultations with outside lawyers are permitted, but the level of detail divulged in the consultation should be limited to avoid violating a lawyer's confidentiality obligations to a client); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) (noting the dangers associated with engaging in a lawyer-to-lawyer consultation with an unaffiliated lawyer); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (warning lawyers that while lawyer-to-lawyer consultations with outside lawyers are permitted, caution must be used to avoid divulging confidential, privileged information); Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (concluding multi-firm lawyer-to-lawyer consultations do not violate confidentiality requirements, but qualifying that confidentiality violations may still occur in situations where the consulting lawyer is careless and divulges too many details).

59. MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 5 (AM. BAR ASS'N 2018) (stating lawyers belonging to the same firm are generally free to discuss matters involving firm clients).

60. *Id.* r. 1.1 cmt. 6 (discussing circumstances in which a lawyer may associate with an outside lawyer to further a representation); *id.* r. 1.5(e) (explaining client representations and fees involving multiple law firms).

is highly skilled in the practice area that relates to the client matter at hand.⁶¹ As lawyers within the same firm can discuss client matters, unaffiliated lawyers can meet and confer about a client's case unless the client has expressly disapproved of such an arrangement.⁶²

However, there may be confidentiality concerns when a lawyer consults with an outside lawyer from an unaffiliated firm before getting the client's express consent. This grey area comes into play when the lawyer, initially hired by a client, consults with an outside lawyer who has superior knowledge or expertise on the issues underlying the client's case *before* notifying the client of the consultation. The consulting lawyer may feel the unaffiliated lawyer—with nothing at stake in the representation—will be able to provide a more neutral opinion than a lawyer within the firm.⁶³ The original version of the Model Rules of Professional Conduct did not directly address the confidentiality-related consequences of a lawyer reaching out to an unaffiliated lawyer to talk about the representation without expressly obtaining the client's express permission beforehand.⁶⁴

In all instances, a consulting lawyer must take great care to ensure that confidentiality obligations owed to the client are not compromised when engaging in a lawyer-to-lawyer consultation with a colleague. Especially in online lawyer-to-lawyer consultations, where the consulting attorney may not know who exactly will be reading the query posted on behalf of a client, the consulting lawyer should ensure not to consult with a lawyer who is counsel for a party whose interests are adverse to the consulting lawyer's client.⁶⁵ A unique danger associated with online lawyer-to-lawyer consultations is the permanent record of the consultation that remains on the Internet indefinitely, increasing the chances that an adverse party or attorney will use the information to harm the client.⁶⁶ Because of this, to

61. See ROTUNDA & DZIENKOWSKI, *supra* note 13, at 273–74 (explaining scenarios in which a lawyer may choose to consult with unaffiliated lawyers to further the representation).

62. See *id.* (noting lawyers may often consult with unaffiliated colleagues in situations where the consulting lawyer wishes to take advantage of the consulted lawyer's knowledge or expertise in a particular practice area).

63. See Drew L. Kershen, *The Ethics of Ethics Consultation*, PROF. LAW., May 1995, at 4 (discussing a lawyer's ability to include an unaffiliated lawyer in a representation).

64. See *id.* at 5 (noting the rise of lawyer-to-lawyer consultations involving multiple, non-affiliated lawyers or firms since the Model Rules were originally drafted).

65. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (cautioning consulting lawyers to avoid making disclosures when there exists a possibility the consulted lawyer receiving the confidential information may be opposing counsel).

66. See Paige A. Thomas, Comment, *Online Legal Advice: Ethics in the Digital Age*, 4 ST. MARY'S J. ON LEGAL MAL. & ETHICS 440, 443–44 (2014) (warning of confidentiality dangers associated with

protect a client's interests, the consulting lawyer would be wise to ask the consulted lawyer to agree to avoid representing a party with adverse interests.⁶⁷ Listservs and social media networks can be dangerous for lawyers. As an additional security step, a consulting lawyer should not disclose any more confidential information than necessary to obtain a useful response.⁶⁸ In virtually all cases, a lawyer is allowed to disclose some client information when engaging in a lawyer-to-lawyer representation so long as the consultation is not likely to damage attorney–client privilege or harm the client's interests in some other way.⁶⁹

As to lawyer-to-lawyer consultations, the American Bar Association (the ABA) has opined that no attorney–client relationship is formed between a consulting lawyer's client and a consulted lawyer,⁷⁰ but upon the consulting lawyer's request, the consulted lawyer may agree to avoid engaging in a representation adverse to the consulting lawyer's client—either expressly or implicitly.⁷¹ However, in the absence of such an agreement between the consulting lawyer and the consulted lawyer, the consulted lawyer can later engage a client whose interests oppose those of the consulting lawyer's client without violating either the duty of

lawyers offering advice online due to the permanence of the interaction); *see also* Lanctot, *supra* note 8, at 156–57 (explaining the dangers of lawyers offering advice online); Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. B. ASS'N (July 28, 2011), <https://webcache.googleusercontent.com/search?q=cache:aoJgRhzmgsj:https://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html+&cd=1&hl=en&ct=clnk&gl=us> [<https://perma.cc/6UW7-GVBQJ>] (discussing the confidentiality-related dangers stemming from lawyers using social media to offer advice).

67. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (advising consulting attorneys to obtain assurances from consulted lawyers that they will not engage in a representation adverse to the interests of the consulting attorney's client).

68. *See* Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious, It's Also Dangerous*, ABA J., Feb. 2011, at 53 (calling for bar associations to articulate guidelines and tips for lawyers to utilize social media without violating their confidentiality obligations to clients); *see also* Hricik, *supra* note 8, at 74 (noting the special hazards the Internet poses to a lawyer's confidentiality obligations).

69. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (pointing out the need for consulting lawyers to avoid seeking advice from lawyers who may use the divulged confidential information in a way that would harm the consulting lawyer's client).

70. *Id.*

71. *See id.* (noting the lack of a formal attorney–client relationship between the consulted lawyer and the consulting lawyer's client can, but does not always, limit the consulted lawyer's ability to represent adverse clients); *see also* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 419–20 (2000) (giving instances where confidentially agreements between lawyers may form implicitly).

confidentiality or any obligations under any of the conflict of interest principles.⁷²

Later renditions of the Model Rules of Professional Conduct attempted to clarify when and how a lawyer may engage in a lawyer-to-lawyer consultation without violating confidentiality principles.⁷³ The current edition of Rule 1.6(b)(4) provides that lawyers may disclose some confidential client information in order “to secure legal advice about the lawyer’s compliance with these Rules.”⁷⁴ Comments to the current version of Rule 1.6 indicate that, in some instances, disclosure of confidential client information may be necessary to comply with other professional responsibility principles, such as a lawyer’s duty of competence.⁷⁵

III. THE AMERICAN BAR ASSOCIATION’S POSITION ON LAWYER-TO-LAWYER CONSULTATIONS

A. *A Hypothetical*

Richard represents Jesse in a divorce. During the representation, complicated tax issues arise. As a solo practitioner, Richard is unable to look within his own office for assistance. Are there limits or issues preventing Richard from seeking assistance from experienced tax attorneys with which he is not affiliated?

A consulting lawyer like Richard may wish to seek advice from Cristopher, an unaffiliated tax law expert. For any number of reasons, Richard may not wish to engage Cristopher as co-counsel on the matter formerly. Because Cristopher is not affiliated with Richard, Richard must carefully consider how much information he can share with Cristopher without breaching his confidentiality obligations.

