

ETHICS IN EMINENT DOMAIN: THE “NO CONTACT” RULE— VARIATIONS ON A THEME

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Introduction¹

Oregon condemnation procedure includes several points where contact occurs with represented parties outside the context of formal discovery. From the condemner's side, for example, the Condemnation Code requires a condemner to serve a variety of notices and offers on a property owner during the course of an acquisition. From the property owner's perspective, land use or other documents held by the planning department of a governmental unit may be very relevant to valuation issues in a condemnation case being prosecuted by the same governmental unit's transportation department.

Oregon's "no contact" rule, RPC 4.2², appears simple on its face but can be difficult in application. At the same time, it involves situations that lawyers encounter frequently and where they risk sanctions (both regulatory and court-imposed) for "guessing wrong." Further, recent developments have also illuminated several "traps for

¹Portions of this paper draw on Mark's article "Who's Fair Game? Who You Can and Can't Talk to on the Other Side," 66 *OSB Bulletin* 27 (2005), and his Chapter 5 on entity clients in the Oregon State Bar's *Ethical Oregon Lawyer* (2006).

²RPC 4.2 reads:

"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 such other person's lawyer."

the unwary” in Oregon’s rule stemming from its unusual history. In short, it is an ethics rule that merits careful review by Oregon condemnation lawyers.³

This paper and the accompanying presentation will survey four aspects of the “no contact” rule: (1) the elements of the rule; (2) its exceptions; (3) how the rule applies in the corporate or governmental context; and (4) sanctions for violating the rule.

I. Elements of the Rule

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. A Lawyer

RPC 4.2 applies to both lawyers acting in a representative capacity and lawyers representing themselves.

RPC 4.2 prohibits both direct contact by the lawyer and “causing another” to engage in a prohibited contact. In this context, a lawyer’s agents include both the lawyer’s employees, such as a paralegal or secretary, and retained consultants working with the lawyer, such as an appraiser. Therefore, a government lawyer cannot direct an appraiser to interview the property owner during an inspection if the property owner’s

³Contacts with unrepresented persons are governed by RPC 4.3, which generally prohibits giving an unrepresented person legal advice. See *generally* OSB Formal Ethics Op 2005-16 (2005). Contacts with opposing experts, in turn, are generally governed by RPC 3.4(c), which requires compliance with associated court rules. See *generally* OSB Formal Ethics Op 2005-132 (2005). On this last point, condemnation is an exception to the general absence of expert discovery in Oregon state court because it does require production of appraisal reports (and associated expert reports upon which appraisal reports are premised). The appellate courts have not addressed whether the statutory requirement for appraisal exchange forecloses other contact as in the federal system (see OSB Formal Ethics Op 2005-132 at 359, noting that in the federal system contact with an opposing expert is limited to specified means of formal discovery). In the absence of clear appellate court guidance, it would be prudent to avoid contact regarding the case involved with an opponent’s current expert. See *also* *State v. Riddle*, 330 Or 471, 8 P3d 980 (2000) (discussing contact with an opponent’s former expert).

lawyer has not given specific permission for such communication to take place. See OSB Formal Ethics Ops 2005-161 (2005) at 446 (dealing with State agency personnel in particular); 2005-6 (2005) (discussing the “no contact” rule generally).⁴ If, however, the property owner *volunteers* a statement to an opposing appraiser that runs counter to the property owner’s position at trial, that statement should not violate the “no contact” rule and may be considered an admission. See *State Dept. of Transportation v. Jeans*, 80 Or App 582, 585-86, 723 P2d 344 (1986) (noting that a property owner’s voluntary statement to an appraiser during the course of an inspection might be admissible as a party admission).

Clients are not prohibited from contacting 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 at 12; OSB Formal Ethics Op 2005-147 (2005) at 398. Nonetheless, a lawyer should not “coach” a client for a prohibited “end run” around the other side’s lawyer. OSB Formal Ethics Op 2005-147 at 399.⁵

B. Communication

“Communicate” is not defined specifically in the rule. The safest course, however, is to read this term broadly to include communications that are either oral—both in-person and telephone—or written—both paper and electronic. OSB Formal Ethics Opinion 2005-164 (2005) deals with communication through web sites and OSB

⁴The Oregon State Bar ethics opinions cited in this paper are available on the Bar’s web site at www.osbar.org.

