

FORMAL OPINION NO 2005-142

Communicating with Represented Persons: Criminal Witnesses

Facts:

A is advised or has reason to believe that she will be called before a grand jury to testify in a criminal investigation. She is not, however, a suspect. Although willing to cooperate, A is anxious about her involvement in the criminal justice system. She retains Lawyer to serve as a buffer between herself and the law enforcement officers, including the District Attorney's office. Lawyer gives notice to the District Attorney's office of Lawyer's representation of A.

Questions:

1. May the District Attorney or the District Attorney's agent communicate directly with A concerning her upcoming testimony after the District Attorney receives notice of Lawyer's representation of A?

2. Is the answer to the first question different if the District Attorney's contact with A takes place after indictment and the testimony of A is anticipated for trial?

3. Is the answer to the first question different if A's motive in hiring Lawyer is to make it as difficult as possible for law enforcement officials to have contact with her?

Conclusions:

1. No.
2. No.
3. 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.

This protection of the rule applies to "persons" represented by counsel and not just "parties" represented by counsel. Under the facts presented, Lawyer has not consented to any contact by the District Attorney. The "authorized by law" exception also would not apply in these circumstances.¹ Accordingly, contact with A by the District Attorney or by the District Attorney's agent is prohibited by Oregon RPC 4.2.

Obstructing an investigation or causing a person to secrete himself or herself or to leave a jurisdiction could subject a lawyer to discipline. *See, e.g.*, Oregon RPC 3.4(f) (A lawyer shall not "advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness therein"); Oregon RPC 8.4(a)(4) (prohibiting conduct that is "prejudicial to the administration of justice"). On these facts, however, there is no

¹ OSB Formal Ethics Op No 2005-126 notes that in a criminal context, most courts have held that prosecutors may engage in preindictment, prearrest, and other investigative contacts with *suspects* even though those suspects are known to be represented by counsel. The scope of this exception is limited to suspects, and A is not a suspect.

suggestion that Lawyer has engaged in such conduct. As long as a lawyer-client relationship exists between A and Lawyer, A's motivation in hiring Lawyer is irrelevant.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.6-3 (making a witness unavailable) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 99 (2000) (supplemented periodically); and ABA Model RPC 4.2.

