Breean L. Beggs

June 25, 2010

Mike Piccolo
808 W. Spokane Falls Blvd.
Spokane, WA 99201

Re: Communications with Council Members

Dear Mike:

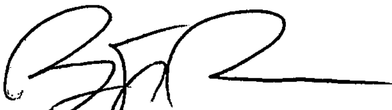
I am writing to you in your capacity as the assigned attorney for Spokane City Council Members. I am in receipt of a letter from Assistant City Attorney Rocco Treppiedi requesting that I not have any further communication with Council Members regarding the proposed changes to the Municipal Code provisions relating to police oversight. Given his threats to take legal action against me, I request that you forward his letter and my response to Council Members Rush, Snyder and Waldref. As you can see from my responsive letter, I disagree with his characterization of the law and his recitation of the facts.

Mr. Treppiedi's attempts to reduce my participation in the debate on appropriate police oversight is without support in the law and appears to violate both my constitutional rights and the rights of Council Members. I have enclosed an article, written by the Chief Disciplinary Counsel for the Washington State Bar Association, that rejects Mr. Treppiedi's interpretation of my right to communicate directly with Council Members on matters within their purview. As I read the law, I have the right to discuss the Zehm case directly with City Council Members in their official capacity since they are not named parties in the litigation and have no individual authority to bind the City to a settlement. In this instance, I believe they will confirm that my communications with them on improving police oversight did not involve the Zehm litigation.

I am willing to continue providing volunteer assistance to Council Members but it would be helpful if they obtained an independent legal opinion regarding the scope of RPC 4.2's authorization to communicate with outside counsel on matters within their purview. This is not the first time that members of the City's executive branch have attempted to use the City's legal department to forestall reforms by the legislative branch. That is beyond the scope of my individual concern but I hope the Council will promptly put an end to this practice.

522 W. Riverside Avenue • Suite 560 • Spokane, Washington 99201
P509.232.7760 • F509.232.7762 • Ebreeanlbeggs@gmail.com

Sincerely,



BREEAN L. BEGGS

Enclosures

Cc: Rocco Treppiedi

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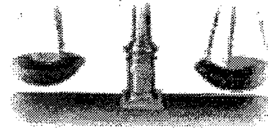

June 2001

Ethics and the Law: Communicating with a Represented Governmental Client

by Barrie Althoff, WSBA Chief Disciplinary Counsel

Opinions expressed herein are the author's and are not official or unofficial WSBA positions.

Communicating with a Represented Governmental Client

Rule 4.2 of Washington's Rules of Professional Conduct generally prohibits a lawyer from communicating about the subject of the representation with a person whom the lawyer knows is represented by another lawyer in the matter.

The application of this rule is generally clear where both clients are individuals involved in a civil dispute. It is more complex where one or both of the clients is an entity. It becomes even more complex, and far more contentious, when the dispute involves criminal law, particularly involving federal prosecutors.

This article looks at only one small part of the application of the rule. It first provides a brief overview of the rule, and then examines the limited application of RPC 4.2 in a civil, noncriminal context to a lawyer who (1) represents a client in a particular matter where the opposing client is a governmental entity or official, and (2) knows the governmental entity or official is represented by counsel in that particular matter, but (3) nonetheless wants to communicate directly with the opposing governmental entity or official about the represented matter. For a more general discussion of Washington's RPC 4.2, see Althoff, "Communicating with Represented Persons," (*Washington State Bar News*, February 2000, p. 47).

Purpose and Scope of Rule

Washington's RPC 4.2, captioned "Communication with Person Represented by Counsel," provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

The rule, long a part of Washington's lawyer ethics codes and of the model ethics codes of the American Bar Association (ABA) on which Washington's are based, appears to have originated in a statement in 2 David Hoffman, *A Course of Legal Study Addressed to Students and the Profession Generally*, 771 (2nd ed. Baltimore, 1836): "I will never enter into any conversation with my opponent's client, relative to his claim or defense,

except with the consent, and in the presence of his counsel."