⁵In an opinion (Formal Opinion 11-461 (2011)) that has generated controversy, the ABA took an aggressive position on a lawyer’s ability to “coach” a client in this regard. Given the rigor with which the Oregon State Bar has traditionally prosecuted lawyers generally and the equal rigor with which the Oregon Supreme Court has disciplined lawyers for “no contact” violations in particular, Oregon practitioners would be prudent not to rely on the ABA’s aggressive posture.

Formal Ethics Opinion 2013-189 (2013) addresses communication through electronic social media. They generally conclude that simply viewing an opponent's web site or social media equivalent should not violate the rule. However, they also conclude that "interactive" forms of communication via the web or social media are generally prohibited by the rule.⁶

Simultaneous communication to both a represented person and the person's lawyer also violates the rule (absent prior permission of the person's lawyer). *In re Hedrick*, 312 Or 442, 448, 822 P2d 1187 (1992), for example, involved a lawyer disciplined for simultaneously sending a demand letter to a represented person and the person's lawyer.

C. 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 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 (2005) at 337. 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.

⁶RPC 4.2 governs the contact itself rather than the content of the contact. Misrepresentations made in the course of an impermissible contact, for example, are generally prohibited by RPC 8.4 subject to Oregon's unique exception for supervision of otherwise lawful covert investigations. See *generally* OSB Formal Ethics Op 2005-173 (2005) (discussing the exception); see *also* OSB Formal Ethics Op 2013-189 at 581 (discussing the exception in the social media context).

Oregon's former Disciplinary Rules, which the current RPCs replaced in 2005, extended the prohibition on contact to "directly related subjects." See Former DR 7-104(A)(1). With the 2005 move to the RPCs, which are modeled generally (but not precisely) on the ABA's influential Model Rules of Professional Conduct, the phrase "or on directly related subjects" was deleted from the text of Oregon's "no contact" rule. Notwithstanding that change, however, the Oregon Supreme Court in *In re Newell*, 348 Or 396, 406-09, 234 P3d 967 (2010), essentially read "or on directly related subjects" back into the rule by disciplining a lawyer for taking the deposition of a third party witness without the witness' lawyer in another proceeding that shared some common facts being present. Condemnation counsel (for both governments and property owners) are often placed in similar circumstances where witnesses may have counsel in other proceedings that share some common facts relevant to valuation, such as land use, wetlands or environmental matters. The *Newell* Court found that, even with the express deletion of the phrase "or on directly related subjects," such persons effectively can only be contacted with the permission of their lawyer in the other matter or, as we will address in the next section on exceptions to RPC 4.2, in a court-ordered deposition.

D. 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).

II. The Exceptions

There are three exceptions to Oregon's "no contact" rule: (1) permission by opposing counsel; (2) communications that are "authorized by law;" and (3) notices that are required by written contract to be served directly on the parties.

A. Permission

The “no contact” rule is designed to protect clients from overreaching by adverse counsel. See generally *In re Knappenberger*, 338 Or 341, 345-46, 108 P3d 1161 (2005) (discussing the reasons for the rule under RPC 4.2’s analogous predecessor, former DR 7-104(A)(1)). Therefore, permission for direct contact under RPC 4.2(a) must come from the party’s lawyer rather than from the party. See, e.g., *In re Spies*, 316 Or 530, 536, 852 P2d 831 (1993) (property owner’s lawyer in a land use matter contacted county commissioners without permission of county counsel). 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.

B. Authorized by Law

Contacts that are expressly permitted by law or court order are permitted under RPC 4.2(b). Service of a summons or obtaining documents under public records inspection statutes, for example, fall within the exception. See OSB Formal Op 2005-144 (2005) (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 former DR 7-104(A)(1)); OSB Formal Ethics Op 2005-144. In the *Newell* case discussed earlier, for example, the Oregon State Bar Office of Disciplinary Counsel argued that neither a subpoena nor a deposition were “authorized by law” even though both are clearly provided by applicable Rules of Civil Procedure (respectively, ORCP 55 and 39) and the ORCP are considered statutory law. See *McCarthy v. Oregon Freeze*

