

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 514
August 15, 2005

**ETHICAL ISSUES INVOLVING LAWYER AND JUDICIAL
PARTICIPATION IN LISTSERV COMMUNICATIONS**

I. SUMMARY OF OPINION

Listserv¹ communications present the possibility for ex parte communications between lawyers and judicial officers who are involved in a case. Inadvertent contact, in that context, likely violates no ethical proscription; and, too, lawyers may rely upon the independent duties of judges to avoid such ex parte contacts. Regardless, however, problems could still arise depending upon the communication's nature, or an unintended recipient's response. Since attorneys must always remain mindful of their duties to protect confidential client information, and one never knows who might read or react to e-mail posted to a listserv, attorneys should avoid including information in listserv postings identifiable to particular cases or controversies.

II. HYPOTHETICAL PREMISE FOR OPINION

A local bar association section is composed of practicing lawyers and members of the bench. In order to facilitate communication among these individuals, the bar has created a listserv. All the members of the section are permitted to participate in a free flowing exchange on the listserv of information including tips on procedure, research, drafting documents, and

¹A listserv is a public or semi-public, non-confidential forum for the exchange of e-mail. Like a newsgroup where people exchange information about a wide array of subjects, listservs use the Internet e-mail system to exchange messages. Each listserv targets pre-determined topics and discussions. Subscribing to a listserv group adds the subscriber's name to its mailing list—every time someone sends an e-mail to the group, that e-mail is automatically forwarded to everybody on the listserv's mailing list. "Listserv" software was developed in the mid-1980's, and the term is now used generically to describe electronic mailing lists. Although L-Soft International, Inc. has registered "Listserv" as its trademark, this

litigation techniques. One member posted an inquiry on the listserv seeking an accountant to serve as an expert witness. Another responded by recommending a specific CPA and included the CPA's credentials. Yet another member read the recommendation and replied with sharp criticism of that same CPA. A judge who actively participates on the listserv read the messages, realized that this particular CPA was scheduled to testify the next week before the judge, and then posted his own message on the listserv advising that messages be censored in order to avoid ex parte contacts.

III. QUESTIONS PRESENTED

Do lawyers participating in e-mail communications with a listserv or "chat room"² risk engaging in improper ex parte communications if judges in front of whom the lawyers may appear also have access to that same information? If a judge on the listserv encounters a communication pertinent to a case in which he or she is presiding, do the listserv communications constitute improper ex parte communications with the judge? What are the obligations and duties of a judge who receives a communication pertinent to a pending case? Do listserv communications create special issues regarding lawyer's duties of confidentiality?

IV. AUTHORITIES CITED

CASES

Bell v. Staacke (1911) 159 Cal. 193

Durbin v. State Bar (1979) 23 Cal.3d 461

Edwards v. State Bar (1990) 52 Cal.3d 28

opinion references no trademark and only uses "listserv" in the generic sense.

²A chat room is a place on the Internet where people with similar interests can meet and communicate

Fellows v. Superior Court (1980) 108 Cal.App.3d 55
Hamilton v. State Bar (1979) 23 Cal.3d 868, 874
In re Jonathan S. (1979) 88 Cal.App.3d 468
In re Jordan (1972) 7 Cal.3d 930
Izazaga v. Superior Court (People) (1991) 54 Cal.3d 356
King v. State Bar (1990) 52 Cal.3d 307
McKesson HBOC, Inc. v. Superior Court (State of Oregon) (2004) 115 Cal.App.4th 1229
McKnight v. State Bar (1991) 53 Cal.3d 1025
U.S. v. Councilman (1st Cir. Aug. 11, 2005) 2005 WL 1907528
Wilbanks v. Wolk (2004) 121 Cal.App.4th 883
Zaheri v. New Motor Vehicle Board (1997) 55 Cal.App. 4th 1305

STATUTES

Business & Professions Code section 5499.30
Business & Professions Code section 6068
Business & Professions Code section 6158
Business & Professions Code section 6158.3
Code of Civil Procedure section 1281.85
Code of Civil Procedure section 1899
Code of Civil Procedure section 2018
Evidence Code section 952
18 USCA § 2517

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together by typing synchronous messages on their computer. Most chat rooms have a particular theme, but a theme is not required. Often, people can enter a chat room without any verification of who they are.

