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Ethics Issues in Dealing With Administrative Agencies: Contact with agency staff; when is it appropriate and when not?

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This presentation is for educational purposes. It is not intended to, and does not provide specific legal advice to attorneys on their individual ethical obligations. Any opinions expressed herein are solely those of the author. Those with ethical issues are encouraged to consult the Rules of Professional Conduct, the Washington State Bar Association help line at (206) 727-8284, or seek their own legal counsel.



WASHINGTON RPCs AMENDED

- New Amendments effective September 1, 2006
- Purpose = to update and make more consistent with ABA Model Rules
- Also added comments from Model Rules
- Washington deviations / additional comments are noted



CONTENTS

- RPC 4.2 Communication with Person Represented by Counsel
- RPC 4.3 Dealing with Unrepresented Person



RPC 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL (i.e., the “No-Contact Rule”)

“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, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”



PURPOSE OF RPC 4.2

- Prevents adverse attorney from overreaching or taking unfair advantage (e.g., obtaining unwise statements or agreements)
- Prevents inappropriate disclosure of privileged information
- Prevents undermining of relationship between opposing attorney and that attorney's client

In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 48 P.3d 311, as amended on denial of reconsideration (2002); RPC 4.2 Comment [1].



FRAMEWORK FOR ANALYZING RPC 4.2

- Are you communicating about a “matter”?
- Is the government agency represented by counsel in the matter?
- Is the person you want to communicate with a “party” under *Wright v. Group Health Hospital*, 103 Wn.2d 192, 196, 197, 691 P.2d 564 (1984)?
- Is the communication “authorized by law”?

All of these assume you do not have government counsel’s consent.



WHAT ARE “MATTERS” TO WHICH RPC 4.2 APPLIES?

Not limited to litigation

- RPC 4.2 recently amended to substitute “person” for “party”
- Majority of jurisdictions hold rule applies to any person represented in a matter – litigation, transaction, or other matter. See *Annotated Model Rules of Professional Conduct* 420-21 (Fifth Ed. 2003); *Hurlbert v. Gordon*, 64 Wn. App. 386, 824 P.2d 1238 (1992) (RPC 4.2 applied to escrow agent in business transaction).



WHAT ARE “MATTERS” TO WHICH RPC 4.2 APPLIES? *Continued*

- ABA Formal Opinion 95-396 (1995):
Rule should protect not just parties to negotiation or to formal adjudicative proceeding, but “any person who has retained counsel in a matter and whose interests are potentially distinct from those of the client on whose behalf the communicating lawyer is acting.”
- Could apply to negotiations / discussions concerning agency decision on an application for a permit; during appeal period before an appeal is filed; rule-making proceedings



HOW “KNOW” IF PERSON IS REPRESENTED BY COUNSEL “IN THE MATTER”?

- Actual knowledge is required
 - “Terminology” section of Washington RPCs defines “knows” as:
 - “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” RPC 1.0(f)
 - “Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.” RPC 4.2 Comment [8].



In re Disciplinary Proceeding Against Carmick,
146 Wn.2d 582, 48 P.3d 311 (2002)

FACTS

- County Prosecuting Attorney represented child support obligee in claim for interest on judgment for past-due child support
- Child support obligor hired an attorney, who reviewed court file, which contained Prosecutor's name on virtually all pleadings
- Obligor's attorney called obligee directly to negotiate settlement
- During telephone conversation, obligee informed opposing attorney she was represented by Prosecutor and asked whether she should consult him
- Attorney falsely states Prosecutor is on vacation and proceeds to settle claim directly with obligee



In re Disciplinary Proceeding Against Carmick,
146 Wn.2d 582, 48 P.3d 311 (2002) *Continued*

HOLDING

- Obligor's attorney "should have known" obligee was represented, based on court record and obligee's statements
- Argument that Prosecutor had no authority to represent obligee, alleged "local custom" of direct contact, and obligor's permission to his attorney to contact obligee were insufficient to meet RPC 4.2
- "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."
- "An attorney cannot evade the requirement of obtaining consent by disregarding the obvious."



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IS MERE FACT OF GENERAL, OR IN-HOUSE,
REPRESENTATION SUFFICIENT KNOWLEDGE?

(E.g., Attorney General's Office is generally exclusive source of legal representation for state agencies, RCW 43.10.040, .067.)

