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Contacting Former Employees North and South of the Columbia

**By Mark J. Fucile
Fucile & Reising LLP**

Many kinds of litigation involve contacting former employees. Moreover, with the increased mobility of workers today, many key witnesses often no longer work for the employer involved in the litigation. Contacting former employees can trigger issues under both the Rules of Professional Conduct and applicable privilege law. Although Oregon and Washington share many things in common, there are important nuances between them when contacting former employees who are occurrence witnesses. In this column, we'll look at two in particular. We'll first examine whether a former employee is represented for purposes of the "no contact" rule—RPC 4.2 in both states. We'll then discuss the contours of a former employer's continuing privilege when interviewing unrepresented former employees.

Is the Former Employee Represented?

Both the Oregon and Washington versions of RPC 4.2 generally prohibit direct contact with "a person the lawyer knows to be represented[.]" When handling litigation where a former employee of a party is a witness, the question is usually framed: Does corporate counsel's representation of the company extend as a matter of law to former employees? Generally, the answer is "no." Oregon reaches this conclusion largely through a series of Oregon State Bar

ethics opinions dating back to 1991. The current version—OSB Formal Opinion 2005-80 (rev 2016) puts it this way (at 3): “Former employees and former officers and directors who are not in fact individually represented by counsel are not ‘represented’ within the meaning of Oregon RPC 4.2 . . . Consequently, Oregon RPC 4.2 does not prevent . . . Lawyer from contacting Former Employee without . . . [Corporate Counsel’s] permission.” Washington reaches this same position through Comment 7 to its version of RPC 4.2: “Consent of the organization’s lawyer is not required for communication with a former constituent.” The Washington Supreme Court reiterated this point in *Newman v. Highland School District No. 203*, 381 P3d 1188, 1193 (Wash 2016): “Without an ongoing obligation between the former employee and the employer that gives rise to a principal-agent relationship, a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party.”

Although relatively infrequent, a former employee may be represented by their own attorney. Accordingly, a lawyer contacting a former employee should confirm that the witness is not represented. There is an important nuance between Washington and Oregon in this regard. Washington RPC 4.2 uses the phrase “in the matter” when assessing representation and, consequently, the ability to contact a witness directly. Oregon RPC 4.2, however, uses the term “on

that subject.” The Oregon Supreme Court in *In re Newell*, 348 Or 396, 406-09, 234 P3d 967 (2010), held that use of the term “subject” means that Oregon’s prohibition on contact extends beyond the specific matter in which contact is made to other factually related matters in which the witness is represented. In an Oregon case, therefore, a contacting lawyer will want to also confirm that the witness is not represented in any factually related matters.

Continuing Privilege

Oregon and Washington differ, too, on the extent to which a contacting lawyer can ask questions about conversations with the former employer’s attorney.

OSB Formal Opinion 2005-80 paints a “bright line” (at 3) prohibiting questions about the former employee’s conversations with corporate counsel both during and after the former employee worked for the corporation:

“[Contacting] Lawyer may not . . . use any conversations with . . . Former Employee to invade Corporate [Employer’s] lawyer-client privilege. Thus, [Contacting] Lawyer may not ask or permit . . . Former Employee to disclose to [Contacting] Lawyer any communications that . . . Former Employee had with [Employer’s] Lawyer pertaining to the matter in litigation.”

OSB Formal Opinion 2005-80 relies primarily on federal—including Ninth Circuit—authority rather than Oregon appellate case law on this point. Pending a

controlling decision from Oregon’s appellate courts, parties can seek guidance from the trial court if they anticipate privilege issues may surface in interviews with former employees. In *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 269 (D Or 1997), for example, the defendant brought a motion for a protective order to clarify the parameters of any inquiry into former employees’ conversations with counsel—and the Court relied on the similar predecessor to the current OSB opinion.

Washington, by contrast, draws a much narrower circle.

In *Newman*, the Washington Supreme Court found that conversations between corporate counsel and employees that occur during employment remain privileged after the employee leaves the corporation: “[C]ommunications between corporate counsel and employees during the period of employment continue to be privileged after the agency relationship ends.” 381 P3d at 1193-94.

The *Newman* Court, however, declined to extend privilege to conversations between corporate counsel and former employees that took place after the employee left the corporation—reasoning that “[t]he underlying purpose of the corporate attorney-client privilege is to foster full and frank communications between counsel and the client (*i.e.*, the corporation), not its former employees.” 381 P3d at 1193.

On a final note, both Oregon (under OSB Formal Opinion 2005-152 (rev 2016)) and Washington (under *Newman*) take the same general approaches on contact and privilege when the witness formerly worked for a government agency rather than a private corporation.

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 Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the 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.