

Washington Defense Trial Lawyers *Defense News*  
Summer 2015

## The “No Contact” Rule and LLLTs

By Mark J. Fucile  
Fucile & Reising LLP

The “no contact” rule—RPC 4.2—is a professional rule that defense lawyers encounter regularly as we investigate cases. Under the rule, we are prohibited from directly contacting a person we know is represented in the matter involved—whether as a party or a witness. Although the rule uses an actual knowledge standard, knowledge can be inferred from the circumstances under RPC 1.0(f). “Guessing wrong” can result in both regulatory discipline (*see, e.g., In re Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002)) and exclusion of any resulting evidence (*see, e.g., Engstrom v. Goodman*, 166 Wn. App. 905, 271 P.3d 959 (2012)).

In 2012, the Washington Supreme Court approved the concept of limited licensed legal technicians—or “LLLTs” for short—in an effort to address unmet legal needs of persons of modest means. APR 28, which regulates LLLTs, created an LLLT licensing board, set minimum educational standards for LLLTs and defined the kinds of legal services that LLLTs can provide independent of lawyers. Although LLLTs are currently limited to family law under APR 28 and its implementing regulations, the LLLT program is expected to expand over time to other practice areas. With the first crop of LLLTs set to enter practice this year,

the Washington Supreme Court recently approved rules of professional conduct for LLLTs and corresponding amendments to the lawyer RPCs.

Both the LLLT RPCs and the amended lawyer RPCs address the interplay between LLLTs and lawyers within the context of parallel “no contact” rules.

On the LLLT side, LLLT RPC 4.2 prohibits an LLLT from contacting a person “the LLLT knows to be represented by a lawyer in the matter.” Like its lawyer counterpart, the LLLT “no contact” rule uses an actual knowledge standard—but, again, actual knowledge can be inferred from the circumstances under LLLT RPC 1.0A(f). Unlike its lawyer counterpart, however, there are no exceptions—such as consent. Accompanying Comment 1 explains that the absolute nature of the prohibition stems from the relatively narrow scope of LLLT services permitted by APR 28. An LLLT is permitted to assist a client with document preparation and similar work but is not permitted under APR 28H(6) to “[n]egotiate the client’s legal rights or responsibilities, or communicate with another person the client’s position or convey to the client the position of another party[.]” Similarly, under APR 28H(5), LLLTs are prohibited from representing clients in court proceedings. Comment 1 to LLLT RPC 4.2 reasons, therefore, that the prohibition must be absolute because direct communication with an opposing party would exceed the authority to practice granted by APR 28.

On the lawyer side, by contrast, a lawyer may communicate directly with a person being assisted by an LLLT even if the lawyer is aware of that assistance. New Comment 12 to RPC 4.2 explains: “A person who is assisted by an LLLT is not represented by a lawyer for purposes of this Rule . . . Therefore, a lawyer may communicate directly with a person who is assisted by an LLLT. Lawyer communication with a person who is assisted by an LLLT instead is governed by RPC 4.3”—which deals with unrepresented persons.

As LLLTs become a more established feature in Washington practice, lawyers will no doubt adjust to the dual licensing structure the LLLT program has created within the legal profession. For now, however, practitioners will need to grapple with some of the more unusual facets of the LLLT program such as the dichotomy created in key practical areas like the “no contact” rule.

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar’s Legal Ethics Committee, has chaired both the Washington State Bar

Page 4

Committee on Professional Ethics and its predecessor, the Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA NWLawyer (formerly Bar News) and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark has also taught legal ethics as an adjunct for the University of Oregon School of Law's Portland campus. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.