- For non-litigation matters, likely not. No Washington authority, but see, e.g.:
 - ABA Formal Opinion 95-396 (1995) (matter must be specific enough that communicating lawyer can be on notice of subject of representation; retaining counsel for “all” matters that might arise, or fact of in-house general counsel not specific enough)



IS MERE FACT OF GENERAL, OR IN-HOUSE, REPRESENTATION SUFFICIENT KNOWLEDGE?

Continued

- North Carolina State Bar Ass'n RPC 132 (1993) (lawyer aware city is generally represented by full-time city attorney but who has no notice of government lawyer participation in particular loan foreclosure matter may contact city employee without knowledge or consent of city attorney)
- *Jorgensen v. Taco Bell Corp.*, 58 Cal. Rptr.2d 178 (Cal. Ct. App. 1996) (plaintiff's lawyer's presumptive knowledge corporation had in-house counsel insufficient to trigger no-contact rule)



IS MERE FACT OF GENERAL, OR IN-HOUSE, REPRESENTATION SUFFICIENT KNOWLEDGE?

Continued

- BUT, if litigation, lawyer may be charged with knowledge state agency is, by law, represented by Attorney General's Office. See RCW 43.10.040 (Attorney General shall represent state and all agencies in court and before all administrative tribunals); RCW 43.10.067 (state agencies precluded from hiring own legal counsel)



DOES LAWYER HAVE A DUTY TO ASK AGENCY EMPLOYEES IF AGENCY IS REPRESENTED? PROBABLY NOT, BUT WOULD BE PRUDENT.

- No Washington authority
- ABA Opinion 95-396 (1995) (no duty to inquire)
- New York Bar Ass'n Ethics Op. 652 (1993) (not always obvious a government attorney has been brought into a matter; attorney seeking to contact a government entity in a matter involving potential adversity should identify herself and the purpose of the communication so government employee has opportunity to inform attorney that government has designated counsel in connection with the matter)



IS THE PROPOSED COMMUNICATION ABOUT THE SAME MATTER IN WHICH AGENCY IS REPRESENTED?

- May communicate directly with represented persons about matters other than the subject matter of the representation
- See, e.g., New York St. Bar Ass'n Ethics Op. 652 (1993) (agency rule making concerning penalties not the same “matter” as ongoing enforcement proceeding and permit application process)



IN A GOVERNMENT AGENCY, WHO ARE THE “PERSONS” TO WHOM RPC 4.2 APPLIES?

- RPC 4.2 Comment [7]:
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.”
- RPC 4.2 Comment [10] – relies on *Wright v. Group Health Hospital*



Wright v. Group Health Hospital, 103 Wn.2d 192, 691 P.2d 564 (1984)

- Adopts “managing-speaking” agent test for corporate employees:
Current employees are “parties,” to whom no-contact rule applies, if they have “managing authority sufficient to give them the right to speak for, and bind, the corporation.”
- Non-managing / speaking agents may be contacted without consent of counsel



Wright v. Group Health Hospital, 103 Wn.2d 192,
691 P.2d 564 (1984) *Continued*

- Former employees may be contacted without consent
- Watch for privileged information – cannot ask questions that violate attorney-client privilege. See, e.g., *Snider v. Superior Court*, 7 Cal. Rptr.3d 119 (Cal. Ct. App. 2003)



Wright v. Group Health Hospital, 103 Wn.2d 192,
691 P.2d 564 (1984) *Continued*

- Some states require specific statements be made to employees prior to interviewing. See, e.g., *McCallum v. CSX Transp. Inc.*, 149 F.R.D. 104, 112 (M.D.N.C. 1993) (must disclose lawyer's representative capacity, state reason for seeking interview as it relates to attorney's client and employer, inform of right to refuse interview, and inform person of right to have their own counsel present)



IS LAWYER “AUTHORIZED BY LAW” TO COMMUNICATE WITH KNOWN REPRESENTED GOVERNMENT OFFICIALS ABOUT THE MATTER?

Are Government Agencies Categorically Excluded from Protection Under RPC 4.2?

