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A Tri-State Look at the Tri-Partite Relationship: Key Insurance Defense Issues in Washington, Oregon & Idaho

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As lawyers around the Northwest have taken advantage of tri-state licensing reciprocity, they are confronting familiar issues on sometimes unfamiliar legal terrain. Insurance defense is a good example. Although practice management basics generally run closely parallel in Washington, Oregon and Idaho, there are some key differences. In this column we'll look at four related questions: (1) whose law governs the attorney-client relationship? (2) who is the client in insurance defense practice? (3) how are insurance case management guidelines handled ethically? and (4) how are confidential communications between insurance defense counsel and the insurer protected?[1]

Whose Law Applies?

To begin with a common example, assume an Oregon-based lawyer who is reciprocally admitted in Washington is asked to handle an insurance defense case in Washington. Whose law governs the attorney-client relationship? Oregon and Idaho adopted virtually identical choice-of-law provisions in their recently revised Rules of Professional Conduct and Washington adopted a similar rule with its newly amended RPCs. Under all three versions of RPC 8.5(b), if a lawyer is litigating a case in another jurisdiction the law of that jurisdiction generally applies. This approach is also consistent with general

choice-of-law principles, which look to the jurisdiction with the "most significant relationship" to the parties and the matter involved in determining whose law applies.[2] In our example, therefore, the Oregon-based lawyer handling a Washington court case would look to the law of Washington in addressing the questions posed in this column.

Who Is the Client?

States vary in their treatment of whether insurance defense counsel are considered to represent only the insured or both the insured and the insurer. In Washington, insurance defense counsel have only one client, the insured, under *Tank v. State Farm*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986), and WSBA Formal Ethics Opinion 195. In Oregon, by contrast, insurance defense counsel are generally considered under OSB Formal Ethics Opinions 2005-30, 2005-77 and 2005-121 to have two clients: the insured as a "primary" client and the insurer as a "secondary" client (but a client nonetheless). Idaho has not yet addressed the "who is the client?" question.[3]

Oregon's "two client" model can present important practical conflicts if the insured also wants to rely on the same lawyer or law firm for coverage advice. This arises most often when a business has a large self-insured retention, a corresponding voice in the selection of defense counsel and a desire to have "its" law firm available to handle coverage questions unhindered by a conflict arising from the "two client" model. In this scenario, it is important in an Oregon-based

matter for the law firm to clarify with the insurer that its only client is the insured and that the insurer stands solely in the role of third-party payor. The existence of an attorney-client relationship under Oregon law is governed largely by the Oregon Supreme Court's decision in *In re Weidner*, 310 Or. 757, 770, 801 P.2d 828 (1990). In *Weidner*, the Supreme Court outlined a two-part test for determining whether an attorney-client relationship exists: (1) the client must subjectively believe that such a relationship exists; and (2) that subjective belief must be objectively reasonable under the circumstances. Although there is no case law directly on point in Oregon in the insurance defense context, it should follow from *Weidner* that a law firm and an insurer could agree that the insurer will *not* be considered the law firm's client. The ABA took this approach in a formal ethics opinion, 96-403, concluding that the law firm and the insurer could expressly agree to limit the "client" to the insured only.[4]

Case Management Guidelines

Regardless of whether the insurer is considered a co-client or not, it is typically the one paying all, or at least most, of a lawyer's bill. The ethical issues surrounding insurance case management guidelines, therefore, apply with equal measure to "one client" and "two client" scenarios. Washington, Oregon and Idaho have all addressed insurance case management guidelines in ethics opinions that reach similar conclusions: WSBA Formal Ethics Opinion 195; OSB Formal Ethics Opinion 2005-166; and ISB Formal Ethics Opinion 136. All three

opinions are also generally consistent with the ABA's position on these issues as expressed in its Formal Ethics Opinion 01-421.

The respective Washington, Oregon and Idaho opinions take a twofold approach to case management guidelines. First, insurance defense counsel can acknowledge them without necessarily agreeing to follow them if they conflict with the lawyer's overriding fiduciary duty to defend the insured competently. Second, insurance defense counsel need to carefully and continually evaluate the guidelines as the case progresses. All three emphasize that under RPC 1.8(f) (which is similar in all three states) a lawyer may (with the client's consent) be paid by another as long as the lawyer's professional judgment on behalf of the client remains unaffected. All three also emphasize that in most cases insurance counsel will be able to comply with both management guidelines and professional standards. But, they all conclude on the cautionary note that if the lawyer's representation will be materially limited by the guidelines then (assuming the insurer won't modify them) the lawyer must withdraw.

