

## FORMAL OPINION NO 2005-165

### Fee Agreements: Indemnification against Claims by Nonclients

#### Facts:

Lawyer's corporate client asks Lawyer to investigate one of its employees for possible malfeasance that, if confirmed, might lead to terminating the employee. Lawyer wishes to include a provision in the engagement agreement under which the client would indemnify or otherwise hold Lawyer harmless from independent civil claims that the employee may assert later against Lawyer as a result of the investigation.

#### Question:

May Lawyer include such a provision in the engagement agreement if the client consents?

#### Conclusion:

Yes.

#### Discussion:

Oregon RPC 1.8(h) provides:

- (h) A lawyer shall not:
  - (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;
  - (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;
  - (3) enter into any agreement with a client regarding arbitration of malpractice claims without informed consent, in a writing signed by the client; or

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(4) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar.

Under this rule, Lawyer may obtain advance exoneration from legal malpractice if Lawyer's client is separately represented. There is no rule that prohibits Lawyer from obtaining the client's advance agreement to indemnify Lawyer on matters that do not constitute legal malpractice. *See generally* South Carolina Ethics Advisory Op No 85-30, 1985 WL 303444 at \*3 (1985) (in-house counsel may be indemnified by corporate employers against claims by third parties); *accord Restatement of the Law Governing Lawyers* § 54 (2000) (supplemented periodically) (indemnity arrangements with employers are permissible). *See also* New York County Legal Ethics Op No 715, 1996 WL 592658 (May 28, 1996) (referring lawyer may obtain indemnity from receiving lawyer for claim of malpractice arising from receiving lawyer's work).

Any such indemnification provision would be subject to the reasonableness standards governing fee agreements generally under Oregon RPC 1.5. *See, e.g.*, OSB Formal Ethics Op No 2005-97. We express no opinion on whether such a provision must also meet Oregon RPC 1.8(a) regarding lawyers who engage in business transactions with their clients.

**Approved by Board of Governors, August 2005.**

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COMMENT: For additional information on this general topic, and other related subjects, see *The Ethical Oregon Lawyer* chapter 3 (fee agreements) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 54; and ABA Model RPC 1.8.