



*Understanding the Ethical Rules for
Lawyer Communications with
Government Agencies*

PRESENTED BY
Lawson E. Fite

REPRESENTED BY
Schwabe

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Objectives

- Explore ethical communications for attorneys representing parties in front of government agencies
 - Communications with represented and unrepresented parties
 - Client communications with represented parties
 - Tension between the First Amendment and ethics rules
- Suggest strategies to reduce risk

Caveats

- Not intended to
 - Be confidential;
 - Provide legal advice;
 - State a legal standard of care; or
 - Create a lawyer-client relationship
- Keep hypotheticals hypothetical
- Seek counsel for a particular issue and your jurisdiction
- Examples focus on OR/WA ethics rules which are similar to Model Rules, but may not apply in your jurisdiction
- Federal courts usually apply rules of the forum state

Why Is This Important?

- Lawyer discipline
- Claims
- Sanctions
- Loss of a matter/client
- Loss of multiple matters/clients
- Damage to reputation

An aerial photograph of a large, calm lake with several forested islands. The water is a deep blue, and the surrounding land is covered in dense green trees. In the background, there are rolling mountains under a clear sky. The text is overlaid on the left side of the image.

Communicating with Represented and Unrepresented Parties, Generally

Let's start with the basics

RPC 4.1

RPC 4.2

RPC 4.3

RPC 4.1 – Truthfulness in Statements to Others

Washington & Oregon

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

RPC 4.3 – Dealing with Unrepresented Persons

Washington & Oregon

In dealing on behalf of a client or the lawyer's own interests 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 or the lawyer's own interests.

RPC 4.2 – Communication with Person Represented by Counsel

Washington

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.

Oregon

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 unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Polling Question #1: Represented, or not?

- A government agency is accused of improper wastewater management leading to an illicit discharge.
- A lawyer represents a person affected by the discharge and reaches out to the agency staff to discuss concerns about the pollution.
- Is the lawyer in trouble for reaching out to the agency without their attorney? (Yes/No)

Represented Parties

- Codifies what is often referred to as the no-contact rule: If a person is represented in a matter, lawyers for others in the matter may not communicate about it with them directly, but must go through their lawyer.
- “Contributes to the proper functioning of the legal system” by preventing lawyers from overreaching, from interfering in other lawyers' relationships with their clients, and from eliciting protected information via “uncounselled disclosure.”

Material Difference Between OR and WA RPC 4.2?

Oregon includes circumstances in which the lawyer is representing their own interests. (i.e., pro se divorce)

Oregon includes “or cause another” ...but see Washington RPC 8.4(a)

Material Difference Between OR and WA RPC 4.2?

WA follows the Model Rule, which prohibits a lawyer from communicating with someone who is represented in the *matter*.

Oregon RPC 4.2 prohibits communicating with a represented person on the *subject* of the representation, which has been interpreted as broader than the *matter*. See *In re Newell*, 348 Or 396, 407 (2010).

If the subject of one representation could affect another, it is on the same “subject” and within the bounds of RPC 4.2.

Polling Question #2: In-House Counsel

Hypo: Lawyer represents a client who is a potentially responsible party in a hazardous waste clean-up action. The City of Vancouver is also a potentially responsible party and they have hired outside counsel to handle the clean-up action. Lawyer has several pending land-use applications with the City as well. Lawyer calls in-house counsel for the City to discuss the pending applications, and while on the phone asks about the clean-up action.

Is Lawyer's call with in-house counsel improper? (Yes/No)



The Nitty Gritty of RPC 4.2

Is There A “Matter”?

- *SEC v. Lines*, 669 F. Supp. 2d 460 (S.D.N.Y. 2009) (SEC lawyer did not violate rule; contact with company president occurred early in course of investigation and there had been no “ripening adverse relationship”);
- *Johnson v. Cadillac Plastic Grp., Inc.*, 930 F. Supp. 1437 (D. Colo. 1996) (focus should be upon how much of adversarial relationship has developed).

