

FORMAL OPINION NO 2005-77

[REVISED 2016]

Conflicts of Interest, Current Clients: Representation of Insured after Investigation of Matter for Insurer

Facts:

Lawyer is retained by Insurer to review an insurance policy issued to Insured because of a complaint filed by a third party against Insured. Lawyer advises Insurer that Insurer has a duty to defend Insured but may well not have a duty to pay any ultimate judgment. After that work is completed, Insurer asks Lawyer to represent Insurer and Insured in defense of the underlying litigation subject to a reservation of rights.

Question:

May Lawyer represent Insurer and Insured in defense of the underlying litigation?

Conclusion:

See discussion.

Discussion:

As discussed in OSB Formal Ethics Op No 2005-30 (rev 2016), both Insured and Insurer would be Lawyer's clients in the defense of the underlying action.¹ Simultaneous representation in insurance defense cases is generally permissible: a conflict that falls within Oregon RPC 1.7 generally will not exist because the clients have common interest in

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).

defeating the claim.² *See also* OSB Formal Ethics Op No 2005-121 (rev 2016).

² If the representation of one client will be directly adverse to the other client, the proposed representation would be impermissible even if both Insurer and Insured consented. *See In re Holmes*, 290 Or 173, 619 P2d 1284 (1980) (under *former* DR 5-105, consent would not have cured actual conflict of interest between lawyer's two clients). If there a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to the other client, the representation would be permissible, but only if Lawyer reasonably believes that he or she is able to competently represent both clients, and Insurer and Insured give informed consent, confirmed in writing. *Cf. In re Barber*, 322 Or 194, 904 P2d 620 (1995).

Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

In this situation, however, the fact of Lawyer's recently completed work for Insurer on the coverage question must also be considered. Because of that work, if there is a significant risk that Lawyer's representation of Insured in defense of the underlying claim will be materially limited by Lawyer's responsibilities to Insurer, a conflict will be present under Oregon RPC 1.7(a). Consequently, Lawyer could not represent both Insurer and Insured in the underlying action without a reasonable belief that Lawyer could competently represent both clients, and only after receiving informed consent, confirmed in writing, from both Insurer and Insured pursuant to Oregon RPC 1.7(b), Oregon RPC 1.0(b), and (g). The disclosure to Insured must include a discussion of the fact of the prior representation of Insurer on the coverage question and its potential significance. *Cf. In re Germundson*, 301 Or 656, 661, 724 P2d 793 (1986); *In re Montgomery*, 292 Or 796, 802-04, 643 P2d 338 (1982); *In re Benson*, 12 DB Rptr 167 (1998); *In re Rich*, 13 DB Rptr 67 (1999).

Oregon RPC 1.0(b) and (g) provide:

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . . .

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Oregon RPC 1.8(f) and Oregon RPC 5.4(c) also apply to this situation.³ On the present facts, however, these rules do not create any additional requirements beyond those created by Oregon RPC 1.7.

Approved by Board of Governors, February 2016.

³ Oregon RPC 1.8(f) provides:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information related to the representation of a client is protected as required by Rule 1.6.

Oregon RPC 5.4(c) provides:

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.5-3 (payment of fees by nonclients), § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(b) (conflicts between current clients), § 10.2-2(e)(1) (creative lawyering to limit conflicts), § 10.2-2(e)(5) (insurer-insured conflicts), chapter 20 (conflicts-waiver letters) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–122, 128, 130, 134 (2000) (supplemented periodically); ABA Model RPC 1.0(b) and (e); ABA Model RPC 1.7; ABA Model RPC 1.8(f); and ABA Model RPC 5.4(c). *See also* OSB Formal Ethics Op No 2005-157 (rev 2016); Washington Advisory Op No 943 (1985) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).