

FORMAL OPINION NO 2005-89

Prosecuting Attorneys: Obtaining Promise Not to Enter into Civil Compromise, Suggesting Civil Compromise

Facts:

District Attorney does not wish to begin certain criminal proceedings only to find that they are civilly compromised pursuant to ORS 135.703 to 135.709.

Questions:

1. May District Attorney condition a decision to prosecute on a commitment from the complaining witness not to enter into a civil compromise?
2. May District Attorney suggest a civil compromise?

Conclusions:

1. No.
2. Yes.

Discussion:

ORS 135.703 to 135.709 provide that a victim may enter into a civil compromise in certain cases at any time before trial. Oregon RPC 8.4(a)(4) makes it professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” The conduct described in the first question violates Oregon RPC 8.4(a)(4). *Cf. In re Haws*, 310 Or 741, 801 P2d 818 (1990) (generally outlining standards under former DR 1-102(A)(4) (current Oregon RPC 8.4(a)(4)); *In re Boothe*, 303 Or 643, 740 P2d 785 (1987) (lawyer engaged in conduct prejudicial to administration of justice when lawyer attempted to obtain agreement from former client not to testify against lawyer in disciplinary proceeding); *In re Wehmeyer*, 14 DB Rptr 188 (2000) (lawyer violated rule when he contacted arresting officer in DUII matter, explained that lawyer’s client would lose his job if his driver license was suspended,

and told officer that lawyer was hoping for “mercy non-appearance” by officer at DMV hearing).

On the other hand, District Attorney may suggest a civil compromise. District Attorney also may ask a complainant whether an out-of-court compromise appears likely so that prosecution may not be necessary or appropriate. Oregon RPC 4.3 provides:

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.

See, e.g., In re Jeffery, 321 Or 360, 898 P2d 752 (1995). *Cf. In re Bauer*, 283 Or 55, 581 P2d 511 (1978) (rule not violated when no legal advice given).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.11 (conduct prejudicial to the administration of justice), § 8.5-1 (communicating with a represented person), § 8.6-8 (threatening criminal prosecution) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 97, 103 (2000) (supplemented periodically); ABA Model RPC 4.3; and ABA Model RPC 8.4(d). *See also* Washington Advisory Op No 1020 (1986) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).