

FORMAL OPINION NO. 2001-164
Communicating with Represented Persons:
Contact Through Web Sites

Facts:

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.

Question:

May Lawyer A access the Web site of Lawyer B's client?

Conclusion:

Yes. *See* discussion.

Discussion:

DR 7-104(A) provides:

During the course of the lawyer's representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation, or on directly related subjects with a person the lawyer knows to be represented by a lawyer on that subject, or on directly related subjects, unless:

(a) The lawyer has the prior consent of a lawyer representing such other person;

(b) The lawyer is authorized by law to do so; or

(c) A written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

This prohibition includes a lawyer representing the lawyer's own interests.

If the "person" represented is an entity, some agents or employees of the entity will be deemed represented for purposes of this rule. *See* OSB Legal Ethics Op No 1991-80.

The purpose of the rule is to ensure that represented persons have the benefit of their lawyer's counsel when discussing the subject of the representation with the adverse attorney. The application of the rule is the same regardless of the form of the communication. *See In re Hedrick*, 312 Or 442, 822 P2d 1187 (1991) (attorney disciplined for sending original letter to represented person with copy to lawyer); *In re Lewelling*, 296 Or 702, 678

P2d 1229 (1984) (direct communication either in person or by telephone is prohibited). Accordingly, if the contact would be prohibited in nonelectronic form, then it is prohibited in electronic form.

A Web site can generally be visited by anyone having access to the Internet.¹ The Web site is posted with the knowledge and understanding that it is placed in the public domain. “Passive” Web sites afford no method of direct interaction with the owner of the Web site. Viewing (or even downloading) information posted on a passive site is the equivalent of reading a newspaper, magazine, or other document available for public consumption. Following links to other Web sites is the equivalent of turning pages or locating other issues of the publication. Neither viewing nor following links involves any personal response to the visitor. A lawyer who reads information posted for general public consumption is not communicating with the represented owner of the Web site.

Some Web sites allow the visitor to interact with the site. The interaction may consist of providing feedback about the site or ordering products. This kind of one-way communication from the visitor to the Web site also does not constitute communicating “with a person” as that phrase is used in DR 7-104.² Rather, it is the equivalent of ordering products from a catalog by mailing the requisite information or by giving it over the telephone to a person who provides no information in return other than what is available in the catalog. In OSB Legal Ethics Op No 1996-144, we held that prior consent of the government’s lawyer is not required to request and receive public records from the governmental entity. However, if the records clerk is asked to interpret records or policies expressed in the records, the risk of violating DR 7-104 is increased. Ordering products from a Web site is little different from requesting public records, with the same attendant limitations and risks.

A more interactive Web site allows the visitor to send messages and receive specific responses from the Web site or to participate in a “chat

¹ Some Web sites require registration and, occasionally, a password for access. If anyone can register and have access, then the site is available to the public. Other sites, by contrast, are by subscription only or are limited to certain users. For purposes of this opinion, those would not be sites accessible to the public.

² Some one-way communication will violate DR 7-104 if it is on the subject of the representation. For example, just as a lawyer cannot send a letter about the matter to a represented person, the lawyer could not send an e-mail through the Web site or otherwise to a represented person without the prior consent of the person’s lawyer. *In re Hedrick, supra.*

room.” A visitor to a Web site who sends a message with the expectation of receiving a personal response is communicating with the responder. The visitor may not be able to ascertain the identity of the responder, at least not before the response is received. In that situation, a lawyer visiting the Web site of a represented person might inadvertently communicate with the represented person. If the subject of the communication with the represented person is on or directly related to the subject of the representation, the lawyer violates DR 7-104.

For example, assume Lawyer *B*'s client is a retailer in whose store a personal injury occurred. Lawyer *A* could visit the store and purchase products without the consent of Lawyer *B*, and could ask questions about the injury of clerks and other witnesses not deemed represented for purposes of DR 7-104. Lawyer *A* could not, however, question the store owner or manager or any clerk whose conduct was at issue in the matter. *See* OSB Legal Ethics Op No 1991-80. That same analysis applies if Lawyer *B*'s client operates an “e-store.” Lawyer *A* could visit the “e-store” site and review all posted information, purchase products, and respond to surveys or other requests for feedback from visitors. Lawyer *A* could not send a demand letter or an inquiry through the Web site requesting information about the matter in litigation unless Lawyer *A* knew that the inquiry would be answered by someone other than Lawyer *B*'s client (or, if the client is a corporation, someone deemed represented).

Without doubt the Internet will be an increasingly common form of advertising and communication in commerce and law practice. It is not possible to foresee all the variations on how that communication will occur. The essence of this analysis, however, is whether the Internet-based communication has the character of a telephonic or face-to-face conversation. For the same reasons that conversing directly or indirectly with a represented person is forbidden by telephone or in person, it is also forbidden in any electronic format. 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 other means.

Approved by Board of Governors, January 2001.