

ETHICS CONSIDERATIONS FOR LAWYERS WHO INTERACT WITH AGENCIES

October 24, 2014
McMenamins Edgefield Manor-Troutdale, OR

- I. INTRODUCTION

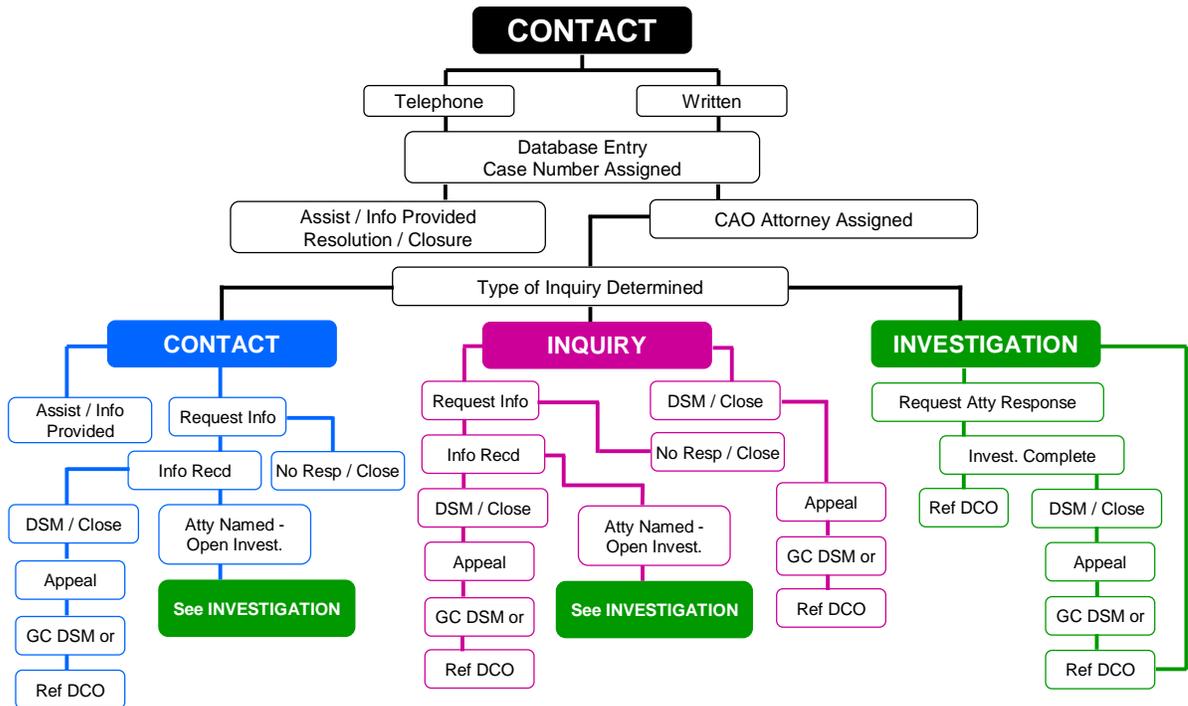
- II. PROBLEMS SPECIFIC TO ENVIRONMENTAL AND
NATURAL RESOURCES LAW
 - A. The Good News
 - B. Process and Set Up
 - C. Communication with Unrepresented Parties
 - D. Oregon RPC 4.2
 - E. Private Practitioner Perspective
 - F. Government Perspective

A. THE GOOD NEWS/STATISTICS FROM OSB.

HOT OFF THE PRESS

B. PROCESS

CAO PROCESS



C. COMMUNICATION WITH REPRESENTED PARTIES

Oregon RPC 4.2. May not communicate or cause another to communicate on the subject matter of the representation if the lawyer knows that a party is represented.

Several Cases, but none regarding agencies.

1. In re Paulson, 341 Or 542 (2006). Lawyer met with client's boyfriend in a sex abuse case when lawyer knew the boyfriend had counsel.
2. In re Koessler, 18 DB Rptr 105 (2004). Lawyer called opposing party to advise a check was ready instead of opposing lawyer because the lawyers had a poor relationship.
3. In re McNeff, 17 DB Rptr 143 (2003). Lawyer had opposing party personally served with notice of deposition even though knew that party had a lawyer.

