

## **FORMAL OPINION NO 2005-30**

[REVISED 2016]

### **Conflicts of Interest, Current Clients: Simultaneous Representation of Insurer and Insured**

#### **Facts:**

Insured has a property-damage insurance policy with Insurer. When Insured's property is damaged by the negligent conduct of a third party, Insurer pays Insured to the extent required by the policy, minus the applicable deductible. The policy provides that, to the extent that Insurer pays Insured, Insurer is subrogated to Insured's claims against third parties.

Insurer now proposes to pay Lawyer to represent both Insurer and Insured in an action against a third party to recover damages not reimbursed by Insurer to Insured as well as the sums that Insurer paid to Insured. At the time that Insurer makes this request, it does not appear that the interests of Insurer and Insured do or may diverge.

#### **Question:**

May Lawyer undertake to represent both Insurer and Insured in an action against the third party?

#### **Conclusion:**

Yes, qualified.

#### **Discussion:**

In undertaking this representation, Lawyer would have both Insurer and Insured as clients, even though the action may be prosecuted

solely in Insured's name.<sup>1</sup> *See, e.g.*, ABA Informal Ethics Op No 1476 (1981); ABA Formal Ethics Op No 282 (1950); 1 *Insurance* ch 14 (Oregon CLE 1996 & Supp 2003). Since Insurer would be paying Lawyer's fee, Lawyer must comply with the requirements of Oregon RPC 1.8(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 not 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) is also relevant:

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.

As long as Lawyer does not permit improper influence within the meaning of Oregon RPC 5.4(c) and obtains informed consent from Insured pursuant to Oregon RPC 1.8(f)(1) and Oregon RPC 1.0(g),<sup>2</sup> the

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<sup>1</sup> 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).

<sup>2</sup> Oregon RPC 1.0(g) provides:

“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

simultaneous representation would not be prohibited. There also is no reason this representation should be prohibited by Oregon RPC 1.7.<sup>3</sup> As discussed in OSB Formal Ethics Op No 2005-27, a lawyer may represent multiple clients without special disclosure and consent if it does not reasonably appear that a conflict is present. *Cf. In re Stauffer*, 327 Or 44,

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give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

<sup>3</sup> 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.

48 n 2, 956 P2d 967 (1998) (citing *In re Samuels & Weiner*, 296 Or 224, 230, 674 P2d 1166 (1983)).

**Approved by Board of Governors, February 2016.**

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COMMENT: For more 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* § 134 (2000) (supplemented periodically); and ABA Model RPC 1.8(f). See also OSB Formal Ethics Op No 2005-166 (rev 2016) (insurance defense lawyer may not agree to comply with insurer's billing guidelines if to do so requires lawyer to materially compromise his or her ability to exercise independent judgment on behalf of client in violation of RPCs); OSB Formal Ethics Op No 2005-115 (rev 2014) (lawyer may not ethically permit representation of client to be controlled by others); OSB Formal Ethics Op No 2005-98 (lawyer may ethically agree with insurer to handle number of cases for insurer at flat rate per case regardless of amount of work required as long as overall fee is not clearly excessive and as long as lawyer does not permit existence of agreement to limit work that lawyer would otherwise do for particular client).