

FORMAL OPINION NO. 2005-30
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. *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 1.0(g),¹ the simultaneous representation would not be prohibited. There also is no reason this representation should be prohibited by Oregon RPC 1.7.² 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

¹ 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 give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

² 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.

appear that a conflict is present. *Cf. In re Stauffer*, 327 Or 44, 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, August 2005.

COMMENT: For more information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§3.36, 9.17 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §134 (2003); and ABA Model Rule 1.8(f). See also OSB Formal Ethics Op Nos 2005-166 (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), 2005-115 (lawyer may not ethically permit representation of client to be controlled by others), 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).

FORMAL OPINION NO. 2005-68

Trust Accounts: Claims of Two or More Persons

Facts:

Lawyer represents Insurer and Insured in an action against a third party to recover damages allegedly caused by a third party's negligence. Insurer tells Lawyer that when settlement funds are received, Lawyer must forward all funds to Insurer and that Insurer will be the one to decide how much Insurer keeps by way of subrogation and how much is forwarded to Insured for uninsured losses.

Question:

May Lawyer honor Insurer's request?

Conclusion:

No.

Discussion:

Under these facts, Lawyer has two clients, Insurer and Insured. OSB Formal Ethics Op No 2005-30. Any settlement proceeds would represent funds of both of Lawyer's clients.

Oregon RPC 1.15-1(d) and (e) provide:

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

On the facts as presented, Insurer is not "entitled to receive" the full amount of settlement funds collected within the meaning of Oregon RPC 1.15-1(d). *Cf. In re Howard*, 304 Or 193, 204, 743 P2d 719 (1987); OSB Formal Ethics Op No 2005-52. If Insurer and Insured agree on how to

divide the money, Lawyer must make the agreed-on division. If not, Lawyer must either retain any disputed sums pending resolution of the dispute, as provided in Oregon RPC 1.15(e), or interplead the disputed funds. *Cf.* OSB Formal Ethics Op No 2005-52.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§9.17, 11.3, 11.7–11.8 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§45, 46 comment d, 134 (2003); and ABA Model Rule 1.15.

FORMAL OPINION NO. 2005-77
Conflicts of Interest, Current Clients:
Representation of Insured
After Investigation of Matter for Insurer

Facts:

Lawyer is retained by Insurer to review an insurance policy issued to Insured because of a complaint filed by a third party against Insured. Lawyer advises Insurer that Insurer has a duty to defend Insured but may well not have a duty to pay any ultimate judgment. After that work is completed, Insurer asks Lawyer to represent Insurer and Insured in defense of the underlying litigation subject to a reservation of rights.

Question:

May Lawyer represent Insurer and Insured in defense of the underlying litigation?

Conclusion:

See discussion.

Discussion:

As discussed in OSB Formal Ethics Op No 2005-30, both Insured and Insurer would be Lawyer's clients in the defense of the underlying action. Simultaneous representation in insurance defense cases is generally permissible: a conflict that falls within Oregon RPC 1.7 generally will not exist because the clients have common interest in defeating the claim.¹ See also OSB Formal Ethics Op No 2005-121.

¹ If the representation of one client will be directly adverse to the other client, the proposed representation would be impermissible even if both Insurer and Insured consented. See *In re Holmes*, 290 Or 173, 619 P2d 1284 (1980) (under former DR 5-105, consent would not have cured actual conflict of interest between lawyer's two clients). If there a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to the other client, the representation would be permissible, but only if Lawyer reasonably believes that he or she is able to competently represent both clients, and Insurer and Insured give informed consent, confirmed in writing. Cf. *In re Barber*, 322 Or 194, 904 P2d 620 (1995).

In this situation, however, the fact of Lawyer's recently completed work for Insurer on the coverage question must also be considered. Because of that work, if there is a significant risk that Lawyer's representation of Insured in defense of the underlying claim will be materially limited by Lawyer's responsibilities to Insurer, a conflict will be present under Oregon RPC 1.7(a). Consequently, Lawyer could not represent both Insurer and Insured in the underlying action without a

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. . . . 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.

reasonable belief that Lawyer could competently represent both clients, and only after receiving informed consent, confirmed in writing, from both Insurer and Insured pursuant to Oregon RPC 1.7(b), 1.0(b), and 1.0(g). The disclosure to Insured must include a discussion of the fact of the prior representation of Insurer on the coverage question and its potential significance. *Cf. In re Germundson*, 301 Or 656, 661, 724 P2d 793 (1986); *In re Montgomery*, 292 Or 796, 802–804, 643 P2d 338 (1982); *In re Benson*, 12 DB Rptr 167 (1998); *In re Rich*, 13 DB Rptr 67 (1999).

Oregon RPC 1.8(f) and 5.4(c) also apply to this situation.² On the present facts, however, these rules do not create any additional requirements beyond those created by Oregon RPC 1.7.

Approved by Board of Governors, August 2005.

² 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) 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 5.4(c) provides:

(c) 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.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§3.36, 9.2, 9.8–9.11, 9.13, 9.17, 9.20, 20.1–20.15 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–122, 128, 130, 134 (2003); and ABA Model Rules 1.0(b) and (e), 1.7, 1.8(f), 5.4(c). *See also* OSB Formal Ethics Op No 2005-157; Washington Informal Ethics Op No 943 (unpublished).

FORMAL OPINION NO. 2005-121
Conflicts of Interest, Current Clients:
Insurance Defense

Facts:

Plaintiff files a complaint against Insured that includes two claims for relief. Insured has an insurance policy pursuant to which Insurer owes a duty to defend against, and a duty to pay damages on, the first claim for relief. Insurer would have no such duties, however, if Plaintiff had sued only on the second claim for relief. The amount of damages sought on the second claim exceeds policy limits.

