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**Making Contact:  
The “No Contact” Rule in the Corporate Context**

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The “no contact” rule, RPC 4.2, is simple on its face but can be difficult in application. In the litigation context, the rule generally prohibits (subject to specified exceptions) a lawyer from contacting a represented party opponent (or a represented witness) concerning the case involved. When both sides are individuals, the analysis is usually straightforward. When the parties are corporations, however, the scope of the prohibition becomes more nuanced and often focusses on the question of who falls within corporate counsel’s representation for purposes of the rule.

The Oregon State Bar has a very useful ethics opinion addressing this topic—Formal Opinion 2005-80. The opinion, which is available on the OSB web site, is built on the legacy of its predecessor under the former Oregon “DRs,” Formal Opinion 1991-80, and incorporates more contemporary analysis from the corresponding ABA Model Rule on which Oregon’s rule is now patterned. Opinion 2005-80 has great practical utility because it sets out four “black letter” categories of corporate employees—two of which generally fall within corporate counsel’s representation (and, therefore, may not be contacted directly) and two which generally fall outside (and, therefore, may be contacted directly). The OSB

has issued a parallel opinion, 2005-152, that takes the same general approach with government agencies.

In this column, we'll look first at who is "off limits" and "fair game" under the OSB opinion. We'll then examine companion issues under the attorney-client privilege when conducting otherwise permissible interviews. Finally, we'll briefly survey the remedies available for violations of the rule in this context.

***"Off Limits" and "Fair Game"***

As noted, Opinion 2005-80 breaks corporate employees out into four categories and then classifies them as being inside or outside corporate counsel's representation. Classifying a particular employee as "off limits" to direct contact under RPC 4.2 doesn't mean that they are shielded altogether from discovery. But, it does mean that they will generally have to be deposed rather than interviewed.

*Current Management.* Current officers, directors and at least some managers fall within corporate counsel's representation and are "off limits." Officers and directors are straightforward. Deciding which managers fall within corporate counsel's representation, however, is often a more fact-specific exercise and usually turns on the particular issues involved and the degree to which the person commonly interacts with company counsel. On a related note,

ABA Formal Opinion 06-443 (2006) generally classifies in-house counsel as lawyers rather than clients for purposes of the rule as long as they are working as a lawyer for the organization concerned.

*Current Employees Whose Conduct Is at Issue.* Current employees whose conduct is at issue are treated as falling within corporate counsel's representation. The rationale is that because the opponent is attempting to hold the corporation liable for the acts of the employee, the employee should fall within corporate counsel's representation.

*Current Employees Who Are Simply Fact Witnesses.* Current employees who are simply fact witnesses may generally be contacted directly—as long as they are not otherwise represented by their own lawyers.

*Former Employees.* Former employees of all stripes may generally be contacted directly—again as long as they are not otherwise represented by their own lawyers.

### ***The Attorney-Client Privilege***

Assuming that a particular employee is “fair game” for direct contact, Opinion 2005-80 counsels (at 3) that a contacting lawyer cannot “use any conversations with Current Employee or Former Employee to invade Corporate . . . [organization's] . . . lawyer-client privilege.” Similarly, the opinion also

counsels (also at 3) that a contacting lawyer “may not ask or permit Current Employee or Former Employee to disclose to . . . [the contacting] Lawyer any communications that Current Employee or Former Employee had with . . . [organization’s] Lawyer pertaining to the matter in litigation.”

The rationale advanced in the opinion is twofold. As to current employees, Opinion 2005-80 notes that all employees—not just management—can have privileged conversations with company counsel under OEC 503. As to former employees, Opinion 2005-80 reasons that communications with company counsel by a former employee concerning the employee’s work for the company are generally privileged under applicable decisional law. *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 269 (D Or 1997), and *Union Pacific R. Co. v. Mower*, 219 F3d 1069, 1072 n.2 (9th Cir 2000), are examples of the latter.

### **Remedies**

Violations of the “no contact” rule are, of course, grounds for regulatory discipline (see, e.g., *In re Knappenberger*, 338 Or 341, 108 P3d 1161 (2005)). Regulatory discipline, however, is not the exclusive remedy and violations of the rule are also potentially subject to a variety of court-imposed sanctions depending on the circumstances. In *Bell v. Kaiser Foundation Hospitals*, 122 Fed Appx 880, 882 (9th Cir 2004), for example, the Ninth Circuit affirmed the trial

court's exclusion of a declaration obtained in violation of the rule. Similarly, in *In re Feldmeier*, 335 BR 807, 809-15 (Bankry D Or 2005), a law firm was sanctioned monetarily for direct contact. Finally, where a prohibited contact also involves an improper invasion of an opponent's privilege, disqualification is a possible remedy if there is no other practical way to protect the confidential information involved (*see generally In re Korea Shipping Corp.*, 621 F Supp 164, 169-71 (D Alaska 1985) (surveying remedies)).

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.