

FORMAL OPINION NO 2005-157

[REVISED 2016]

Information Relating to the Representation of a Client: Submission of Bills to Insurer's Third-Party Audit Service

Facts:

Lawyer represents Client whose insurance carrier is paying the bills. The insurance carrier asks Lawyer to submit Client's detailed bills to a third-party audit service.

Questions:

1. May Lawyer submit Client's bills to a third-party audit service at the request of Client's insurance carrier?

2. May Lawyer ethically seek Client's consent to submit Client's bills, which contain information relating to the representation of a client, to a third-party audit service?

Conclusions:

1. No, qualified.
2. Yes, qualified.

Discussion:

Absent an agreement to the contrary, an Oregon lawyer who represents an insured in an insurance defense case will generally have two clients: the insurer and the insured.¹ OSB Formal Ethics Op No 2005-121 (rev 2016); OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal

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).

Ethics Op No 2005-30 (rev 2016). Both the Oregon Rules of Professional Conduct (RPCs) and insurance law as interpreted in Oregon 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. OSB Formal Ethics Op No 2005-121 (rev 2016).

One of a lawyer’s most important duties is the preservation of information relating to the representation of a client. Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client’s identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information

revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

1. *Submission of Bills to Third Party.*

If the bills contain no information protected by Oregon RPC 1.6, Lawyer may submit the bills to the third-party audit service. On the other hand, if the bills contain such information, Lawyer may not disclose them unless one of the exceptions contained in Oregon RPC 1.6 applies. In effect, this means that absent Client's consent, Lawyer must not reveal the information. Depending on the facts of the matter and the substantive law applicable to such situations, Lawyer may need to discuss with Client the risks, if any, that the submission of the detailed bills to the third-party audit service may entail. This might include, for example, a risk of inappropriate disclosure of protected information, a risk of waiver of the lawyer-client privilege,² or a risk of adverse effects on the insurer-insured relationship.

² For a discussion regarding the waiver of lawyer-client privilege on the disclosure of bills to a government auditor, see *United States v. Massachusetts Inst. of Tech.*, 129 F3d 681, 97-2 US Tax Cas P 50955 (1st Cir 1997).

2. *Seeking Consent to Disclose Bills.*

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.

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. See paragraph (g) for the definition of "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.

Whether an insurer’s demand for Lawyer to provide confidential client information to a third party would give rise to a conflict and, if so, whether the conflict would be waivable or nonwaivable, will depend on the specific facts of the matter. *Cf.* Washington Advisory Op No 195 (1999) (“it is almost inconceivable that it would ever be in the client’s best interests to disclose information relating to the representation to a third party”) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>). *See also* New York State Bar Association Ethics Op No 1999-716; Massachusetts Informal Ethics Op No 1997-T53 (1997) (auditor must take steps to protect confidentiality of disclosed information). Unless a conflict exists that cannot be waived, it is permissible for Lawyer to ask Client for consent.

Approved by the Board of Governors, February 2016.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.3-3 (joint defense, common interest, and co-client issues), § 10.2-2(e)(5) (insurer-insured conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 59–60, 62, 121, 128 (2000) (supplemented periodically); and ABA Model RPC 1.6–1.7.