72. See MODEL RULES OF PROF’L CONDUCT r. 1.7(a) (AM. BAR ASS’N 2018) (prohibiting a lawyer from “represent[ing] a client if the representation involves a concurrent conflict of interest.”).

73. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 98-411 (1998) (explaining a consulted lawyer is not “obligated” to avoid undertaking a representation adverse to the consulting lawyer’s client).

74. See MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(4) (AM. BAR ASS’N 2018) (explaining lawyers may seek advice from other lawyers to further a representation or to ensure compliance with the rules of professional conduct).

75. See *id.* r. 1.6 cmt. 9 (stating a lawyer can consult with an outside lawyer without violating the ethics rules); see also *id.* r. 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

Situations like those above are common and have been addressed by the ABA.⁷⁶ As to lawyer-to-lawyer consultations between unaffiliated lawyers, ABA Opinion 98-411 had the following to say:

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 a benefit of their expertise on a difficult or unusual problem.⁷⁷

B. *The Consulting Lawyer*

Opinion 98-411, in essence, blesses lawyer-to-lawyer consultations between unaffiliated attorneys while cautioning both consulting lawyers and consulted lawyers to observe their confidentiality.⁷⁸ A particularly illuminating segment of Opinion 98-411 provides:

We interpret Rule 1.6(a), as illuminated by Comment [7], 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. However, the consulting lawyer's implied authority to disclose client information in consultation is limited, as our further discussion reflects.⁷⁹

Unless specifically told otherwise by a client, a lawyer may disclose a limited amount of information to other lawyers for purposes of effectively carrying out the representation.⁸⁰ If the lawyer cannot work out how to

76. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (addressing lawyer-to-lawyer consultations).

77. *Id.*

78. See *id.* (explaining Model Rule 1.6 allows for disclosure of confidential client information to unaffiliated lawyers when the consulting lawyer reasonably believes such disclosure will benefit the client's case).

79. *Id.*

80. See *id.* (noting Model Rule 1.6 allows for disclosure of confidential client information when the disclosure advances the consulting lawyer's knowledge or understanding of the underlying practice area pertinent to the representation).

represent a client, it is helpful for the lawyer to be able to reach out for assistance from another lawyer who has information that will enable the client to receive the necessary assistance. No matter how experienced a lawyer may be, nuances in a given representation may cause a lawyer to ask for assistance, because even the best lawyers may be perplexed from time to time.

Of course, a lawyer's ability to consult with other lawyers is not without limits. According to the ABA, when consulting with an unaffiliated lawyer, it is best to frame the inquiry in the abstract, when possible, to avoid unnecessarily revealing confidential information or giving away the client's identity when doing so would cause harm to the client.⁸¹ When a consulting lawyer discloses little to no confidential information pertaining to a client, the lawyer is unlikely to violate the confidentiality principles of Model Rule 1.6. However, ABA Opinion 98-411 warns consulting lawyers that the use of hypothetical or abstract inquiries does not automatically avoid the possibility of breaching confidentiality obligations, because a consulted lawyer may deduce information about the client—even the client's identity—if the consulted lawyer is familiar with the consulting lawyer's clientele.⁸²

When a consulting lawyer believes there is a serious possibility the consultation will result in the revelation of information protected by attorney–client privilege, the lawyer should obtain the client's express consent before proceeding with the consultation to avoid possibly waiving this sacred privilege.⁸³ The ABA cautions consulting lawyers that information otherwise protected by attorney–client privilege may be waived in lawyer-to-lawyer consultations, even if the consulting lawyer takes reasonable steps to keep the inquiry generic and abstract.⁸⁴ Moreover, a

81. *See id.* (recommending the use of generalities and hypotheticals to avoid breaches of confidentiality).

82. *See id.* (cautioning hypothetical usage may not avoid a confidentiality breach when the inquiry is for a client with such a unique set of circumstances that the client's identity could be deduced even if no actual names or locations are disclosed by the consulting lawyer).

83. *See id.* (explaining if the disclosure requires disclosing information protected by attorney–client privilege, the consulting lawyer “must obtain client consent for the consultation” before proceeding, to ensure the duty of confidentiality is not breached).

84. *See id.* (warning waiver of attorney–client privilege might result if the privileged information must be revealed in the consultation); *see also* Paula Schaefer, *Technology's Triple Threat to the Attorney–Client Privilege*, 2013 J. PROF'L.L. 171, 173 (2013) (“A confidential communication between attorney and client for the purpose of seeking or giving legal advice is privileged information. While privilege can be waived in various ways, the technology-related cause of privilege waiver is disclosure.”).

lawyer-to-lawyer consultation may backfire if the consulted lawyer turns out to be representing a party whose interests are, in fact, adverse to those of the consulting lawyer's client. If the consulted lawyer deduces the identity of the consulting lawyer's client, there is nothing unethical per se with the consulted lawyer continuing to listen to the consulting lawyer before proceeding to use the disclosed information against the consulting lawyer's client—unless the consulting lawyer gets the consulted lawyer to agree beforehand to keep information learned confidential.⁸⁵ The ABA stated that an express or implied agreement between a consulting lawyer and a consulted lawyer might be the only way for a consulting lawyer to be sure disclosed information will not be used against the client.⁸⁶ However, even if there is an agreement between the consulting lawyer and the consulted lawyer, any attorney–client privileged information proffered during the consultation will only remain protected if the law of the relevant jurisdiction indicates that privilege would not be waived.⁸⁷

C. *Avoid Consulting with Potential Adversaries; Get Assurances of Confidentiality*

Even if a consulting lawyer engages in a lawyer-to-lawyer consultation with another lawyer whose client has interests adverse to those of the consulting lawyer's client, there is nothing unethical about the consulted lawyer using the information against the consulting lawyer's client unless an express or implied agreement is entered into by both lawyers.⁸⁸ While the ABA approves of lawyer-to-lawyer consultations in most circumstances, Opinion 98-411 makes it clear that a lawyer should not consult with a colleague who may potentially represent a party with interests adverse to those of the consulting lawyer's client with the intention of disqualifying the

85. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (describing the relationship between the consulting attorney, the client, and the consulted attorney in the absence of a confidentiality agreement).

86. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (recommending consulting lawyers “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.”).

87. *Id.*

88. See *id.* (cautioning consulting lawyers to avoid consulting with someone known to have “represented the opposing party in the past without first ascertaining whether or not the matter is substantially related and whether the opposing party is represented by someone else in [the] matter” at hand; similarly, consulting lawyers “should exercise caution when consulting a lawyer who typically represents clients on the other side of the issue”—even if not the *specific* opposing party on the other side of the matter being consulted on).

consulted lawyer by attempting to compromise the consulted lawyer's ability to represent a given individual or entity.⁸⁹ To protect the interests of both the consulting lawyer and consulted lawyer (and their clients), they both should agree in advance—before any consultation transpires—that the consulted lawyer will not take on a client whose interests are at odds with those of the consulting lawyer's client directly after the consultation.⁹⁰ When a consulting lawyer is unable to get the consulted lawyer to agree to avoid taking on a representation directly adverse to the interests of the consulting lawyer's client, the consulting lawyer should speak with another colleague.⁹¹

D. *The Consulted Lawyer*

To be clear, consulted lawyers are not without their confidentiality considerations when offering advice to other lawyers. According to the ABA, while lawyer-to-lawyer consultations do not generally create an attorney–client relationship between the consulted lawyer and the consulting lawyer's client, the consulted lawyer may take on some duty to keep the learned information confidential; which impacts who the consulted lawyer may subsequently represent.⁹²

Noteworthy, in Opinion 98-411, the ABA stated that many of the confidentiality concerns that exist between a consulted lawyer and a consulting lawyer's client do not extend to *prospective* clients with whom the consulting lawyer has no formal representation agreement.⁹³ Many of the confidentiality concerns described above only apply when a consulting lawyer has an existing relationship with the client on whose behalf the

89. *See id.* (noting consultations “for the deliberate purpose of disqualifying potential adversaries would violate [Model] Rule 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation, and possibly [Model] Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice.”).