What About “Reply All?”

- Is hitting “reply all” in response to an email from another lawyer who cc’ed their own client on the initial email a violation of 4.2?
- Committee on Washington Professional Ethics Advisory Opinion 202201
 - “Reply All” may be allowed if consent can be implied in the situation, but express consent is always more prudent.
 - Lawyers must make a factual, good faith determination that implied consent has been given.
 - Consider the prior course of dealings, level of adversity of the matter, and nature of the communication.
- Different outcome in Oregon?

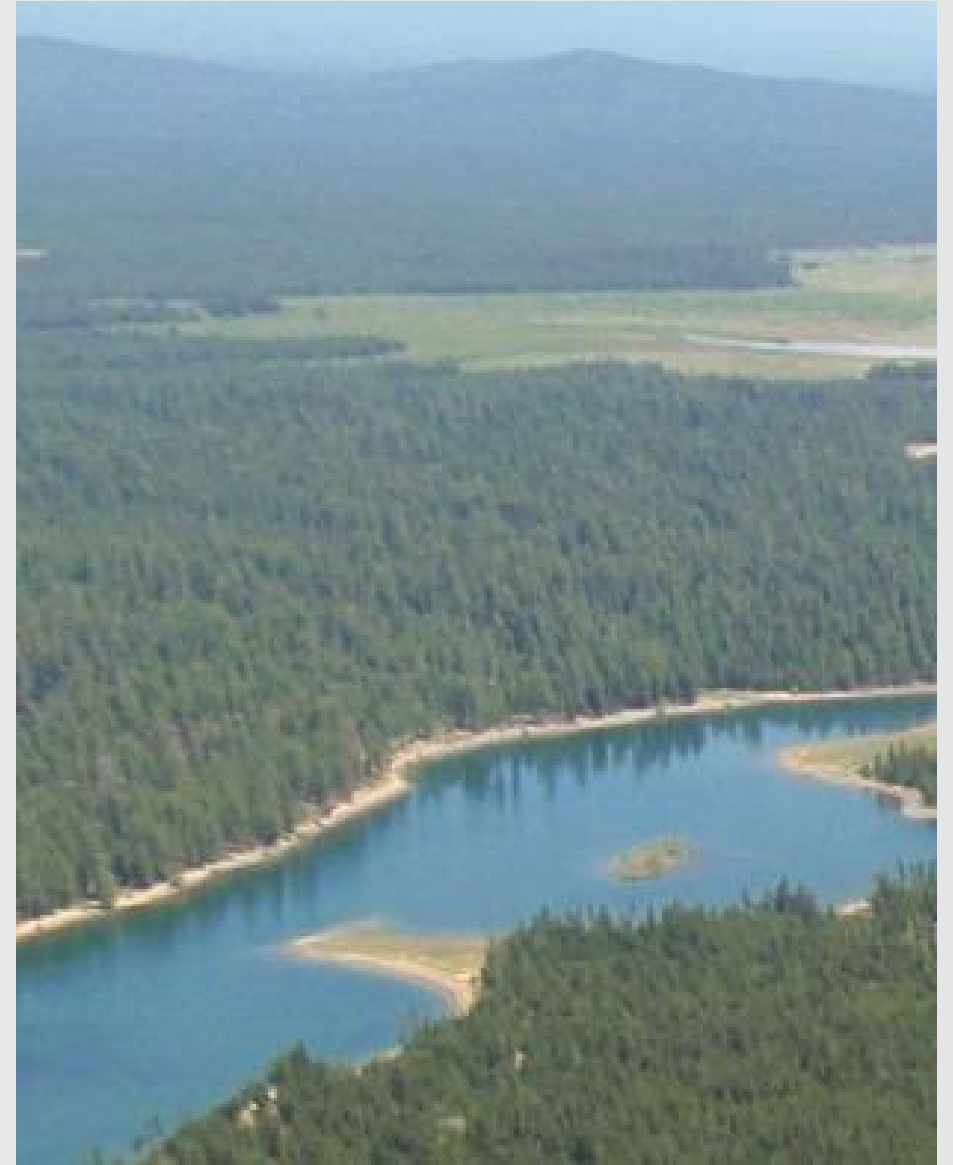
Communicating With Represented Parties

- Simply copying the lawyer does not address the prohibition in RPC 4.2
- ABA Model Rule 4.2 Comment [5]:
“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.”



