

FORMAL OPINION NO 2005-163

Communicating with Unrepresented Persons: Defense Lawyer Suggesting Civil Compromise

Facts:

Lawyer represents a person charged with a criminal offense and wishes to contact the complaining witness about the possibility of civil compromise pursuant to ORS 135.703 to 135.709.

Question:

May Lawyer contact the complaining witness to suggest a civil compromise?

Conclusion:

Yes.

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.

Oregon RPC 4.3 provides:

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.

OSB Formal Ethics Op No 2005-89 concludes that a district attorney can ethically suggest a civil compromise. The reasoning applies equally to lawyers representing defendants in criminal cases. The complaining witness or victim in a criminal case is not represented by the district attorney. Thus, contact with a complaining witness would not, in most cases, constitute improper contact with a represented individual in violation of Oregon RPC 4.2. (If a complaining witness is represented on the subject matter of the prosecution, defense counsel's suggestion for civil compromise would need to be made through that lawyer.)

The mere suggestion of a civil compromise does not constitute giving advice to a person who is not represented. A defense lawyer suggesting a civil compromise, however, must be sensitive to the distinction between making the suggestion and advising the complaining witness about whether to accept the compromise. Information must be offered in factual terms rather than as advice.¹

The suggestion of civil compromise also does not constitute the type of conduct prohibited by Oregon RPC 3.4(b) ("A lawyer shall not . . . offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon . . . the outcome of the case."). Similarly, suggesting a

¹ Defense lawyers must make certain disclosure to victims. *See, e.g.*, ORS 135.970(2).

permissible offer of compromise does not constitute conduct that is prejudicial to the administration of justice in violation of Oregon RPC 8.4(a)(4).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.5-2 (communicating with an unrepresented person) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 98–99, 120 (2000) (supplemented periodically); and ABA Model RPC 4.2–4.3.

