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Who Is the Client? New Decisions in Insurance Defense

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“Who is the client?” is a key predicate question cutting across many law firm risk management issues ranging from conflicts to legal malpractice. Courts in Oregon and Washington recently addressed this touchstone in the insurance defense context. Neither decision fundamentally changed the law in either state, but they offer important clarifications in this common practice setting.

Oregon

The “default” position in Oregon under a series of Oregon State Bar ethics opinions (Formal Ethics Ops 2005-30, 2005-77, 2005-121, 2005-157) is that an insurance defense counsel has two clients: the insured and the carrier. At the same time, Oregon commentary, including the OSB’s *Ethical Oregon Lawyer* treatise, suggests that this “two-client” model can be modified by agreement or the circumstances to limit the “client” to the insured only—leaving the carrier solely as a third-party payor. This variation from the “default” arises with greatest frequency when a corporate client with a large self-insured retention and a corresponding “say” in the selection of counsel wishes to both hire “its” longtime law firm to handle litigation and also maintain the ability to consult that same firm about coverage issues arising from the matter concerned. A decision by the U.S. District Court in Portland confirmed this view.

Evrz Inc., N.A. v. Continental Insurance Co., 2013 WL 6174839 (D Or Nov 21, 2013) (unpublished), involved a corporation seeking to substitute its environmental counsel into a coverage case against a carrier that had reimbursed the corporation for the firm’s work in long-running superfund litigation. The corporation had retained the firm itself in the underlying superfund litigation and later tendered the defense to the carrier. The carrier accepted the defense under a reservation, with the carrier reimbursing the corporation for the firm’s work. In the subsequent coverage case, the carrier argued that the ethics opinions noted were a hard and fast rule creating a disqualifying conflict for the firm.

The District Court disagreed, reasoning that there could be no disqualifying conflict in the absence of multiple clients. The District Court found that although the ethics opinions expressed the general rule, they did not exclude the possibility of altering the two-client model. Relying on the classic test for an attorney-client relationship set out in *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990), that examines both the client’s subjective belief and the objective circumstances, the District Court concluded that no attorney-client relationship ever existed between the law firm and the carrier under the facts involved. In doing so, *Evrz* provides a useful clarification to Oregon practice.

On a related point, even in the “one-client” scenario, an insured and the carrier should still be able to maintain privilege under the “common interest

doctrine,” which preserves privilege over otherwise confidential communications on matters of common interest between parties whose positions are aligned.

Port of Portland v. Oregon Center for Environmental Health, 238 Or App 404, 409-16, 243 P3d 102 (2010), and *U.S. v. Gonzalez*, 669 F3d 974, 977-83 (9th Cir 2012), discuss the common interest doctrine in detail under, respectively, Oregon and federal law.

Washington

Washington, by contrast, is a “one-client” state under a Washington Supreme Court decision (*Tank v. State Farm*, 715 P2d 1133 (Wash 1986)) and a Washington State Bar ethics opinion (Advisory Op 195). The “default” position in Washington, therefore, is that an insurance defense counsel only represents the insured and the carrier is simply a third-party payor. The Washington Supreme Court reiterated that paradigm in *Stewart Title Guar. Co. v. Sterling Savings Bank*, 311 P3d 1 (Wash 2013).

The plaintiff carrier in *Stewart* had hired a law firm to defend Sterling Savings in a foreclosure case involving lien priority issues. There were no coverage issues. But, the carrier later claimed that the law firm committed malpractice in the foreclosure case and sued the firm. Under Washington law, however, a claimant in a legal malpractice case must generally have had an attorney-client relationship with the lawyer in the matter in which the malpractice allegedly occurred. Tacitly acknowledging Washington’s “one-client” approach to

insurance defense, the carrier instead argued that it still had standing as a third-party payor under a “multi-factor test” adopted in *Trask v. Butler*, 872 P2d 1080 (Wash 1994), allowing nonclients to sue for legal malpractice under narrow circumstances.

The Washington Supreme Court disagreed, finding that a carrier is not an intended beneficiary as that concept was articulated in *Trask*. Lacking either an attorney-client relationship or the alternative under *Trask*, the Washington Supreme Court concluded that the carrier could not meet a required element for a legal malpractice claim and affirmed dismissal of its claim. Like *Evraz* in Oregon, *Stewart* does not fundamentally change Washington law. But again like *Evraz*, *Stewart* offers a helpful clarification for Washington practice.

Again like Oregon, Washington also recognizes the common interest doctrine to afford an avenue for confidential sharing of information between an insured and a carrier. *Sanders v. State*, 240 P3d 120, 133-34 (Wash 2010), includes an extended discussion of the common interest doctrine under Washington law.

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