Insured tenders the defense of the entire action to Insurer. Insurer accepts the tender of defense of both claims subject to a reservation of rights with respect to the second claim. Insurer then hires Lawyer to represent Insured in the case brought by Plaintiff.

After reviewing the pleadings and investigating the facts, Lawyer concludes that the first claim for relief may be subject to a motion to dismiss or a summary judgment motion or that it may be possible, for a sum that Insurer would be willing to pay, to settle the first claim only. The second claim, however, is not potentially subject to such motions and cannot be settled. Lawyer also knows that Insured does not want Lawyer to bring such a motion or effect such a partial settlement because doing so would leave Insured without an Insurer-paid defense on the second claim for relief and would diminish the ability of Insured to get funds from Insurer to help settle the case as a whole.

Question:

May Lawyer file a motion against the first claim or settle it?

Conclusion:

No.

Discussion:

As a general proposition, a lawyer who represents an insured in an insurance defense case has two clients: the insurer and the insured. OSB Formal Ethics Op Nos 2005-77, 2005-30. Consequently, a lawyer in such a situation must be mindful of the restrictions in Oregon RPC 1.7 on current-client conflicts of interest:

(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.

For the definitions of *informed consent* and *confirmed in writing*, see Oregon RPC 1.0(b) and (g).¹

¹ 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. . . . 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.

The relationship between Lawyer, Insured, and Insurer is both created and limited by the insurance policy. As the court stated in *Nielsen v. St. Paul Companies*, 283 Or 277, 280, 583 P2d 545 (1978), for example:

When a complaint is filed against the insured which alleges, without amendment, that the insured is liable for conduct covered by the policy, the insurer has the duty to defend the insured, even though other conduct is also alleged which is not within the coverage. . . . The insurer owes a duty to defend if the claimant can recover against the insured under the allegations of the complaint *upon any basis* for which the insurer affords coverage. [Emphasis in original; citations omitted.]

See also ABA Formal Ethics Op No 282 (1950), which notes that simultaneous representation of insurers and insureds in actions brought by third parties generally does not raise conflict problems because of the “community of interest” growing out of the insurance contract.

When an insurer defends an insured without any reservation of rights (by which the insured reserves its right to deny coverage), there is little or no opportunity for a conflict of interest because the community of interest between the insurer and insured should be complete. When an insurer defends subject to a reservation of rights, however, a risk of conflict is present. To minimize this risk and to permit joint representation in such cases, both the ethics rules and insurance law 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. *See, e.g.*, ABA Informal Ethics Op No 1476 (1981); 1 INSURANCE chs 6, 14 (Oregon CLE 1996 & Supp 2003).² Consequently, a lawyer who is hired to defend the insured in a situation such as the one described in this opinion cannot file a motion that would adversely affect the insured’s right to a defense or to coverage but must indeed act in a manner that is consistent with the interests of the insured.³

² The law also provides that if there is a potential conflict between the insurer and the insured, the facts found by the court in the action by the third party against the insured will not be given collateral estoppel effect as to either the insurer or the insured in a subsequent coverage dispute. *See, e.g., Ferguson v. Birmingham Fire Ins.Co.*, 254 Or 496, 509–511, 460 P2d 342 (1969).

³ The insurer is free to hire other counsel to litigate the coverage issue.

Formal Opinion No. 2005-121

See INSURANCE, *supra*. *See also* *Barmat v. John and Jane Doe Partners A–D*, 747 P2d 1218, 1219 (Ariz 1987).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §9.17 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §134 (2000); and ABA Model Rules 1.0(b), (e), 1.7.

FORMAL OPINION NO. 2005-157

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. OSB Formal Ethics Op Nos 2005-121, 2005-77, 2005-30. Both the Oregon 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.

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) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

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,¹ or a risk of adverse effects on the insurer-insured relationship.

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.

.....

¹ For a discussion regarding the waiver of lawyer-client privilege on the disclosure of bills to a government auditor, see *U.S. v. Massachusetts Institute of Technology*, 129 F3d 681 (1st Cir 1997).

(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 Formal Ethics Op No 195 (1999) (“it is almost inconceivable that it would ever be in the client’s best interests to disclose confidences or secrets to a third party”). *See also* New York Formal Ethics Op No 716 (1999); 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, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§6.10, 9.17 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§59–60, 62, 121, 128 (2003); and ABA Model Rules 1.6–1.7.

FORMAL OPINION NO. 2005-166
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.

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

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

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." OSB Formal Ethics Op Nos 2005-121, 2005-77, 2005-30.

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) 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 nonlawyer 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.

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, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§3.36, 9.17 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§3, 16, 134 (2003); and ABA Model Rule 1.8.

Oregon Rules of Professional Conduct

(Excerpt)

RULE 1.0 TERMINOLOGY

* * *

(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.

* * *

(f) "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(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.

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(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 a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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RULE 1.4 COMMUNICATION

(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.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(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).

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RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(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.

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction. (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, confirmed in writing, except as permitted or required under these Rules.

* * *

(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 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.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST; SCREENING

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited

lawyer or on Rule 1.7(a)(3) and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is promptly screened from any form of participation or representation in the matter and written notice of the screening procedures employed is promptly given to any affected former client.

(d) A disqualification prescribed by this rule may be waived by the affected clients under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

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RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work a substantial hardship on the client; or (4) the lawyer is appearing pro se.

(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness on behalf of the lawyer's client.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the lawyer's firm may be called as a witness other than on behalf of the lawyer's client, the lawyer may continue the representation until it is apparent that the lawyer's or firm member's testimony is or may be prejudicial to the lawyer's client.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

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(c) 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.

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