Rule 379

Rule 955

Appendix, Div VI, Ethics Standards for Neutral Judges in Contractual Arbitration

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Rule 1-710

Rule 5-300

CALIFORNIA CODE OF JUDICIAL ETHICS

Canon 2A

Canon 4

Canon 4B

Canon 6D

ABA/LOCAL BAR ETHICS OPINIONS

Formal Opinion No. 99-413 of the American Bar Association

Formal Opinion No. 97-002 of the Orange County Bar Association

ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT

Rule 3.5

INTERNET WEB SITES

<http://lists.washlaw.edu/mailman/listinfo/legaethics/> (Washburn University)

<http://www.abtl.org/welcome.htm> (The Association of Business Trial Lawyers)

<http://www.innsofcourt.org> (The American Inns of Court)

http://www.spam.com/ci/ci_in.htm (Hormel Foods Corporation)

V. DISCUSSION

1. A LISTSERV IS AN E-MAIL RENDERING OF THE “LETTERS TO THE EDITOR” PAGE

The methods that attorneys use to communicate with their clients have changed along with developments in technology. We once mailed letters or faxed information. Now we employ digitalized methods of communicating with clients and others.

Regardless of the methods used to communicate with their clients and other lawyers, attorneys must maintain their clients' confidences and secrets.³ Few ethics rules anticipate the mode of communication to be used or its potential problems.⁴ A communication between attorney and client does not lose confidentiality solely because it is transmitted by fax, cell phone or other electronic means.⁵ Lawyers are not required to encrypt e-mail containing confidential client communications because e-mail poses no greater risk of interception and disclosure than regular mail, phones or faxes.⁶

So it is no longer uncommon for attorneys and clients to communicate with one another, and with third parties, through e-mail. But some of the very advantages in using e-mail impose risks not inherent in more traditional forms of communication. Because e-mail is relatively informal, it may contain content not appropriate for should-be-formal communications. Because e-mail content is electronic and therefore invisible to the human eye, e-mail can contain hidden content, either data, or malicious programming. E-mail can also be sent simultaneously–

³“It is the duty of an attorney . . . To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Business and Professions Code section 6068(e)(1). “[T]he protection of confidences and secrets is not a rule of mere professional conduct, but instead involves public policies of paramount importance which are reflected in numerous statutes.” *In re Jordan* (1972) 7 Cal.3d 930, 940-941.

⁴California Business and Professions Code sections 6158 through 6158.3, which govern attorney advertising by “electronic media,” are unusual since most expressions of attorney ethics fail to specify the mode of communication.

⁵Evid. Code §952; 18 USCA § 2517(4)–privileged wire/oral transmissions intercepted in accordance with (or in violation of) federal wiretapping statute do not lose their privileged character; Orange County Bar Assn. Form. Opn. 97-002. Correspondingly, the First Circuit held in its en banc decision in *U.S. v. Councilman* (1st Cir. Aug. 11, 2005) 2005 WL 1907528 that a third party’s interception of e-mail while on its way to the recipient violates the Electronic Communications Privacy Act.

⁶ABA Form. Opn. 99-413–unencrypted e-mail sent over the Internet “affords a reasonable expectation of privacy from a technological and legal standpoint”; see also Orange County Bar Assn. Form. Opn. 97-002, concluding that encryption is encouraged but not required.

inadvertently or intentionally—to thousands of e-mail addresses,⁷ yet it is impossible to know who might have read any given e-mail unless a recipient confirms the same. An e-mail “address” is an anonym—it merely identifies an e-mail account; it neither specifies any particular computer nor identifies any of the persons who might receive the e-mail sent to that address.

A listserv is a public conversation. It is transmitted through the World Wide Web, which, as a whole, has been analogized to a public bulletin board.⁸ Even communicating through a closed listserv⁹ is like e-mailing a letter to the editor of a newspaper, or participating in a call-in radio show or a conference call, via e-mail. Although the hypothetical may seem not to involve client confidences, such concerns must be paramount at all times. New forms of communication can seductively cause lawyers to forget their ongoing duty to maintain the confidences of their respective clients.

Since, for the purposes of this discussion, it is the content of the e-mail which is critical, it ought not matter whether one is seeking or furnishing information through a listserv. An attorney *responding* to a request for an expert or other information on a listserv is not necessarily rendering legal services¹⁰ within the meaning of the ethical rules; particularly where opinion about another is the only information being conveyed. Nor would the *request* on a listserv for information such as an expert referral seem to impair obligations of confidentiality.