The Attorney-Client Privilege

All three states protect confidential communications between defense counsel and the insurer on litigation strategy. The path to that result, however, is different in each.

Under Washington's "one client" approach, confidential communications between defense counsel and the insurer regarding litigation strategy fall under

work product protection afforded by Washington Civil Rule 26b(4) and *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 400-401, 706 P.2d 212 (1985).[5] Therefore, even though the insurer is not the defense counsel's client in Washington, confidential communications regarding litigation strategy are protected.

Under Oregon's "two client" approach, OSB Formal Ethics Opinion 2005-157 puts such communications squarely within the privilege because the insured and the insurer are joint clients. Even in a "one client" scenario in Oregon, however, the privilege applies through the "common interest doctrine," which was recognized in Oregon by *Interstate Production Cr. v. Fireman's Fund Ins.*, 128 F.R.D. 273, 280 (D. Or. 1989). Under the "common interest doctrine," which is a variant of the "joint defense privilege," sharing confidential information with a third party whose interest is aligned with the client does not constitute a waiver of the attorney-client privilege.[6]

Idaho has incorporated the common interest doctrine into Evidence Rule 502(b). It also generally accords work product protection to confidential communications with insurers regarding the defense of a case under *Dabestani v. Bellus*, 131 Idaho 542, 545, 961 P.2d 633 (1998). Therefore, whether Idaho law eventually takes the position that it is a "one client" or "two client" state, confidential communications between defense counsel and insurers concerning litigation strategy should be protected.

Summing Up

Tri-state reciprocity in the Northwest has made practicing across state lines significantly easier. In most instances, the knowledge and skills honed in one jurisdiction apply seamlessly in all three states. There remain, however, important variations in each. Insurance defense practice is a good illustration of how those nuances play out in an area that shares many common threads.

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[1] For a look at these issues farther north and south, see Alaska Ethics Opinions 99-1 and 99-3 and the comments to California Rule of Professional Conduct 3-310. They are available on the Alaska and California bar web sites at, respectively, www.alaskabar.org and www.calbar.ca.gov.

[2] *See generally Frost v. Lotspeich*, 175 Or. App. 163, 188-89, 30 P.3d 1185 (2001) (discussing choice-of-law principles in the context of lawyer professional rules). *See also Zenaida-Garcia v. Recovery Systems Technology, Inc.*, 128 Wn. App. 256, 259-260, 115 P.3d 1017 (2005) (discussing Washington's approach on choice-of-law issues); *Grover v. Isom*, 137 Idaho 770, 772-73, 53 P.3d 821 (2002) (outlining Idaho choice-of-law principles).

[3] *See* ISB Formal Ethics Op 136 at 3. Washington and Oregon ethics opinions are available on the WSBA and OSB web sites at, respectively, www.wsba.org and www.osbar.org. ISB ethics opinions can be obtained directly from the Idaho State Bar.

[4] If Idaho law develops into the "two client" model, this same approach should be available there because Idaho uses a similar subjective-objective test for determining whether an attorney-client relationship exists. *See Warner v. Stewart*, 129 Idaho 588, 593-94, 930 P.2d 1030 (1997); *O'Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134 (Ct App 1990).

[5] *Accord Harris v. Drake*, 152 Wn.2d 480, 487-88, 99 P.3d 872 (2004) (discussing *Heidebrink*). *See generally* Robert H. Aronson, The Law of Evidence in Washington, § 501.03[2][b] at 501-10 (rev ed 2005) (discussing *Heidebrink* and the work product rule). *See also State v. American Tobacco*, 1997 WL 728262 at *1 n.1 (Wa. Super. [King County] Nov. 21, 1997) (discussing the common interest doctrine).

[6] For more on the common interest doctrine from a national perspective as it relates to confidential reports between defense counsel and insurers, see Restatement (Third) of the Law Governing Lawyers § 134, cmt. f at 408 (2000).