

FORMAL OPINION NO 2005-126

Communicating with Represented Persons: Prosecutions

Facts:

Prosecuting Attorney has instituted criminal proceedings against *A* for possession of controlled substances. *A* is not represented in that matter. Prosecuting Attorney has also instituted criminal proceedings against *A* and *B* for participating jointly in a bank robbery. Both *A* and *B* are represented on the robbery charge.

Prosecuting Attorney is also considering filing criminal charges against *C* and, to that end, has caused *C* to be called to testify before a grand jury. Prosecuting Attorney knows that *C* is represented by counsel in connection with the potential criminal charges. Before deciding whether to institute formal criminal proceedings against *C*, Prosecuting Attorney would like to use undercover agents or informants to obtain certain information from *C* for use by Prosecuting Attorney.

Questions:

1. May *B*'s lawyer communicate with *A* without the consent of *A*'s lawyer?
2. May Prosecuting Attorney talk to *A* about the controlled substances charge without the consent of *A*'s lawyer?
3. May Prosecuting Attorney use undercover agents or informants in connection with the investigation of *C*?

Conclusions:

1. No.
2. No.
3. Yes, 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.

See also Oregon RPC 4.3:

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.

These rules apply to criminal cases as well as to civil cases. *Cf.* OSB Formal Ethics Op No 2005-6. It follows, for example, that *B*'s lawyer cannot talk to *A* about anything relating to the bank robbery charges without the consent of the lawyer who represents *A* in that matter.

What constitutes the "subject of a representation" will depend on the facts of each case. In criminal cases, however, the rule is susceptible to a narrow application. A prosecutor may not talk to a criminal defendant about a matter on which the criminal defendant is unrepresented if the criminal defendant also is represented on another matter, unless the lawyer for the criminal defendant in the other matter consents. *See, e.g.,*

In re Burrows, 291 Or 135, 629 P2d 820 (1981); *In re Hostetler*, 291 Or 147, 629 P2d 827 (1981). The reason is that the disposition of criminal charges in one case can, through plea bargaining or otherwise, potentially affect the disposition of criminal charges in the other.¹

In light of the “authorized by law” exception in Oregon RPC 4.2(b), most courts have held, and we agree, that prosecutors may engage in preindictment, prearrest, and other investigative contacts with suspects even though those suspects are known to be represented by counsel. *See, e.g., United States v. Ryans*, 903 F2d 731, 735–36 (10th Cir 1990); *United States v. Hammad*, 902 F2d 1062, 1063 n 1 (2d Cir 1990); *United States v. Kenny*, 645 F2d 1323, 1339 (9th Cir 1981). In contrast, prosecutors cannot use go-betweens to circumvent defense counsel in discussing or negotiating a plea bargain.

Approved by Board of Governors, August 2005.

¹ Application of Oregon RPC 4.2 in civil cases is outside the scope of this opinion. Nevertheless, there could certainly be situations in civil matters when a lawyer’s communication on a subject about which a person is not represented could have an effect on a matter about which the person is represented. *Cf. In re Blackmore*, 12 DB Rptr 286 (1998) (lawyer did not violate *former* DR 7-104 by deposing unrepresented witness in one case who was opposing party and had counsel in another case; questions that had relevance to both cases were authorized by law).

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.5-1 to § 8.5-2 (communicating with third parties) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 98, 103 (2000) (supplemented periodically); and ABA Model RPC 4.2–4.3.