Often known as the "anti-contact" rule, RPC 4.2 seeks to preserve the lawyer-client relationship and client's confidences and secrets. It does so by prohibiting situations wherein a lawyer might take advantage of represented persons or induce them to disclose privileged, confidential or other information, or make admissions harmful to their legal position; or wherein an opposing lawyer might undermine, or seek to undermine, their confidence in their own lawyer. The rule only applies where the lawyer knows the other client is represented by counsel as to the matter in question. Under the terminology section of the RPCs, "'[k]nows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

An official comment, not adopted by Washington, to the parallel rule in the ABA Model Rules of Professional Conduct observes: "This Rule does not prohibit communication with a represented person ... concerning matters outside the representation." Comment 1 to ABA Model RPC 4.2. Thus, WSBA Informal Opinion 86-2 authorizes a prosecutor to communicate with a represented defendant as to matters other than those on which the defendant was represented. The determination of whether there is a "matter," of what the "matter" is, and of whether there is known representation as to the "matter" are each complex and crucial determinations.

If there is a matter as to which the opposing client is known to be represented, all communications with an opposing client, whether substantive or procedural, or of whatever duration are prohibited unless they fall within the rule's narrow exceptions. There is no de minimus exception. For example, a Washington lawyer was admonished for discussing for several minutes his municipal client's need for access to a property and the opposing client's concerns about damage to the property. The discussion about the subject matter of the representation was with an opposing client whom the lawyer knew was represented. The fact that a court clerk had called the parties together just prior to a scheduled hearing on the issues, but the opposing client's lawyer had not appeared, believing the issues had been resolved, did not make the direct communication fall within the "authorized by law" exception, discussed below, to the no-contact rule. See discipline notice, *Washington State Bar News*, December 2000, p. 48.

Because the no-contact rule applies only to lawyers representing clients, it does not prohibit represented clients from communicating directly with one another. Thus, private clients and government officials are generally free to communicate directly about a matter even where each is represented by counsel as to that matter. Lawyers may not, however, "mastermind" or script their client's communications. See *Trumbull County Bar Ass'n v. Makridis*, 671 N.E.2d 31 (Ohio 1996), and Formal Opinion 1993-131 (1993), State Bar of California Standing Committee on Professional Responsibility and Conduct.

Although the rule does not by its terms prohibit a lawyer who is acting on behalf of himself or herself, and thus who is arguably not acting in a representational capacity, from communicating with a person the lawyer knows is represented by counsel in the matter, some jurisdictions, including Washington, have interpreted RPC 4.2 to prohibit such communication. For example, a Washington lawyer who communicated with an architect with whom he had a personal dispute, and whom he knew was represented as to the matter of the dispute was admonished for the contact as a violation of RPC 4.2. See

discipline notice, *Bar News*, June 1998, p. 46.

Similarly, Alaska Ethics Opinion 95-7, after noting the split of authority in various jurisdictions and the purpose of the rule as insulating a client from opposing counsel, opines, in the context of a marital dissolution, that a pro se lawyer is subject to the no-contact rule. It does so on the basis that a client who retains a lawyer should not lose the protection of that lawyer merely because the opposing client happens to be a pro se lawyer. If the opposing client were a government entity or official, however, the "authorized by law" exception to the no-contact rule, discussed below, would likely permit a private pro se lawyer to communicate directly with the official unless the official was being sued in his or her personal capacity by the lawyer.

Washington law provides little guidance as to the applicability of the no-contact rule to private lawyers communicating with governmental officials on matters as to which the officials are represented by counsel. Washington's leading no-contact case, *Wright v. Group Health Hospital*, 103 Wn.2d 192 (1984), clarified applicability of the no-contact rule to employees of an entity by establishing bright-line rules. It held the no-contact rule prohibits ex parte communication with 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." 103 Wn.2d 192, 200. It does not prohibit contacting former employees, nor does it address the special considerations applicable to dealing with a represented governmental entity.