Dry, Inc., 327 Or 84, 88, 957 P2d 1200 (1998) (so stating). The Supreme Court found that a deposition is “authorized by law” (348 Or at 409), but disciplined the lawyer, nonetheless. The Supreme Court suggested (without citation to either the Rules of Civil Procedure or the Rules of Professional Conduct) that a lawyer must first confirm that a lawyer who represents a third party in another matter has given permission for the third party to appear unrepresented (either expressly or by implication by the lawyer’s failure to attend). Although the Supreme Court did not address the remedy if the lawyer expressly refuses to grant such permission (notwithstanding a valid subpoena), both the procedural rules (ORCP 46) and the professional rules (RPC 4.2) suggest that the remedy is to seek a court order compelling the deposition to proceed.

C. Contractual Notice

Notices that are required by written agreements to be served directly to parties are permitted under RPC 4.2(c) 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 the required contractual notice is sent to the other party.

III. Application in the Corporate and Governmental Context

A key question in applying the “no contact” rule in the corporate or governmental context is: Who is the represented party? Or stated alternatively, if the corporation or governmental unit 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. OSB Formal Ethics Opinion 2005-80 (2005) addresses corporate employees and OSB Formal Ethics Opinion 2005-152 (2005) 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.”

A. 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 (examining this question in the context of a public agency clerk handling a request for a public document). A senior manager of a 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.

B. Current Employees Whose Conduct Is at Issue

Current employees whose conduct is at issue are treated as falling within the entity’s representation. Therefore, even a line-level 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 in a subsequent lawsuit to hold both (or at least the corporate employer) liable and will be off limits outside formal discovery.

C. 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.⁷

D. 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); RPC 4.4(a) (prohibiting unauthorized invasion of another party’s privileged communications).

IV. Sanctions

Regulatory discipline is the most common sanction for violation of the “no contact” rule. See, e.g., *In re Spies*, 316 Or 530. The Supreme Court has held that there is no “*de minimis*” violation of the rule and has also concluded that harm is not a

⁷On occasion, entity counsel may take the position that the lawyer represents other entity employees (beyond those noted above). Nothing in the entity client rule, RPC 1.13, prohibits multiple representation of both the entity and its constituents as long as no impermissible conflicts exist. However, if an entity lawyer makes that representation, it must be true. If not, the entity lawyer may be subject to both regulatory discipline and court-ordered sanctions for both misrepresentation and unlawfully impeding an opponent’s access to discoverable evidence. See generally Utah State Bar Ethics Advisory Op 04-06 (2004); see also *Wright v. Group Health Hospital*, 691 P2d 564 (Wash 1984).

required element for a violation. See *In re Knappenberger*, 338 Or at 345-46.

Therefore, assuming the requisite elements are present, the Supreme Court's interpretation of the rule effectively makes it nearly a "strict liability" offense. Further, the Supreme Court in *Newell* concluded that if it finds a violation it must impose discipline regardless of the mitigating factors present. 348 Or at 413.

Regulatory discipline, however, does not preclude other more direct sanctions in the litigation itself.⁸ These include disqualification of the offending lawyer (see, e.g., *In re News America Pub., Inc.*, 974 SW2d 97, 105 (Tex App 1998) (applying Texas law)) and/or exclusion of the resulting evidence (see, e.g., *Bell v. Kaiser Foundation Hospitals*, No. 03-35876, 2004 WL 2853107 (9th Cir 2004) (unpublished) (applying Oregon law)). Direct sanctions most often occur in situations where the improper contact is combined with the actual or attempted invasion of an opponent's privilege or work product during the improper contact. See generally *In re Korea Shipping Corp.*, 621 F Supp 164 (D Alaska 1985) (discussing the range of sanctions available for violations of the "no contact" rule).⁹

⁸ For discussion of national authorities on litigation remedies, see generally Mark J. Fucile, "Beyond Discipline: Litigation Remedies for 'No Contact' Rule Violations," *DRI For the Defense* (June 2012) at 69.

⁹ For discussions of disqualification in particular as a remedy for improper invasion of an opponent's privilege, see generally OSB Formal Ethics Op 2005-150 (2005) at 408 and *Richards v. Jain*, 168 F Supp2d 1195 (WD Wash 2001).