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Who's Fair Game? The "No Contact" Rule in the Corporate Context

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Oregon DR 7-104(A)(1) governs communications with represented parties. The "no contact" rule generally prohibits communications with a represented opponent outside the presence of the other side's lawyer on the matters at issue absent the specific permission of the other lawyer. The rule is designed to protect clients by channeling most communications through counsel for each side.

A question that often comes up in the corporate or governmental context is: Who is the represented party? Or, stated somewhat differently, if the corporation or the government agency is represented in a matter, does that representation extend to its current and former officers and employees? The Oregon State Bar has developed some relatively "bright line" distinctions in two ethics opinions looking at the "no contact" rule in the entity context. The first, Legal Ethics Opinion 1991-80, addresses corporate employees. The second, Legal Ethics Opinion 1998-152, does the same for governmental employees. Their conclusions mirror each other and both opinions are available on the OSB web site at www.osbar.org.

1991-80 and 1998-152 set out four categories of employees and then define who's "fair game" and who's "off limits":

Current Management Employees. Current corporate officers, directors and managers are swept under the entity's representation and, therefore, are "off limits." Applying the rule to corporate officers and directors is easy. "Managers," by contrast, can be a more elusive concept. Senior officials who have the ability to set policy for an organization are clearly included. But, what about the night shift manager of a local store or plant? The Oregon Supreme Court has not yet addressed how far down the corporate roster "management" extends for purposes of the "no contact" rule and cases from around the country are split. Courts that have wrestled with this point usually look to factors like the degree of at least local management decision-making authority the supervisor has on the matters involved.

Current Employees Whose Conduct Is at Issue. Current employees whose conduct will be attributed to the entity in an effort to hold the entity liable fall within the entity's representation and are also "off limits."

Current Employees Whose Conduct Is Not at Issue. Current employees whose conduct is not at issue are generally "fair game." An example highlights the distinction between the two categories of current line-level employees: Two company truckers are driving separate rigs. The first driver runs a red light, causes an accident and then jumps out of his truck and shouts "it's all my fault." The second driver simply witnesses the accident and the admission. The driver who was involved in the accident and whose conduct will be attributed to the

employer is “off limits.” The other driver who was merely a witness, however, is “fair game” because the second driver’s conduct is not in question.

Former Employees. All former employees of every stripe are “fair game”—subject to two important qualifiers. First, if the former employee is separately represented by his or her own counsel in the matter, then any contact would need to be channeled through the former employee’s personal lawyer. Second, the contact with the former employee can’t be used to invade the former employer’s attorney-client privilege by asking the former employee about discussions with corporate counsel. See *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 269 (D Or 1997).

1991-80 and 1998-152 don’t answer every conceivable issue that might arise under the “no contact” rule in the corporate or governmental setting. But, they offer valuable navigation tools in waters that lawyers in both litigation and transactional practices sail through often.

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