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Insurance Defense: Who's In Charge?

**By Mark J. Fucile
Fucile & Reising LLP**

In recent years, insurers have increasingly relied on case management guidelines to control litigation costs. Although guidelines vary, they often direct prior approval of major activities like depositions and retaining experts and require detailed status reports and case plans. The advent of guidelines has, in turn, sparked a debate over the extent to which insurance defense counsel can ethically comply with them and whether the required reports fall within the attorney-client privilege. In this column we'll look at three related questions: (1) who is the client in Oregon insurance defense? (2) must an insurance defense counsel follow case management guidelines? and (3) are reports to insurers protected by the attorney-client privilege?

Who Is the Client? States vary in their treatment of whether an insurance defense counsel is considered to represent only the insured or both the insured and the insurer. In Oregon, an insurance defense counsel is generally considered under OSB Formal Ethics Opinions 2005-77 and 2005-121 to have two clients—the insured as the “primary” client and the insurer as a “secondary” client (but a client nonetheless).

Although the “two client” approach is the “default” position in Oregon, it need not always be the case. For example, a corporate insured with a large self-

insured retention might want to make certain that “its” law firm remains available to handle coverage questions unhindered by a conflict arising from the “two client” model. In Oregon, the existence of an attorney-client relationship is governed largely by the Oregon Supreme Court’s decision in *In re Weidner*, 310 Or 757, 770, 801 P2d 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. In fact, the ABA took this view in a formal ethics opinion—96-403 (1996)—concluding that the law firm and the insurer could expressly agree to limit the “client” to the insured only.

Insurance Defense 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 raised by case management guidelines, therefore, apply with equal measure to the “one client” and “two client” scenarios. Both the OSB and the ABA have addressed insurance case management guidelines in ethics opinions that reach similar conclusions: OSB Formal Ethics Opinion 2005-166 and ABA Formal Ethics Opinion 01-421 (2001).

The OSB took a twofold approach in 2005-166. First, it concluded that insurance defense counsel could acknowledge receipt of the guidelines without necessarily agreeing to follow them. Second, the OSB stressed that insurance defense counsel would need to carefully and continually evaluate the guidelines as a case progresses. In reaching these conclusions, the OSB relied primarily on RPC 1.8(f), which directs that a lawyer's judgment on a client's behalf should not be swayed when another person is paying the bill, and RPC 1.1, which requires competent representation. 2005-166 contemplates that in most instances an insurance defense counsel will be able to comply with both case management guidelines and professional standards. But it concludes on a cautionary note: "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."

The Attorney-Client Privilege. Regardless of whether an insurer is the lawyer's "client" or not, reports, litigation plans and other correspondence concerning an insured's case are generally protected by the attorney-client privilege. Under the "two client" approach, OSB Formal Ethics Opinion 2005-157 puts such reports squarely within the privilege because the insurer is a co-client. Even in a "one client" scenario, however, the privilege applies through the "common interest doctrine," which was recognized in Oregon by *Interstate Production Cr. v. Fireman's Fund Ins.*, 128 FRD 273, 280 (D Or 1989), and holds

that disclosure of privileged information to a third party with a common or closely aligned interest is not a waiver.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.