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

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Idaho 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 *Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 925 P.2d 1118 (1996)). 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. Comment 2 to RPC 4.2 recognizes this: "Parties 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 person is represented "in the matter."

As Comment 2 to RPC 4.2 puts 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 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. See, e.g., *State v. Robinson*, 115 Idaho 800, 815 n.3, 770 P.2d 809 (Ct. App. 1989) (prosecutor confronted a defendant in a courthouse hallway regarding his testimony); *Runsvold*, 129 Idaho at 421 (lawyer sent copies of pleading directly to the opposing party). 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. Comment 7 to RPC 4.2 notes, however, that “actual knowledge may be inferred from the circumstances.”

The Exceptions

RPC 4.2 contains two principal exceptions to the “no contact” rule: permission by opposing counsel and communications that are “authorized by law or a court order.”

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. 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 or court order 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. 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?

Comment 6 to RPC 4.2 and ABA Formal Ethics Opinion 95-396, § VI (1995), which discusses the analogous provision under the ABA Model Rules from which Idaho RPC 4.2 is drawn, set out a four-layer hierarchy of who's "fair game" and who's "off limits."

Corporate Directors and Officers. Comment 6 notes that the "[r]ule 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[.]”

Directors, officers and senior managers fall within this circle. Lower-level managers who do not direct the entity's general or legal affairs management, however, typically fall outside this circle. For example, a corporate director of a large fast food chain would be “off limits,” but the night shift manager at one of the company's outlets would likely be “fair game.”

Employees Whose Conduct Is at Issue. Comment 6 also notes that a line-level employee will be deemed to fall within the representation of the employer by corporate counsel (either internal or outside) when the employee's conduct “may be imputed to the organization for purposes of civil or criminal liability.” Party admissions under Idaho 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 of the servant or agent, 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. 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.

Summing Up

Potential sanctions for unauthorized contact can include disqualification, suppression of the evidence obtained and bar discipline. 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.

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