Exceptions to RPC 4.2

There are two exceptions to the noncommunication rule of RPC 4.2. A lawyer may communicate with a client whom the lawyer knows is represented in the matter about the subject of the representation if (1) the opposing lawyer consents to the communication, or (2) the lawyer is authorized by law to engage in the communication.

Consent Exception

Although RPC 4.2 exists to protect the client and the lawyer-client relationship, it is the lawyer, not the client, who may waive the protection of the rule. As part of the lawyer's duty under RPC 1.4 to communicate with the lawyer's client, the lawyer should consult with his or her client prior to consenting under RPC 4.2 to such communication. An opposing client's consent to such communication without the opposing lawyer's consent is ineffectual. Thus, where the lawyer knows the opposing client is represented as to the matter, the lawyer may not communicate with the opposing client even if the opposing client offers — even pleads — to communicate with the lawyer about the subject matter of the representation unless the lawyer secures the consent of the opposing client's lawyer.

The rule does not require that consent be written, but in good practice it should be, preferably signed by the opposing lawyer, or at least by sending a writing to that lawyer confirming his or her consent. Given the purpose and strictness of the rule, it is highly perilous to engage in otherwise prohibited communication solely in reliance on an "implied" consent of the opposing counsel. A lawyer doing so should immediately seek written ratification from opposing counsel, but recognize that counsel may not at all agree such consent was implied.

While lawyers for governmental clients routinely consent to opposing counsel communicating with their clients, this article

assumes that such consent has either not been asked, or has been asked but been refused. Whenever private counsel is considering communicating with known represented governmental officials about a represented matter, private counsel should consider asking for the government lawyer's consent before engaging in such communication, since there is a reasonable likelihood that the government lawyer will consent. Doing so significantly reduces the possibility of both professional ill will and of charges of ethical misconduct developing from the direct communication.

Authorized by Law Exception

The second exception under RPC 4.2 that permits a lawyer to communicate with a known represented person about a matter as to which the lawyer knows the person is represented is where the lawyer is "authorized by law" to communicate with that person. In the context of a private lawyer seeking to communicate with a represented governmental official about the represented matter, the most important basis for this exception is a constitutional one, discussed below. As between governmental clients and opposing private lawyers, this exception comes close to swallowing the entire rule. But it does not wholly do so.

The principal basis for permitting private persons and their lawyers to communicate with a represented governmental official about the subject matter of the representation without the government lawyer's consent is the right of petition under the First Amendment of the U.S. Constitution. That amendment provides: "Congress shall make no law...abridging the...the right of the people...to petition the Government for a redress of grievances." See, for example, *American Canoe Ass'n, Inc. v. City of St. Albans*, 18 F.Supp.2d 620 (S.D.W.Va. 1998); *Camden v. State of Maryland*, 910 F. Supp. 1115 (D.Md. 1996). Similarly, Washington's Constitution, Article I, Section 4 provides: "The right of petition... shall never be abridged."

The constitutional right of a citizen to petition for redress of grievances would seem necessarily to include the right to petition through a lawyer. See Formal Opinion 97-408, note 10, American Bar Association Committee on Ethics and Professional Responsibility. Alaska Bar Association Ethics Opinion 94-1 (1994), on the other hand, opines that for purposes of the no-contact rule, although a citizen may directly petition a represented governmental official, the citizen may not do so through a lawyer. To the author, elevation of an ethics rule over a constitutional right seems questionable. Other opinions and rules on the issue include Utah State Bar Ethics Opinions 115 (1993) and 115R (1994), District of Columbia RPC 4.2(d), Formal Opinion 1991-4 (1991) of the Ass'n of the City of the Bar of New York, and California RPC 7-103. There is considerable uncertainty and disagreement on the breadth of the right to petition and to what extent it limits the no-contact rule when applied to private lawyers seeking to communicate with known represented governmental officers.

