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## Listservs: Risky business?

### MEMBER'S FAILURE TO COMPLY WITH LISTSERV CONFIDENTIALITY RULES ENDANGERS US ALL

As consumer attorneys, we're well versed in risk. From identifying instances where negligence increased risk exponentially, to taking cases on contingencies, we know all too well that risk is everywhere, and risk assessment is an imperfect science. However, much as we've all been doing our part to reduce our risk, it's worth remembering, in this time of increased reliance on virtual meetings and tools, that risk is literally everywhere. Even if we think we're protected from it.

Case in point: the recently published decision in *Robert A. Curtis v. Superior Court*, 2021 WL 1115484 (2021) ("*Curtis*") was delivered on March 24, 2021. The case involved a claim of improper use of the California Employment Lawyers Association (CELA) Listserv. Plaintiff was an employee at a hotel, who filed a lawsuit for age discrimination against the owner. The owner retained Curtis in addition to other counsel. Curtis was retained to assist with trial preparation, trial strategy, and posttrial motions. In doing so, Curtis contacted Doe 1 and used Doe 1 as a non-testify expert.

The day the jury returned a verdict, Plaintiff's counsel posted a message describing the victory on CELA's online Listserv. Doe 1 forwarded an email containing plaintiff's counsel's posting to Curtis. Neither Curtis, nor the other attorneys at his law firm, were members of CELA. Curtis then forwarded the email to the hotel owner's other counsel and the email was filed as an exhibit in a post-trial opposition to plaintiff's motion for attorneys' fees.

CELA filed the underlying action in the Los Angeles County Superior Court. CELA's complaint alleged causes of action for breach of contract and injunctive relief against five Doe



defendants who were members of CELA. CELA alleged that members are required to enter a written joint prosecution and confidentiality agreement to receive access to its confidential materials, including information on its Listserv.

Amongst other applications, the court held that a non-testifying expert was not necessarily entitled to absolute protection. Keep in mind, Curtis did not have Doe 1 testify at trial or prepare a written report. There was no consulting agreement between Curtis and Doe 1. Doe 1 never provided a bill for their services. There was no record of Curtis paying Doe 1. However, Doe 1 regularly consulted for Curtis. When deposited, Curtis refused to identify Doe 1.

Curtis argued that the identity of a non-testifying expert is covered under the attorney-work product. However, the court ultimately ruled that Doe 1's anonymity is not necessarily protected and CELA met its "burden of establishing that that denial of disclosure will unfairly prejudice [it] in preparing its claim or defense or will result in an injustice."

This decision comes at a time when our regular in-person Bar meetings are restricted. For so many of us, technology has played an integral role in maintaining a sense of belonging, and a sense of support. This decision makes clear that we must remember that for all the support we may receive thanks to

Listservs, there are risks involved when using them or any other online forum; members do not always comply with the Listserv's confidentiality rules.

None of us want to be muzzled. We become better lawyers because we learn from one another. Brainstorming, debate, and open, candid discussion all play an invaluable role in strengthening our advocacy skills. In a largely virtual world, it's expected that we would seek this support online. However, this decision reminds us of the importance of abiding by our Listserv confidentiality agreements, including keeping postings private.

It is encouraging that as of this writing, California is reporting the lowest case rates of coronavirus in months. We are vaccinating at record-breaking rates. Restrictions are easing, and before long we will be able to resume some of our in-person events. But much like we need to assess our risks when it comes to new variants of COVID-19, we must also remember that the risks involved in failure to comply with the confidentiality of our online forums. Let's head into the summer months, without fear, but ever mindful that risk is everywhere, including in the tech spaces we use.

Wishing you a safe and healthy summer.

