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A Balancing Act:
Conflicts and Confidentiality in Insurance Defense

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> "The tripartite relationship among defense lawyer, insured, and insurer requires a delicate balance of rights and duties."
> ~ABA Formal Op 01-421 at 3 (2001)

In the 20 years that have passed since the ABA made our opening observation, the balancing act for insurance defense counsel hasn't gotten any easier. At the same time, insurance defense remains a core practice area for many lawyers. In this column, we'll look at two of the most delicate elements of the balancing act for insurance defense counsel: conflicts and confidentiality.[1]

Conflicts

The starting point for most conflict analysis is a simple one: who is my client? An earlier ABA ethics opinion—Formal Opinion 96-403 (1996)—noted that this simple question has a not-so-simple answer in the insurance defense context: "The Model Rules of Professional Conduct offer virtually no guidance as to whether a lawyer retained and paid by an insurer to defend its insured represents the insured, the insurer, or both."[2] As a result, states vary in their approach to the "who is the client?" question—with some answering the insured only and others including both the insured and the carrier.[3]

Oregon is a "two client" state absent an agreement to the contrary under a series of Oregon State Bar ethics opinions and associated Oregon case law.[4]

Under Oregon's "default" approach, therefore, an insurance defense counsel represents the insured and the carrier jointly.[5]

Oregon's predominant "two client" approach has important implications for conflicts. Three of the more commonly recurring involve coverage, case management "guidelines" and settlement.

First, insurance defense counsel under the "two client" model cannot advise either the insured or the carrier on coverage issues.[6] In other words, the job of insurance defense counsel is to defend the case rather than wade into coverage disputes between the jointly represented insured and carrier that would create a multiple-client conflict under RPC 1.7(a)(1). This can sometimes be easier said than done. OSB Formal Opinion 2005-121, for example, suggests that insurance defense counsel should not "file a motion that would adversely affect the insured's right to a defense or to coverage but must instead act in a manner consistent with the interests of the insured."[7] Even with this general guidance, the potential for conflicts in a specific situation touching on this scenario merits especially close review because conflicts between jointly represented clients in the same matter are typically not waivable under RPC 1.7(b) and instead require a law firm's withdrawal altogether.[8]

Second, although insurance defense counsel under the "two client" model can acknowledge and generally comply with case-handling "guidelines," they owe a duty of competent representation under RPC 1.1 and the standard of care to both the insured and the carrier.[9] OSB Formal Opinion 2005-166, therefore, cautions that under RPC 1.8(f), which addresses "material limitation" conflicts[10] arising from payment for legal services on a client's behalf by others, insurance defense counsel cannot shade their judgment in defending an insured by the fact that they are being paid by the carrier.

Third, insurance defense counsel under the "two client" model cannot act as a "referee" between an insured and the carrier if there is a disagreement over settlement. RPC 1.2(a) requires a lawyer to "abide" by a client's decision on settlement.[11] When dealing with a covered claim within policy limits, insureds and carriers usually agree on settlement because a primary reason the insured bought the policy involved was to shift responsibility for indemnity contractually to the carrier. Nonetheless, ABA Formal Opinion 96-403 observes that "[w]hatever the rights and duties of the insurer and the insured under the insurance contract, that contract does not define the ethical responsibilities of the lawyer to . . . [the] . . . client."[12] In the relatively rare scenario where an insured and a carrier disagree over settlement, therefore, ABA Formal Opinion 96-403 suggests that

insurance defense counsel advise both to consult independent counsel regarding the consequences and associated coverage issues.[13] If the insured at that point rejects coverage and wishes to proceed with separate, privately-retained counsel, insurance counsel would ordinarily be expected to withdraw through substitution in light of conflicting instructions between jointly represented clients.[14]

In contrast to the predominant "two client" model, Oregon allows a lawyer to limit the client to the insured only. This is usually done through an engagement agreement with the insured and an accompanying "non-representation" letter to the carrier. This variant most frequently occurs when a sophisticated corporate client—often with a large self-insured retention—wishes to use the same law firm for both defense and coverage advice. *Evraz, Inc., N.A. v. Continental Insurance Co.*, 2013 WL 6174839 (D Or Nov 21, 2013) (unpublished) illustrates the "one client" approach. In *Evraz*, a corporation retained its long-time law firm to represent it in an environmental liability matter in which the corporation's legal expenses were being reimbursed by an insurance carrier. The law firm specifically disclaimed an attorney-client relationship with the carrier so that the law firm could continue to advise its corporate client on coverage issues while defending the environmental liability matter. Later, the

corporate client asked the law firm to represent it in subsequent coverage litigation against the carrier. The carrier moved to disqualify the law firm—arguing under the ethics opinions noted earlier that the firm had represented it as well in the liability matter. The court denied the motion, holding that the law firm had expressly disclaimed an attorney-client relationship with the carrier and, therefore, no attorney-client relationship was created. In doing so, the court noted that this was simply a specific application of Oregon's general "reasonable expectations of the client" test for an attorney-client relationship that looks to both a putative client's subjective belief and whether that subjective belief is objectively reasonable under the circumstances. Although comparatively rare, the model illustrated in *Evraz* avoids many conflicts because the law firm only has one client—the insured.