Washington's RPC 4.2 is based on and nearly identical to Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct. The official ABA comment, not adopted by Washington, to ABA Model RPC 4.2 explains the scope of the "authorized by law" exception in the civil law context:

> [A] lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with

government officials about the matter.

Formal Opinion 95-396 (1995) of the American Bar Association Committee on Ethics and Professional Responsibility, after quoting the above official comment and noting the First Amendment origin of the right to speak with government officials, describes the scope of the "authorized by law" exception:

The "authorized by law" exception to the Rule is also satisfied by a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel — such as court rules providing for service of process on a party, or a statute authorizing a government agency to inspect certain regulated premises. Further, in appropriate circumstances a court order could provide the necessary authorization. [Footnotes omitted]

Other examples of cases falling within this exception are statutes relating to whistleblowers or to freedom-of-information-type requests and judicial precedent. See, for example, *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 960-61 (2d Cir. 1983), cert. denied 464 U.S. 915 (1983), holding proper a trial judge's permission for plaintiffs to interview governmental staff to determine the government's compliance with prior court rulings. WSBA Formal Opinion 96 (1961) similarly recognizes that communication with a represented person does not violate the no-contact rule when the communication is authorized by a court rule.

Commenting on the limited application of RPC 4.2 to governmental clients, and addressing both the consent exception and the authorized-by-law exception, Charles Wolfram, Modern Legal Ethics 614-615 (1986), observes:

Requiring the consent of an adversary lawyer seems particularly inappropriate when the adversary is a government agency. Constitutional guarantees of access to government and statutory policies encouraging government in the sunshine seem hostile to a rule that prohibits a citizen from access to an adversary governmental party without prior clearance from the government party's lawyer.

While recognizing the theoretical legitimacy of the broad constitutional right to petition for redress of grievances, a government lawyer may still very realistically perceive that a private lawyer who exercises that right on behalf of his or her client is trying to go over the government lawyer's head or around the government lawyer. Thus, such communications can be very bothersome for government lawyers.

Few government lawyers likely feel wholly comfortable with the fact that private counsel can often communicate directly with the governmental client while government lawyers are prohibited by RPC 4.2 from similarly communicating directly with the private counsel's client. It has long been clear under Washington law that government lawyers are subject to the no-contact rule. See WSBA Formal Opinion 12 (1951) opining that Rule 9 of the Canons of Professional Ethics, a predecessor to the present RPC 4.2 no-contact rule, applied to government lawyers for the Veterans Administration who were licensed in Washington.

Allowing private lawyers to communicate with governmental officials without their lawyer's consent may undercut the government lawyer and subject that lawyer's client, as embodied in the governmental decision-maker, to the very

risks that RPC 4.2 was intended to remove from a private client. The careful government lawyer will anticipate that such communications will likely take place, will counsel the governmeal decision-maker in advance to expect such communications, will educate the decision-maker on whether and how to accept such communications, and will urge the decision-maker to consult with the government lawyer before making any decisions as to the matter of the representation. On the other hand, experienced governmental officials are likely more used to dealing by themselves with opposing counsel than most private clients are, and thus the protections of RPC 4.2 may not be as necessary for such governmental officials. The government lawyer should also recognize and explain to the governmental official that constitutional rights are not expected to be convenient or advantageous to the government or its agents since they are intended to check governmental power, not facilitate it. Thus, a private lawyer may, without a government lawyer's consent, often communicate directly with the governmental official known to be represented who is handling the matter. Similarly, the governmental official (but not the government lawyer) is generally free to communicate directly with the private party's lawyer and does not need the permission of a government lawyer handling the dispute.