Communicating with Regulatory Bodies

- You've submitted an appeal to PCHB of an Ecology decision and you need to push the hearing date.
 - Is Ecology always represented by counsel?
 - Must Ecology's counsel be included in any hearing communications?



An aerial photograph of a person standing in the center of a large circular arrangement of stanchions on a concrete floor. The stanchions are connected by a black rope, forming a large circle. The person is wearing a white shirt and dark pants. The floor is light-colored concrete with visible expansion joints. The lighting creates long shadows from the stanchions and the person.

Client Communications with Represented Parties

Model Rule and WA RPC 4.2 Comment 4

- “A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). **Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.**”
- So how do we draw the line between RPC 8.4 and RPC 4.2?
- Oregon does not have this comment

Polling Question #3 – Client-to-Client Communications

Attorney represents a real estate developer facing permitting issues for a project impacting wetlands. The client would like to come to an agreement with the Agency. The attorney conveyed a proposed agreement to the Agency attorney, but the attorney is unsure the Agency actually received it. Attorney's client is getting impatient and is pressing attorney to take action. What can the attorney do?

- a) Nothing
- b) Reach out to the Agency directly, and copy the Agency attorney
- c) Storm down to the Agency office and present a copy to the Agency
- d) Advise her client that she is permitted to reach out to the Agency directly

Additional Authority

- ABA Formal Ethics Op. 11-461 (2011) (lawyer may give client “substantial assistance” about issues and strategies for communicating with represented adversary; irrelevant whether idea originates with lawyer or with client);
- ABA Formal Ethics Op. 92-362 (1992) (lawyer who has serious doubts whether settlement offer he made to opponent's lawyer was communicated to offeree may not ask offeree, but may tell client that client is free to ask).

Proceed with Caution

- Note Washington RPC 8.4(a) (professional misconduct to violate RPCs through the acts of another)
- Note Oregon's "or cause another to communicate"
- The precise placement of the line is in the eye of the beholder – put yourself in the shoes of the lawyer whose client you are contacting

First Amendment vs. RPC 4.2



Communicating with Regulatory Bodies

At Public Meetings

- Lawyer attends a monthly Natural Resource Damage Assessment Committee Meeting. Ecology chairs this meeting. Lawyer represents a client with a contested case hearing against Ecology in two weeks that involves an oil spill in Pierce County. During the committee meeting, Lawyer asks Ecology employees about a change in damage assessment methodology up for discussion.
- Is Lawyer's questioning of Ecology employees improper given Lawyer's impending contested case?



Tensions Between Fundamental Rights and Regulating Lawyer Conduct

- As citizens, lawyers have a fundamental right to communicate with their government under the First Amendment.
- How far do the First Amendment protections extend when a lawyer communicates with city councils, agency officials, and other government entities?

Public Communications – Prohibited

- *United States v. Sierra Pac. Indus.*, 759 F. Supp. 2d 1206 (E.D. Cal. 2010) (when lawyer for defendant in government's suit alleging corporate responsibility for forest fire attended Forest Service field trip open to public and questioned lower-level employees, without disclosing his role in the lawsuit, he was not exercising right of petition but was “attempting to gain information for use in the litigation” in violation of California's anticontact rule as well as Model Rule 4.2).

