



TOP 10 ETHICAL PITFALLS EMPLOYMENT LAWYERS SHOULD AVOID

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NEGLECT AND NONCOMMUNICATION

- ▶ Far most common ethical violations
- ▶ Poor office procedures, too many cases, taking on cases in unfamiliar areas of law, creating unjustified client expectations
- ▶ MN Rule of Professional Conduct 1.3: Diligence
 - ▶ “A lawyer shall act with reasonable diligence and promptness in representing a client.”
- ▶ MRPC 1.4: Communication
 - ▶ Defines duties to promptly inform client and consult with client about matter
- ▶ MRPC 3.2: requires lawyers to expedite litigation consistent with interests of client

EMPLOYEE EMAILS

- ▶ Rule 1.6(c), MRPC - A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

EMPLOYEE EMAILS

- ▶ Employer may legitimately have access to email on employee's computers or other electronic devices
 - ▶ See: *In re Asia Global Crossing*, 322 B.R. 247, 257 (U.S. Bankruptcy Court, S.D. New York, 2005) and *Gates v. Wheeler*, 2010 WL 4721331 (Minn. App. 2010, unpublished).
- ▶ Lawyer should discuss with client confidentiality concerns that arise from such communications

EMPLOYEE E-MAILS – Comment 17 to Rule 1.6

- ▶ The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

EMPLOYEE E-MAILS –

COMMENT 18 TO Rule 1.6

- ▶ When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.
- ▶ This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

ABA OPINION 11-460

- ▶ When an employer's lawyer receives copies of an employee's private communications with counsel, which the employer located in the employee's business email file or on the employee's workplace computer or other device, neither rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON


In dealing on behalf of a client with a person who is not represented by counsel:

- (a) a lawyer shall not state or imply that the lawyer is disinterested;
- (b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;
- (c) when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
- (d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.



CONFLICTS IN REPRESENTING A COMPANY AND THE PEOPLE WITHIN IT

- ▶ Rule 1.13(a), MRPC : " A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

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- ▶ Rule 1.13(e), MRPC: “In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”



RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL


- ▶ In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order.

WHO IS OFF LIMITS AT AN ORGANIZATION


- ▶ Comment [7] to Rule 4.2, MRPC:
 - ▶ In the case of a represented organization, this rule prohibits communications with **a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.**
 - ▶ Consent of the organization's lawyer is not required for communication with a former constituent.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

- ▶ (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person (emphasis added).

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- ▶ Because of the close relationship between [Rule 4.2](#) and rules protecting against the disclosure of attorney-client privileged information, courts in this district have adopted a flexible approach to prevent privileged information from being disclosed to an adverse party in the context of lawyer contact with a former managerial employee. See *Snap Prods.*, 183 F.R.D. at 544-45

Arnold v. Cargill, 2004 WL 2203410 (D. Minn.

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- ▶ The court declined to adopt a “bright-line” rule, and instead held that the key factor in evaluating the propriety of a lawyer's conduct under [Rule 4.2](#) with respect to former managerial employees is the likelihood that any privileged matters were intruded upon.
 - ▶ May be no discipline for contacting former employee, but information gained may be excluded by court, you may be disqualified from matter, or the client’s case may be dismissed. *See also, Gifford v. Target Corporation*, 723 F. Supp. 2d 1110 (D. Minn. 2010).

THREAT OF CRIMINAL PROSECUTION

- ▶ Prior to 1985, a lawyer could not use threat of criminal prosecution as leverage
- ▶ Since adoption of MRPC in 1985, can in certain circumstances. ABA Formal Opinion 92-363:
 - ▶ allows “threats” (short of criminal coercion) if the matters are directly related,
 - ▶ there is a good faith basis in law and fact for the civil and criminal claims, and
 - ▶ the lawyer neither states nor implies an ability to improperly influence the criminal process

SETTLEMENT STATEMENT IN CONTINGENT FEE CASES

- ▶ Rule 1.5(c), MRPC, provides that “upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement showing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the methods of its determination.”
 - ▶ Also shall state whether expenses are to be deducted before or after the contingent fee is calculated.

FEE SPLITTING

- ▶ Rule 1.5(e), MRPC, states that a division of a fee between lawyers who are not in the same firm may be made only if, among other things, the client is advised of the share that each lawyer is to receive.