BUT: several ethics opinions.

1. No. 2005-161. AAG may advise agency regarding investigations that contemplate agency contact with a represented party as long as the agency

investigator is not an employee or subject to the supervision, direction or control of the AG's office and the AAG does not cause the communication. The AAG is also not obligated to advise the agency not to make contact.

2. 2005-152. Plaintiff's attorney in suit against former employer state agency may not communicate directly with current agency employee, without consent of AG's office, if the conduct of the current employee is at issue or the current employee is management. Plaintiff's attorney does not need consent to speak with former agency employee or current employee of a separate agency, but does need consent if that employee has their own attorney in that subject matter.
3. 2005-144. Attorney may contact county employee to obtain public records, but if the contact strays into asking the employee about the meaning of the records, this could be a violation.
4. 2005-147. Communications between represented parties is not per se prohibited. Cannot induce a client to communicate.

And other resources:

1. Attorney Matthew Corbin from Missouri wrote a two part article for the ABA/BNA Manual (Vol. 30, No 12 and No. 13). This article starts by summarizing a Federal case out of California in which an associate at a law firm that represented a client who was preparing to sue the US Forest Service attended a tour conducted by Forest Service personnel. The associate asked questions and offered hypotheticals that the court found was designed to develop testimony favorable to the firm's client. The firm knew the Forest Service was represented. The court ordered the firm to turn over everything to the Forest Service's counsel and forbade it from using the information in the trial. It is unclear if an ethics complaint resulted from the conduct. The moral of this story is that if you are trying to be sneaky you are probably violating rule 4.2. If you are making good faith efforts to resolve client problems the agency's lawyers are not likely concerned about the communications.
2. ABA Formal Opinion 11-461 (08/04/2011). The gist of this opinion is that it is recognized that in some legal disputes (divorce, contract negotiations) there may come a time when it makes sense for the parties to communicate directly. The lawyers may advise their clients about the wisdom of communicating directly. What they may not do is "mastermind" the communication. That is, you can tell your client what is at stake, how their legal rights/obligations may be affected by the communication and that it would be a good idea to have the communication. But, you cannot script the discussion in a way that you are just using your client as a mouthpiece. The opinion refers to overreaching. An example of where it would be okay to advise a client to speak directly with the opposing party is when an offer has been made, but it is unclear if the opposing attorney has passed it along to the client. Here, you could ask your client to ask the opposing party if the offer had been forwarded.

D. Communication with Unrepresented Parties

Oregon RPC 4.3 Dealing with unrepresented party.

In dealing on behalf of a client or the lawyer's own interests with a person/agency 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/agency 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.

You are allowed to communicate (advocate your client's position) as long as you make clear what your role is and don't give legal advice other than to get a lawyer. Of course, Oregon RPC 4.2 prohibits you from communicating with someone you know is represented.

In re Lawrence, 337 OR 450, 98 P3d 366 (2004) attorney's firm represented defendant in domestic violence case. Attorney violated rule when he gave legal advice to the victim and assisted the victim in filling out an affidavit used in attempt to have charged dismissed.

In re Richardson, 19 DB Rptr 239 (2005) attorney who represented defendant in domestic violence case advised the victim she was not required to appear at grand jury unless service was valid.

In re Jeffery, 321 Or 360 (1995) attorney disciplined for giving legal advice to unrepresented party with interests adverse to those of his client. Attorney represented defendant in a drug case and gave "free legal advice" to his client's live-in girlfriend who had already made statements to police that were not in the client's best interests.

E. PRIVATE PRACTITIONER PERSPECTIVE

1. Discussion

F. GOVERNMENT LAWYER PERSPECTIVE

1. Discussion

G. Help

- A. Web site www.osbar.org
- B. Oregon RPC 8.6 (written ethics opinions from General Counsel)
- C. Helen Hirschbiel (GC) 503.431.6361
- D. Amber Hollister (DGC) 503.431.6312
- E. Any CAO lawyer 503.620.0222