⁷*Unsolicited* commercial e-mail (“UCE”) is almost universally called “spam,” because of a *Monty Python* skit wherein a group of Vikings sang a chorus of “SPAM, SPAM, SPAM ...” in an increasing crescendo, drowning out other conversation. Hormel Foods Corporation (which does not object to use of the term “spam” to describe UCE so long as it is all in lower case letters to avoid confusion with its trademark, “SPAM”) says the “analogy applied because UCE was drowning out normal discourse on the Internet.” (See http://www.spam.com/ci/ci_in.htm.)

⁸*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883,897, concluding web site statements were made in a public forum.

⁹A listserv may be open to all, or it may be “closed,” that is, its access may be limited to particular members or registrants. For instance, the Association of Professional Responsibility Lawyers (APRL) maintains a closed listserv for its membership—access is available only to its members.

¹⁰As regards workers’ compensation, the term “legal services” includes “any service which refers potential clients to any attorney.” (Bus. & Prof. Code §5499.30(b).)

But given the inherently public nature of a listserv, a discussion about an expert referral on a listserv, whether requesting or responding with information, *could* impair a lawyer’s ability to continue representing a client, by improvidently disclosing information or engaging in ex parte communications with members of the bench.¹¹ Arguably, an attorney opining in reply about an expert might reveal mental impressions and effect a waiver of work product doctrine. Though “work product” is a statutory creation affecting evidentiary rather than ethical concepts,¹² and despite that the attorney—not the client—is the exclusive holder of work product protection,¹³ a cavalier waiver of work product protection could have adverse impact and might be rued.¹⁴

2. LAWYERS MUST ALWAYS AVOID “EX PARTE” COMMUNICATIONS WITH JUDGES CONCERNING THE MERITS OF PENDING MATTERS

A lawyer “shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except: (1) In open court; or (2) With the consent of all other counsel in such matter; or (3) In the presence of all other counsel in such matter; or (4) In writing with a copy thereof furnished to such other counsel; or (5) In ex parte matters.”¹⁵

Ex parte contacts with judges erode public confidence in the fairness of the

¹¹See, e.g., *Bell v. Staacke* (1911) 159 Cal. 193, 196-197 (letter to opposing counsel as admission).

¹²See California Code of Civil Procedure section 2018.

¹³*Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 63.

¹⁴See, e.g., *Izazaga v. Superior Court (People)* (1991) 54 Cal.3d 356, 385, discussing “how the work product privilege plays an essential role in enabling attorneys to properly represent their clients’ interests” and avoids “[i]nefficiency, unfairness and sharp practices”; and *McKesson HBOC, Inc. v. Superior Court (State of Oregon)* (2004) 115 Cal.App.4th 1229, 1240 [parties’ interests in maintaining confidentiality might be damaged if work product disclosed.]

¹⁵California Rule of Professional Conduct 5-300(B)(5). The Rules of Professional Conduct prohibit only *unauthorized* ex parte contact and not, e.g., an ex parte application made pursuant to Rule 379 of the California Rules of Court.

administration of justice, “the very cement by which the system holds together.”¹⁶ The prohibition and restrictions “apply equally whether the judge or the lawyer initiates the contact.”¹⁷

Rule 5-300(B) incorporates two critical principles. The communication must be on the merits, and it must involve a pending matter. Yet an attorney can *willfully* violate an ethical rule without engaging in any evil or bad faith,¹⁸ and without even knowing the specific rule he or she is violating.¹⁹

Though an “innocent” suggestion of an expert witness in response to an inquiry would seem to lack the specific knowledge required for liability under the rule, even an “innocent” (i.e., negligent) *ex parte* contact would still violate 5-300(B), since no *intent* to engage in an improper communication is required.²⁰

The contact with the judge suggested in the hypothetical was inadvertent because it was not intended by the attorney. Suggesting an expert, or commenting upon an expert on a listserv, does not evince any intent to engage in direct or indirect contact with the judge.²¹ However, in

¹⁶*In re Jonathan S.* (1979) 88 Cal.App.3d 468, 471.

¹⁷Rule 3.5 of the ABA Annotated Model Rules of Professional Conduct (5th ed. 2003,) p. 363 (“ABA Rule 3.5.”)