90. *See id.* (advising consulting attorneys to obtain assurances of confidentiality from consulted lawyers).

91. *See id.* (posing a rhetorical question to consulting lawyers as to whether or not they should proceed with the representation if they are unable to obtain assurances of confidentiality from the consulted lawyer).

92. *See id.* (discussing the possibility of a consulted lawyer acquiring the duty of confidentiality regarding information received). The consulted lawyer must also be sensitive to the duty of loyalty to clients when consulting for the benefit of the clients of another lawyer. *Id.*

93. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998); *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-358 (1990) (addressing confidentiality as applied to prospective clients).

consultation is made.⁹⁴ From the ABA's perspective, extending all confidentiality obligations applicable to lawyer-to-lawyer consultations made on behalf of an *existing* client to those made for a *prospective* client "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."⁹⁵

The ABA found that an agreement between a consulting lawyer and a consulted lawyer may be created either expressly—by an oral or written agreement—or implicitly, such as in situations where the consulted lawyer knows or should know that the information provided is given with the assumption that the consulted lawyer will keep the information confidential.⁹⁶ The ABA did not give clear guidance as to when an implicit agreement to preserve confidentiality regarding a lawyer-to-lawyer consultation is formed.⁹⁷

Consulted lawyers, like consulting lawyers, should ensure they are not giving advice, which may end up adverse to the interests of their clients.⁹⁸ When a consulted lawyer accidentally offers advice to a consulting lawyer whose client has adverse interests to the consulted lawyer's client, the consulted lawyer may be obliged to undertake the unpleasant task of telling their client what happened and explaining the negative consequences which may result from the mistake.⁹⁹ To avoid making this mistake, a consulted lawyer should ascertain the consulting lawyer's identity, along with the identity of the consulting lawyer's client, if possible, before responding to the consulting lawyer's inquiry.¹⁰⁰

94. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (concluding rules dealing with prospective clients are inapplicable to lawyer-to-lawyer consultations).

95. *Id.*

96. *Id.*

97. See *id.* (explaining a consulted lawyer may be obligated to protect the confidential information of a consulting lawyer's client—even in the absence of an express agreement—where the consulted lawyer would be led to infer from the consultation that the information provided was to be kept confidential).

98. *Id.*

99. *Id.*

100. See *id.* ("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.").

IV. ONLINE LAWYER-TO-LAWYER CONSULTATIONS

A. Overview

Social media is a broad term used to describe user interactions via technology, “with any combination of words, pictures, video, or audio.”¹⁰¹ Traditionally, lawyer-to-lawyer consultations took place face-to-face, but today, many lawyers prefer to communicate with colleagues over the Internet.¹⁰² A vast number of online lawyer-to-lawyer consultations take place on listservs, social media, and chat rooms. While the Internet makes lawyer-to-lawyer consultations more convenient than ever, lawyers who choose to discuss client matters in cyberspace must take care to ensure they comply with the confidentiality rules of their respective jurisdictions.¹⁰³ Given the popularity of online lawyer-to-lawyer consultations, multiple bar associations have felt the need to address their propriety and to offer guidance as to the confidentiality requirements imposed on the lawyers who engage in them.¹⁰⁴

By engaging in online consultations, lawyers can seek advice from colleagues not just within their respective jurisdiction, but from lawyers all over the nation, thus increasing the possibility that a useful answer will be obtained for their client.¹⁰⁵ Indeed, online lawyer-to-lawyer consultations help ensure a lawyer’s duty of competence is fulfilled, because now, even

101. Debra L. Bruce, *Social Media 101 for Lawyers*, 73 TEX. B.J. 186, 186 (2010).

102. *See id.* (recognizing lawyers’ appreciation for online discussion groups).

103. *See* Md. State Bar Ass’n Comm. on Ethics, Ethics Op. 2015-03 (2015) (evaluating the advantages and disadvantages of using the Internet to further a client representation); Leonard Bierman & Michael A. Hitt, *The Globalization of Legal Practice in the Internet Age*, 14 IND. J. GLOBAL LEGAL STUD. 29, 31 (discussing the effect of the Internet on the legal profession).

104. *See* Tex. Comm. on Prof’l Ethics, Op. 673, 81 TEX. B.J. 624, 624 (2018) (addressing online lawyer-to-lawyer consultations); *see also* Ill. State Bar Ass’n, Ethics Op. 12-15 (2012) (discussing confidentiality concerns associated with lawyer-to-lawyer consultations); Md. State Bar Ass’n Comm. on Ethics, Ethics Op. 2015-03 (2015) (evaluating the risks associated with online lawyer-to-lawyer consultations); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (dealing with confidentiality concerns posed by online lawyer-to-lawyer consultations on listservs and social media).

105. *See* Md. State Bar Ass’n Comm. on Ethics, Ethics Op. 2015-03 (2015) (addressing the emerging trend of lawyers using the Internet to confer with colleagues as to particularly difficult representations); *see also* John Council, *Social Media Mentoring*, TEX. LAW., Dec. 2018, at 12–13, (discussing the prevalence of online lawyer-to-lawyer consultations taking place on Facebook and other social media outlets); Nicole Black, *Should Lawyers Seek Advice from Other Lawyers in Online Forums?*, FREE LIBR. (Oct. 18, 2018), <https://www.thefreelibrary.com/should-lawyers-seek-advice-from-other-lawyers-in-online-forums%3F-a0559474874> [https://perma.cc/AU X7-REAC] (discussing the benefits and drawbacks of online lawyer-to-lawyer consultations).

solo practitioners in the most remote jurisdictions may obtain guidance from lawyers with expertise in many practice areas.¹⁰⁶

“[P]eer-to-peer listservs represent a powerful tool for lawyers.”¹⁰⁷ Listservs like APRL allow members to obtain expert advice from lawyers and legal academics in numerous jurisdictions, which affords a consulting lawyer’s client the knowledge of some of the nation’s most esteemed legal minds.¹⁰⁸ Lawyer-to-lawyer listservs allow attorneys to obtain informed opinions before proceeding with a proposed course of action in a client representation—which is especially useful in unique situations involving unsettled areas of law.¹⁰⁹ In addition to allowing lawyers to obtain information from many colleagues, online lawyer-to-lawyer consultations allow consulting lawyers to obtain informed responses to their inquiries more quickly than traditional face-to-face consultations.¹¹⁰ In a sense, listservs and social media networks level the playing field in the legal profession. A solo practitioner now has reliable access to professional colleagues who have the knowledge to assist with a variety of issues outside of his or her areas of expertise—a benefit previously available only to lawyers who were affiliated with large firms.¹¹¹ Because of the Internet, many client representations have improved, as with the increased access to qualified colleagues, lawyers can more competently advocate for and provide well-informed advice to their clients.¹¹² While online lawyer-to-lawyer consultations are beneficial in many ways, like in-person consultations, they are subject to confidentiality requirements.¹¹³

106. See Md. State Bar Ass’n Comm. on Ethics, Ethics Op. 2015-03 (2015) (explaining online lawyer-to-lawyer consultations allow attorneys to meet their professional responsibility standard of competency).