SOCIAL MEDIA

- ▶ “Definition”:
 - ▶ Facebook, Twitter, MySpace, Blogs, Listserves, LinkedIn, etc.
- ▶ Applicable Rules:
 - ▶ Rule 1.1 – Competence
 - ▶ Obligation to convey risk of social media use
 - ▶ Rule 1.6 – Confidentiality of Information
 - ▶ Disclosure of information relating to the representation of a client through social media
 - ▶ In re Peshek, 798 N.W.2d 879 (Wis. 2011)
 - ▶ Reciprocal 60-day suspension imposed upon attorney who placed on her blog confidential information relating to the representation of clients and derogatory comments about judges and included content sufficient to identify those clients and judges. Attorney further failed to correct a false statement of fact concerning her client’s use of narcotics.

SOCIAL MEDIA, CONT.

- ▶ Applicable Rules, Cont.:
 - ▶ Rule 1.7 – Conflict of Interest: Current Clients
 - ▶ Do “friendships” create conflicts, real or imagined?
 - ▶ Perceptions by others – Loss of confidence of client
 - ▶ Rule 3.6 – Trial Publicity (Extrajudicial statements)
 - ▶ Anything posted on the internet or on other public forums could potentially be subject to Rule 3.6
 - ▶ Definition of when a lawyer knows or reasonably should know a statement made will be “disseminated by means of public communication” may be expanded due to the ever-increasing accessibility of information online.
 - ▶ Rules 4.1 & 8.4(c) – Truthful Statements
 - ▶ Use of deception when “contacting” others impermissible
 - ▶ Use of third parties to contact – your obligations run through any third party used
 - ▶ Even if no actual deception is used, “friending” a party or another for the purpose of obtaining information not publicly shared may be disciplinable.

SOCIAL MEDIA, CONT.

- ▶ Applicable Rules, Cont.:
 - ▶ Rule 4.2 – Communication with Represented Parties
 - ▶ Social media “communication”
 - ▶ Do “friend requests” constitute contact?
 - ▶ See, e.g., People v. Fernino, 851 N.Y.S.2d 339 (N.Y.C. Crim. Ct. 2008) (court found that defendant violated order for protection’s “no-contact” provision by sending MySpace “friend requests” to victims—despite the fact that victims could simply deny the requests—because “friend requests” constituted contact).
 - ▶ “Friend requests” to agents of opposing party who is represented by counsel
 - ▶ Comment to Rule 4.2 provides, in part, that the prohibition on contacting an opposing party represented by counsel extends to “a constituent of the organization who supervises, directs, or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”
 - ▶ OLPR Admonition – 4.2 & 8.4(c) violation found when attorney instructed paralegal (under her own name) to send “friend request” to opposing party who was represented by counsel

SOCIAL MEDIA, CONT.

- ▶ Potential Pitfalls of Social Media Use
 - ▶ Damaging information revealed by attorneys, clients, family, friends, witnesses, etc.
 - ▶ Particularly in context of family law and personal injury/workers' compensation matters
 - ▶ E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, Inc., No. 11-CV-02560-MSK-MEH, 2012 WL 5430974 (D. Colo. Nov. 7, 2012) (order on motion to compel)
 - ▶ Inherent informality of online communications
 - ▶ "Mistakes"
 - ▶ Information may be unreliable (including identity of persons placing or receiving information online)

SOCIAL MEDIA, CONT.

- ▶ Ethics Opinions:

- ▶ **New York City Bar Association, Formal Opinion 2010-02**

- ▶ An attorney, acting him/herself or through the actions of another, “ may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.”
 - ▶ <http://www.abcnyc.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites>

- ▶ **New York State Bar Association, Opinion 843 (09/10/10)**

- ▶ “ A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not “ friend” the other party or direct a third person to do so, accessing the social network pages of the party will not violate [the Rules of Professional Conduct].”
 - ▶ <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208>

- ▶ **Oregon State Bar Association, Formal Opinion No. 2005-164**

- ▶ Attorney may view the website of an opposing party who is represented by counsel as this action is not dissimilar from reading a magazine article or book written by that person. “ A lawyer who reads information posted for general public consumption...is not communicating with the represented owner of the [website].” “ [A website] can be ‘ public’ even if an access fee or a subscription fee is charged.”
 - ▶ If an attorney “ does not invade the adverse party’s privilege and communicates only with a non-managerial employee who is merely a fact witness, no violation [of the Rules] would exist.”
 - ▶ http://www.osbar.org/_docs/ethics/2005-164.pdf

SOCIAL MEDIA, CONT

- ▶ Ethics Opinions, Cont.:

- ▶ **Missouri Bar Association, Informal Advisory Opinion 2009-0003**

- ▶ Attorney may not send “friend request” to opposing party who is represented by counsel.

