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New WSBA Advisory Opinion on Contacting Government Employees

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The WSBA Committee on Professional Ethics recently released a new advisory opinion—No. 201803—addressing the contours of contacting government employees under Washington Rule of Professional Conduct 4.2.

RPC 4.2 generally prohibits communication with a person the contacting lawyer “knows to be represented by another lawyer in the matter[.]” Under *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), the “no contact” rule applies in the entity setting and generally prohibits direct communications with entity employees who are “speaking agents” in an evidentiary sense for the entity. The rationale under *Wright* is that speaking agents are encompassed within entity counsel’s representation and, therefore, are “off limits” from direct contact outside of formal discovery—typically a deposition. As a practical matter, *Wright*’s “speaking agent” test ordinarily draws a relatively tight circle around higher level management: “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[.]” 103 Wn.2d at 200. Under *Wright*, occurrence witnesses who neither fall with entity counsel’s representation nor have their own lawyers may be contacted directly through, for example, an informal interview.

When the RPCs were comprehensively revised in 2006, the amendments included a new Washington-specific Comment 10 to RPC 4.2 that essentially “codified” *Wright* by concluding that “[w]hether and how lawyers may communicate with employees of an adverse party is governed by *Wright*[.]” The same package of amendments in 2006 also included a Washington-modified (from the ABA formulation) Comment 7 to RPC 4.2 that echoes the nub of *Wright*: “In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter.”

The new advisory opinion concludes that *Wright* applies with equal measure in the governmental context as articulated in Comments 7 and 10 to RPC 4.2. The advisory opinion, therefore, finds (at 2): “If an employee is not in that limited class of persons, RPC 4.2 does not apply to the communication.” Advisory Opinion 201803 also notes (at 2) that “[a] government lawyer may not instruct all agency employees not to have ex parte contacts with outside lawyers.” In that respect, too, the opinion mirrors *Wright*. However, if an individual employee is also represented—as is often the case when a litigation opponent is attempting to impute a governmental employee’s act or omission to

the agency employer—then Advisory Opinion 201803 finds (at 2) that direct contact is prohibited: “[A]n opposing counsel who knows that the government lawyer represents an individual government employee may not contact that employee.” The new advisory opinion summarizes (at 2) the application of RPC 4.2 in the governmental context:

“Thus, if . . . low-level government employees do not supervise, direct or regularly consult with the government lawyer concerning the matter, do not have authority to obligate the government with respect to the matter, and are not individually represented by the government lawyer, the opposing lawyer may contact those employees directly.”

In a separate section, Advisory Opinion 201803 notes that, in light of the lack of controlling Washington appellate authority, the opinion does not take a position whether the constitutional right to petition the government permits an opposing counsel to contact a represented government employee directly under the “authorized by law” exception to RPC 4.2.

Advisory Opinion 201803 is available on the WSBA web site.

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.