

FORMAL OPINION NO 2019-195

Communication; Delegation of Settlement Authority to Lawyer

Facts:

Client wishes to hire Lawyer to pursue a lawsuit against Defendant. Client travels often, has a time-consuming job, and is concerned he will not have sufficient time to communicate with Lawyer about decisions related to his lawsuit, including settlement issues. Moreover, Client trusts Lawyer's judgment and experience and is confident that Client would defer to Lawyer's judgment on case-related issues in any event. To make things easier, Lawyer and Client agree that Client will delegate all authority over settlement decisions to Lawyer. Lawyer and Client place no parameters on what terms the Lawyer may accept and simply agree that Lawyer will contact Client when the case is finally settled.

Question:

May Client delegate all settlement authority to Lawyer?

Conclusions:

No.

Discussion:

The proper allocation of authority between a lawyer and client is addressed in Oregon RPC 1.2(a), which provides, in pertinent part:

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. . . .

In addition, Oregon RPC 1.4 provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Oregon RPC 1.0(g) defines *informed consent* as an “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 reasonable available alternatives to the proposed course of conduct.”

An attorney may not ethically obtain from a client an advance *blanket* authorization over all settlement decisions. Under Oregon RPC 1.2(a), a decision to settle must be made by the client, not the lawyer. *See* OSB Formal Ethics Op No 2005-54. An agreement between a lawyer and a client to delegate all settlement authority, regardless of the circumstances, to the lawyer would violate Oregon RPC 1.2(a). Such an agreement would also violate Oregon RPC 1.4, because an attorney is obligated under RPC 1.4 to inform the client adequately about any settlement offer so that the client can make an *informed* decision about whether to accept or reject the offer. *See In re Bailey*, 25 DB Rptr 19 (2011) (sanctioning lawyer for accepting a settlement offer without notifying or consulting with client); *see also* Ariz State Bar Ethics Op No 06-07 (2006).

Nor can Lawyer resolve the ethical problem by merely asking Client to waive his right to control settlement decisions. Unlike other Oregon RPCs, such as the current conflict rules in Oregon RPC 1.7, Oregon RPC 1.2(a) contains no language allowing a lawyer to seek a client’s consent to a waiver of the client’s right to make settlement decisions. And even if seeking such a waiver were permissible, it would be virtually impossible for a client to provide *informed* consent to such a decision at the outset of a representation. At that time, the facts and circumstances of a case are not fully developed, and the terms and conditions of a settlement will likely not have been fully explored or determined.

Notably, there are other mechanisms available to Lawyer to address the possibility that Client's unavailability will impede the ability to settle a case. A client "may authorize a lawyer to negotiate a settlement that is subject to the client's approval or to settle a matter on terms indicated by the client." *Restatement (Third) of the Law Governing Lawyers* § 22, cmt c (2000). Absent such authority, however, a lawyer may not settle a client's case in the client's absence. *See* OSB Formal Ethics Op No 2005-33.

It is important to emphasize that this opinion only addresses a client's *blanket* delegation of settlement authority to his or her lawyer. A blanket delegation of settlement authority means the client has placed no restrictions whatsoever on the settlement terms the lawyer may accept on the client's behalf. The same ethical considerations are not necessarily implicated when the client and lawyer discuss settlement beforehand and the client agrees to give the lawyer authority to settle a claim within pre-agreed parameters—even broad parameters that confer significant discretion to the lawyer.

Nothing prevents a client from providing a lawyer with advance authorization to agree to a settlement within pre-agreed parameters as long as that client places some outer limit on the lawyer's discretion and the client has sufficient information available at the time to make an informed decision about providing such authorization under Oregon RPC 1.4.¹ Whether or not a client is capable of making such an informed decision will likely depend on a variety of factors, including, without limitation, the range of settlement authority that the client seeks to provide to the lawyer, the complexity of the case, the procedural posture of the case, the level of factual investigation and/or discovery that has taken place, the client's sophistication level, the monetary value of the

¹ *See* ABA Model Rule 1.2 cmt [3] ("At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.").

claims at issue, and the importance of the claim to the client's overall financial, personal, and other objectives.

Approved by the Board of Governors, September 2019.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 7.4 (client communication), § 7.5-1 (abiding by client's decision; scope of representation), § 9.6 (informed consent), § 18.3-1 (scope of representation; allocation of authority), § 20.2-1 (informed consent) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 20–27 (client and lawyer authority) (2000).