

**RPC 4.2's "NO CONTACT" RULE:
Who You Can & Can't Talk to on the Other Side**

Mark J. Fucile

Fucile & Reising LLP

115 NW First Ave., Suite 401

Portland, OR 97209

503.224.4895

mark@frllp.com

www.frllp.com

Oregon State Bar Real Estate & Land Use Section Annual Meeting
August 11, 2007
Bend

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark is a past chair and a current member of the Washington State Bar Association Rules of Professional Conduct Committee, is a former member of the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar's Section on Professionalism & Ethics. Mark was also a member of the special committees in Oregon and Washington that developed the current Rules of Professional Conduct in both states. He writes the quarterly Ethics & the Law column for the WSBA *Bar News* and the monthly Ethics Focus column for the Multnomah Bar's *Multnomah Lawyer* and is a regular contributor on law firm risk management to the OSB *Bulletin*, the ISB *Advocate* and the Alaska *Bar Rag*. Mark is a contributing author/editor for the current editions of the WSBA's *Legal Ethics Deskbook* and the OSB's *Ethical Oregon Lawyer*. Mark also handles condemnation litigation, is a member of the OSB's Real Estate & Land Use Section and is a contributor on condemnation to the RELU *Digest*. He is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. Mark received his B.S. from Lewis & Clark College and his J.D. from UCLA.

Introduction

Oregon RPC 4.2 governs communications with represented persons:

“In representing a client or the lawyer’s own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- “(a) the lawyer has the prior consent of a lawyer representing such other person;
- “(b) the lawyer is authorized by law or by court order to do so; or
- “(c) a written agreement requires a written notice or demand to be sent to such other person in which case a copy of such notice or demand shall also be sent to the other person’s lawyer.”

The “no contact” rule is designed to protect clients by channeling most communications through counsel for each side. See generally *In re Knappenberger*, 338 Or 341, 345-46, 108 P3d 1161 (2005) (discussing the purpose for the “no contact” rule). 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.” See generally *In re Hedrick*, 312 Or 442, 448-49, 822 P2d 1187 (1991) (rule violated even if no harm results); see, e.g., *In re Spies*, 316 Or 530, 852 P2d 831 (1993) (lawyer disciplined for communicating directly with county commissioners in a contested land use matter when the lawyer knew that the county was represented).

This paper looks 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 as adopted in 2005 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. Both the new and old rules and the new ethics opinions are available on the Oregon State Bar's web site at www.osbar.org.¹

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. 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? By its terms, RPC 4.2 also applies to the lawyer's agents when they are directed by the lawyer. See *also* RPC 8.4(a)(1) (prohibiting lawyers from violating the RPCs “through the acts of another”). 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 Formal 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. See OSB Formal Ethics Op 2005-164 at 452-53 (“The application of the rule is the same regardless of the form of the communication.”).

Subject 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

¹ Oregon's version of the “no contact” rule is similar to ABA Model Rule 4.2. Oregon did not include formal comments to its RPCs when they were adopted in 2005. Nonetheless, the Supreme Court has looked to the comments to ABA Model Rule 4.2 in interpreting and applying Oregon's “no contact” rule. See *In re Knappenberger*, 338 Or at 345-46. ABA Model Rule 4.2 and its accompanying comments are available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.

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 Formal 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 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 Formal Ethics Ops 2005-6 (summons), 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 Formal 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. Formal Ethics Opinion 2005-80 addresses corporate employees and Formal 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 Formal 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. Therefore, an employee whose conduct is attributable to the corporation will fall within the company's representation. *Accord* Oregon Evidence Code 801(4)(b)(D) (including as party admissions 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"). 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 outside formal discovery.

Current Employees Whose Conduct Is Not at Issue. Current employees whose conduct is not directly at issue and who are not otherwise separately represented are generally "fair game." *See also* RPC 3.4(a) (a lawyer cannot unlawfully obstruct another party's access to evidence). 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); *see also* RPC 4.4(a) (prohibiting methods of gathering evidence that violate the legal rights of another).

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.