Public Communications – Permitted

- *Da Silva v. N.Y. City Transit Auth.*, No. 117CIV04550FBVMS, 2019 WL 13180282, 2019 BL 581435 (E.D.N.Y. June 21, 2019) (lawyer for plaintiff alleging negligent maintenance and design of subway station did not violate rule by attending public meeting and asking about prospective safety measures; topic was public interest and policy, not subject of representation and to extent there was any overlap, First Amendment protects right to complain to public officials and to seek relief from their actions).

Oregon-Specific Approach

(1) *Current Management Employees*. Current corporate officers, directors, and managers are represented to the same extent as the entity.

- Deciding who is a manager is a fact-specific inquiry – proceed with caution.

(2) *Current Employees Whose Conduct Is at Issue*: within the entity's representation.

(3) *Current Employees Whose Conduct Is Not at Issue*. may generally be contacted without permission from their attorneys.

(4) *Former Employees*. Former employees of all stripes may be contacted as long as they are not separately represented in the matter by their own lawyers.

- But don't invade attorney-client privilege.

Oregon-Specific Case

Nicita v. Holladay, 3:19-CV-01960-YY (D. Or. Jan. 18, 2023)

- Plaintiff, a pro se attorney, filed a lawsuit against defendant Mr. Holiday, the mayor of Oregon City, alleging First Amendment retaliation stemming from a dispute over a development project.
- The defendant filed a motion for a protective order to prevent Plaintiff from **prospectively** contacting current and former City employees, including an attorney, the city manager, and city commissioners.
- The court was unwilling to circumscribe the lawyer's First Amendment rights without guidance from the Oregon State Bar and/or Oregon Supreme Court.
 - Prior communications not set out in the opinion, but the court noted that they had not prejudiced the government, and there was no evidence of harassment, attempts to gather evidence, or get overly personal.

How About Public Records Requests?

Oregon Formal Ethics Opinion No. 2005-144

Issue: whether a lawyer who represents a client opposing a certain county action is “authorized by law” to make a public records request to a county employee and not run afoul of RPC 4.2.

Rule: The public records request is “authorized by law,” **unless** the inquiry involved “the substantive content rather than identification of the documents and if the communications are directed to a ‘person represented,’ ” such as if the lawyer asked “a person who is deemed to be represented to explain the legal significance of the document.”

Questions?



Contacts

- Lawson Fite
 - 503-568-6694
 - lfite@schwabe.com

- Nellie Barnard
 - 503-796-2071
 - nbarnard@schwabe.com

Lawson Fite
(503) 568-6694
lfite@Schwabe.com

REPRESENTED BY

Schwabe

Thank you!

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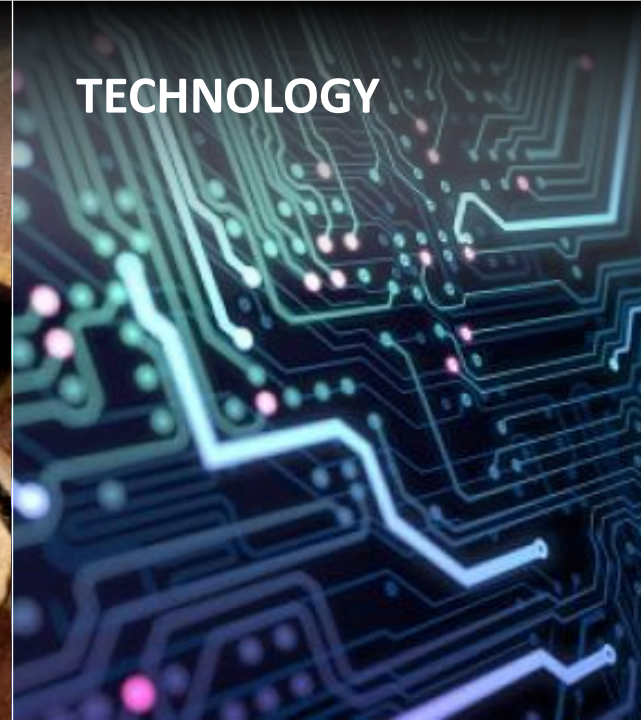
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