

FORMAL OPINION NO 2005-81

[REVISED 2014]

Communicating with Represented Persons: Information Relating to the Representation of a Client, Second Opinions

Facts:

Lawyer A is approached by Potential Client. Potential Client tells Lawyer A that Potential Client is unhappy with work being done for Potential Client by Lawyer B. Potential Client asks Lawyer A for a second opinion.

Questions:

1. May Lawyer A provide the second opinion?
2. May Lawyer A inform Lawyer B of Potential Client's request?

Conclusions:

1. Yes.
2. No, qualified.

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.

This rule applies when a lawyer is representing a client or the lawyer's own interests in a matter, but not when the lawyer is approached by a prospective client. Neither this rule nor its predecessor, *former* DR 7-104, has ever been interpreted to prohibit a lawyer from providing a second opinion to a represented party. *See, e.g., Restatement (Third) of the Law Governing Lawyers* § 99 cmt c (2000) (supplemented periodically)¹; ABA Model RPC 4.2.²

Whether Lawyer A can inform Lawyer B of Potential Client's request depends on ORS 9.460(3)³ and Oregon RPC 1.6.⁴ *Cf. State v.*

¹ A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation. *Restatement (Third) of the Law Governing Lawyers* § 99 cmt c.

² "[T]his Rule [does not] preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter." ABA Model RPC 4.2 cmt [4] (2002).

Other jurisdictions have issued ethics opinions similar to the Oregon position. *See, e.g.,* Florida Ethics Op No 02-5 (2003); South Carolina Ethics Advisory Op No 97-07 (1997); Utah Ethics Op No 110 (1993); Philadelphia Ethics Op Nos 91-32 and 2004-1; Kentucky Ethics Op No KBA E-325 (1987); State Bar of Michigan Ethics Op No CI-883 (1983).

³ ORS 9.460(3) provides that a lawyer must "[m]aintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct established pursuant to ORS 9.490."

⁴ Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional

Keenan, 307 Or 515, 771 P2d 244 (1989). Potential Client's request for a second opinion would be information relating to the representation of the client. Consequently, Lawyer A cannot reveal this request to Lawyer B unless Potential Client consents or one of the other exceptions to the duty of confidentiality within Oregon RPC 1.6 applies. *Cf.* OSB Formal Ethics Op No 2005-23 (rev 2014).

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reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

COMMENT: For additional resources on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 5 (identifying the client), § 6.1 to § 6.3-1 (confidentiality) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 99–100, 102 (2000) (supplemented periodically); ABA Model RPC 1.6; and ABA Model RPC 4.2.