

FORMAL OPINION NO 2005-152

Communicating with Represented Persons: Current and Former Employees of State Agency

Facts:

Plaintiff has brought an employment claim against an agency of the State of Oregon for which Plaintiff formerly worked. Agency is represented by the Attorney General's Office.

Plaintiff's Lawyer wishes to interview a Current Employee of Agency and Former Employees concerning the facts of Plaintiff's claim. First Former Employee is no longer employed by any state agency. Second Former Employee is now employed by a different agency, which is not a defendant in the litigation. Current Employee and Former Employees are not separately represented by the Attorney General's Office or by other counsel.¹

Questions:

1. May Plaintiff's Lawyer speak to Current Employee without permission of the Attorney General's Office?
2. May Plaintiff's Lawyer speak to First Former Employee without permission of the Attorney General's Office?
3. May Plaintiff's Lawyer speak to Second Former Employee without permission of the Attorney General's Office?
4. Must Plaintiff's Lawyer give notice to the Attorney General's Office of the intended contacts?

Conclusions:

1. See discussion.

¹ For purposes of this opinion, we assume that the employees are potential fact witnesses or sources of information and not quasi-judicial decision-makers. *Cf.* Oregon RPC 3.5; OSB Formal Ethics Op No 2005-83 (rev 2016); OSB Formal Ethics Op No 2005-134.

2. Yes, qualified.
3. Yes, qualified.
4. 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.

OSB Formal Ethics Op No 2005-80 (rev 2016) addresses the questions raised here in the context of a corporate defendant. The officers, directors, and members of corporate management are deemed represented by the corporation's counsel for purposes of Oregon RPC 4.2, as are any persons whose conduct is at issue in the matter in question.

The same analysis and result apply to current employees of a state agency. *In re Spies*, 316 Or 530, 852 P2d 831 (1993). It follows that absent consent from the Attorney General's Office, and subject to the exception noted in OSB Formal Ethics Op No 2005-144 (rev 2007) regarding formal public records requests, Plaintiff's Lawyer may not speak to Current Employee if (1) the conduct of Current Employee is at issue in the matter, or (2) Current Employee is part of agency management. If Current Employee does not fall into either of these categories, Plaintiff's Lawyer may speak with Current Employee without the permission of the Attorney General's Office because Current Employee is not considered represented for purposes of Oregon RPC 4.2.

The rule regarding former Agency employees also follows the analysis set forth in OSB Formal Ethics Op No 2005-80 (rev 2016). Thus, Plaintiff's Lawyer need not obtain permission to contact First Former Employee but must not, as is noted in that opinion, use those discussions to invade the state's privileged communications.

The same rule should apply to Second Former Employee. The fact that Second Former Employee is now employed by a different state agency does not require that the current employee rules be applied. *Cf. Brown v. State of Or., Dep't of Corr.*, 173 FRD 265, 268 (D Or 1997) (ruling on defendant's motion for protective order limiting contact with current and former employees of state agency defendant and noting that improper invasion of an opposing party's privileged communications can lead to severe adverse results).

When the contact with a current or former employee is not prohibited under Oregon RPC 4.2, there is no requirement that Lawyer notify the Attorney General's Office of the proposed contact.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this 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* §§ 99–101 (2000) (supplemented periodically); ABA Model RPC 7.1; and ABA Model RPC 7.5.

