

ETHICS CONSIDERATIONS FOR LAWYERS WHO INTERACT WITH AGENCIES

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McMenamins Edgefield Manor-Troutdale, OR

THE PRIVATE PRACTICE ATTORNEY'S PERSPECTIVE *J. Mark Morford*

Oregon Rules of Professional Conduct (ORPC) Rule 4.2, Communication with Person Represented by Counsel:

“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.”

Rule 4.3, Dealing with Unrepresented Parties:

“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.”

I. The Practical Realities of an Agency Practice

A. Many regulatory programs are legally complex. The complexity of the regulatory processes creates the need for many clients to be represented by counsel to navigate through agency processes. Representation by an attorney also may be necessary to protect the client's legal rights.

B. The agency personnel who administer complex regulatory processes typically are not attorneys. Even if they are trained and licensed as attorneys, the Oregon

Department of Justice takes the position that agency personnel are not representing the agency as the agency's attorney.

- C. Consequently, in order for regulated parties to wend their way through regulatory processes, they frequently need an attorney to communicate, directly or indirectly, with agency personnel who are not attorneys (or acting in the role of an attorney).

II. Application of Rule 4.2

- A. The key language in the rule is "a person the lawyer knows to be represented by a lawyer *on that subject*."
- B. In most situations with most agencies, the private practice attorney reasonably can assume that agency personnel are not represented on a particular subject, unless agency personnel have instructed them otherwise.

III. Application of Rule 4.3

One obvious purpose of Rule 4.3 is to prevent lawyers from bamboozling an unrepresented party. Most agency personnel are sophisticated enough and agency decision making polices are rigorous enough that an agency is unlikely to believe that a private attorney is somehow looking out for the agency's interests or for the agency to be harmed by biased legal advice. That said, circumstances certainly arise where the private attorney is more familiar with the law than the agency personnel, and an agency person may look to the private attorney to provide guidance on that law. In those circumstances, the attorney must be clear that they are representing only their private client in explaining or interpreting the law and that the agency person should confirm the attorneys legal explanation with the agency's own counsel.

IV. Special Situations

A. Ghost Writing

A significant part of an agency practice is preparing permit applications or drafting correspondence that the client will send to a government agency. Often, the attorney's role is in the backroom, and it is not apparent to the agency personnel that an attorney is even involved. In these circumstances, clients do not typically disclose the fact that an attorney has drafted all or a portion of the correspondence or application.

This sort of ghost writing for the client could be construed as indirect communication by the attorney with the agency. If the attorney knows that the agency is represented by an attorney in the matter, all aspects of Rule 4.2 apply; the attorney should disclose their role in drafting correspondence and should clarify with the agency's counsel that such indirect communication is acceptable.

In most situations involving permit applications and other correspondence outside the enforcement context, the agency is likely not to be represented by an attorney.

In these cases, Rule 4.3 applies. While it should not be necessary for the client or their attorney to disclose the fact that an attorney is helping with the drafting of routine documents, when the correspondence becomes more in the nature of legal argument with the agency, the attorney's role should be clarified.

B. Bounds of Representation by Department of Justice

In some situations, such as negotiation of a remedial action consent decree with the Oregon Department of Environmental Quality (DEQ), the agency is clearly represented by the Department of Justice, but the bounds of that representation are not entirely clear. Certainly, negotiation of the terms of the consent decree must be conducted directly with the agency's attorney, but what about negotiation of the details of DEQ's staff report selecting the remedial action?

The private attorney may have spent months or years working directly with DEQ's remedial project manager to develop the remedial action without any involvement of an agency attorney. Once an assistant attorney general starts advising DEQ on the consent decree, must the private attorney cease all those communications? Arguably yes, but that could significantly encumber the process for both DEQ and the regulated party. This situation is best addressed openly with the assistant attorney general. Usually, the agency's attorney will agree that the private attorney can continue direct communications with the agency on some aspects of the matter, but will request to be contacted directly about certain issues or to be copied on all correspondence. The boundaries and conditions should be documented in writing with the assistant attorney general.

C. Enforcement Actions

When a private person is the subject of civil enforcement by an agency, they have a right to be represented by counsel. The agency enforcement officer, however, may not be an attorney or, even if licensed as an attorney, may not be representing the agency in their licensed capacity. In these circumstances, the private attorney should ask the agency enforcement officer if the agency is represented by an attorney in the action. Oregon agencies usually do not seek representation from the Department of Justice in administrative enforcement actions, although occasionally they do. Federal agencies, on the other hand, often have agency counsel involved in all enforcement actions.

When the agency is represented by counsel in an enforcement action, the private attorney should discuss directly with the agency's attorney whether and under what circumstances they can communicate directly with agency personnel regarding the enforcement action or related matters. For example, if the enforcement action concerns violation of the conditions of an air quality permit issued by DEQ, the permittee's attorney should clarify whether they can continue to communicate directly with the DEQ permitting staff about other aspects of the permit or the client's compliance.

D. Criminal Investigations

Private parties who become the target of criminal investigations or persons of interest in criminal investigations clearly need representation by an attorney. Such investigations, however, usually are conducted by non-attorney law enforcement officers or by agency personnel. Often, the target or person of interest should have an attorney present during any questioning, and communication by that person's attorney with investigators will be necessary for their adequate representation.

The best practice is to ask the investigators if a prosecuting attorney is involved and to contact the prosecuting attorney to discuss and agree on any limits to communications by the private attorney directly with investigators. Nevertheless, the private attorney should not allow investigators to use Rule 4.2 to limit the legal right of their client to be fully represented. If the investigator insists that the private attorney not be present unless the prosecutor is also present, then the attorney should insist that the questioning be rescheduled when the prosecuting attorney can attend.

E. Agency Personnel Uncomfortable with Attorneys

Occasionally, agency personnel may become obviously uncomfortable in communications with a private party's attorney. Such discomfort may be manifested by repeated questions about why an attorney needs to be involved or remarking uncomfortably that they are not represented by counsel. In these situations, the private attorney should specifically ask the agency person if they have consulted with an agency attorney and recommend that they consult with an agency attorney if they are at all uncomfortable with the private attorney's involvement. See ORPC 4.3.

F. Matters Involving the Attorney's Personal Interests

Like everyone else, attorneys are regulated by various government agencies in their personal dealings. Rule 4.2 is clear that it applies to an attorney when handling their own affairs.

Such matters create unique risk of violating Rule 4.2 because the fact that the attorney is an attorney may not be at all obvious to agency personnel the way it usually is when the attorney is representing someone else. In fact, the attorney may wish to conceal the fact they are an attorney out of fear that agency personnel may treat them differently or proceed more cautiously. These are precisely the reasons that the attorney should clearly disclose that they are an attorney handling their own personal affairs and they should document that they have made that disclosure.