107. *Id.*

108. See *Mission*, *supra* note 6 (indicating one example of many tools utilized by practitioners to further client representations); see also Levin, *supra* note 2, at 589–90 (addressing the prominence of lawyer-to-lawyer listservs in the legal profession today).

109. See *Mission*, *supra* note 6 (highlighting a listserv many lawyers use to obtain qualified advice on how to proceed when facing a difficult case).

110. *Cf. id.* (indicating sociologists and psychologists are studying “the virtual communities that have been formed through computer-mediated communications” as one example of many tools utilized by legal practitioners).

111. See Md. State Bar Ass’n Comm. on Ethics, Ethics Op. 2015-03 (2015) (noting the importance of peer-to-peer listservs to solo practitioners).

112. See *id.* (recognizing solo practitioners may use listservs to obtain valuable advice for their clients in the absence of inter-office colleagues).

113. *Id.*; see also Caroline D. Buddensick, *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, 715–16, 718 (2009) (“The Internet and new technologies have transformed many facets of modern life,

Like face-to-face consultations, lawyers using listservs to seek advice should heed Model Rule 1.6's confidentiality requirements.¹¹⁴ When consulting online, lawyers should consider the *type* of information being sharing. According to Model Rule 1.6(a), lawyers are limited as to types of information that can be disclosed in an online consultation—a consulting lawyer may only make disclosures when the “client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [of Rule 1.6].”¹¹⁵

Bar associations that have addressed online lawyer-to-lawyer consultations advise consulting lawyers to make use of abstract inquiries to avoid revealing more confidential client information than necessary.¹¹⁶ However, because the audience involved in an online lawyer-to-lawyer consultation is large, it is difficult to know who, exactly, is in the audience. Even where a consulting lawyer uses hypotheticals, they may not completely prevent unwanted disclosure of confidential client information.¹¹⁷ Often an attorney utilizing a listserv to pose a question about a client representation will have his or her name included along with the inquiry, and the consulting lawyer may run the risk of revealing information prohibited by Model Rule 1.6 as a result.¹¹⁸ Model Rule 1.6 states in pertinent part:

This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.¹¹⁹

especially the ease and speed of communications. These pervasive changes affect lawyers personally as well as professionally. . . . Despite the benefits conferred by access to online professional discussion groups, ethical problems may arise when an attorney requests advice on specific legal questions[.]”.

114. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) (discussing the applicability of the confidentiality obligations contained within Model Rule 1.6 on online interactions by lawyers on listservs, social media, and blog websites).

115. MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2018).

116. Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015).

117. See *id.* (warning consulting attorneys that even if abstract questions are used, confidentiality problems may still arise).

118. See MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 4 (AM. BAR ASS'N 2018) (noting information which may not be disclosed by consulting lawyers).

119. *Id.*

The drafters of the Model Rules did not take issue with lawyers using hypothetical questions when engaging in lawyer-to-lawyer consultations when it would be unlikely that a consulted lawyer would be able to decipher the identity of a consulting lawyer's client.¹²⁰

Nevertheless, in situations with unique facts where the consulted lawyer may be able to deduce the identity of the consulting lawyer's client—even if no names or dates are used—the consulting lawyer should seek the client's permission before consulting online.¹²¹ Indeed, a lawyer can be disciplined for posting confidential information on a listserv without obtaining client consent because the posting, in this circumstance, can be particularly disadvantageous to the client.¹²²

Because there are many listservs and social media networks available today, lawyers wishing to discuss client matters should post their inquiries on secure platforms to avoid breaching confidentiality.¹²³ On unsecured platforms, information posted by a consulting lawyer may be publicly viewable.¹²⁴ If a lawyer, whose client has interests adverse to the consulting lawyer's client, searches either the client's name or the consulting lawyer's name, information may appear in an online search which could harm the interests of the consulting lawyer's client.¹²⁵ It is, therefore, critical that a consulting lawyer think not only long and hard about what they should post,

120. *Id.*

121. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (advising consulting attorneys to obtain permission from the client to consult even if the discussion is comprised of hypotheticals).

122. *See In re Quillinan*, 20 DB Rptr 288, 288–90 (2006) (finding a lawyer “violated her duty to preserve client confidences” when she “sent an email message to members of the Oregon State Bar Workers Compensation Section listserv” in which she “disclosed personal and medical information” learned during the representation of the client).

123. *See* Ty Alper, *Confidentiality in the Age of Social Media*, GP SOLO, Mar.–Apr. 2017, at 66–67 (“[O]nce a statement is posted on social media, it can be shared, commented on, misquoted, misunderstood, and exploited—by anyone, to the possible detriment of the client's interests.”).

124. *See id.* (“An otherwise trivial violation of Rule 1.6 can have larger ramifications for the client when broadcast, potentially, to the judge, the prosecutor, the media, and others.”).

125. *See* Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (cautioning consulting lawyers to take steps to ensure they do not seek advice from one who is or might be opposing counsel on the matter being consulted on); *see also* Peter Geraghty, *Ethics Tip - November 2016*, ABA ETHICSEARCH, (Jun. 7, 2019), https://americanbar.org/groups/professional_responsibility/services/ethicsearch/ethicstipnovember2016/ [<https://perma.cc/G6QL-LHRD>] (referencing the Illinois State Bar Association's opinion regarding listservs to bolster its message to use care when utilizing online lawyer-to-lawyer consultation platforms).

but also *where* it will be posted.¹²⁶ Indeed, in regard to online lawyer-to-lawyer consultations, consulting lawyers must avoid posting client information on unsecured websites.¹²⁷

B. *Treatment of Online Lawyer-to-Lawyer Consultations in Various Jurisdictions*

Various state bar associations have addressed the applicability of confidentiality rules to lawyer-to-lawyer consultations on listservs and other social media outlets.¹²⁸ Their opinions addressing online lawyer-to-lawyer consultations focus primarily on the relative ease with which the identity of a consulting lawyer's client could be inadvertently made public, or worse, how critical details related to the representation could be leaked to an adversary in the same dispute; all the more reason to limit the level of detail employed when making such consultations.¹²⁹

1. Texas

Under the Texas Disciplinary Rules, several considerations should be taken into account by a lawyer seeking to determine the amount and type of information that may be disclosed during an online lawyer-to-lawyer consultation. A recent Texas ethics opinion addressed the applicability of confidentiality principles to online lawyer-to-lawyer consultations taking place on listservs and Facebook.¹³⁰ The Opinion noted online

126. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) (explaining how a lawyer posting online may accidentally reveal a client's identity or information relating to the client's representation).

127. See *id.* (emphasizing the necessity of consulting lawyers ensuring both the content and method of inquiry comport with confidentiality requirements).

128. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 624 (2018) (opining on the confidentiality requirements related to online lawyer-to-lawyer consultations); see also Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (when using an online consultation resource, "both the consulting lawyer and consulted lawyer must take care to protect client confidentiality. . . ."); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) ("[P]eer-to-peer listservs represent a powerful tool for lawyers."); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (exemplifying proper usage of an internet consultation resource for lawyers).

129. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 624 (2018) (addressing the confidentiality ramifications of online lawyer-to-lawyer consultations); see also Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (discussing confidentiality concerns associated with lawyer-to-lawyer listservs); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) (touching upon the interplay between confidentiality obligations and listservs); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (dealing with confidentiality concerns posed by listservs and social media).

130. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 624 (2018) (opining on the confidentiality ramifications of lawyers using Facebook and listservs to consult with outside lawyers to discuss client matters); see also John Council, *Facebook Ethics*, TEX. LAW., Oct. 2018, at 4,

consultations are more prevalent than ever, and the issue was ripe for the Committee to address what Texas lawyers can and cannot do when participating in them.¹³¹ The Committee explained lawyer-to-lawyer consultations have been commonplace in the legal profession for some time, with lawyers frequently seeking guidance from their peers at continuing legal education events and other professional seminars.¹³² The Committee noted that the online variety of lawyer-to-lawyer consultations provides a new and exciting tool for the profession, and traditional mentoring done face-to-face may now be done online from the comfort of a lawyer's office or home.¹³³ Nevertheless, despite the many benefits of online lawyer-to-lawyer consultations, the Committee stated that Texas Disciplinary Rule 1.05, which imposes confidentiality obligations upon lawyers practicing in the state, limits what a lawyer may disclose when consulting online with colleagues.¹³⁴

Indeed, the most important professional obligation applicable when lawyers informally consult online in Texas is the consulting lawyer's duty of confidentiality to the client.¹³⁵ The Texas Disciplinary Rules generally prohibit lawyers from making disclosures of confidential client information except for situations where such disclosures are allowed or mandated by Rule 1.05.¹³⁶ Disciplinary Rule 1.05(a) explains that confidential information means not just information protected by attorney-client

("An opinion from the State Bar of Texas' Professional Ethics Committee recently . . . blessed lawyers' use of attorney internet forums to get answers to tricky legal questions, as long as the query does not give up too much about their client's identity."); Council, *Lawyers May Use Facebook*, *supra* note 15 (commenting on Texas Ethics Opinion 673, which concludes that Texas lawyers may use Facebook to engage in consultations with peers online); Andrea Shannon, *Texas Lawyers and Social Media*, SOC. MEDIA L. BULL. (Sept. 18, 2018), <https://www.socialmedialawbulletin.com/2018/09/texas-attorneys-social-media/> [perma.cc/75ML-LQTX] (discussing Texas Ethics Opinion 673 and the ability of Texas lawyers to engage in online lawyer-to-lawyer consultations).

131. *See* Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 624 (2018) (noting the frequency with which lawyers engage in online lawyer-to-lawyer consultations).

132. *Id.* at 624–25.

133. *See id.* (addressing the benefits of online lawyer-to-lawyer consultations).

134. *See id.* (noting the applicability of Texas Disciplinary Rule 1.05, which deals with confidentiality, to online lawyer-to-lawyer consultations); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (imposing confidentiality obligations upon lawyers practicing in Texas).

135. *See* Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 624–25 (2018) (stating the applicability of confidentiality principles to online lawyer-to-lawyer consultations); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (setting forth confidentiality obligations).

136. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a) (laying out when disclosure of confidential client information can or must be made).

privilege, but instead refers to *any* information pertaining to a given client or tendered by the client during the representation.¹³⁷

It is important to note that not all lawyer-to-lawyer consultations result in the disclosure of confidential client information. For example, a consulting lawyer could generally ask about a given procedural rule, statute, or relevant case without disclosing any confidential client information. To this point, the Texas Ethics Committee explained that the confidentiality requirements of Disciplinary Rule 1.05 only come into play when confidential information is *actually* disclosed; in other words, Rule 1.05 is not implicated simply because a consulting lawyer opts to utilize an online forum.¹³⁸

When it is not possible for a lawyer to obtain a helpful response to an inquiry with abstract questions alone, the lawyer may need to disclose some client information in order to further the representation. However, if confidential client information needs to be disclosed for a lawyer to obtain a satisfactory response, Disciplinary Rule 1.05's confidentiality obligations will be triggered because the provided disclosures would be "information relating to a client or furnished by the client . . . acquired by the lawyer during the course of or by reason of the representation of the client."¹³⁹ When Disciplinary Rule 1.05 attaches, the type of information that may be revealed by a consulting lawyer becomes limited.¹⁴⁰

Disciplinary Rule 1.05 contains multiple situations where a Texas lawyer's disclosure of client information is justified; these provisions are exceptions to the Rule's confidentiality mandates.¹⁴¹ Section (d)(1) of Disciplinary Rule 1.05 allows Texas lawyers to disclose unprivileged confidential information in situations "[w]hen impliedly authorized to do so in order to carry out the representation."¹⁴² Section (d)(2) of Disciplinary Rule 1.05 allows Texas lawyers to disclose confidential client information when a reasonable lawyer would deem it necessary to do so in order to "carry out the representation effectively."¹⁴³ Even when sections (d)(1) and (d)(2) of Texas Disciplinary Rule 1.05 apply, they only allow for the disclosure of

137. *See id.* (defining what constitutes "confidential information" under the rule).

138. *See* Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (explaining confidentiality obligations do not attach to inquiries involving *only* abstract questions of law).

139. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05.

140. *See id.* (laying out when disclosure of confidential client information can or must be made).

141. *Id.* R. 1.05(d)(1)–(2).

142. *Id.* R. 1.05(d)(1).

143. *Id.* R. 1.05(d)(2)(i).

limited amounts of confidential client information.¹⁴⁴ When a lawyer believes a contemplated lawyer-to-lawyer consultation will call for the disclosure of confidential client information, but may cast the client in a negative light if revealed to the wrong person, the Texas Ethics Committee suggests the consulting lawyer obtain the client's informed consent and notify the client of any adverse consequences which could stem from the unwanted disclosure.¹⁴⁵ In fact, the Texas Ethics Committee warns that when done incorrectly, lawyer-to-lawyer consultations may ultimately destroy attorney-client privilege.¹⁴⁶ In limiting a lawyer's ability to make disclosures under Rule 1.05, the Texas Ethics Committee explains that a lawyer cannot make disclosures which are otherwise authorized by sections (d)(1) and (d)(2) of Rule 1.05 when the client has specifically told the lawyer not to reveal the unprivileged confidential information to third parties.¹⁴⁷ The Ethics Opinion deems it best in situations where there is a risk of inadvertent disclosure of confidential information for the consulting lawyer to get both the client's permission *and* enter into an agreement with the consulted lawyer indicating the consulted lawyer will not use information learned during the consultation against the consulting lawyer's client.¹⁴⁸

By the logic of the Texas Ethics Committee, if a consulting lawyer is unable to procure an agreement from the responding lawyer that the information learned during the consultation will be kept confidential, the consulting lawyer should have no expectation that the responding lawyer will avoid using the confidential information to harm the consulting lawyer's client.¹⁴⁹ Indeed, when the consulting lawyer cannot be sure a confidentiality agreement from the responding lawyer can be procured, the consulting lawyer should consider that in determining if it would be in the

144. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (noting the limited scope of client disclosures made without a client's express consent under the Texas Disciplinary Rules).

