

FORMAL OPINION NO 2005-42

Communicating with Unrepresented Persons: Prospective Defendant

Facts:

Lawyer has been asked to represent Client, a prospective plaintiff, against a prospective defendant. Before instituting litigation, Lawyer would like to speak to the prospective defendant about the matter or have an investigator do so.

Questions:

1. May Lawyer speak to the prospective defendant?
2. May Lawyer draft an affidavit commemorating the prospective defendant's statement?
3. May Lawyer negotiate and draft a settlement agreement between Client and the prospective defendant?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.
3. Yes, qualified.

Discussion:

The appropriate starting point of analysis is Oregon RPC 4.2:

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 rule is discussed at length in OSB Formal Ethics Op No 2005-6. *See also* OSB Formal Ethics Op No 2005-126.

Under the facts presented, it is not improper for Lawyer to speak to the prospective defendant or to cause Lawyer's agent to do so because Lawyer does not know¹ that the prospective defendant has already retained counsel in connection with this matter. Oregon RPC 4.2 is not implicated even if Lawyer knows or reasonably believes² that the prospective defendant likely will have counsel if suit is filed.

If Lawyer does not know that the prospective defendant is represented in the matter, Lawyer or Lawyer's investigator may speak to the prospective defendant and may also draft an affidavit commemorating the prospective defendant's statement.

In that event, Oregon RPC 4.3 is also relevant:

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.

¹ Oregon RPC 1.0(h) provides:

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question A person's knowledge may be inferred from circumstances.

² Oregon RPC 1.0(l) provides:

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

As long as Lawyer abides by Oregon RPC 4.3, Lawyer may negotiate a settlement between Client and the prospective defendant. *Cf.* OSB Formal Ethics Op No 2005-16; *Bohn v. Cody*, 119 Wash 2d 357, 832 P2d 71 (1992), *amended on denial of recons* (June 22, 1992), *modified by Trask v. Butler*, 123 Wash 2d 835, 872 P2d 1080 (1994) (discussing when lawyer may be liable to nonclient).

Once the prospective defendant has counsel, Lawyer must communicate with that counsel to seek an affidavit or negotiate a settlement.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 8.2 (knowingly, known, or knows), § 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* §§ 99–103 (2000) (supplemented periodically); and ABA Model RPC 4.2–4.3. *See also In re Jeffrey*, 321 Or 360, 898 P2d 752 (1995) (lawyer violated *former* DR 7-104(A)(2) by giving advice to unrepresented party with interests adverse to those of client).