¹⁸An attorney’s concerns for his and a co-counsel’s personal safety, when communicated on an *ex parte* basis to an administrative law judge, violated Rule 5-300 regardless of the perceived justification; see also, *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1034 [violation of Business and Professions Code section 6108]; *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467 [bad faith not a necessary element of “willfulness” under California Rules of Court, rule 955]; and *King v. State Bar* (1990) 52 Cal.3d 307, 313-314: “We have also held in other contexts that to establish a willful breach of the Rules of Professional Conduct, ‘[I]t must be demonstrated that the person charged acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it.’ (Citations.) Willfulness of an act is thus not necessarily dependent upon knowledge of the provision which is violated. (Citations.)”

¹⁹*Hamilton v. State Bar* (1979) 23 Cal.3d 868, 874.

²⁰“An attorney’s misconduct need not be in bad faith to be willful; rather, all that is required is ‘a general purpose or willingness to commit the act or permit the omission.’ (Citation.)” *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.

²¹Though Paragraph C of Rule 5-300 expressly refers to *ex parte* contact with a “judge” or “judicial officer,” including “law clerks, research attorneys, or other court personnel who participate in the decision-making process,” Rule 5-300(C)) has been interpreted as also prohibiting *ex parte* contacts with

order to reduce the likelihood of any kind of unintended ex parte contact, lawyers using listservs must always consider who else may have access.²²

3. JUDGES AND OTHER JUDICIAL OFFICERS MUST BE CIRCUMSPECT ABOUT AVOIDING EX PARTE COMMUNICATIONS WITH LAWYERS AND LITIGANTS

The attorney's contact with the judge in the hypothetical was inadvertent; the judge's following warning message was not. Judges have their own independent duties to try to avoid situations where unintended and inadvertent communication regarding issues in controversy might be discussed in their presence. A judge should ignore rather than respond to information mistakenly received about a pending matter.²³ Information received by a judge from participating in a listserv is no different.

However, members of the bench do not foreswear participating in society when they become judges. The legal community benefits from having judges remain active in bar affairs.²⁴

Administrative Law Judges. (See *Zaheri v. New Motor Vehicle Board* (1997) 55 Cal. App. 4th 1305, wherein the court traced the history of Rule 5-300 back to the original Rules of Professional Conduct in 1926, and held that Administrative Law Judges are not "within the compass of the term 'judicial officer' as used in [the] Rules of Professional Conduct." Nevertheless, *Zaheri* goes on to state: "Nonetheless, the law of legal ethics is not limited to written law; it partakes of a common law or 'unwritten law' (Code Civ. Proc., § 1899) aspect. (See, e.g., rule 1-100(A), Rules Prof. Conduct.) There is no principled basis to distinguish between an ALJ and a judge in the judicial branch for purposes of ethical strictures against ex parte contacts. Hence, we find the same standard applicable." 55 Cal. App. 4th at 1317.)

²²Caution is needed when using a listserv whether it is open or closed (see footnote 9, above.) The listserv in the hypothetical could be considered closed because its use is limited to members of the local bar association. Though the attorney in the hypothetical might not have posted the expert witness inquiry on an open listserv, the same issues would arise if he or she did.

²³"A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly." Advisory Comm. Com., foll. Canon 2A, Cal. Code Jud. Ethics.

²⁴For example, the *American Inns of Court* "give judges and lawyers an opportunity to discuss the ethical and professional issues that they share" (<http://www.innsofcourt.org/contentviewer.asp?breadcrumb=6,9,343>), and the *Association of Business Trial Lawyers*, "committed to promoting and enhancing communications between the bar and the federal and state benches" (<http://www.abtl.org/welcome.htm>) claims that twenty to thirty judges attend their dinner seminars. Nothing prohibits a lawyer from chatting with or having a drink with a judge, so long as

Members of the bench are also exposed to legal commentary and details about cases in the media. Judges may accidentally overhear counsel discussing cases in hallways or around the courthouse. Such random inadvertencies are not unusual and do not mandate judicial recusal unless significant details are imparted or actual prejudice inures. Judges have learned to turn a blind eye regardless of how this information is transmitted.

Yet, while judges may speak in and write to public forums, through bar associations or otherwise,²⁵ they should approach this opportunity with caution. A listserv, as mentioned, is a public forum whether open or closed.²⁶ Accordingly, any judge communicating on a listserv must remain aware that he or she is communicating (even as a passive reader) with an unknown segment of the public—a public which includes persons who may appear as parties or advocates before that judge.