145. See *id.* at 624–25 (advising consulting lawyers to obtain the client's informed consent when the contemplated consultation may result in negative consequences to the client).

146. *Id.*

147. See *id.* at 625 (explaining the clients specific instructions trump the lawyer's ability to disclose unprivileged confidential information); see also TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(d)(1)–(2) (explaining when confidential information may not be disclosed to further a representation).

148. Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018).

149. See *id.* (stating consulting lawyers cannot be certain that responding lawyers will not use information from the consultation to harm their clients, absent an express or implicit agreement).

client's best interest to proceed with the consultation, despite the agreement.¹⁵⁰

One of the main takeaways of Texas Ethics Opinion 673 is that Disciplinary Rule 1.05 permits a lawyer to disclose limited confidential client information to unaffiliated lawyers without first obtaining informed client consent when the lawyer believes "the revelation will further the representation by obtaining the responding lawyers' experience or expertise for the benefit of the client, and when it is not reasonably foreseeable that revelation will prejudice the client."¹⁵¹

2. Illinois

Recently, the Illinois State Bar Association issued an opinion essentially blessing online lawyer-to-lawyer consultations so long as Illinois Rule of Professional Conduct 1.6 is followed.¹⁵² The Illinois State Bar Association takes the position that online consultations are useful in furthering representations in a time-efficient manner, and such consultations occurring over lawyer-to-lawyer listservs can foster meaningful mentor relationships amongst practitioners.¹⁵³ However, the Illinois Bar warns that because inquiries posted on lawyer-to-lawyer listservs may be accessed by members and non-members of the listserv alike, such consultations can accidentally leak valuable, confidential information about a consulting lawyer's representation to an adversary.¹⁵⁴

In approving online lawyer-to-lawyer consultations, the Illinois State Bar lists time efficiency and furtherance of lawyers' duty of competence as reasons why limited disclosure of confidential client information is justified

150. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (stating when one lawyer consults with another lawyer who is not associated in the client matter, both must take care to fulfill their ethical obligations); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) (explaining lawyers interacting online may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules).

151. Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 624-25 (2018).

152. See Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (concluding Illinois lawyers may engage in online lawyer-to-lawyer consultations); see also ILL. RULES OF PROF'L CONDUCT r. 1.6 (2015) (setting forth confidentiality obligations for Illinois lawyers).

153. See Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (addressing online lawyer-to-lawyer consultations).

154. See *id.* (cautioning consulting lawyers not to disclose confidential information to opposing counsel when utilizing a lawyer-to-lawyer listserv).

in these interactions.¹⁵⁵ However, like ABA Opinion 98-411, the Illinois State Bar opinion warns consulting lawyers and consulted lawyers alike to take precautions in order to avoid breaching confidentiality or inadvertently creating conflicts of interests.¹⁵⁶ Indeed, the Illinois Opinion reminds lawyers that online consultations should not take the place of a lawyer's independent research on the client representation at hand.¹⁵⁷

Despite warning of the confidentiality-related dangers pertaining to online lawyer-to-lawyer consultations, the Illinois Opinion generally approves of their use, seeing listservs as a valuable tool upon which lawyers can test their comprehension of difficult questions of law and ensure that they competently represent their clients.¹⁵⁸ The Illinois Opinion echoes ABA Opinion 98-411 in asserting that listservs are especially valuable for solo practitioners and lawyers practicing in small firms which lack expertise in an area of law affecting the representation at hand; in this way, the Illinois Opinion found that these consultations serve the purpose of helping to level the playing field between large sophisticated firms and individual lawyers with more limited resources.¹⁵⁹

The Illinois Opinion attempts to define the parameters in which Illinois lawyers are to operate when engaging in lawyer-to-lawyer consultations; setting forth the applicable confidentiality restrictions.¹⁶⁰ Illinois Rule 1.6(a) provides, in pertinent part, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry

155. *See id.* (indicating why online lawyer-to-lawyer consultations are useful); ILL. RULES OF PROF'L CONDUCT r. 1.1 (2010) (requiring Illinois lawyers to provide competent representation to their clients).

156. *See* Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (cautioning consulting and consulted lawyers to avoid breaching confidentiality when engaging in lawyer-to-lawyer consultations); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) ("The consulting lawyer must take care not to breach his duty of confidentiality under Rule 1.6.").

157. Ill. State Bar Ass'n, Ethics Op. 12-15 (2012).

158. ILL. RULES OF PROF'L CONDUCT r. 1.1 (2010) (mandating attorneys in Illinois operate with competence).

159. *See* Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (highlighting the benefits of lawyer-to-lawyer consultations to solo practitioners or lawyers who are members of firms of modest resources); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) (seeing lawyer-to-lawyer consultations as a means of furthering lawyers' duty of competence to their respective clients).

160. *See* Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (noting the interplay between Illinois Rule 1.6 and online lawyer-to-lawyer consultations); *see also* ILL. RULES OF PROF'L CONDUCT r. 1.6 (2010) (mandating Illinois attorneys keep their clients' information confidential).

out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).”¹⁶¹

Furthermore, the comments to Illinois Rule 1.6 indicate that Illinois lawyers have implied authority to confer with other member-lawyers within their same respective firms “unless the client has instructed that the particular information be confined to specified lawyers.”¹⁶² As stated above, this is not always possible when the consulting lawyer is a solo practitioner or a member of a small firm lacking the needed expertise in an area of law.

Indeed, under the Illinois rule governing confidentiality, unless a client specifically instructs otherwise, or a particular situation makes disclosure disadvantageous to the client, “a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.”¹⁶³ However, the comments to Illinois Rule 1.6 do not elaborate on what specific types of information a lawyer has implied authority to disclose.

Ultimately, the Illinois State Bar Association concluded that while lawyer-to-lawyer consultations are good for the legal profession, consulting lawyers should be cautious when seeking advice from colleagues on the Internet. In the Illinois State Bar Association’s view, information that is not protected by the attorney–client privilege may be proffered in online lawyer-to-lawyer consultations without the client’s express consent (unless the client says otherwise), and confidentiality principles apply equally to consulting lawyers and the consulted lawyers in these scenarios.¹⁶⁴

3. Oregon

The Oregon State Bar has also addressed online lawyer-to-lawyer consultations, seeing such interactions as a mentorship and educational tool that serves an increasingly “important” role in the Oregon legal community.¹⁶⁵ In Opinion 2011-184, the Oregon State Bar emphasized

161. ILL. RULES OF PROF’L CONDUCT r. 1.6 (2010).

162. *Id.* at cmt. 5.

163. *Id.*

164. *See* Ill. State Bar Ass’n, Ethics Op. 12-15 (2012) (applying Illinois confidentiality principles to online lawyer-to-lawyer consultations); *see also* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 98-411 (1998) (addressing confidentiality concerns associated with lawyer-to-lawyer consultations).

