

## CONFLICT DISCLOSURE AND CONSENT LETTERS

The following letters are reprinted with permission of the authors, Peter R. Jarvis, Mark J. Fucile, and Bradley F. Tellam. They originally appeared as a supplement to the article, "[Waiving Discipline Away: The effective use of disclosure and consent letters](#)," *Oregon State Bar Bulletin* (June 2002). Updated courtesy of Peter R. Jarvis, Mark J. Fucile, and Bradley F. Tellam (2015).

Practitioners should also consult *The Ethical Oregon Lawyer*, available in BarBooks™, the OSB online library of legal resources.

### Letter 1

Proposed Unrelated Matters Representation of ABC adverse to Def when both are Current Clients—Letter to Client Being Represented

### Letter 2

Proposed Unrelated Matters Representation of ABC adverse to Def when both are Current Clients—Letter to Client Being Opposed

### Letter 3

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### Letter 4

Proposed Incorporation/Partnership

### Letter 5

Personal Conflict Between Attorney and Client

CAVEAT: This letter should not be used for investment in client situations or for situations in which the lawyer is concerned that the lawyer may have malpracticed while representing a client.

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**LETTER 1—PROPOSED UNRELATED MATTERS REPRESENTATION  
OF ABC ADVERSE TO DEF WHEN BOTH ARE CURRENT  
CLIENTS—LETTER TO CLIENT BEING REPRESENTED**

Dear ABC:

As you know, you have asked us to represent you against DEF with respect to [describe]. As you also know, this firm represents DEF with respect to [describe]. Insofar as I can presently tell, the factual and legal issues likely to arise in the work that you have asked us to do appear to be unrelated to the work we are presently doing or appear likely to do for DEF.

Under the Oregon Rules of Professional Conduct, which apply to all Oregon attorneys, [my firm and I] may not oppose a current client, even on an unrelated matter, without the informed consent of all affected clients after an explanation about the material risks of and reasonable alternatives to consenting. This means that I must explain to both DEF and you the pros and cons of consenting and that I cannot proceed to represent you unless both DEF and you consent.

In deciding whether or not to consent, you should consider how our representation of DEF as described above could or might affect you. For example, clients that are asked to waive or consent to conflicts typically should consider whether there is any material risk that “their” attorney will be less zealous or eager on their behalf due to the conflict. Similarly, clients should consider whether there is any material risk that their confidences or secrets will be used adversely to them due to the conflict. In the present case, I personally do not believe that there is a material risk of either type because of the unrelated nature of the work for the two clients. Nevertheless, these are issues that you should consider for yourself. In fact, the Oregon Rules of Professional Conduct also require that I recommend that you seek independent counsel to assist you in deciding whether or not to consent. You do not have to do so if you do not wish to, however. Whether or not you consult such counsel is up to you.

Please review this matter carefully. If you have any questions that you would like me to answer prior to reaching a decision on this issue, please let me know. If you are willing to consent after such review as you believe appropriate, please sign the enclosed extra copy of this letter in the space provided and return it to me for my files.

Very truly yours,

---

I hereby consent to the terms of representation set forth above:

Dated: \_\_\_\_\_

\_\_\_\_\_  
ABC

**LETTER 2—PROPOSED UNRELATED MATTERS REPRESENTATION  
OF ABC ADVERSE TO DEF WHEN BOTH ARE CURRENT  
CLIENTS—LETTER TO CLIENT BEING OPPOSED**

Dear DEF:

As you know, ABC has asked us to represent it adverse to you with respect to [describe]. As you also know, this firm represents you with respect to [describe]. Insofar as I can presently tell, the factual and legal issues likely to arise in the work that you have asked us to do appear to be unrelated to the work we have been asked to or appear likely to do for ABC.

Under the Oregon Rules of Professional Conduct, which apply to all Oregon attorneys, [my firm and I] may not oppose a current client, even on an unrelated matter, without the informed consent of all affected clients after an explanation about the material risks of and reasonable alternatives to consenting. This means that I must explain to both ABC and you the pros and cons of consenting and that I cannot proceed to represent ABC unless both ABC and you consent.

In deciding whether or not to consent, you should consider how our representation of ABC as described above could or might affect you. For example, clients that are asked to waive or consent to conflicts typically should consider whether there is any material risk that “their” attorney will be less zealous or eager on their behalf due to the conflict. Similarly, clients should consider whether there is any material risk that their confidences or secrets will be used adversely to them due to the conflict. In the present case, I personally do not believe that there is a material risk of either type because of the unrelated nature of the work for the two clients. Nevertheless, these are issues that you should consider for yourself. In addition, you should bear in mind that if you consent, [my firm/I] will be representing ABC adversely to DEF in connection with the matter referenced above. In other words, we would be adverse to you on that matter.

