

**FORMAL OPINION NO. 1995-142  
Communicating with Represented Persons, Criminal Witnesses**

**Facts:**

A is advised or has reason to believe that she will be called before a grand jury to testify in a criminal investigation. She is not, however, a suspect. Although willing to cooperate, A is anxious about her involvement in the criminal justice system. She retains Lawyer to serve as a buffer between herself and the law enforcement officers, including the District Attorney's office. Lawyer gives notice to the District Attorney's office of Lawyer's representation of A.

**Questions:**

1. May the District Attorney or the District Attorney's agent communicate directly with A concerning her upcoming testimony after the District Attorney receives notice of Lawyer's representation of A?
2. Is the answer to Question No. 1 different if the District Attorney's contact with A takes place after indictment and the testimony of A is anticipated for trial?
3. Is the answer to Question No. 1 different if A's motive in hiring Lawyer is to make it as difficult as possible for law enforcement officials to have contact with her?

**Conclusions:**

1. No.
2. No.
3. No.

**Discussion:**

DR 7-104(A) provides in pertinent part:

During the course of a lawyer's representation of a client, a lawyer shall not:

- (1) Communicate or cause another to communicate on the subject of the representation, or on directly related subjects, with a person the lawyer knows to be represented by a lawyer on that subject, or on directly related subjects, unless:

(a) The lawyer has the prior consent of a lawyer representing such other person [or];

(b) The lawyer is authorized by law to do so. . . .

This rule, unlike ABA Model Rule 4.2 and similar rules in other states, covers “persons” represented by counsel and not just “parties” represented by counsel. *See* THE ETHICAL OREGON LAWYER §14.10 et seq. (Oregon CLE 1991 & Supp 1994). *See also* THE ETHICAL OREGON LAWYER, *supra*, §6.10. Thus, unless one of the enumerated exceptions to the rule applies, the proposed contact is prohibited.

The facts do not state that Lawyer has consented to any contact by the District Attorney. Nor do we believe that the “authorized by law” exception would apply in these circumstances.<sup>1</sup> Accordingly, DR 7-104(A) prohibits the District Attorney or the District Attorney's agents from contacting A before or after indictment.

Finally, A's motive for hiring counsel is irrelevant. DR 7-104(A)(1) applies whenever a person is represented by counsel.<sup>2</sup>

**Approved by Board of Governors, April 1995.**

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<sup>1</sup> The "authorized by law exception to DR 7-104(A)(1) as applied in the criminal context was discussed in OSB Legal Ethics Op No 1991-126: "In light of the 'authorized by law' exception to DR 7-104(A)(1), most courts have held, and we agree, that prosecutors may engage in preindictment, prearrest and other investigative contacts with *suspects* even though those suspects are known to be represented by counsel.: (Emphasis added; citations omitted.) The scope of this exception is limited, as noted above, to suspects. The facts expressly state that A is not a suspect. We do not believe an extension of the “authorized by law” exception to nonsuspects is supported by any statute or case law.

<sup>2</sup> Obstructing an investigation or causing a person to secrete himself or herself or to leave a jurisdiction could subject a lawyer to discipline. *See, e.g.*, DR 7-109(B) ("A lawyer shall not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein"); DR 1-102(A)(4) (prohibiting conduct that is "prejudicial to the administration of justice"). However, on these facts, there is no suggestion that the lawyer has engaged in this conduct.