

District of Columbia Opinion Clarifies “Who is an Attorney” Within RPC 4.2

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When an organization hires in-house counsel, it does so with the intent of always having a lawyer available for internal problems, as well as, lawsuits, contract disputes, and other issues with the outside world. But suppose you represent an adverse party to an organization that, to your knowledge, has hired outside counsel to handle a particular matter. Suppose further, that you are finding outside counsel to be extremely difficult to deal with. May you directly contact in-house counsel without outside counsel’s permission?

In the October 2005 Bar Bulletin, Mark J. Fucile wrote a useful primer on the hows and whys of communication with represented parties, *Who’s Fair Game? Whom You Can and Can’t Talk to on the Other Side*, Mark J Fucile, October 2005. Since that time, the Washington DC Bar released DC Formal Ethics Op 311 (2005), which specifically addresses the question raised above but not raised in the Fucile article. The opinion states what we believe to be the only logical conclusion and one which our office has long maintained: “Yes, you can talk to in-house counsel.”

Oregon RPC 4.2 provides that:

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 that a lawyer knows to be represented by a lawyer on that subject matter 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.

In examining its equivalent rule, the DC Bar concluded that the intent of the rule is not to protect lawyers from each other. Rather, the intent is to protect potentially unsophisticated parties who lack legal training against overreaching by opposing lawyers. ABA Formal Ethics Op No 95-396 3; DC Op 311; *see also* Restatement (Third) of the Law Governing Lawyers §99 cmt b (2000). Since there is no reason to consider in-house counsel as inherently less competent or capable than outside counsel, a communication with any lawyer on the “other side” meets the purposes of the rule. Although no Oregon case has so held, this conclusion is consistent with Oregon authorities and with the weight of non-Oregon authorities, concerning the purpose of the rule. *See In re: Grievance Proceeding*, WL 31106389 (D Conn 2002); *In re Finkelstein*, 901 F2d 1560 (11th Cir1990).