

FORMAL OPINION NO 2005-68

[REVISED 2016]

Trust Accounts: Claims of Two or More Persons

Facts:

Lawyer represents Insurer and Insured in an action against a third party to recover damages allegedly caused by a third party's negligence. Insurer tells Lawyer that when settlement funds are received, Lawyer must forward all funds to Insurer and that Insurer will be the one to decide how much Insurer keeps by way of subrogation and how much is forwarded to Insured for uninsured losses.

Question:

May Lawyer honor Insurer's request?

Conclusion:

No.

Discussion:

Under these facts, Lawyer has two clients, Insurer and Insured.¹ OSB Formal Ethics Op No 2005-30 (rev 2016). Any settlement proceeds would represent funds of both of Lawyer's clients.

Oregon RPC 1.15-1(d) and (e) provide:

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise per-

¹ Any assumption that a tripartite relationship exists can be overcome by the specific facts and circumstances in a particular matter. *See In re Weidner*, 310 Or 757, 801 P2d 828 (1990) (articulating the test for an attorney-client relationship); *Evraz Inc., N.A., v. Continental Ins. Co.*, Civ No 3:08-cv-00447-AC, 2013 WL 6174839 (D Or, Nov 21, 2013) (finding no tripartite relationship when insurer did not hire lawyer and when lawyer had made it clear to insurer that she only represented insured).

mitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

On the facts as presented, Insurer is not “entitled to receive” the full amount of settlement funds collected within the meaning of Oregon RPC 1.15-1(d). *Cf. In re Howard*, 304 Or 193, 204, 743 P2d 719 (1987); OSB Formal Ethics Op No 2005-52. If Insurer and Insured agree on how to divide the money, Lawyer must make the agreed-on division. If not, Lawyer must either retain any disputed sums pending resolution of the dispute, as provided in Oregon RPC 1.15(e), or interplead the disputed funds. *Cf. OSB Formal Ethics Op No 2005-52.*

Approved by Board of Governors, February 2016.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 10.2-2(e)(5) (insurer-insured conflicts), § 12.3-3 (difference between lawyer trust account and general or office account), § 12.3-6(b) (funds to be used in implementing a settlement or business transaction), § 12.3-6(c) (disputed and jointly owned funds) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 45, 46 cmt d, 134 (2000) (supplemented periodically); and ABA Model RPC 1.15.