- Risky approach to assume RPC 4.2 does not apply at all to contact with government entities
- No express exemption in language of Rule
 - Compare, California Rules of Professional Conduct, Rule 7-103 (expressly exempts from no-contact rule communications with a public officer, board, committee or body)



IS LAWYER “AUTHORIZED BY LAW” TO COMMUNICATE WITH KNOWN REPRESENTED GOVERNMENT OFFICIALS ABOUT THE MATTER? *Continued*

- ABA Committee on Ethics and Professional Responsibility, Formal Opinion 408 (1997):
[T]he Committee finds no basis in the text of [Model] Rule 4.2 or its commentary for concluding that governmental agencies are categorically excluded from the class of represented “persons” protected by the rule.
- Recent amendment to Washington’s RPC 4.2 includes commentary from Model Rule



OTHER INDICIA OF RULE'S APPLICABILITY

1. *Washington State Bar News* (June 2001) at p. 52 (disciplinary stipulation involving lawyer representing student and parents censured for sending 10-day notice of intent to file claim directly to superintendent of school district involved)
2. WSBA Informal Ethics Opinion 1363 (1992) (RPC 4.2 provides authority to contact a government official even when represented by counsel if contact authorized by law. This is consistent with *Wright v. Group Health Hospital*.)
3. WSBA Informal Ethics Opinion 1274 (1989) (Nothing in RPCs prohibits communication with city employees by adverse counsel unless employee is a speaking agent regarding matter that is subject of representation or there is an actual attorney / client relationship between prosecutor and city employee in the matter. See *Wright v. Group Health Hospital*.)



IS CONTACT WITH GOVERNMENT OFFICIALS “AUTHORIZED BY LAW” UNDER CONSTITUTIONAL RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES (*U.S. Const. Amend. 1; WA Const. Art. 1 § 4*)?

- Comment [5] to ABA Model Rule and Washington’s Rule says:

“Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.”



IS CONTACT WITH GOVERNMENT OFFICIALS “AUTHORIZED BY LAW” *Continued*

- Jurisdictions are split
 - No right to contact without government counsel’s consent, see, e.g.:
 - Alaska Bar Ass’n Ethics Op. 94-1 (1994)
 - Illinois State Bar Ass’n Advisory Op. on Prof. Conduct 92-3 (1992)
 - South Dakota Bar Ass’n Ethics Op. 92-115 (1993)
 - Constitutional right to unconsented contact, see, e.g.:
 - Alabama Bar Ass’n Ethics Op. 03-03 (2003)
 - Connecticut Bar Ass’n Informal Ethics Op. 01-17 (2001)
 - North Carolina State Bar Ass’n RPC 202 (1995)
 - Utah Bar Ass’n Ethics Op. 115 (1993), 115R (1994)
 - New York City Bar Ass’n Formal Ethics Op. 1991-4 (1991)

Limits / conditions of unconsented contacts vary by jurisdiction



IS CONTACT WITH GOVERNMENT OFFICIALS “AUTHORIZED BY LAW” *Continued*

- ABA Formal Opinion 97-408 (1997)
 - Attempts to reconcile tension between citizen’s right of access and government’s right to protection from uncounselled communication by opposing party’s lawyer
 - Concludes Model RPC 4.2 authorizes unconsented contacts, under constitutional right to petition, if:
 1. Government official to be contacted has authority to take or recommend action in the controversy;



IS CONTACT WITH GOVERNMENT OFFICIALS “AUTHORIZED BY LAW” *Continued*

2. Sole purpose of the communication is to address a policy issue, including settling the controversy
 - Committee members split on whether discussion of settlement only appropriate if it involves a policy issue vs. routine cases, e.g., slip and fall or vehicle accident; and
 - ~ Note: Washington Attorney General retains authority to ultimately decide disposition of cases. RCW 43.10.040; 43.10.067; *Ex Parte Mike Weaver v. Blue Cross & Blue Shield*, 570 So.2d 675 (Ala. 1990); *Feeney v. Massachusetts*, 366 N.E.2d 1262 (Mass. 1977).



IS CONTACT WITH GOVERNMENT OFFICIALS “AUTHORIZED BY LAW” *Continued*

3. Government attorney is given advance notice of intent to communicate; written materials must be provided to government attorney in advance.
- Given recent amendment to Washington’s RPC 4.2 adding Comment [5], exemption from no-contact rule may exist for exercise of constitutional right to petition government for redress of grievances
 - But existence and parameters of exemption are uncertain



PRACTICE TIPS

- Given uncertainty of law and potential significant consequences of rule violation (sanctions; disqualification of attorney or attorney's law firm), contact government's counsel and seek consent
- If consent denied, consider seeking court order (ABA Opinion recommends this if case law does not establish parameters of constitutional exception to RPC 4.2)
- At a minimum, follow parameters in ABA Formal Opinion 97-408 (1997)



OTHER “AUTHORIZATIONS BY LAW” FOR UNCONSENTED CONTACT WITH GOVERNMENT

- ABA Formal Opinion 95-396 (1995)
“authorized by law” is satisfied by constitutional provision, statute, or court rule that expressly allows a particular communication to occur in absence of counsel, e.g., court rules concerning service of process on a party



OTHER “AUTHORIZATIONS BY LAW” FOR UNCONSENTED CONTACT WITH GOVERNMENT *Continued*

- Public Records Act

- *O’Connor v. Department of Social & Health Svcs.*, 143 Wn.2d 895, 25 P.3d 426 (2001) (party in litigation may use Public Records Act to obtain records rather than Civil Discovery Rules).

