

## FORMAL OPINION NO. 2005-164

### Communicating with Represented Persons: Contact Through Web Sites and the Internet

#### Facts:

Lawyer *A* discovers that Lawyer *B*'s client has a public Web site. Information on the Web site may be relevant to the litigation pending between the two clients. Lawyer *A* wishes to visit the Web site and, perhaps, to communicate with representatives of the adverse party via the Internet.

#### Questions:

1. May Lawyer *A* visit the Web site of Lawyer *B*'s client?
2. May Lawyer *A* communicate via the Web site with representatives of Lawyer *B*'s client?

#### Conclusions:

1. Yes, qualified.
2. See discussion.

#### Discussion:

1. *Visiting a Public Web Site.*

Oregon RPC 4.2 provides:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
  - (b) the lawyer is authorized by law or by court order 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.

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 lawyer. 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) (lawyer 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). For purposes of this opinion, there is no reason to distinguish between electronic or nonelectronic forms of contact. Both are permitted or both are prohibited.

Accessing an adversary's public Web site is no different from reading a magazine article or purchasing a book written by that adversary. Because the risks that Oregon RPC 4.2 seeks to avoid are not implicated by such activities, no Oregon RPC 4.2 violation would arise from such electronic access. A lawyer who reads information posted for general public consumption simply is not communicating with the represented owner of the Web site.<sup>1</sup>

## 2. *Internet Communications.*

On the other hand, written communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to Oregon RPC 4.2. In effect, and because none of the exceptions to Oregon RPC 4.2 appear to apply here, the question is whether the individual with whom Lawyer A may communicate is or is not a represented person within the meaning of OSB Formal Ethics Op No 2005-80. *Cf.* OSB Formal Ethics Op No 2005-144 (noting the limited scope of the "authorized by law" exception).

If Lawyer A knows<sup>2</sup> that the person with whom Lawyer A is communicating is a represented person within the meaning of OSB Formal Ethics Op No 2005-80 (because, for example, the person is a part of the adverse party's management or is a nonmanagerial employee for

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<sup>1</sup> For purposes of this opinion, a Web site can be "public" even if an access fee or a subscription fee is charged. We express no opinion concerning access to Web sites involving or obtained through the use of deception. *Cf.* OSB Formal Ethics Op No 2005-173.

<sup>2</sup> Oregon RPC 1.0(h) provides:

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

whose conduct Lawyer A seeks to hold the adverse party responsible), the Internet communication would be prohibited. Similarly, Lawyer A could not use Internet communications to invade the adverse party's lawyer-client privilege. If, on the other hand, Lawyer A does not invade the adverse party's privilege and communicates only with a nonmanagerial employee who is merely a fact witness, no violation would exist. OSB Formal Ethics Op No 2005-80.

The remaining question is whether Lawyer A may communicate via the Internet (or other means) with someone whom Lawyer A does not "know" to be a represented person within the meaning of OSB Formal Ethics Op No 2005-80 but who is in fact such a person. Given the language of the rule, we conclude that such communications are permissible.

**Approved by Board of Governors, August 2005.**

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COMMENT: For additional information on this general topic, and other related subjects, see THE ETHICAL OREGON LAWYER §§5.10, 7.46 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§98–100 (2003); and ABA Model Rule 4.2.