The risk of engaging in prejudicial *ex parte* communications through a particular listserv increases in proportion to the listserv's connection to the legal jurisdiction in which the judge sits. A judge who communicates through a local bar association listserv must be more circumspect than when engaged with a non-legal-themed listserv, or a listserv not focused on subjects within the judge's jurisdiction. Likewise, a judge who participates in a listserv which includes attorneys who may potentially appear before that judge should expect from time to time to have to delete e-mail without reading it. A judge ought not join a litigation advocacy group, for example, if the exposure to lawyers' inadvertent communications creates a potential problem.²⁷ To avoid even the potential for such problems, some attorney or litigation listservs

there is no discussion of a case involving the lawyer over which the judge is presiding. (See the discussion of Rule 5-300, above.)

²⁵Advisory Comm. Com., foll. Canon 4B, Cal. Code Jud. Ethics.

²⁶See Footnote 9, above. The listserv in the hypothetical, for instance, which would seem to be limited to use by members of the local bar association, could be considered a "closed listserv."

²⁷"A judge shall so conduct the judge's quasi-judicial and extrajudicial activities as to minimize the risk of conflict with judicial obligations." Canon 4, Cal. Code of Judicial Ethics.

forbid judges outright.²⁸

4. LAWYERS ACTING AS TEMPORARY JUDGES OR ARBITRATORS MUST AVOID EX PARTE COMMUNICATIONS AS SCRUPULOUSLY AS SITTING JUDGES

Even if no sitting judges are known to be on a listserv, many practicing lawyers and retired judges serve as assigned judges, private judges, judges pro tem, and arbitrators. Such persons must be mindful of the ramifications of ex parte contact from the perspective of a sitting judge. When acting *as advocates*, lawyers have no duty to avoid information received “ex parte,” but lawyers who act as temporary judges or arbitrators must avoid ex parte communications just like sitting judges.²⁹

Like sitting judges, temporary judges and arbitrators must also avoid appearances of impropriety,³⁰ and must likewise avoid improper ex parte communications concerning pending matters.³¹ Whereas Rule 1-710 applies relevant portions of the Code of Judicial Ethics to attorneys acting as court-appointed arbitrators, section 1281.85 of the Code of Civil Procedure

²⁸ Washburn University School of Law’s *Legal Ethics* list, for example, is “restricted to lawyers, law professors, and law students only . . . [¶] . . . available only to **attorneys, law professors, and law students.**” *WashLaw Your Guide to Legal Information on the Internet*, <http://lists.washlaw.edu/mailman/listinfo/legaethics/> (bolding in original).

²⁹Rule 1-710, permitting discipline of lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity. “A member who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject under the Code of Judicial Ethics to Canon 6D, shall comply with the terms of that canon.” The Official Discussion states that Rule 1-710 is intended to regulate attorneys “while acting in a judicial capacity.”

³⁰“An arbitrator must act in a manner that upholds the integrity and fairness of the arbitration process. He or she must maintain impartiality toward all participants in the arbitration at all times.” Cal. Rules Ct., Appendix, Div VI, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 5. “An arbitrator [must avoid creating an appearance of impropriety but] does not become partial, biased, or prejudiced simply by having acquired knowledge of the parties, the issues or arguments, or the applicable law.” Cal. Rules Ct., Appendix, Div VI, supra, Advisory Committee Comment to Standard 5.

³¹“An arbitrator must not initiate, permit, or consider any ex parte communications or consider other communications made to the arbitrator outside the presence of all of the parties concerning a pending or impending arbitration, except as permitted by this standard, by agreement of the parties, or by applicable law.” Cal. Rules Ct., Appendix, Div VI, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 14(a).

imposes Judicial Council ethics standards upon arbitrators who are not court-appointed.³²

VI. CONCLUSION

A lawyer who honors every ethical duty still cannot be guaranteed that nothing will go wrong. For instance, lawyers have no ethical duty to encrypt confidential communications although that would minimize the risk that such communications could be read by unintended recipients. Likewise, judges must try to avoid ex parte contact concerning matters which will or may come before them, but there is no sure-fire way to prevent it from occurring. Since one can never know who might read or react to e-mail posted on the Internet, and because it is likely that judges will be included in listservs or other open communication lists, it is incumbent upon attorneys to avoid including any confidential or private information in a listserv or other Internet posting that could be identified to a particular case or controversy.

This opinion is advisory only. The Committee acts on specific questions and its opinions are based on such facts as are set forth in the inquiry submitted to it.

³²California Code of Civil Procedure section 1281.85 provides in part, “a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the ethics standards for judges adopted by the Judicial Council pursuant to this section.”