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New Ethics Opinion on Process Server Communication with Opposing Party

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The WSBA Committee on Professional Ethics recently issued an ethics opinion addressing a very common scenario for civil litigators: using an independent process server to personally serve a represented opponent. The “no contact” rule, RPC 4.2, generally prohibits a lawyer from communicating “about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter[.]” RPC 8.4(a), in turn, prohibits a lawyer from violating the RPCs “through the acts of another[.]” The new opinion, 201502, examines two facets of the “no contact” rule involving process servers.

First, the opinion notes that RPC 4.2 includes an exception for contacts that are “authorized by law.” CR 4(d) generally requires personal service of a summons and initial complaint on an opposing party. In a similar vein, CR 45(b) generally requires personal service of a subpoena on a non-party. Further, in many instances, lawyers representing an opposing party or a non-party witness may not be authorized to accept service on behalf of their clients. Opinion 201502 concludes that the “authorized by law” exception applies when process is required by a statute or rule to be served personally.

Second, the opinion also addresses the more nuanced question of whether a process server may communicate with a represented person to

facilitate service. Opinion 201502 concludes that simply contacting a represented person to arrange a convenient time and place for service does not violate RPC 4.2 because the “authorized by law” exception fairly read includes “communications required to accomplish personal service.” The opinion cautions, however, that “any comments or questions regarding substantive issues in the matter are clearly beyond the scope of the exception and therefore improper under RPC 4.2.”

Opinion 201502 is available through the ethics opinion search engine on the WSBA web site.

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 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

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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.