

FORMAL OPINION NO. 2005-80

Communicating with Represented Persons: Current and Former Employees of Entities Represented by Counsel, Lawyer-Client Privilege

Facts:

Plaintiff's Lawyer represents Plaintiff in litigation against Corporate Defendant. Corporate Defendant is represented by Defense Lawyer. Current Employee is a current employee of Corporate Defendant. Former Employee is a former employee of Corporate Defendant. Current Employee and Former Employee are not separately represented by Defense Lawyer or by other counsel.

Questions:

1. May Plaintiff's Lawyer talk to Current Employee about the facts of the underlying dispute without the permission of Defense Lawyer?
2. May Plaintiff's Lawyer talk to Former Employee about the facts of the underlying dispute without the permission of Defense Lawyer?
3. May Plaintiff's Lawyer discuss with Current Employee or Former Employee communications between Current Employee or Former Employee on the one hand and Defense Lawyer on the other?

Conclusions:

1. See discussion.
2. Yes.
3. No, qualified.

Discussion:

Oregon RPC 4.2 provides:

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.

Whether Current Employee is deemed represented for purposes of Oregon RPC 4.2 depends on the position held by Current Employee within Corporate Defendant and the relationship of Current Employee to the matters at issue in the litigation. Different jurisdictions have adopted somewhat different, albeit overlapping, approaches to the problem of which employees or constituents of an organization are entitled to the protection afforded by Oregon RPC 4.2.¹ In the absence of express authority in Oregon,² we believe that the correct approach is as follows:

(1) If Current Employee is part of corporate management or a corporate officer or director, then Current Employee is "represented" within the meaning of this rule even though Current Employee is not individually represented by Defense Lawyer.

(2) If Current Employee's conduct is at issue in the litigation (because, for example, Plaintiff seeks to hold Corporate Defendant vicariously liable in whole or in part for Current Employee's acts or omissions), Current Employee is also "represented" within the meaning of this rule.

¹ See, e.g., ABA Model Rule 4.2 comment; *Niesig v. Team I*, 76 NY2d 363, 558 NE2d 1030, 559 NYS2d 493 (1990); *Massa v. Eaton Corp.*, 109 FRD 312, 314–315 (WD Mich 1985); and sources therein cited. See also *Porter v. Arco Metals, Div. of Atlantic Richfield*, 642 F Supp 1116 (D Mont 1986); *Wright v. Group Health Hosp.*, 103 Wash2d 192, 200–201, 691 P2d 564 (1984); *Chancellor v. Boeing Co.*, 678 F Supp 250, 252–253 (D Kan 1988); Mary Burns Tomlinson, *Problems for Lawyers Who Contact Adverse Corporate Employees Directly*, 49 OSB BULLETIN 2, at 18 (Nov 1988); Annot, *Right of Lawyer to Conduct Ex Parte Interviews with Corporate Party's Nonmanagement Employees*, 50 ALR4TH 652 (1986).

² For a discussion of the application of this principle in reference to a governmental entity, see *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265 (Or 1997).

(3) If Current Employee does not come within either of these two categories, however, Plaintiff's Lawyer may contact Current Employee without the consent of Defense Lawyer.³

With respect to Former Employee, the answer is simpler: Former employees and former officers and directors who are not in fact individually represented by counsel are not "represented" within the meaning of Oregon RPC 4.2. *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 268 (Or 1997). *See, e.g., Wright v. Group Health Hosp.*, 103 Wash2d 192, 691 P2d 564 (1984); *Triple A Machine Shop, Inc. v. State*, 213 Cal App3d 131, 261 Cal Rptr 493 (1989). *See also* ABA Formal Ethics Op No 91-359.⁴ Consequently, Oregon RPC 4.2 does not prevent Plaintiff's Lawyer from contacting Former Employee without Defense Lawyer's permission.

Plaintiff's Lawyer may not, however, use any conversations with Current Employee or Former Employee to invade Corporate Defendant's lawyer-client privilege. Thus, Plaintiff's Lawyer may not ask or permit Current Employee or Former Employee to disclose to Plaintiff's Lawyer any communications that Current Employee or Former Employee had with Defense Lawyer pertaining to the matter in litigation. *Cf. ORS 9.460(3)*; Oregon RPC 1.6; *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 FRD 36, 42 (D Mass 1987); *Porter v. Arco Metals, Div. of Atlantic Richfield*, 642 F Supp 1116, 1118 (D Mont 1986). *See also* OSB Formal Ethics Op Nos 2005-50, 2005-44.

This limitation applies to Plaintiff's Lawyer's conversations with Current Employee even if Current Employee is not one of the persons deemed "represented" within the meaning of Oregon RPC 4.2. OEC 503(1)(d) provides, in effect, that all employees, not merely those holding controlling positions within the corporation, can have conversations with corporate counsel that are subject to the corporation's lawyer-client

³ If Current Employee is represented on the matter by Current Employee's personal lawyer, consent must first be obtained from the personal lawyer to speak to Current Employee.

⁴ If Former Employee were still a current director or officer, Former Employee would be a represented person. *Cf. Mills Land & Water Co. v. Golden West Refining Co.*, 186 Cal App3d 116, 230 Cal Rptr 461 (1986).

privilege.⁵ *Cf. Upjohn Co. v. United States*, 449 US 383, 394, 101 S Ct 677, 66 L Ed2d 584 (1981).

This prohibition also applies to Plaintiff's Lawyer's conversations with Former Employee about communications that Former Employee may have had with Corporate Counsel either before or after Former Employee left Corporate Defendant's employment. Communications by Corporate Counsel with a former corporate employee about the subject of that former employee's employment are subject to lawyer-client privilege. *See, e.g., Upjohn Co., supra*, 449 US at 402–403 (Burger, C.J., concurring); *Admiral Ins. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F2d 1486, 1493 (9th Cir 1989); *Command Transp., Inc. v. Y.S. Line (USA) Corp.*, 116 FRD 94, 97 (D Mass 1987); *Amarin Plastics, Inc., supra*.

It follows that unless Corporate Defendant has waived its lawyer-client privilege or the conversations between Defense Lawyer on the one hand and Current Employee or Former Employee on the other are not privileged for some other reason (because, for example, third parties unrelated to Corporate Defendant were present), Plaintiff's Lawyer may not discuss with Current Employee or Former Employee any communications that they may have had with Defense Lawyer.

Approved by Board of Governors, August 2005.

⁵ OEC 503(1)(d) provides:

(d) "Representative of the Client" means a principal, an employee, an officer or a director of the client:

(A) Who provides the client's lawyer with information that was acquired during the course of, or as a result of, such person's relationship with the client as principal, employee, officer or director, and is provided to the lawyer for the purpose of obtaining for the client the legal advice or other legal services of the lawyer; or

(B) Who, as part of such person's relationship with the client as principal, employee, officer or director, seeks, receives or applies legal advice from the client's lawyer.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§5.1, 5.4, 5.10–5.12, 6.2–6.5, 6.8–6.9, 6.11–6.12, 7.42–7.46 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§99–100, 102 (2003); and ABA Model Rules 1.6, 4.2–4.3.