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## The “No Contact” Rule Revisited

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The “no contact” rule has been around a long time. In fact, it was one of the original canons adopted by the ABA in 1908. At the same time, the rule continues to be relevant today because it is one of the RPCs that all lawyers encounter frequently. Although the form of the rule has evolved over the years from the original ABA canon to today’s RPC 4.2, the prohibition on communicating with a person represented in the matter to which the communication relates remains at its core. Since we last examined the rule in this space, however, there have been a number of significant developments in the comments to the rule, case law interpreting the rule and advisory opinions addressing the rule from both the ABA and the WSBA.

In this column, we’ll look first at those developments within the context of the elements of the rule and its exceptions. We’ll then turn to the closely related topic of how the rule plays out in the entity setting.

### ***Elements of the Rule***

The “no contact” rule is simple on its face, but can be difficult in application. It is only a single sentence long: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the

lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” In understanding the rule, it is useful to break the rule down into its component parts: (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” making the contact is, in many respects, the easiest part of the rule. But, even here, there are important nuances. For example, the Washington Supreme Court in *In re Haley*, 156 Wn.2d 324, 126 P.3d 1262 (2006), concluded that the prohibition extended to lawyers who are representing themselves. By contrast, the Supreme Court is currently reviewing a proposed comment that would exclude lawyers who are represented in a matter (and who have not otherwise joined in that representation as co-counsel) from the prohibition—essentially putting them on the “client” side of the rule rather than the “lawyer” side. In-house lawyers also straddle the “lawyer” and “client” divide. ABA Formal Opinion 06-443 (2006), concluded that in-house lawyers who are acting in a representational capacity fall on the “lawyer” side (and, therefore, may be contacted directly) while lawyers who are filling management positions are generally on the “client” side (and, therefore, may not be contacted directly).

RPC 8.4(a) prohibits a lawyer from violating the RPCs “through the acts of another[.]” Accordingly, a lawyer cannot use the lawyer’s paralegal, assistant or investigator to make an otherwise prohibited contact. Clients, in turn, present a more difficult question. On one hand, clients are generally free to contact each other directly during the course of litigation and, in many circumstances, need to do so as a matter of ongoing business operations. In fact, Comment 4 to RPC 4.2 notes: “Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” On the other hand, there is some ambiguity on the extent to which a lawyer can “coach” a client in this scenario. ABA Formal Opinion 11-461 (2011) takes the position that such assistance is generally permissible. But, that is not a uniform view nationally (*see generally San Francisco Unified School District ex. rel. Contreras v. First Student, Inc.*, 153 Cal. Rptr.3d 583, 601-03 (Cal. App. 2013) (compiling authorities)) and the Washington Supreme Court has not addressed it squarely. Pending clarification in Washington, therefore, lawyers would be wise to treat this area gingerly.

**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. Washington has not yet addressed the definition of “communicate” in the web or social media context. The general consensus nationally, however is that simply looking at (or clicking through) static web or social media pages of a represented person or entity does not fall within the term “communicate.” By contrast, the general consensus is that interactive communication—such as a “friend” request or the equivalent—does meet the definition. Regionally, Oregon has two very useful ethics opinions—Nos. 2005-164 and 2013-189—discussing this distinction.

***Subject Matter of the Representation.*** RPC 4.2 does not prohibit all communications with the other side. Rather, it prohibits communications “about the subject of the representation” when the person contacted is represented in “the matter.” In a litigation setting, the “subject of the representation” typically mirrors the issues in the lawsuit as reflected in the pleadings or positions that the parties have otherwise staked out. For example, asking an opposing party in an automobile accident case during a break in a deposition whether the light was green or red 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 the person contacted is represented. Actual knowledge, however, can be inferred from the circumstances under RPC 1.0A(f). The Supreme Court put it this way in *In re Carmick*, 146 Wn.2d 582, 598, 48 P.3d 311 (2002): “Where there is a reasonable basis for an attorney to believe a party may be represented, the attorney’s duty is to determine whether the party is in fact represented.” Of note, Comment 12 was added to RPC 4.2 when the rules were amended to incorporate LLLTs to clarify that an LLLT is not “representing” a person for purposes of RPC 4.2. As the role of LLLTs evolves, lawyers should monitor further developments on this point.

### ***The Exceptions***

There are two principal exceptions to the “no contact” rule: permission by the lawyer representing the contacted person and communications that are authorized by law or court order.

***Permission.*** Because the rule is designed to protect clients from overreaching by adverse counsel, permission for direct contact must come from the person’s lawyer rather than from the represented person. The rule does not require permission to be in writing. A quick note or email 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.*** Contacts that are permitted by law or court order do not violate the rule. WSBA Advisory Opinion 201502 (2015), for example, gives the example a service of a summons. At the same time, Advisory Opinion 201502 cautions that the exception is narrow and does not extend beyond contacts necessary to accomplish service or similar process. The safest course in many circumstances, therefore, is to rely on permission or to seek a clarifying court order.

### ***The Corporate Context***

A key question in applying the “no contact” rule in the corporate or other organizational context is: who is a represented person? Or, stated alternatively, if the corporation is represented, does that representation extend to its current and former officers and employees?

The leading case in Washington on this point is *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984). *Wright* was decided under Washington’s former DR 7-104(A)(1). Comment 10 to RPC 4.2, however, notes that “[w]hether and how lawyers may communicate with employees of an adverse party is governed by *Wright v. Group Health Hospital*, 103 Wn.2d 192,

691 P.2d 564 (1984).” In *Wright*, the Washington Supreme Court drew a relatively narrow circle of corporate constituents who fall within entity counsel’s representation:

“We hold the best interpretation of ‘party’ in litigation involving corporations is only those employees who have the legal authority to ‘bind’ the corporation in a legal evidentiary sense, *i.e.*, those employees who have ‘speaking authority’ for the corporation. . . .

“We hold *current* Group Health employees should be considered ‘parties’ for the purposes of the disciplinary rule if, under applicable Washington law, they have managing authority sufficient to given them the right to speak for, and bind, the corporation. . . . 103 Wn.2d at 200-01 (emphasis in original).

In other words, directors, officers and senior managers are typically “off limits” if they are “speaking agents” for the corporation. Line-level employees who would not ordinarily qualify as “speaking agents” may nonetheless be “off limits” if they are separately represented—as is often the case if they are named as additional defendants or are central to holding the entity vicariously liable. The Supreme Court in *Wright* concluded that former employees of all stripes are “fair game” (again, unless they are separately represented) because they cannot bind their former corporate employer in an evidentiary sense. The Supreme Court recently reiterated this aspect of *Wright* in *Newman v. Highland School District No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016), which also held that

corporate counsel's postemployment communications with former employees is not shielded by the corporation's attorney-client privilege.

### ***Summing Up***

Potential sanctions for unauthorized contact can include suppression of the evidence obtained, disqualification and regulatory discipline. Given these possible sanctions, this is definitely an area where "discretion is the better part of valor."

### **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.