165. Or. State Bar, Formal Ethics Op. 2011-184 (2011) (stating the importance of lawyer-to-lawyer consultations—both in-person and online).

the importance of lawyers being able to reach out beyond the resources of their respective firms in order to seek the advice of unaffiliated colleagues in furtherance of competently carrying out client representations.¹⁶⁶ The Oregon Opinion recommends consulting lawyers keep inquiries as generic as possible to avoid a confidentiality breach while warning that “[f]raming a question as a hypothetical is not a perfect solution . . . [l]awyers face a significant risk of violating Oregon RPC 1.6 when posing hypothetical questions if the facts provided permit persons outside the lawyer’s firm to determine the client’s identity.”¹⁶⁷ When abstract questions do not yield sufficient responses, the Oregon State Bar has suggested consulting lawyers procure client consent, either expressly or implicitly, “where the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer’s client” even if no actual client names are used.¹⁶⁸

The Oregon State Bar warned that a consulted lawyer owes no duty of confidentiality to a consulting lawyer’s client, such that the consulted lawyer may potentially use information from the consultation in a manner that can cause the consulting lawyer’s client harm in the future.¹⁶⁹ However, while consulted lawyers are under no duty of confidentiality to clients of consulting lawyers, they must ensure not to provide advice which can end up hurting their own clients.¹⁷⁰ The Oregon Opinion concludes by approving of online lawyer-to-lawyer consultations, while suggesting consulting lawyers take into account that their inquiries may be received by

166. See *id.* (recommending the use of hypotheticals in online lawyer-to-lawyer consultations to ensure confidentiality obligations are met); see also OR. RULES OF PROF'L CONDUCT r. 1.1 (2018) (requiring Oregon lawyers to carry out client representations with competence).

167. See Helen Hirschbiel, *Ethics Advisory Opinions: What Are They and How Do I Get One?*, OR. ST. B. BULL., Aug.–Sept. 2015, at 10 [hereinafter Hirschbiel, *Ethics*] (explaining hypotheticals are necessary for online lawyer-to-lawyer consultations to avoid inadvertently revealing a client’s identity when the representation involves a unique fact pattern); see also OR. RULES OF PROF'L CONDUCT r. 1.6 (2018) (outlining confidentiality obligations of Oregon lawyers); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (recommending the use of hypothetical inquiries to consulting lawyers).

168. Hirschbiel, *Ethics*, *supra* note 167, at 12; see Or. State Bar, Formal Ethics Op. 2011-184 (2011) (giving guidance to consulting lawyers where abstract inquiries will not lead to helpful answers).

169. See Or. State Bar, Formal Ethics Op. 2011-184 (2011) (explaining consulted lawyers are not necessarily obligated to keep information learned about a consulting lawyer’s client confidential); see also Helen Hirschbiel, *The Many Faces of Mentoring: Confidentially Speaking*, OR. ST. B. BULL., June 2011, at 10 [hereinafter Hirschbiel, *The Many Faces*] (discussing Oregon Ethics Opinion 2011-184).

170. Or. State Bar, Formal Ethics Op. 2011-184 (2011); Hirschbiel, *The Many Faces*, *supra* note 169.

an adversary, making hypothetical inquiries containing little to no confidential client information optimal.¹⁷¹

4. Maryland

A recent Maryland ethics opinion concluded that a lawyer could confer with unaffiliated colleagues via listservs and social media to fulfill the duty of competence owed to clients; finding these virtual consultations further the interests of the Maryland legal community as a whole.¹⁷²

The Maryland State Bar Association opined that a prudent lawyer who wishes to avoid breaching his or her duty of confidentiality should obtain informed consent before divulging unique facts or circumstances pertaining to a client—which might inadvertently reveal the client’s identity—when engaging in an online lawyer-to-lawyer consultation¹⁷³ While an agreement between the attorney and client does not mitigate all possible harm that can stem from lawyer-to-lawyer consultations, it mitigates many of the dangers a lawyer encounters when engaging in such a consultation without explaining to the client why such an arrangement would be beneficial.¹⁷⁴

According to Maryland Opinion 2015-03, when a consulting lawyer has a client’s informed consent, lawyer-to-lawyer consultations are permissible, and the consulting lawyer may disclose confidential client information so long as doing so will not negatively impact the representation of the client.¹⁷⁵ To the Maryland State Bar Association, online lawyer-to-lawyer consultations are a valuable, yet potentially hazardous, tool which should not be misused, because the use of lawyer-to-lawyer listservs for client

171. See Or. State Bar, Formal Ethics Op. 2011-184 (2011) (concluding with a recommendation that consulting lawyers keep their inquiries general or hypothetical in nature); see also Hirschbiel, *The Many Faces*, *supra* note 169, at 11 (explaining the use of hypotheticals in generic terms in an effort to avoid ethical issues).

172. See Md. State Bar Ass’n Comm. on Ethics, Ethics Op. 2015-03 (2015) (addressing confidentiality concerns pertaining to lawyer-to-lawyer listservs); see also MD. ATT’Y RULES OF PROF’L CONDUCT r. 1.6 (2016) (detailing Maryland lawyers’ confidentiality obligations); *id.* r. 1.1 (2016) (governing the duty of Maryland lawyers to provide competent representation to their clients).

173. Md. State Bar Ass’n Comm. on Ethics, Ethics Op. 2015-03 (2015). The MSBA indicates that it agrees with the Oregon Bar Association’s position that “[w]here the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer’s client without the client being named, the lawyer must first obtain the client’s informed consent for the disclosure.” *Id.* (quoting Or. State Bar, Formal Ethics Op. 2011-184 (2011)).

174. See *id.* (explaining why a consulting lawyer should get client permission before engaging in an online lawyer-to-lawyer consultation).

175. *Id.*

gossip and other forms of abuse runs the risk of leaking confidential client identities—or worse—damaging the attorney–client privilege.¹⁷⁶

5. Summary of Positions Taken by State Bar Associations

All jurisdictions that have addressed online lawyer-to-lawyer consultations generally approve of their use while stressing the need for lawyers to adhere to their confidentiality obligations.¹⁷⁷ The bar associations that have broached the topic have concluded that the most ethical approach a consulting lawyer can take is to utilize abstract or general inquiries where possible, and where abstractions will not yield useful responses, to obtain client permission before engaging in the consultation while seeking the consulted lawyer's agreement to keep all information learned confidential.¹⁷⁸ Additionally, a lawyer who considers engaging in a lawyer-to-lawyer consultation should understand that even when all reasonable steps are taken to avoid disclosure of confidential information to adversaries, this may happen anyway. It is hard for the consulting lawyer to control who will read the inquiry, and the consulting lawyer may unwittingly consult with an adverse lawyer. Absent an agreement, an adverse lawyer is under no obligation to the consulting lawyer to avoid using information learned during the consultation to harm the interests of the consulting lawyer's client.¹⁷⁹ Given the many benefits to online lawyer-to-lawyer consultations and the harmful consequences which may result if the information proffered by the consulting lawyer ends up in the wrong hands, a lawyer should be cautious when deciding to utilize listservs or social media on behalf of a client.

176. *See id.* (summarizing the positive and negative aspects of online lawyer-to-lawyer consultations).

177. Ill. State Bar Ass'n, Ethics Op. 12-15 (2012); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015); Or. State Bar, Formal Ethics Op. 2011-184 (2011); Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018).

178. Ill. State Bar Ass'n, Ethics Op. 12-15 (2012); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015); Or. State Bar, Formal Ethics Op. 2011-184 (2011); Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018).

179. *See* Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (warning consulting lawyers that online lawyer-to-lawyer consultations may inadvertently lead to the disclosure of confidential client information to adverse parties); *see also* Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (same); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) (same); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (same).

