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Who's Fair Game? Who You Can and Can't Talk to on the Other Side

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Washington RPC 4.2 governs communications with represented parties. The “no contact” rule is designed to protect clients by channeling most communications through counsel for each side. Although RPC 4.2 is simple on its face, it can be difficult in application. At the same time, it involves situations that lawyers encounter frequently and where they risk sanctions for “guessing wrong.”

In this column we'll look at who you can—and can't—talk to on the other side. Although the focus is on the litigation context where this arises most frequently, the concepts discussed apply with equal measure outside litigation. We'll first survey the elements of the “no contact” rule, then turn to its exceptions and conclude with how the rule applies in the corporate context.

Before doing so, though, we should note three amendments that are before the Supreme Court as a part of the WSBA's “Ethics 2003” proposals. The first broadens the scope of the rule slightly by substituting represented *person* for *party*. The second deletes RPC 4.2(b), which deals with communications in limited-scope representations under RPC 1.2, and moves it to a comment instead. The third expands the “authorized by law” exception by including court

orders. More information on these changes is available on the WSBA's web site at www.wsba.org/lawyers/groups/ethics2003.

The Elements

The “no contact” rule has four primary elements: (1) a lawyer; (2) a communication; (3) about the subject of the representation; and (4) with a party the lawyer knows to be represented.

A Lawyer. The “lawyer” part is easy. But what about people who work for the lawyer—such as paralegals, secretaries and investigators? And what about our own clients? Although RPC 4.2 doesn't specifically mention communications channeled through others, the WSBA RPC Committee concluded in an Informal Ethics Opinion in 1996—No. 1669—that a lawyer cannot use others as a conduit to circumvent the rule. In doing so the Committee relied on RPC 8.4(a), which prohibits a lawyer from violating the rules “through the acts of another.” The comments to the pending amendments make that same point. Clients are not prohibited from contacts with each other during a lawsuit and in fact, often continue to deal with each other on many fronts while disputes are underway. The comments to the pending amendments recognize this. Nonetheless, a lawyer should not “coach” a client for a prohibited “end run” around the other side's lawyer.

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.

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” where the party is represented in “the matter.” See WSBA Informal Ethics Opinion 2010 (2003). In a litigation setting, the “subject of the representation” will typically mirror 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 red or green 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.

Party the Lawyer Knows to Be Represented. RPC 4.2 is framed in terms of actual knowledge that a party is represented. Actual knowledge, however, can be implied from the circumstances. See *In re Carmick*, 146 Wn.2d 582, 598, 48 P.3d 311 (2002); WSBA Informal Ethics Opinion 2044 (2003). The Supreme Court noted in *Carmick*: “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.” 146 Wn.2d at 598.

The Exceptions

There are two principal exceptions to the “no contact” rule: permission by opposing counsel and communications that are “authorized by law.”

Permission. Because the rule is designed to protect clients from overreaching by adverse counsel, permission for direct contact must come from the party’s lawyer rather than from the party. The rule does not require permission to be in writing. A quick note or e-mail 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 expressly permitted by law (or under the pending amendments, court order) do not violate the rule. Service of a summons or obtaining documents under public records inspection statutes, for example, fall within the exception. See WSBA Informal Ethics Opinion 1668 (1996) (public records). At the same time, the phrase “authorized by law” is more ambiguous in its application than in its recitation. See *generally* ABA Formal Ethics Opinion 95-396, § X (1995) (discussing this phrase at length under the analogous ABA Model Rule); WSBA Formal Ethics Opinion 96 (1961) (wrestling with this issue under the former Canons). The safest course is to read this exception narrowly and to rely on permission from opposing counsel instead if direct contact is necessary.

The Corporate Context

A key question in applying the “no contact” rule in the corporate context is: Who is the represented party? 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 by Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984). *Wright* was decided under Washington’s former DR 7-104(A)(1). Nonetheless, the comments to the pending amendments note that “[w]hether and how lawyers may communicate with employees of an adverse party is governed by *Wright*.”

In *Wright*, the Washington Supreme Court drew a relatively narrow circle of employees who fall within the scope of corporate counsel’s representation—particularly as it relates to a line employee whose conduct is at issue:

“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. This interpretation is consistent with the declared purpose of the rule to protect represented parties from the dangers of dealing with adverse counsel. . . . We find no reason to distinguish between

employees who in fact witnessed an event and those whose act or omission caused the event leading to the action. . . .

“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 give them the right to speak for, and bind, the corporation. Since former employees cannot possibly speak for the corporation, we hold that CPR DR 7-104(A)(1) does not apply to them.” 103 Wn.2d at 200-01 (emphasis in original).

Wright’s explicit reliance on substantive evidence law produces an interesting dichotomy depending on whether the underlying case is pending in state or federal court. Professor Robert Aronson of the University of Washington notes this difference in his treatise, *Law of Evidence in Washington*:

“ER 801(d)(2)(iv) provides that the statement of a party’s agent or servant is imputed to the party only if the agent or servant is ‘acting within the scope of the authority to make a statement for the party.’ This is a more stringent requirement than FRE 801(d)(2)(D), which exempts from hearsay treatment admissions by a party’s agent ‘concerning a matter within the scope of his agency or employment, made during the existence of the relationship.’

“ER 801(d)(2)(iv) requires that the declarant be a ‘*speaking agent*.’ See Comment 801(d); *Kadiak Fish Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 422 P.2d 946 (1967). Thus, the statement of a truck driver after an accident, ‘Sorry, I was speeding,’ would be admissible against the truck company in federal court (because it is within the scope of his authority to act), but not in Washington courts (because the truck company did not authorize him to *speak* on its behalf.)” R. Aronson, *The Law of Evidence in Washington*, 801-27 through 28 (4th ed. 2004) (emphasis in original).

In other words, senior officers and directors are “off limits” and line-level employees whose conduct is at issue may or may not be “off limits” depending on their status as “speaking agents” under applicable evidence law. By contrast, line-level employees who are simply occurrence witnesses (to borrow from Professor Aronson’s example: another company truck driver who simply observed the accident) and former employees of all stripes are “fair game.” In communicating with a former employee, however, the comments to the pending amendments suggest that the contact cannot be used to invade the former employer’s attorney-client privilege.

Summing Up

Potential sanctions for unauthorized contact can include disqualification, suppression of the evidence obtained and bar discipline. Given those possible sanctions, coupled with the natural reaction of opposing counsel upon learning of a perceived “end run” to get to his or her client, this is definitely an area where discretion is the better part of valor.

ABOUT THE AUTHOR

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