Limitations on "Authorized by Law" Exception

Even when relying on the authorized-by-law exception to the no-contact rule, there are important limits on the ability of private counsel to communicate directly with a governmental entity or official without the consent of the government lawyer. Formal Opinion 97-408 (1997) of the ABA Committee on Ethics and Professional Responsibility recognizes the tension between a citizen's right of access to government and the government's right to be protected from communications by an opposing party's lawyer without the government counsel's consent. It opines that all contacts with governmental officials not consented to by officials' counsel which would otherwise be prohibited by RPC 4.2 should, to remain exempt from RPC 4.2, be subject to two conditions, one requiring the communication be only about a policy issue and to a governmental decision-maker, the other requiring advance notice to the government lawyer.

The ABA opinion's first condition is made up of two parts: (1) the governmental official contacted must have authority to take or recommend action in the matter, and (2) the sole purpose of the communication must be to address a policy issue, including settling a controversy. If the governmental officials with whom the private lawyer wants to communicate are not authorized to take or recommend action in the matter, the right to petition for redress would not apply, and the private lawyer may not communicate with that official without the government lawyer's consent. Nor may private counsel communicate directly with a represented governmental officer or employee who may be *personally* liable in a matter without the consent of that person's lawyer. This also applies where the same lawyer represents both the governmenal officer/employee and the governmental entity.

The second part of the first ABA condition requires that the sole purpose of the communication be to address a policy issue. The opinion itself notes disagreement among committee members, however, as to what constitutes "policy." Some members contended that settlement is a proper topic for direct communication only when the settlement issues to be discussed may fairly be said to be policy issues within the constitutional ambit of the right to petition, and that not every routine case against the government involves such issues.

Other committee members contended, however, that a citizen's right to seek settlement of a controversy with the government goes to the very heart of the constitutional right of access recognized and given effect by the drafters of Model RPC 4.2.

The ABA opinion's second condition is that the private lawyer "must always" give government counsel advance notice of intent to communicate with known represented governmenal officials about the represented matter, so as to give government counsel the opportunity to discuss with governmental officials the advisability of entertaining such communication. If the communication is written, the opinion requires the private lawyer to provide advance copies of the communication to government counsel at a time and in a fashion that will afford the government lawyer a meaningful opportunity to advise the officials whether to receive the communication from the private lawyer. The opinion notes that the majority of the committee's members believed advance notice should be mandatory, while a minority believed it should only be advisory. The opinion also observes that requiring the private lawyer to give advance notice of intended communication gives the government the benefit of most of the rule's salutary purposes while obviating the possibility that government counsel could attempt to block access to their principals by involving a rule of professional conduct.

In the context of the constitutional right to petition for redress of grievances, the ABA opinion concludes that if these two conditions are not satisfied, RPC 4.2 would prohibit the communication of private counsel with represented governmental officials as to the represented matter, unless the government lawyer consented to the communication or unless another portion of the authorized-by-law exception applied. The author, a former government lawyer, has had private counsel, without his consent or advance knowledge, communicate with his governmental clients known by opposing counsel to be represented by the author. Believing that the First Amendment right to petition may well be chilled by the ABA's stated mandatory advance-notice requirements, however, and believing that constitutional right is more important than the aims sought to be protected by RPC 4.2, the author agrees with the minority position of the ABA committee. Such advance notice requirements, while commendable, recommended, likely ethically protective of the private lawyer, and probably welcomed by government lawyers, should not be mandatory.

The ABA opinion illustrates its application by stating that a private person's lawyer in a lawsuit against a municipality may seek to meet with a city council committee to discuss settlement of issues the council is empowered to settle, but must give the city's lawyer sufficient advance notice to allow the city lawyer to consult with the committee and be present at the meeting if the committee so decides, or to advise the committee against having such a meeting. The private lawyer may also write to council members, but must provide an advance copy to the city's lawyer. It concludes that many situations in which a lawyer might reasonably want to communicate directly with governmental decision-makers are likely to be ones in which Rule 4.2 either does not apply at all because no specific controversy between the government and the private party has yet developed, or are ones specifically superceded by the statute authorizing citizen communications with governmental officials.

