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# Heading South: Key Differences Between the Washington and Oregon Versions of the "No Contact" Rule

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

A variety of regulatory and economic forces have combined over the past generation to make cross-border practice increasingly common throughout the Northwest. For the most part, the professional rules in Washington and Oregon look a lot alike—with both patterned generally on the ABA Model Rules of Professional Conduct. Although we are expected to know all of the RPCs, the "no contact" rule—RPC 4.2 in both states—is especially sensitive because we frequently deal with represented persons and the rule is often enforced rigidly.

For Washington defense lawyers traveling south, there are important differences between the Washington and Oregon variants of the rule. In this article, we'll look at three: (1) the scope of the prohibition; (2) the application in the entity setting; and (3) the interplay with privilege. With all three, Oregon takes a more restrictive approach than Washington.

Before we do, two preliminary points are in order.

First, a lawyer officed in Washington who is handling an Oregon court proceeding is bound by the Oregon RPCs. Oregon RPC 8.5(b)(1) addresses choice-of-law and generally applies the law of the forum in litigation. Oregon

federal district court Local Rule 83-7(a), in turn, makes the Oregon RPCs applicable to its cases.

Second, the risk from a violation is not only regulatory discipline. Potential court-imposed sanctions include exclusion of resulting evidence and, if privilege is improperly invaded, disqualification. In *Bell v. Kaiser Foundation Hospitals*, 122 Fed. Appx. 880 (9th Cir. 2004), for example, the Ninth Circuit affirmed the trial court's exclusion of an affidavit obtained in violation of the predecessor to Oregon's current version of RPC 4.2.

***Scope***

Washington RPC 4.2 mirrors its ABA Model Rule counterpart in focusing on the particular matter the contacting lawyer is handling:

> 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**[.] (Emphasis added.)

Oregon, by contrast, substitutes the word "subject" for the word "matter" (based on some parochial legislative history) and reads:

> In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that **subject**[.] (Emphasis added.)

The Oregon Supreme Court in *In re Newell*, 348 Or. 396, 234 P.3d 967 (2010), rejected the argument that "subject" and "matter" were interchangeable and interpreted Oregon's use of the word "subject" as imposing a broader prohibition than in states like Washington that use the term "matter." *Newell* involved a lawyer handling a civil case who took the deposition of a fact witness. At the time, the witness had pled guilty but had not yet been sentenced in a criminal case that, while not precisely paralleling the civil case, shared some common facts. The witness was represented in the criminal case but not the civil case. The Oregon State Bar took the position that Oregon's prohibition extended beyond the contacting lawyer's case to include other matters involving common facts. The Oregon Supreme Court agreed and disciplined the lawyer. Under Oregon's broader prohibition, a lawyer in a securities case, for example, might violate the rule by contacting a witness who, while not represented in the lawyer's civil case, was represented in a related criminal investigation.

***Entity Application***

In the entity setting, "no contact" analysis turns largely on whether the person contacted falls within entity counsel's representation. Washington and Oregon agree that management generally does and employee occurrence witnesses generally do not. They diverge, however, when it comes to employees

for whom a claimant seeks to hold the entity vicariously liable. Under *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), which, in turn, is incorporated into Comment 10 to Washington RPC 4.2, a non-management employee only falls within entity counsel's representation if the employee is a "speaking agent" of the entity under Washington evidence law. Oregon does not use the "speaking agent" test. Instead, under Oregon State Bar Formal Opinion 2005-80 (rev. 2016), a non-management employee falls within entity counsel's representation if a party is simply attempting to hold the entity vicariously liable for the employee's actions. A company truck driver who allegedly caused an accident, for example, would be "off limits" to direct contact in Oregon while not (if not separately represented) in Washington (unless somehow construed as a "speaking agent"). Another Oregon State Bar ethics opinion, 2005-152 (rev. 2016), takes the same general approach with employees of government agencies.

***Privilege***

Washington and Oregon also diverge in the entity context on the application of privilege when contacting former corporate or governmental employees. Both states hold that when interviewing a former employee the contacting lawyer cannot inquire about privileged conversations the former

employee had with entity counsel while still working for the entity. In *Newman v. Highland School District No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016), however, the Washington Supreme Court held that privilege did not apply to entity counsel's post-employment communications with former employees. By contrast, OSB Formal Opinion 2005-80 concluded that privilege also applied to post-employment communications relating to the former employee's work. In doing so, the Oregon opinion is consistent with two Oregon federal district court decisions also addressing that point—*Brown v. State of Or., Dept. of Corrections*, 173 F.R.D. 265, 269 (D. Or. 1997), and *Kozowski v. Nelson*, 2020 WL 1066329 at *3 (D. Or. Mar. 5, 2020) (unpublished).

**ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management 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 a member of the Oregon State Bar Legal Ethics Committee and 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 *Bar News* 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.