

FORMAL OPINION NO 2005-6
Communicating with Represented Persons

Facts:

Lawyer *A* is engaged in negotiations on behalf of Party *A* and against Party *B*, who is represented by Lawyer *B*.

Lawyer *C* is engaged in litigation on behalf of Party *C* and against Party *D*, who is represented by Lawyer *D*.

Question:

Absent consent by opposing counsel, may any of these lawyers communicate about the matters at issue with the opposing party or cause their clients or others (such as investigators or claims adjustors) to do so, either in person or in writing?

Conclusion:

No.

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.

From the wording of this rule, it should be clear that the proposed conduct described above is prohibited. *See, e.g., In re Schenck*, 320 Or 94, 101, 879 P2d 863 (1994) (lawyer violated rule by sending Notice to Produce directly to represented party); *In re Smith*, 318 Or 47, 49, 861 P2d 1013 (1993), *cert den*, 513 US 866 (1994) (inactive member of bar, representing self, is subject to provisions of rule); *In re Murray*, 287 Or 633, 601 P2d 780 (1979) (lawyer who causes client to communicate with opposing party in writing would be in violation of this rule); *In re Lewelling*, 296 Or 702, 678 P2d 1229 (1984) (acting on impulse is not a defense); *In re Schwabe*, 242 Or 169, 408 P2d 922 (1965) (disciplining lawyer who, *inter alia*, telephoned opposing party to learn whether that party really had hired counsel after lawyer had received letter from counsel indicating that counsel had been hired); *In re Heider*, 217 Or 134, 341 P2d 1107 (1959) (contact held not justified by business relationship between lawyer and opposing party).

Two qualifications should be noted. First, Oregon RPC 4.2 does not prohibit, *per se*, communications between parties who happen to have counsel and does not prohibit a lawyer from answering a client's question about whether the client may communicate with the represented person. What is prohibited is simply the initiation by lawyers of such communications. *See* OSB Formal Ethics Op No 2005-147. *Cf. Wilson v. Brand S Corp.*, 27 Wash App 743, 621 P2d 748 (1980). Second, there are circumstances in which direct communications may be proper under the "authorized by law" provision. *See, e.g.,* ORS 20.080(1), which provides for certain written demands to be served "on the defendant"; ORS 18.265(1)(a), which provides for "mail addressed to the judgment debtor"; and ORCP 7 D, which provides for service of process on a party. *See also United States v. Schwimmer*, 882 F2d 22 (2d Cir 1989) (*former* DR 7-104(A)(1) did not prohibit prosecutor from asking questions of

represented party during grand jury proceedings). As a general proposition, however, the cases cited above indicate that the “authorized by law” exception will be narrowly construed.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 5.4 (the no-contact rule in the organizational setting), § 8.5-1 (communicating with a represented person) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 99–102 (2000) (supplemented periodically); and OSB Formal Ethics Op No 2005-80 (rev 2016). See also Gregory G. Sarno, Annotation, *Communication with Party Represented by Counsel as Ground for Disciplining Attorney*, 26 ALR4th 102 (1983) (supplemented periodically).

