

FORMAL OPINION NO 2005-80

[REVISED 2016]

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 See, e.g., ABA Model RPC 4.2 comments; *Niesig v. Team I*, 76 NY2d 363, 558 NE2d 1030 (1990); *Massa v. Eaton Corp.*, 109 FRD 312, 314–15 (WD Mich 1985), and sources therein cited. See also *Porter v. Arco Metals Co., Div. of Atl. Richfield Corp.*, 642 F Supp 1116 (D Mont 1986); *Wright by Wright v. Grp. Health Hosp.*, 103 Wash 2d 192, 200–01, 691 P2d 564 (1984); *Chancellor v. Boeing Co.*, 678 F Supp 250, 252–53 (D Kan 1988); Mary Burns Tomlinson, *Problems for Lawyers Who Contact Adverse Corporate Employees Directly*, 49 OSB Bulletin 2, at 18 (Nov 1988); John D. Hodson, Annotation, *Right of Attorney to Conduct Ex Parte Interviews with Corporate Party's Nonmanagement Employees*, 50 ALR4th 652 (1986) (supplemented periodically).

² For a discussion of the application of this principle in reference to a governmental entity, see *Brown v. State of Or., Dep't of Corr.*, 173 FRD 265 (D Or 1997).

(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.

(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*, 173 FRD at 268. *See, e.g., Wright by Wright*, 103 Wash 2d 192; *Triple A Mach. Shop, Inc. v. State of California*, 213 Cal App 3d 131, 261 Cal Rptr 493 (Ct App 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.*,

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 W. Ref. Co.*, 186 Cal App 3d 116, 230 Cal Rptr 461 (Ct App 1986).

116 FRD 36, 42 (D Mass 1987); *Porter v. Arco Metals Co., Div. of Atl. Richfield Corp.*, 642 F Supp 1116, 1118 (D Mont 1986). *See also* OSB Formal Ethics Op No 2005-50 (rev 2014); OSB Formal Ethics Op No 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 that any person who is acting to further the legal representation and within the person’s scope of employment—not merely those holding controlling positions within the corporation—can have conversations with corporate counsel that are subject to the corporation’s lawyer-client privilege.⁵ *Cf. Upjohn Co. v. United States*, 449 US 383, 394, 101 S Ct 677, 81-1 US Tax Cas P 9138, 66 L Ed 2d 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.*, 449 US at 402–03 (Burger, C.J., concurring); *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 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.*, 116 FRD 36.

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

⁵ OEC 503(1)(d) provides:

- (d) “Representative of the client” means:
 - (A) A principal, an officer or a director of the client; or
 - (B) A person who has authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client, or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the person’s scope of employment for the client.

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 and updated by the Legal Ethics Committee, May 2016.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 5.1 (client identification), § 5.3-1 (identifying the client in corporations), § 5.4 (the no-contact rule in the organizational setting), § 6.2-1 to § 6.2-4 (duty of confidentiality), § 6.3-1 (client consent), § 6.3-2 (waiver by production), § 6.3-4 to § 6.3-5 (disclosures), § 8.5-1 (communicating with a represented person), § 11.5-1 (confidentiality issues for in-house lawyers) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 99–100, 102 (2000) (supplemented periodically); ABA Model RPC 1.6; and ABA Model RPC 4.2–4.3.

