

FORMAL OPINION NO. 2005-16
Communicating with Unrepresented Persons

Facts:

Lawyer *A* represents Client *A*, who was injured when struck by a car driven by a person whom Lawyer *A* does not know to be represented by counsel. Lawyer *A* would like to send a letter to this person, informing the person of the seriousness of the injuries to Client *A* and recommending that the person instruct his or her insurance carrier to accept a policy limits demand.

Lawyer *B*, who represents Criminal Defendant *B*, learns that Witness, who may or may not also be implicated in the same crime, has been subpoenaed to appear before the grand jury investigating Criminal Defendant *B*. To help Criminal Defendant *B*, Lawyer *B* would like to advise Witness to assert the Fifth Amendment privilege against self-incrimination. Lawyer *B* does not know whether Witness has counsel.

Question:

May either Lawyer *A* or Lawyer *B* engage in the proposed communication?

Conclusion:

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.

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.

Oregon RPC 4.2 does not apply because Lawyer A and Lawyer B do not know that the persons to whom they propose to speak are represented by counsel on the same or related matters. *Cf.* OSB Formal Ethics Op No 2005-6. On the other hand, Oregon RPC 4.3 applies and would clearly be violated by the proposed conduct. *Cf. In re Bauer*, 283 Or 55, 581 P2d 511 (1978) (lawyer not guilty of violating *former* DR 7-105(A)(2) because no advice was given).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on the general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§5.9–5.12 (Oregon CLE 2003); and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§98–99, 103 (2003). *See also In re Jeffery*, 321 Or 360, 372, 898 P2d 752 (1995) (lawyer violated *former* DR 7-104(A)(2) for communicating with unrepresented party with adverse interests); OSB Formal Ethics Op No 2005-89 (district attorney may suggest civil compromise to victim of crime as long as district attorney does not violate Oregon RPC 4.3).