

FORMAL OPINION NO 2005-161

Competence and Diligence: Agency Investigator's Contact with Represented Persons

Facts:

State Agency regulates a licensed profession. State Agency has a statutory mandate to investigate allegations that licensing statutes and administrative rules have been violated. A citizen makes a complaint against Licensee, and State Agency assigns one of its staff investigators (Investigator) to investigate the complaint. State Agency has also requested and received legal counsel for this investigation from the Attorney General through an assistant attorney general (AAG). Licensee is aware that a complaint has been made against him and has retained Lawyer A to represent him in the matter.

Questions:

1. May AAG advise Investigator about contacting Licensee regarding the complaint if AAG knows that Licensee is represented by Lawyer A?
2. May AAG inform Lawyer A about Investigator's proposed contact with Licensee without State Agency's consent to do so?

Conclusions:

1. Yes, qualified.
2. No.

Discussion:

1. *Advising Investigator about Contact with Licensee.*

The following analysis assumes that Investigator is the direct agent or employee of State Agency, and not an employee of the Attorney General's Office or subject to the supervision, direction, or control of AAG.

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Contacts with a party who is represented by a lawyer are generally governed by Oregon RPC 4.2, Oregon RPC 8.4(a)(1), Oregon RPC 8.4(a)(3), OSB Formal Ethics Op No 2005-6 and OSB Formal Ethics Op No 2005-147.

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.

Oregon RPC 8.4(a)(1) makes it professional misconduct for a lawyer to "violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another," and Oregon RPC 8.4(a)(3) makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."

State Agency is authorized by law to investigate complaints against Licensee. Licensee's retaining Lawyer A does not, in and of itself, shield Licensee from contact by State Agency or Investigator. Moreover, the fact that State Agency seeks legal advice in the matter does not mean that State Agency must conduct its investigation through its legal counsel. Clients who are represented in a matter are permitted to communicate directly with each other, even though the Oregon Rules of Professional Conduct (RPCs) prevent the same direct communication by either client's lawyer. *See* OSB Formal Ethics Op No 2005-147. In this situation, Investigator may contact Licensee without the permission of AAG and without the permission of Lawyer A. Taking this analysis a step further, it also is not an Oregon RPC violation for AAG to draft rules

to assist State Agency in conducting investigations, including specific discussion of the right of State Agency to contact licensees directly even if they are represented by counsel.

Nevertheless, discussions between AAG and State Agency, through Investigator, regarding Investigator's contact with Licensee, require caution on the part of AAG. As was true in OSB Formal Ethics Op No 2005-147, AAG may not instruct Investigator what to say to Licensee.

2. *Informing Licensee of Intended Contact.*

If Investigator intends permissibly to contact Licensee about the allegations without the knowledge or consent of Lawyer A, AAG cannot alert Lawyer A to the intended contact unless AAG has State Agency's consent. A disclosure of this information without client consent would violate State Agency's rights under Oregon RPC 1.6(a), which 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).

This does not, however, prohibit AAG from informing State Agency or Investigator if AAG believes that such contacts are unwise.

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 to § 8.5-2 (communications with persons other than the client) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 11, 58, 60, 99 (2000) (supplemented periodically); and ABA Model RPC 4.2.

