

Is Communicating the Right Thing to do?

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As soon as she is sworn in to practice law, Attorney purchases a shingle, some paint and a brush. She rents a small space, hangs out the shingle on which she placed her name and opens for business. Attorney sits eagerly at her desk, awaiting work, until Prospective Client arrives at her door.

Prospective Client tells her of his legal troubles arising out of grave bodily injury, multi-million dollar economic losses and an incredibly deep pocket and heavily insured defendant. Attorney can hear her student loans paying themselves off. Then comes the twist. Prospective Client explains that he already has counsel but thinks his counsel is pressuring to settle for a paltry sum and has simply not done the work to prepare Prospective Client's case.

Attorney freezes in her chair. Something from her law school professional responsibility class is swimming in her head. It would appear that Potential Client is already represented. What should she do?

DR 7-104(A) prohibits a lawyer from communicating, or causing another to communicate, with a represented person on the subject matter of the representation, without prior consent from the representing lawyer, or when authorized by law to make such communication. It is no defense that the represented party is the one who initiated the communication.¹ It also is no defense that the represented party *intends* to fire his client in the future.² So may Attorney either advise Prospective Client about the quality of the present attorney's work or arrange to take over the case from the present attorney without first speaking to the present attorney?

There is no Oregon caselaw, and there is no black letter exception in the Oregon disciplinary rules that addresses this issue. Nevertheless, it has been and is clear that the answer to this question is an unambiguous "yes". See OSB Legal Ethics Op No 1991-81. The opinion holds, that it is appropriate for an attorney to engage in the communication either to render a second opinion or to consider participation in the case.

¹ "The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by [the disciplinary rules]." ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.2 cmt. 3 (2003). This Rule was intended to only apply where the contacting attorney "knows" that the prospective client is represented on the matter to be discussed. ABA FORMAL OP 95-396 at 6. The Rule does not imply a duty to inquire as to current representation, however, "actual knowledge may be inferred from the circumstances." *Id.*

² The attorney may request the prospective client to provide evidence that the other lawyer has been dismissed or may contact the other lawyer directly to determine that the other lawyer perceives the representation to have been terminated. ABA Formal Op No 95-396 at 8.

The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §99 cmt. c (2000) supports the Oregon position:

A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation.

Additionally, the ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.2 cmt. 4, was amended in 2002 to include a similar exception: the Rule does not “preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.”³

This result makes sense. The anti-contact rules have been said to exist in order to provide “protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.” ABA Formal Ethics Op No 95-396 at 3. The Attorney-Present Client scenario does not violate any of these purposes. Moreover, a prohibition against such contacts would, or at least could, harm the client by putting pressure on the client to remain in an unsatisfactory attorney-client relationship.

In fact, it is clear that Attorney must not inform Prospective Client's present lawyer about this communication unless Prospective Client consents since the Attorney-Prospective Client communication will be a confidence under DR 4-101(A) and OREGON EVIDENCE CODE §503(1)(b).⁴ *See also* Proposed Oregon RPC 1.18 (stating the duties to prospective clients).

³ Other jurisdictions have issued similar ethics opinions. *See, e.g.*, Florida Ethics Op No 02-5; South Carolina Ethics Op No 97-07; Utah Ethics Op No 110 (1993); Philadelphia Ethics Op Nos 91-32 and 2004-1; Kentucky Ethics Op No E-325 (1987); Michigan Ethics Op No CI-883 (1983).

⁴ OEC §503(1)(b) provides in pertinent part that:

“Confidential communication” means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.