The opinion goes on to state that Model RPC 4.2 would prohibit a communication by a private person's lawyer to a represented governmental official if that governmental official is not authorized to take or recommend action in the represented matter, or if the purpose of the communication is to develop

evidence as well as to resolve a policy issue. For example, a private person's lawyer generally may not communicate ex parte with decision-making governmental officials in order to conduct a factual inquiry for an intended lawsuit against the government entity or official.

The somewhat begrudging acknowledgment in the foregoing ABA opinion of the First Amendment right of petition as a limit on RPC 4.2 is not unanimous. For example, California generally makes its no-contract rule inapplicable to representations against the government. California RPC 7-103.

The *Restatement of the Law Third, The Law Governing Lawyers* also shows considerably greater acceptance of communications with a represented governmental official than does the ABA opinion. The restatement sets out its no-contact rule over several different rules. Section 99 states the general no-contact rule. Section 99(1)(a) excludes from its application communications with a public officer or agency to the extent stated in Section 101. Section 99(1)(c) excludes communications authorized by law. Section 101(1) states that the no-contact prohibitions of Section 99 do not apply to communications with employees of a represented governmental agency, or with a governmental officer being represented in the officer's official capacity, unless, as provided in Section 101(2), the government is in a position closely analogous to that of a private litigant, such as in negotiations or litigation, and even then contact is generally permitted with a represented governmental officer as to issues of general policy. Similar to ABA Formal Opinion 94-408, Restatement Section 101(2) concludes that if the governmental officer has retained separate counsel to represent the officer's personal interests, contact with the officer is subject to the general Section 99 no-contact rule.

Further Reading

A private lawyer who is considering communicating with a represented government official about the matter of representation, but who is not planning on securing the known government lawyer's consent to the communication, should research the ethical issues before undertaking such a communication. Likewise, a government lawyer puzzling whether such a communication is ethical should research the issues before concluding the private lawyer is unethical. Useful materials include: RPC 4.2 and the ABA commentary thereto; Formal Opinions 95-396 (1995) and 97-408 (1997) of the American Bar Association Committee on Ethics and Professional Responsibility; the *Restatement of the Law Third, The Law Governing Lawyers*, Sections 99-101; and the wealth of other authorities cited in these works. Other useful works include the ABA *Annotated Model Rules of Professional Conduct* (4th ed., 1999), 397-417; Wolfram's *Modern Legal Ethics* (1986), 614-615; the *ABA/BNA Lawyers' Manual on Professional Conduct*, Section 71:301 et seq.; and 2 Hazard & Hodes, *The Law of Lawyering* (3rd Ed. 2000), Section 38.8.

Conclusion

Washington's RPC 4.2 generally prohibits a lawyer from communicating about the subject of the representation with a person whom the lawyer knows is represented by another lawyer in the matter. Two important exceptions, however, permit such communication: if the other lawyer consents to the communication, and if the communication is authorized by law.

Where the matter of representation involves communicating with a governmental entity or official, the authorized-by-law

exception to the no-contact rule significantly limits the rule's application. This is especially true when the basis for the exception is the First Amendment constitutional right of citizens to petition (likely including through counsel) for redress of their grievances. In this case, private counsel may communicate with represented governmental officials authorized to take or recommend action on the issue, without the consent of the government lawyer, but, under an ABA opinion, only if the sole purpose of the communication is to address policy issues (including settling the claim), and if the private lawyer gives the government lawyer adequate advance notice of the intended communication. While the author does not agree with the ABA that such advance notice is mandatory for the communication to be exempt from RPC 4.2, such advance notice is recommended.

Private lawyers considering non-consensual communication with a governmental official, and government lawyers encountering them, should first consider whether the no-contact rule even applies, since much everyday communication with government is not subject to RPC 4.2. If the rule appears on its face to apply, ethics research should be undertaken to verify whether the communication is or is not subject to the rule. Even if private counsel may communicate with a governmental official without consent of the government lawyer, private counsel may, to maintain a more positive and effective future working relationship, wish to seek such consent.

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