

July-September 2005 Alaska Bar *Rag*

Making Contact: The “No Contact with Represented Parties” Rule

**By Mark J. Fucile
Fucile & Reising LLP**

Alaska RPC 4.2 governs communications with represented parties. The “no contact” rule is designed to protect clients by channeling most communications through counsel for each side. Although RPC 4.2 is simple on its face, it can be difficult in application. At the same time, it involves situations lawyers encounter often and where there can be stiff penalties for guessing wrong.

In this article, we’ll first look at the elements of the rule and its exceptions. We’ll then turn to how the rule applies when “the other side” is a corporation or the government. Although the focus will be on the litigation context where the rule comes into play most often, the concepts discussed apply with equal measure outside litigation.

The Elements

The “no contact” rule has four primary elements: (1) a lawyer; (2) a communication; (3) about the subject of the representation; and (4) with a party the lawyer knows to be represented.

A lawyer. The “lawyer” part is easy (and includes lawyers acting pro se under Alaska Bar Ethics Opinion 95-7). But what about people who work for lawyers—such as paralegals, secretaries and investigators? And what about our

own clients? Although RPC 4.2 doesn't specifically mention communications channeled through others, RPC 8.4(a) defines "professional misconduct" to include violating the professional rules "through the acts of another[.]" Moreover, RPC 5.3(c)(1), which governs lawyer responsibility for staff conduct, states that "a lawyer shall be responsible for conduct of such a person 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." A lawyer, accordingly, can't use staff to make an otherwise prohibited contact. Clients, by contrast, are not prohibited from contact with each other during a lawsuit and, in fact, often continue to deal with each other on many fronts while disputes are under way. The comments to RPC 4.2 recognize this: "[P]arties to a matter may communicate directly with each other[.]" Nonetheless, a lawyer should not "coach" a client for a prohibited "end run" around the other side's lawyer.

Communication. "Communicate" is not defined specifically in the rule. The safest course, though, is to read this term broadly to include communications that are either oral (both in-person and telephone) or written (both paper and electronic).

Subject of the Representation. RPC 4.2 does not prohibit *all* communications with the other side. Rather, it prohibits communications "about the subject of the representation" when a party (or a person) is represented "in

the matter.” Or as the comments to RPC 4.2 put it by way of example: “[T]he existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.” In a litigation setting the “subject matter of the representation” will typically mirror the issues as framed by the pleadings. For example, in an automobile accident case, asking an opposing party during a break in a deposition whether the light was green or red likely runs afoul of the rule. By contrast, exchanging common social pleasantries during that same break should not.

Party the Lawyer Knows to Be Represented. RPC 4.2 is phrased in terms of actual knowledge that the party is represented. Actual knowledge, however, can be implied from the circumstances. See Alaska Ethics Opinion 98-1.

The Exceptions

There are two principal exceptions to the “no contact” rule: permission by opposing counsel and communications that are “authorized by law.”

Permission. Because the rule is designed to protect clients from overreaching by adverse counsel, permission for direct contact must come from the party’s lawyer rather than from the party. See RPC 4.2. The rule does not require permission to be in writing. A quick note or e-mail back to the lawyer who

has granted permission, however, should protect the contacting lawyer if there are any misunderstandings later.

Authorized by Law. Contacts that are expressly permitted by law do not violate the rule. Service of a summons, for example, falls within the exception. At the same time, the phrase “authorized by law” is more ambiguous in its application than in its recitation. Alaska Ethics Opinion 94-1 suggests taking a conservative course: “The Committee is of the opinion that the phrase ‘authorized by law’ does not apply to all laws of general application permitting communications. Rather, to be effective as an exemption from Rule 4.2, a provision of law authorizing direct attorney contact . . . must specifically allow the communication[.]” The safest course is to read this exception narrowly and to rely on permission from opposing counsel if direct contact is necessary.

The Corporate/Governmental Context

A key question in applying the “no contact” rule in the corporate/governmental context is: Who is the represented party? Or stated a little differently, if the corporation or agency is represented, does that representation extend to its current and former officers and employees?

The comments to RPC 4.2 and the ethics opinions set out a four-layer hierarchy of who’s “fair game” and who’s “off limits.”

Corporate Directors and Officers. The comments to RPC 4.2 note that the “rule prohibits communications by a lawyer for one party concerning the matter in

representation with persons having a managerial responsibility on behalf of the organization.” Directors and officers fall within this circle. See Alaska Ethics Opinion 90-1. Lower-level managers who do not direct the entity’s general or legal affairs management typically fall outside this circle. See Alaska Ethics Opinion 84-11. For example, a corporate director of a grocery store chain would be “off limits,” but the night shift manager for the produce department at one of the company’s stores would likely be “fair game.”

Employees Whose Conduct Is at Issue. In interpreting RPC 4.2’s very similar predecessor, DR 7-104(A)(1), Alaska Ethics Opinion 90-1 found that “[w]here the opposing party is a corporation, an officer *or employee* with authority to commit the corporation is considered a party.” (Emphasis added.) Alaska Ethics Opinion 91-1 echoed this point: “[T]hose employees whose acts or omissions are binding on the corporation, are considered to be ‘parties’ to litigation involving the corporation.” Party admissions under Alaska Rule of Evidence 801(d)(2)(D) include statements by a “party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]” Therefore, an employee whose conduct is attributable to the corporation will fall within the company’s representation. For example, if a company truck driver runs a red light, causes an accident, jumps out of the cab and yells “it’s all my fault,” that employee will fall within the company’s representation and will be “off limits.”

Employees Whose Conduct Is Not at Issue. Current employees whose conduct is not directly at issue are generally “fair game.” To return to the truck driver example, let’s add the twist that another company driver was following behind and both witnessed the accident and heard the admission. The second driver would simply be an occurrence witness and would not fall within the company’s representation.

Former Employees. Former employees of all stripes are “fair game” as long as they are not separately represented in the matter by their own counsel. See Alaska Ethics Opinion 91-1. The only caveat is that a contacting lawyer cannot use the interview to invade the former employer’s attorney-client privilege or work product protection. See Alaska Ethics Opinion 88-3.

Summing Up

Potential sanctions for unauthorized contact can include disqualification, suppression of the evidence obtained and bar discipline. See *generally In re Korea Shipping Corp.*, 621 F. Supp. 164 (D. Alaska 1985) (discussing possible remedies). Given those possible sanctions coupled with the natural reaction of opposing counsel who learns of a perceived “end run” to get to his or her client, this is definitely an area where it’s better to be safe than sorry.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark

handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.