

Don't Send Guido

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The problem solving continues apace at the IMLA listserv sites. A city attorney in Florida helps find a way to make things better in Kansas. Somebody from Wyoming knows who to call to get a sewer trunk line in Montana flushed out.

We have ways of drawing the spotlight to any problem in any corner of the country. This has been our version of Open Source problem-solving since before the term 'open source' became popular.

We are way ahead of the technology wonks who are inventing the words we use to describe it. How could things possibly be any better?

Wait a minute. We have over 700 municipal law practitioners subscribed to the list. I suppose I see 100 different names on the emails we trade every day.

Who are the other 600 watchers on the list? Who else is listening to every word that is said?

There are some entrance requirements that have to be met before anyone can sign up and share from their corner of the greatest nation in the history of the world. Every attorney on the list has to certify that a substantial part of their practice is devoted to representing local governments.

If you are a full-time city attorney, that is more than enough. But if you are in private practice and you represent cities as outside counsel, you have to solemnly swear to the gatekeepers at MuniCode that representing local governments is a substantial portion of your practice.

This self-screening process gets vetted when each new list member is introduced to everyone on the list. Their name, firm, address and municipal clientele are described in a paragraph or so.

They are routinely welcomed by many, but their name is also up there for all to see, to give everyone notice who else is listening on the Internet's version of a party line we call the IMLA listserv.

This double screening is especially important when communicating via email, where all of the meet-and-greet sessions are virtual. It is likely that we have never met the person before and we do not see them, but we will be discussing business with them on a continuous basis from this day forward, for better or for worse.

But our business is our client's business, and we have a duty to maintain the confidentiality of the matters entrusted to us to the best of our ability. So how do we ask our questions on the listserv and protect our clients' confidential information at the same time?

ABA Model Rule 1.6 provides that '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 out the representation...'

So as you pose your listserv question, before hitting the Send button, ask yourself if you have shared any information about your client or the legal matter your client has entrusted to you that is confidential.

This is email, and the Pause Before Sending rule is always hard to remember, which makes it that much more important to Pause Before Sending, particularly when asking for collaboration from your fellow municipal lawyers.

There is an informality and intimacy to email. It's like chatting with a friend. The physical accoutrements of privacy are all present. You are in your office, the door is closed and no one is listening.

Since Watergate, the presumption of privacy, particularly concerning matters before public agencies from the White House to City Hall has been questioned routinely and vigorously.

On the one hand, that means that our municipal clients have less confidential information to protect. But on the other hand, it means that what confidentiality our public clients have is far more precious to them.

It would be easy, but perilous, to overlook the privacy rights of third parties implicated in the matters we may be discussing. While our municipalities have no right to privacy, public employees have not waived their personal privacy rights by accepting public employment, and third parties who have asked for our help or reported matters of public concern do not automatically waive their right to privacy when place their call for assistance.

Asking your client for consent to query the listserv can resolve many of these issues in advance, but it should not be the end of the inquiry.

Asking another listserv member, perhaps the general counsel for your state municipal league association, to post the question with generalized facts can also eliminate issues before they become issues.

The bottom line is to be aware of the hazards here and to plan in advance to avoid any inadvertent disclosures because waiver as to one part of your case may be deemed a general waiver for purposes of your case.

The listserv is such a good tool, but it is a double edged sword we unsheathe as we protect and defend the citizens and officials who ask us for our help because we are so astute and informed and because we know how to do things right.

May we never give them occasion to reconsider the high opinion they have of their chosen counsel. ML