

FORMAL OPINION NO 2005-121

[REVISED 2016]

**Conflicts of Interest, Current Clients:
Insurance Defense**

Facts:

Plaintiff files a complaint against Insured that includes two claims for relief. Insured has an insurance policy pursuant to which Insurer owes a duty to defend against, and a duty to pay damages on, the first claim for relief. Insurer would have no such duties, however, if Plaintiff had sued only on the second claim for relief. The amount of damages sought on the second claim exceeds policy limits.

Insured tenders the defense of the entire action to Insurer. Insurer accepts the tender of defense of both claims subject to a reservation of rights with respect to the second claim. Insurer then hires Lawyer to represent Insured in the case brought by Plaintiff.

After reviewing the pleadings and investigating the facts, Lawyer concludes that the first claim for relief may be subject to a motion to dismiss or a summary judgment motion or that it may be possible, for a sum that Insurer would be willing to pay, to settle the first claim only. The second claim, however, is not potentially subject to such motions and cannot be settled. Lawyer also knows that Insured does not want Lawyer to bring such a motion or effect such a partial settlement because doing so would leave Insured without an Insurer-paid defense on the second claim for relief and would diminish the ability of Insured to get funds from Insurer to help settle the case as a whole.

Question:

May Lawyer file a motion against the first claim or settle it?

Conclusion:

No.

Discussion:

As a general proposition, a lawyer who represents an insured in an insurance defense case has two clients: the insurer and the insured.¹ OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal Ethics Op No 2005-30 (rev 2016). Consequently, a lawyer in such a situation must be mindful of the restrictions in Oregon RPC 1.7 on current-client conflicts of interest:

(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;

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); *Evrax 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).

(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.

For the definitions of *informed consent* and *confirmed in writing*, see Oregon RPC 1.0(b) and (g).²

The relationship between Lawyer, Insured, and Insurer is both created and limited by the insurance policy. As the court stated in *Nielsen v. St. Paul Companies*, 283 Or 277, 280, 583 P2d 545 (1978), for example:

When a complaint is filed against the insured which alleges, without amendment, that the insured is liable for conduct covered by the policy, the insurer has the duty to defend the insured, even though other conduct is also alleged which is not within the coverage. . . . The insurer owes a duty to defend if the claimant can recover against the insured under the allegations of the complaint *upon any basis* for which the insurer affords coverage. [Emphasis in original; citations omitted.]

² 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.

See also ABA Formal Ethics Op No 282 (1950), which notes that simultaneous representation of insurers and insureds in actions brought by third parties generally does not raise conflict problems because of the “community of interest” growing out of the insurance contract.

When an insurer defends an insured without any reservation of rights (by which the insured reserves its right to deny coverage), there is little or no opportunity for a conflict of interest because the community of interest between the insurer and insured should be complete. When an insurer defends subject to a reservation or rights, however, a risk of conflict is present. To minimize this risk and to permit joint representation in such cases, both the ethics rules and insurance law require that a lawyer hired by the insurer to defend an insured must treat the insured as “the primary client” whose protection must be the lawyer’s “dominant” concern. *See, e.g.*, ABA Informal Ethics Op No 1476 (1981); 1 *Insurance* chs 6, 14 (Oregon CLE 1996 & Supp 2003).³ Consequently, a lawyer who is hired to defend the insured in a situation such as the one described in this opinion cannot file a motion that would adversely affect the insured’s right to a defense or to coverage but must instead act in a manner that is consistent with the interests of the insured.⁴ *See* 1 *Insurance*, chs 6, 14. *See also* *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz 519, 747 P2d 1218, 1219 (1987).

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³ The law also provides that if there is a potential conflict between the insurer and the insured, the facts found by the court in the action by the third party against the insured will not be given collateral estoppel effect as to either the insurer or the insured in a subsequent coverage dispute. *See, e.g., Ferguson v. Birmingham Fire Ins. Co.*, 254 Or 496, 509–11, 460 P2d 342 (1969).

⁴ The insurer is free to hire other counsel to litigate the coverage issue.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 10.2-2(e)(5) (insurer-insured conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 134 (2000); ABA Model RPC 1.0(b), (e); and ABA Model RPC 1.7.