Case did not specifically address RPC 4.2; requests were made by party’s attorney to Attorney General’s Office

- WSBA Informal Ethics Op. 1668 (1996) (opposing attorney in lawsuit against city may request public records from official who is managerial agent, and therefore “party” under RPC 4.2, without violating RPC. Contact is “authorized by law.”)



OTHER “AUTHORIZATIONS BY LAW” FOR UNCONSENTED CONTACT WITH GOVERNMENT *Continued*

- Court Order—recently added as express exemption from RPC 4.2
- Other laws
 - *See, e.g.*, WSBA Formal Ethic Op. 190 (1993) (compliance with RPC 1.10(b)(3), which requires notice to former client of disqualified lawyer of conflict and screening mechanisms, does not violate RPC 4.2)



MAY CLIENT GIVE CONSENT RATHER THAN LAWYER?

- No. RPC 4.2 applies and prohibits communication without the consent of the *other lawyer*
 - The rule applies even when the contact is initiated by the adverse party. See WSBA Informal Eth. Op. 1307 (1989) (lawyer obligated to resolve whether adverse party is still represented by counsel when contacted by adverse party who states he wants to discuss matter without involvement of his counsel); CA Eth. Op. 1996 - 145 (1996)



MAY CLIENT GIVE CONSENT RATHER THAN LAWYER? *Continued*

- Simply listening, without asking questions, may constitute prohibited “communication.”
 - See, *In re Howes*, 940 P.2d 159 (N.M. 1997) (prosecutor violated ethics rules by listening to criminal defendant discuss case without consent of defense lawyer, even though defendant initiated discussion and prosecutor did not ask questions)



COMMUNICATION THROUGH OTHERS

Clients may communicate directly with each other

But, lawyer may not knowingly assist or induce another to violate the RPCs or do so through the acts of another. RPC 8.4(a)

See, e.g.:

- *In re Pyle*, 91 P.3d 1222 (Kan. 2004) (lawyer violated RPC by preparing affidavit, at client's request, and encouraging client to deliver it to adverse party, who was represented by counsel)
- *Trumbull County Bar Ass'n v. Makridis*, 671 N.E.2d 31 (Ohio 1996) (public reprimand for plaintiff's lawyer who suggests her client call defendant about client's anticipated testimony and during call, hands telephone to lawyer who continues conversation)



PRO SE LAWYERS

Lawyer representing himself *pro se* in a matter is bound by the no-contact rule in RPC 4.2

See *In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 126 P.2d 1262 (2006).



CONSEQUENCES OF VIOLATING RPC 4.2

Possible consequences:

- Disciplinary action
- Disqualification of lawyer and lawyer's firm from representation
- Suppression of evidence
- Fines / penalties / sanctions



IF PARTY IS UNREPRESENTED, MUST COMPLY WITH RPC 4.3

RPC 4.3 Dealing with unrepresented person

“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”



IF PARTY IS UNREPRESENTED, MUST COMPLY WITH RPC 4.3 *Continued*

- Two parts to RPC 4.3:
 1. Clarifying the lawyer's role
 2. Giving "advice" to unrepresented persons
 - Second part added in 2006 amendments



CLARIFYING LAWYER'S ROLE

RPC 4.3, Comment [1]:

- “In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented persons.”
- *Jones v. Allstate Insurance Co.*, 146 Wn.2d 291, 45 P.3d 1068 (2002)
 - Insurance claims adjuster breached duty to auto accident victim and spouse to correct misunderstanding concerning adjuster’s role
 - She advised them to sign release of claims for less than medical expenses and failed to advise of consequences
 - She led them to believe she had their best interests in mind while simultaneously appearing disinterested in outcome of settlement



GIVING ADVICE

- Is a mandatory prohibition
- Only applies if unrepresented person's interests may conflict with client's