V. RECOMMENDATIONS AND SOLUTIONS:
CONSULT HYPOTHETICALLY, LIMIT THE INFORMATION REVEALED,
OR OBTAIN A CONFIDENTIALITY AGREEMENT
FROM THE CONSULTED LAWYER

Generally, lawyer-to-lawyer consultations regarding general questions of law that do not lead to the disclosure of confidential client information are not subject to confidentiality obligations and do not require advance client consent.¹⁸⁰ In similar fashion, a lawyer-to-lawyer consultation can be conducted effectively through the use of hypothetical scenarios and where the consultation does not involve a situation so unique as to out the client's identity—even when no names are used—does not require client consent.¹⁸¹ However, the use of hypotheticals does not absolve the consulting lawyer of the confidentiality obligations.¹⁸² This danger is especially apparent when the consulting lawyer's client has a situation with a unique set of facts, or when the consulting lawyer's identity is known and represents a finite number of clients. In such cases, the consulted lawyer or another reader may be able to determine who the consulting lawyer's client is. Also, if the facts in the inquiry include particularly embarrassing or damaging information about said client, the undesired viewer may then act in a way that is detrimental to the client's position—constituting a breach of confidentiality on the consulting lawyer's part.¹⁸³

Unquestionably, the technological advancements enabling lawyers to seek the advice of others from across the nation with a wide, collective set of knowledge and skill has been a positive thing for the legal profession. For the first time in the legal profession, Lawyer A, a solo practitioner in the first year of practice, may consult with Lawyer B, an established lawyer with

180. See ROTUNDA & DZIENKOWSKI, *supra* note 13 (explaining how the use of general questions of law do not trigger the confidentiality obligations which would arise if a consulting lawyer disclosed privileged client information during the consultation).

181. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (indicating a lawyer is not immune from all liability related to breaches of confidentiality just because hypotheticals may be utilized in the inquiry rather than client-specific information); see also Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (same); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) (same); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (same).

182. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 625 (2018) (requiring lawyers to continue adherence to their confidentiality obligations even when making use of hypothetical inquiries); see also Ill. State Bar Ass'n, Ethics Op. 12-15 (2012) (same); Md. State Bar Ass'n Comm. on Ethics, Ethics Op. 2015-03 (2015) (same); Or. State Bar, Formal Ethics Op. 2011-184 (2011) (same).

183. See ROTUNDA & DZIENKOWSKI, *supra* note 13 (stating consulting lawyers should disclose only the facts necessary to elicit a satisfactory response from the consulted lawyer).

ample knowledge in the relevant practice area location one thousand miles away, all from the comfort of Lawyer A's own office. Except when specifically instructed otherwise, Lawyer A may now use Lawyer B's superior knowledge and skill, providing a satisfactory representation to Lawyer A's client while saving valuable time and effort. Lawyer A can use an arsenal of online tools to connect with Lawyer B, such as a lawyer-to-lawyer chat room, a professional listserv, or even Facebook—at least in Texas—to advance the representation.¹⁸⁴

In sum, when engaging in lawyer-to-lawyer consultations, lawyers should make use of hypotheticals, obtain client consent when hypotheticals are unhelpful, obtain a confidentiality agreement from the consulted lawyer, and utilize reputable online forums to engage in the consultation—like the listserv hosted by APRL or Texas Bar Circle, as both websites restrict their membership to practicing lawyers and academics, while employing data security measures to prevent unauthorized access.¹⁸⁵ Taking these steps will afford the consulting lawyer the benefit of speaking with colleagues who possess superior knowledge or skill in the practice area underlying the subject of the consultation, while vastly decreasing the likelihood that the consultation will be counterproductive.

VI. CONCLUSION: LAWYERS MAY CONSULT WITH OTHER,
OUTSIDE LAWYERS ON PEER-TO-PEER LISTSERVS AND
OTHER SOCIAL MEDIA PROVIDED THE CONSULTING LAWYER
AVOIDS ANY RISK THAT THE CLIENT COULD BE IDENTIFIED
BY VIRTUE OF THE INQUIRY

For better or for worse, one thing is certain: the Internet and social media are here to stay. Each year, more and more people connect on social media, and by now, it is apparent that it represents the future of communication.¹⁸⁶ As with virtually anything, there are risks associated with the use of social

184. See Tex. Comm. on Prof'l Ethics, Op. 673, 81 TEX. B.J. 624, 624–25 (2018) (permitting lawyers to utilize online discussion forums to engage in lawyer-to-lawyer consultations).

185. See Robert L. Tobey, *How Social Media Affects Lawyers, Judges, and Juries: Tips to Avoid Disaster*, 26 APP. ADVOC. 560, 569–71 (2014) (cautioning lawyers to only use reputable websites); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477 (2017) (emphasizing the importance of lawyers utilizing secure websites when engaging in client matters online); *About APRL*, ASS'N PROF'L RESP. LAW., <https://aprl.net/about-aprl/> [<https://perma.cc/3HFG-NKT8>] (indicating the APRL listserv is available only to members).

186. See CAROLYN ELEFANT & NICOLE BLACK, *SOCIAL MEDIA FOR LAWYERS: THE NEXT FRONTIER* 6–7 (2010) (commenting on the prevalence of social media in the modern world).

media.¹⁸⁷ It would be an overreaction for lawyers to entirely avoid using social media just because its use carries risk. But, lawyers should use social media with caution, as its *misuse* has the potential to damage a lawyer's career.¹⁸⁸ Indeed, the Internet offers many exciting new ways to connect and share information that can increase the overall competence with which lawyers represent their clients in today's modern world. The ability of a lawyer to connect with a colleague thousands of miles away is something that may have been unimaginable one hundred years ago. Lawyers can now share information via listservs and social media and can even attach documents to illustrate the context in which the inquiry should be viewed. Online lawyer-to-lawyer consultations are helping to level the playing field between solo practitioners and large, sophisticated firms. Today, a solo practitioner located in a town where he or she may be one of only a handful of practicing attorneys can now connect with colleagues across the street or across the country, vastly increasing the chance of finding the answer to a question, which helps clients who may have limited access to attorneys.

Indeed, a practicing lawyer today is not limited to personal knowledge (in the case of solo practitioners) or the knowledge of those the lawyer is affiliated with, but the collective knowledge of the greater legal profession. A lawyer may reach out to a knowledgeable colleague affiliated with a different firm for a consultation and advise without the need to retain this colleague as co-counsel to the representation. This saves small firms and solo practitioners, both the money and time associated with traveling physically to the consulted lawyer's jurisdiction to meet face-to-face.

Despite the benefits of online lawyer-to-lawyer consultations, there are confidentiality concerns associated with their use. Lawyers must ensure that they do not inadvertently make unauthorized disclosures of confidential client information when engaging in such consultations. Lawyers engaged in online lawyer-to-lawyer consultations should heed the following safeguards: frame inquiries as general questions of law to avoid all confidentiality obligations, utilize hypothetical scenarios loosely based on real client circumstances to minimize the chance of unauthorized disclosures, obtain client permission before disclosing client-specific confidential details where hypotheticals are not of use, and seek an agreement of confidentiality from consulted lawyers. If a consulting lawyer

187. Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, BENCH & B. MINN., Nov., 2010, at 16.

188. *See id.* (addressing numerous risks that attorneys face when using social media).

follows the aforementioned steps, there is a minimal risk of violating the duty of confidentiality to the client, while also a tremendous increase in the chances of moving the representation along, and having the benefit of an informed colleague's opinion on the matter in question.