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**The New Rules:  
What's Inside the Box? Part 3-The No Contact Rule**

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In this month's installment of our look at the new rules, we'll examine the "no contact with represented parties" rule. The old rule was DR 7-104(A)(1). The new rule is RPC 4.2. The new rule, and its likely application, is very similar to the old one: it generally prohibits a lawyer from communicating on the subject matter of the representation with someone the lawyer knows to be represented. We'll first look at the elements of the rule, then turn to the exceptions and conclude with how it applies in the entity context.

*The Elements.* Like the old rule, RPC 4.2 has four primary components. First, it prevents a lawyer (acting in either a representative capacity or pro se) from communicating with a represented party and also prohibits a lawyer from using another person (for example, the lawyer's paralegal, secretary or investigator and, in some instances, the lawyer's own client) to make an "end run" around the other side's attorney. Second, although the term "communicate" is not defined in the new rule (nor was it in the old), there is nothing to indicate that it is any less broad than it was in the old rule and, accordingly, will likely apply to many forms of communication (for example, in-person, telephone and surface and electronic mail). Third, it applies to communications "on the subject matter of the representation" (for example, small talk about the weather during a

break in a deposition is permitted, but calling the other party with a settlement offer is not). Fourth, the lawyer must actually know that the other party is represented—although that knowledge can be inferred from the circumstances (for example, an opposing party gives you a document suggesting that it was prepared by a lawyer and that the lawyer represents that person).

*The Exceptions.* Like the old rule, RPC 4.2 also has three exceptions. First, a lawyer can make a direct contact when the lawyer has permission from the other side's attorney. Second, a lawyer can make a direct contact when the communication is authorized by law (for example, a summons) or a court order. Third, a lawyer can make a direct contact when a written agreement (for example, a contract) requires written notice of specified events—as long as the notice is also transmitted to the other party's attorney.

*The Entity Context.* Oregon has two very helpful ethics opinions applying the no contact rule in the entity context: 1991-80, which addresses the corporate context, and 1998-152, which generally applies 1991-80 to the governmental context. The Oregon State Bar is in the process of updating and reissuing the current ethics opinions with the appropriate citations to the new rules. As we went to press, the updated opinions had not yet been released. But they are expected to remain the same in this area because the new rule is so similar to the old rule. Assuming that, corporate and governmental officers, directors and management fall within the entity's representation and are "off limits." Corporate

and governmental employees for whose conduct a party seeks to hold the entity liable also fall within the entity's representation and are "off limits." By contrast, line-level employees who are simply occurrence witnesses are generally outside the entity's representation and are "fair game." Finally, all former employees are generally "fair game" as long as the contact does not invade the former employer's attorney-client privilege. See *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 269 (D Or 1997) (applying DR 7-104(A)(1) in the entity context).

#### **ABOUT THE AUTHOR**

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