

FORMAL OPINION NO 2005-166

[REVISED 2016]

Competence and Diligence: Compliance with Insurance Defense Guidelines

Facts:

Insurer has an ongoing professional relationship with Lawyer to defend claims asserted against its insureds. As a part of that relationship, Insurer requires Lawyer to agree to comply with its Litigation Billing/Management Guidelines (the “Guidelines”).¹ The Guidelines may mandate, among other things, (1) approval by Insurer before Lawyer may schedule and take depositions, conduct legal research, prepare substantive motions, or hire experts; (2) delegation of particular tasks to paralegals; and (3) submission to Insurer of status reports or litigation plans or both.

A cause of action is filed against defendant Insured. Insurer retains Lawyer to provide a defense for Insured. Insurer sends Lawyer a cover letter confirming representation, along with the claim file. The letter contains a reminder to Lawyer to comply with Insurer’s Guidelines. Insurer also requests that Lawyer sign an acknowledgement form that Lawyer has received the claim file and the Guidelines.

Question:

May Lawyer agree to comply with the Guidelines without regard to their effect on Lawyer’s clients?

Conclusion:

No.

¹ The Guidelines may also be referred to as “case handling” or “case management” guidelines.

Discussion:

Lawyer may sign and return the acknowledgment letter to indicate that Lawyer has accepted the *assignment* of the matter, but must advise Insurer that he or she cannot agree to comply with Guidelines that might compromise Lawyer's ethical obligations as discussed below.

Lawyer may comply with the Guidelines only if Lawyer has an opportunity to review and evaluate the Guidelines with respect to each case and, based on that review, Lawyer reasonably concludes that compliance with the Guidelines will not materially compromise Lawyer's professional, independent judgment or Lawyer's ability to provide competent representation to Insured. Lawyer cannot agree to comply with the Guidelines before reviewing and analyzing the facts and issues of each case because such an advance agreement would potentially surrender Lawyer's professional judgment. Moreover, throughout the case, Lawyer has an ongoing ethical obligation to reevaluate whether his or her continued compliance with the Guidelines impedes his or her ability to exercise independent judgment.

In Oregon, a lawyer retained by an insurer to represent both the insurer and the insured must treat the insured as the "primary client" whose protection must remain the lawyer's "dominant concern."² OSB Formal Ethics Op No 2005-121 (rev 2016); OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal Ethics Op No 2005-30 (rev 2016).

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 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).

(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 1.1 requires that Lawyer provide "competent representation" to Insured, which requires the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Notwithstanding the directives set forth in the Guidelines, Lawyer must not allow his or her professional judgment or the quality of his or her legal services to be compromised materially by Insurer.

Under Oregon RPC 5.5(a), Lawyer also must not assist a non-lawyer in the unauthorized practice of law. Thus, Lawyer may comply with the Guidelines requirements that certain tasks be delegated to a paralegal only if, in Lawyer's independent professional judgment, the particular task is appropriate for performance by a paralegal in the particular case and the paralegal is appropriately supervised.

Insurer may require Lawyer to inform Insurer about the litigation process through periodic status reports, detailed billing statements, and the submission of other information. Lawyer's compliance with this aspect of the Guidelines does not necessarily violate Lawyer's ethical obligations if the disclosure of such information advances the interests of both Insured and Insurer, and does not otherwise compromise Lawyer's duty to maintain his or her independent judgment. *Cf.* OSB Formal Ethics Op No 2005-157 (rev 2016).

In the final analysis, Lawyer must determine on a case-by-case and step-by-step basis whether compliance with the Guidelines will restrict Lawyer's ability to perform tasks that, in Lawyer's professional judgment, are necessary to protect Insured's interests. Lawyer cannot commit in advance to comply with Guidelines that restrict Lawyer's representation of Insured, possibly to Insured's detriment. Lawyer also must continue to monitor the effect of the Guidelines during the entire course of representation. If Lawyer cannot ethically comply with any particular aspect of the Guidelines, Lawyer must obtain a modification of

the Guidelines from Insurer, or decline or withdraw from the representation.

Approved by Board of Governors, February 2016.

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), § 10.2-2(e)(5) (insurer-insured conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 3, 16, 134 (2000) (supplemented periodically); and ABA Model RPC 1.8.