

Can You Ethically View a Represented Party's Web Site?

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Lawyers in Minnesota know, or should know, that they are not permitted to communicate with or contact a represented party directly. Specifically, Rule 4.2 of the Minnesota Rules of Professional Conduct (MRPC) states in part: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." This prohibition includes contact with the represented party whether made in person, by phone or by mail, or even through another individual via MRPC Rule 5.3.

How does this rule apply in the Internet age? For instance, if you become aware that the opposing represented party maintains a Web site on the Internet, may you ethically visit the site to obtain potentially relevant information without notice to the party or his or her attorney? The Oregon bar's ethics committee recently issued an opinion which stated that so long as an attorney avoids eliciting responses on the subject of the representation from the represented person, no violation occurs. See *Oregon State Bar Legal Ethics Committee Opinion 2001-164, January 2001*.

In its opinion, the committee distinguished ordinary Web surfing and one-way communications from exchanges that have the character of a telephone or face-to-face communication. The facts of the opinion indicated that Lawyer A discovers that Lawyer B's client has a Web site. Information on the Web site may or may not be relevant to the litigation pending between the two clients. Lawyer A wishes to visit the Web site. The question posed to the committee was whether Lawyer A may access the Web site of Lawyer B's client.

In analyzing the matter, the committee noted that viewing or downloading information posted on a passive Web site is the equivalent of reading a newspaper, magazine, or other document available for public consumption.

Similarly, following links to other Web sites is the equivalent of turning pages or locating other issues of the publication. Neither viewing nor following links involved any personal response to the visitor. Thus, according to the committee, a lawyer who "reads information posted for general public consumption is not communicating with the represented owner of the Web site."

Further, a visit by a lawyer to a site that allows one-way communication from the visitor to the Web site also does not constitute a violation of the Oregon rule. The Committee expressed concern, however, if the Web site was completely interactive and would permit the visitor to send messages and receive specific responses from the Web site or to participate in a "chat room." It noted that a visitor to a Web site who sends a message with the expectation of receiving a personal response is communicating with the responder. Because the visitor may not be able to ascertain the identity of the responder, at least not before the response is received, a lawyer visiting the Web site of a represented person might inadvertently

communicate with the represented person. Thus, if the subject of the communication with a represented person is on or directly related to the subject matter of the representation, the lawyer would violate the rule prohibiting contact with a represented party. In sum, the committee noted that if the contact would be forbidden by telephone or in person, it also is forbidden in any electronic format.

While the analysis noted above is from the Oregon committee, it appears that a similar analysis would be likely under the Minnesota rules. Lawyers who wish to obtain information from a represented person's Web site must exercise the same caution they would use in eliciting information by any other means.