- ▶ <http://members.mobar.org/pdfs/precedent/aug11/informal-opinions.pdf>

- ▶ **San Diego County Bar Association, Opinion 2011-2**

- ▶ A “friend request” sent to a person deemed to be represented by counsel is an indirect ex parte contact and concerns the subject of the representation “ [i]f the communication to the represented party is motivated by the quest for information about the subject of the representation....”

- ▶ <http://www.sdcba.org/index.cfm?pg=LEC2011-2>

- ▶ **Philadelphia Bar Association, Opinion 2009-02**

- ▶ An attorney may not ask a third person to seek to become a friend of a witness on Facebook in an effort to gain access to the information posted for the purposes of impeaching the credibility of the witness at trial. Communication with a witness through a third party on Facebook is inherently deceptive.

- ▶ http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf

WITHDRAWAL

- ▶ MRPC 1.16(a)-(b)
 - ▶ Withdrawal should not overtly prejudice a client's interests; timing of withdrawal is critical
- ▶ Return of client files (Rule 1.16(d), 1.15(c)(4))
- ▶ Documenting termination of representation important
 - ▶ Not mandatory, but recommended

OLPR ADVISORY OPINION SERVICE

- ▶ Available to licensed MN attorneys
- ▶ OLPR attorneys will provide no cost verbal opinion on application of specific facts to rules
- ▶ Confidential; non-binding on third parties
- ▶ No opinion will be offered on (1) conduct of third parties, (2) where conduct has already occurred, (3) questions of law, and (4) content of lawyer advertising
- ▶ In 2016, the OLPR provided 1890 opinions.
- ▶ Options: Submit a written request on line (preferred where facts are complicated or detailed); call 651-296-3952 or toll-free 1-800-657-3601 and ask for the A/O attorney
- ▶ Website: <http://lprb.mncourts.gov>

OTHER RESOURCES: LAWYERS CONCERNED FOR LAWYERS

- ▶ During 2016: 108 open disciplinary probations—39 included a disability related condition, either mental health (24) and/or chemical dependency (15)
- ▶ A recent ABA/Hazelden study indicates that one-fifth of U.S. attorneys may suffer from some level of problematic drinking, and a significant percentage of study participants reported mental health concerns.
- ▶ Study participants advised that barriers to seeking treatment included (1) not wanting others to find out they needed help; and (2) concerns regarding confidentiality or privacy.
- ▶ **Lawyer assistance programs like Lawyers Concerned for Lawyers are not required to report misconduct disclosed to them by an attorney seeking assistance. Rule 8.3(c), MRPC.**
- ▶ Please do not let concerns for your license interfere with seeking help from a lawyer assistance program.
- ▶ Lawyers Concerned for Lawyers: 651-646-5590 or help@mnlcl.org
- ▶ 24-hr crisis line: 612-332-4805

ADDITIONAL RESOURCES

- ▶ Wealth of Resources on Website, <http://lprb.mncourts.gov>
- ▶ Index and text of Bench and Bar articles and MN Lawyer ethics columns by Office, sorted by Rule, Subject and Year (no precedential value but useful guidance)
- ▶ Current Rules (MRPC and RLPR) and Board Opinions
- ▶ Suspended and Disbarred Lawyer List
- ▶ Attorney Search containing all public discipline, with links to Court opinions and petitions for discipline
- ▶ Trust Account Information and Resources, including FAQs
- ▶ Professional Firm Filing Requirements
- ▶ Cross Border (Multijurisdictional Practice) Information
- ▶ Annual Reports of OLPR, including historical reports
- ▶ Announcements and News
- ▶ Board and Office Directory
- ▶ Complaint forms in English, Hmong, Russian, Somali, and Spanish