Confidentiality

In the "two client" model, confidentiality is ordinarily straightforward: both the insured and the carrier are clients so joint communications are privileged (as long as the other requisites for the attorney-client privilege are present). OSB Formal Opinion 2005-157 makes this point in the context of billings and OSB Formal Opinion 2005-166 does the same for case reports. This approach is also

consistent with the duty of communication because we are generally expected to communicate material developments to all jointly represented clients.[15]

In the "one client" model, communications between insurance defense counsel and a carrier are generally protected by the "common interest" doctrine. The federal district court in Portland summarized the broad outlines of this doctrine:

> "The 'common interest' doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group." . . . "The common interest doctrine is an exception to the general rule that the voluntary disclosure of a privileged attorney client or work product communication to a third party waives the privilege."[16]

The common interest doctrine allows insurance defense counsel in the "one client" model to provide reports and other information necessary for the carrier to contribute to both the defense and any settlement of the case involved.[17]

Summing Up

The tri-partite relationship is a time-honored formula spanning practice areas ranging from personal injury to employment law. In each case, however, insurance defense counsel needs to carefully balance the nuanced conflict and confidentiality elements of this three-cornered relationship.

ABOUT THE AUTHOR

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[1] Some insurance defense counsel are employees of carriers. Although this column is oriented primarily to insurance defense counsel who are in private practice, the topics discussed also apply generally to lawyer-employees of carriers who represent the carrier's insureds. *See generally* ABA Formal Op 03-430 (2003) (discussing lawyer-employees of carriers who represent insureds).

[2] *Id*. at 2.

[3] ABA Formal Op 01-421, *supra*, at 3-4 (surveying jurisdictions nationally).

[4] *See generally* OSB Formal Ops 2005-30 1-2 (rev 2016); 2005-77 1 (rev 2016); 2005-121 2 (rev 2016); 2005-157 1-2 (rev 2016); 2005-166 2 (rev 2016). *See also Sabrix, Inc. v. Carolina Cas. Ins. Co.*, 2003 WL 23538035 2 n.1 (D Or July 23, 2003) (unpublished) (noting earlier series of Oregon ethics opinions from 1991 discussing Oregon's "two client" approach to insurance defense).

[5] ORS 465.483(1), which was enacted in 2013, provides as a matter of insurance law that an insured in an environmental case with either a reservation of rights or excess exposure must be provided with "independent counsel" paid for by the carrier but only representing the insured.

See generally Siltronic Corporation v. Employers Insurance Company of Wasau, 176 F Supp 3d 1033, 1047-54 (D Or 2016) (discussing ORS 465.483 and the "independent counsel" requirement); *see also Schnitzer Steel Industries, Inc. v. Continental Casualty Company*, 2013 WL 12212732 (D Or Dec 17, 2013) (unpublished) (also discussing the legislative history of ORS 465.483).

[6] *See generally* OSB Formal Ops 2005-77, *supra*, at 3; 2005-121, *supra*, at 4.

[7] *Id*. at 4. This opinion refers to the insured as the "primary" client under insurance law. It is important to note, however, that the Oregon Rules of Professional Conduct do not distinguish between "primary" and "secondary" clients.

[8] *See* ABA Model Rule 1.7, cmt 29 ("Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.").

[9] *See* UCJI No. 45.04 (Oregon legal malpractice jury instruction in legal for standard of care). *See also* ABA Formal Op 01-421, *supra* (addressing case handling "guidelines" from a national perspective).

[10] *See also* RPC 1.7(a)(2) (the general rule on "material limitation" conflicts).

[11] *See also* OSB Formal Op 2019-195 2 (2019) ("Under Oregon RPC 1.2(a), a decision to settle must be made by the client, not the lawyer."); *see, e.g., In re Kang*, 32 DB Rptr 191 (Or 2018) (attorney disciplined for violation of RPC 1.2(a) by agreeing to settlement without first confirming authority with client). This is also consistent with Oregon agency law applied to attorney settlement authority. *See generally Grudzien v. Rogers*, 294 Or App 673, 679-80, 432 P3d 1169 (2018) (discussing agency principles as applied to attorney settlement authority).

[12] *Id.* at 3.

[13] *Id*. at 4.

[14] *Id*. at 5.

[15] *See generally* OSB, Ethical Oregon Lawyer § 10.2-2(e)(2) (rev 4th ed 2015) (discussing joint representation of multiple litigants); RPC 1.4 (duty of communication). *See also* ABA Formal Op 08-450 (2008) (discussing scenario where lawyer knows that sharing information with carrier will result in loss of coverage).

[16] *In re Premera Blue Cross Customer Data Security Breach Litigation*, 296 F Supp 3d 1230, 1240 (D Or 2017) (citations omitted); *see also U.S. Gonzalez*, 669 F3d 974, 977-79 (2012) (noting that when applied in the defense setting the common interest doctrine is also known as the "joint defense" privilege); *Port of Portland v. Oregon Center for Environmental Health*, 238 Or App 404, 413-16, 243 P3d 102 (2010) (addressing the common interest doctrine under Oregon law).

[17] *See also* RPC 2.3 (addressing evaluations provided to non-clients).