

FORMAL OPINION NO 2005-147

Communicating with Represented Persons: Direct Communication between Represented Parties

Facts:

Lawyer *A* represents Client *A*, who opposes Client *B* in litigation. Client *B* is represented by Lawyer *B*. Client *A* wishes to engage in settlement negotiations directly with Client *B*.

Question:

May Lawyer *A* allow Client *A* to negotiate directly with Client *B* about the matter while Client *B* is represented by counsel in the matter?

Conclusion:

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.

To fall within the prohibition of the rule, the "communication" or the direction to communicate must originate with Lawyer *A*. Lawyer *A* has no duty to prohibit voluntary communications between Client *A* and Client *B*. Indeed, Client *A* and Client *B* have a right to speak directly to

each other that Lawyer A may not abridge. *Cf.* OSB Formal Ethics Op No 2005-6; ABA Formal Ethics Op No 95-396.

Nevertheless, even if Client A initiates the communication with Client B, a represented adverse party, Lawyer A must not instruct Client A to convey a particular message because Oregon RPC 8.4(a) provides that a lawyer cannot violate the Oregon Rules of Professional Conduct “through the acts of another.” *See also* OSB Formal Ethics Op No 2005-6; *cf. In re Murray*, 287 Or 633, 639, 601 P2d 780 (1979).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.5-1 (communicating with a represented person) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 99 (2000) (supplemented periodically); and ABA Model RPC 4.2.