

It's the steak, not the sizzle that counts

by

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Lawyers who are otherwise confident in their understanding of the Minnesota Rules of Professional Conduct may experience a sense of disorientation when considering their conduct in light of the onslaught of new technologies and applications. May I contact opposing parties through Facebook? May I tweet about a case I'm handling? What sort of information about the nature of my practice may I post on my website?

Why is this so and how can you avoid a similar fate?

The "why" is sometimes the result of lawyers being distracted by the "sizzle" of new or unfamiliar technology and not focusing on the "steak" of what's actually at issue.

In other words, the technology used may cause lawyers to lose sight of the principles governing their conduct. This can result in lawyers either missing limitations on their conduct, or placing limitations that may not exist. The fact that a lawyer is communicating confidential information about her client's case on her new iPhone is not the issue, the fact that she is doing so in a crowded elevator is.

Consider the application of MRPC 4.2, which prohibits a lawyer, in the context of representing a client, from communicating about the subject of the representation with a person known to be represented by counsel. Lawyers understand that using that antiquated technology, the telephone, to call a represented person to discuss the case doesn't change the application of the rule. The rationale for the rule, "to protect a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter" applies regardless of the method of the communication.

Yet when an unfamiliar technology or new application is used, lawyers may fail to apply the appropriate rules.

Consider the case of the lawyer who became aware that the opposing party in litigation (who was represented) had posted information relevant to the case on her Facebook account. The opposing party had, however, set her security settings so that the information was available only to "friends" (i.e., individuals who had specifically been authorized to access information on the sites).

The lawyer had a legal assistant check the site and when it was discovered that the information could only be accessed by friends, the lawyer instructed the legal assistant to make a friend request without disclosing that he was actually behind the request. Also, when the opposing party responded to the friend request,

asking if the person making the request was someone she knew from high school, the lawyer instructed the legal assistant not to respond.

This conduct implicated both Rule 4.2, regarding communication with represented persons, and Rule 8.4(c), prohibiting conduct involving deceit or misrepresentation. The lawyer likely understood that he could not have approached the represented party in person and misrepresented who he was to access information regarding the litigation. Yet the impropriety of such conduct was apparently less apparent to the lawyer because it was through an application the lawyer was not familiar with.[Ftn1](#)

Contrast this with the lawyer who contacted the Director's Office for an advisory opinion upon discovering that the opposing party (who was represented) had posted information relevant to the litigation on her Facebook site. In that instance the opposing party had placed no restrictions on access to information in her account. Anyone who was a member of Facebook, and the lawyer was, had access to the information.

The lawyer questioned whether, given the fact that the other party was represented, her use of the information would be a violation of the rules of professional conduct, which it would not.

If the opposing party had been physically observed in public, engaging in conduct that was relevant to the litigation, there would be little question that the lawyer could use that information without concern that doing so might violate Rule 4.2. Yet the propriety of using the information was less apparent because of the technology involved.

So how does a lawyer determine how an unfamiliar technology or application might impact the lawyer's ethical obligations?

The lawyer should be less concerned with the "sizzle" and more with the "steak." When considering their conduct in light of a new or unfamiliar technology, lawyers should be conscious of the underlying ethical issues at play and not be distracted by the technology involved.

¹ Since it was the legal assistant who engaged in the conduct, the lawyer actually violated MRPC 5.3(c)(1), which provides that "a lawyer shall be responsible for the conduct of a nonlawyer that would be a violation of the rules of professional conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved."