

**Murky Waters:**  
***Ethical Issues in Water Resource Practice***

- **The “No Contact with Represented Parties Rule”**
- **Inadvertent Production of Privileged Documents**

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## **Section 1**

### **The “No Contact with Represented Parties Rule”**

(Originally published in the October 2005 Oregon State Bar Bulletin as: “Who’s Fair Game? Who You Can and Can’t Talk to on the Other Side”)

Oregon 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 that lawyers encounter frequently and where they risk sanctions for “guessing wrong.”

In this column we’ll look at who you can—and can’t—talk to on the other side. Although the focus is on the litigation context where this arises most frequently, the concepts discussed apply with equal measure outside litigation. We’ll first survey the elements of the “no contact” rule, then turn to its exceptions and conclude with how the rule applies in the corporate context.

Before we do, a note on the relationship between RPC 4.2 and its predecessor, DR 7-104(A)(1), is warranted. Subject to further development of the new rule by the Oregon Supreme Court, the cases applying DR 7-104(A)(1) should still be “good law.” In fact, the new Oregon ethics opinions rely heavily on prior decisions under DR 7-104(A)(1) in discussing RPC 4.2.

## 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 person the lawyer knows to be represented.

*A Lawyer.* The “lawyer” part is easy. Under its terms, RPC 4.2 applies to both lawyers acting in a representative capacity and lawyers representing themselves. But what about people who work for the lawyer—such as paralegals, secretaries and investigators? And what about our own clients? Clients are not prohibited from contacts with each other during a lawsuit and in fact, often continue to deal with each other on many fronts while disputes are underway. See OSB Legal Ethics Op 2005-6. Nonetheless, a lawyer should not “coach” a client for a prohibited “end run” around the other side’s lawyer. *Id.*

*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 Matter of the Representation.* RPC 4.2 does not prohibit *all* communications with the other side. Rather, it prohibits communications “on the subject of the representation” where the party is represented on “that subject.” In a litigation setting, the “subject of the representation” will typically mirror the issues in the lawsuit as reflected in the pleadings or positions that the parties have otherwise staked out. See OSB Legal Ethics Op 2005-126. For example, asking an opposing party in an automobile accident case during a break in a

deposition whether the light was red or green will likely run afoul of the rule. By contrast, exchanging common social pleasantries with an opposing party during a break in a deposition should not.

*Person the Lawyer Knows to Be Represented.* RPC 4.2 is framed in terms of actual knowledge that a party is represented. Actual knowledge, however, can be implied from the circumstances under RPC 1.0(h).

### **The Exceptions**

There are three exceptions to the “no contact” rule: permission by opposing counsel, communications that are “authorized by law,” and notices that are required by written contract to be served directly on the parties.

*Permission: RPC 4.2(a).* 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, will protect the contacting lawyer if there are any misunderstandings or disputes later.

*Authorized by Law: RPC 4.2(b).* Contacts that are expressly permitted by law (or under the pending amendments, court order) do not violate the rule. Service of a summons or obtaining documents under public records inspection statutes, for example, fall within the exception. See OSB Legal Ethics Op 2005-144 (public records). At the same time, the phrase “authorized by law” is more ambiguous in its application than in its recitation. See *generally In re Williams*, 314 Or 530, 840 P2d 1280 (1992) (reading the “authorized by law exception”

narrowly under RPC 4.2's analogous predecessor), DR 7-104(A)(1).); OSB Legal Ethics Op 2005-144. The safest course is to read this exception narrowly and to rely on permission from opposing counsel instead if direct contact is necessary.

*Contractual Notice: RPC 4.2(c).* Notices that are required by written agreements to be served directly to parties are permitted as long as the notice is also sent to the other person's lawyer. Although not a specific part of the exception, the safest course is to transmit the lawyer's copy at the same time as the required contractual notice other person.

### **The Corporate Context**

A key question in applying the "no contact" rule in the corporate context is: Who is the represented party? Or stated alternatively, if the corporation is represented, does that representation extend to its current and former officers and employees?

Oregon has a series of ethics opinions and decisions that have developed some relatively "bright line" distinctions. Legal Ethics Opinion 2005-80 addresses corporate employees and Legal Ethics Opinion 2005-152 does the same for governmental employees. Both 2005-80 and 2005-152 set out four categories of employees and then define whether they are "fair game" or "off limits":

*Current Management Employees.* Current corporate officers, directors and managers are swept under the entity's representation and, therefore, are "off limits" outside formal discovery such as depositions. Applying the rule to corporate officers and directors is straightforward. Deciding who is a "manager"

for purposes of the rule, however, can be more difficult: 2005-80 notes that it is a fact-specific exercise and depends largely on the duties of the individual in relation to the issues in the litigation. See also OSB Legal Ethics Op 2005-144. A senior manager of grocery store chain, for example, would likely be off-limits even if not an officer of the corporation when the manager had responsibility for negotiating a vegetable supply contract that was the subject of litigation with a grower. The night shift manager for the produce department at one of the company's stores, by contrast, would likely be fair game as long as the litigation did not raise issues within the purview of that person's responsibilities.

*Current Employees Whose Conduct Is at Issue.* Current employees whose conduct is at issue are treated as falling within the entity's representation. Party admissions under Oregon Evidence Code 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 yell's "it's all my fault," that employee will fall within the company's representation and will be off limits outside formal discovery.

*Current 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. See *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 269 (D Or 1997) (applying former DR 7-104(A)(1) in the entity context).

### **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 upon learning of a perceived "end run" to get to his or her client, this is definitely an area where discretion is the better part of valor.

## **Section 2**

### **Inadvertent Production of Privileged Documents**

(Originally published in the February 2006 Multnomah Lawyer as: “Inadvertent Production Revisited”)

Two years ago this month, I wrote a column on inadvertent production. I noted at the time that for a variety of reasons the pendulum had swung from one that essentially rewarded the recipient of inadvertently produced confidential material to one that posed a disqualification risk to the recipient if the material involved wasn’t returned and potential privilege waiver wasn’t litigated promptly. With the new Oregon Rules of Professional Conduct that were adopted last year, there has been a slight swing back in the pendulum—but disqualification risk still remains if inadvertently produced material isn’t handled with care.

When inadvertent production occurs, four key questions usually follow for the recipient: (1) do I need to notify my opponent? (2) do I need to return the document involved? (3) has privilege been waived? and (4) if I don’t litigate privilege waiver before I use the document, will bad things happen to me?

*Notice.* Before the RPCs were adopted last year, the principal guidance in Oregon on these questions was Oregon State Bar Formal Ethics Opinion 1998-150. That opinion, in turn, drew heavily from an ABA ethics opinion on the same subject—Formal Opinion 92-368. 1998-150 counseled that a recipient of inadvertently produced confidential material had to both notify his or her opponent *and* follow the opponent’s instructions pending a decision by the court on whether privilege had been waived.



This past year saw the adoption of a new Oregon rule specifically addressing inadvertent production, a new accompanying Oregon ethics opinion and the withdrawal of ABA Formal Opinion 92-368. Oregon RPC 4.4(b) creates a duty to notify an opponent: “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

*Return.* At the same time, RPC 4.4(b) does not create a *rule of ethics* on whether a recipient must return inadvertently produced confidential information. Rather, the new ethics opinion, 2005-150, casts that decision as turning on the substantive *law of evidence*: “By its express terms, Oregon RPC 4.4(b) does not require the recipient of the document to return the original nor does it prohibit the recipient from openly claiming and litigating the right to retain the document if there is a nonfrivolous basis on which to do so. The purpose of the rule is to permit the sender to take protective measures; whether the recipient lawyer is required to return the documents or take other measures is a matter of law beyond the scope of the Oregon RPC, as is the question of whether the privileged status of such documents has been waived.”

*Waiver.* On the question of privilege waiver, *Goldsborough v. Eagle Crest Partners*, 314 Or 336, 838 P2d 1069 (1992), and *In re Sause Brothers Ocean Towing*, 144 FRD 111 (D Or 1991), are the leading cases in Oregon. Although the state and federal formulations vary somewhat, they generally look at the following case-specific factors to determine whether privilege has been waived through inadvertence: the reasonableness of the precautions taken against

disclosure; the time taken to raise the error; the overall scope of discovery; the extent of the inadvertent production; and fairness to both sides.

*Recipient Risk.* Are there risks if you conclude on your own that privilege has been waived and use the documents without either telling your opponent or first litigating privilege waiver? The short answer is “yes.” Formal Ethics Opinion 2005-150 cites a federal case from Seattle that illustrates the risk. *Richards v. Jain*, 168 F Supp 2d 1195 (WD Wash 2001), was not a true “inadvertent” production case because the plaintiffs’ law firm received the privileged documents directly from its client who had secretly taken them with him when he left his job with the defendants. Rather than notify their opponents and litigate the waiver issue up front, the law firm simply used the documents in formulating its case strategy. When the defendants found out, they moved to disqualify the plaintiffs’ firm. The court agreed—holding that because there was no other way to “unring the bell” to erase the law firm’s knowledge of the confidential information, disqualification was an appropriate sanction. Although disqualification is only one possible remedy, *Richards* drives home the risk of what can happen if a recipient of inadvertently produced confidential information uses the material involved without first litigating privilege waiver and obtaining a ruling from the court.