The Oregon Rules of Professional Conduct require that I recommend that you seek independent counsel to assist you in deciding whether or not to consent. You do not have to do so if you do not wish to, however. Whether or not you consult such counsel is up to you.

Please review this matter carefully. If you have any questions that you would like me to answer prior to reaching a decision on this issue, please let me know. If you are willing to consent after such review as you believe appropriate, please sign the enclosed extra copy of this letter in the space provided and return it to me for my files.

Very truly yours,

\_\_\_\_\_

I hereby consent to the terms of representation set forth above:

Dated: \_\_\_\_\_

\_\_\_\_\_

DEF

### LETTER 3—JOINT REPRESENTATION

Dear Clients:

This letter confirms that you have asked me to represent you jointly with respect to [describe]. It also sets forth potential conflicts of interest that may arise in the course of a joint representation.

Under the legal ethics rules, a law firm may not represent clients jointly if their interests conflict. Based on our discussions, it does not appear that your interests currently conflict. In this regard, you have agreed that [list any limits on the scope of our representation that eliminate possible areas of conflict between the joint clients].

With any joint representation, however, it is possible that your interests may come into conflict later in ways that we cannot predict now. If they do, it may prevent us from continuing to represent you in this matter. In that situation, you would each then need to incur the expense of retaining separate lawyers to represent you.

You should also consider the potential impact of joint representation on the attorney-client privilege. In joint representation, anything you tell us in confidence is subject to the attorney-client privilege as it relates to others. But, if litigation related to this matter arises later between you, there would be no attorney-client privilege in that litigation concerning anything that you shared with us. Further, by agreeing to this joint representation, you are authorizing us to share with each of you anything that you tell us separately relating to your joint representation.

Please consider this situation and decide whether or not you wish to consent to my representation of both of you. Oregon law requires me to recommend that each of you consult with separate counsel in deciding whether or not your consent should be given. Whether or not you consult separate counsel is, however, up to you.

If you have questions that you would like me to answer before you make a decision, please let me know. If, after such review as you believe appropriate, you decide to consent to my representation of both of you in spite of the limitations discussed in this letter, please sign and date the enclosed extra copy of this letter in the spaces provided and return it to me.

Very truly yours,

---

I hereby consent to the terms of representation set forth above:

\_\_\_\_\_  
Client 1

\_\_\_\_\_  
Client 2

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

## LETTER 4—PROPOSED INCORPORATION OR PARTNERSHIP

Dear Proposed Partners/Incorporators:

As you know, you have asked me to represent both of you and your proposed new [corporation/partnership]. Before I begin work on your behalf, however, I must discuss the matter of potential conflicts of interest with you. The reason that I must do so is that the Oregon Rules of Professional Conduct place limits upon an attorney's or firm's ability to represent clients whose interests do or may conflict. I want to make sure that our relationship begins on a positive note and that you are fully informed of what I may and may not do. Only in this way can you make the best choice for yourselves and your business.

During our discussion, you told me that you believe that you have worked out all of the major points between you concerning the creation of [corporation/partnership] and its operation. Based upon what you have told me, it would appear that you have, in fact, agreed upon many issues, including [set forth major points of agreement already related, e.g., division of stock, compensation, amount of compensation, etc.].

Nonetheless, it is possible that one of you may change your mind with respect to one or more points as documents begin to take their final shape. It is also possible that issues of disagreement between you may arise that neither you nor I presently know. For example, [give examples—e.g., you may come to disagree with regard to buyout issues or with regard to the relative allocation of rights between you].

If differences do develop, I would not be in a position to advocate the interests of either of you as against the other one of you. In fact, the best I could do would be to lay out the possible alternatives, giving you some of the pluses and minuses pertaining to each one and urge that you review the matter with separate counsel in order to look after your separate interests. Moreover, and if the points of divergence become too numerous or too significant, I would probably have to stop representing either [corporation/partnership] or you, if not both.

You should also consider that if I represent both of you, neither one of you could assume that anything that you told me would be held secret or would not become known to the other. In other words, you would need separate counsel if you wanted independent advice or to discuss matters in complete privacy.

Please review these issues and then let me know whether, notwithstanding the potential for conflict that I have described, you are willing to have me represent you. Oregon law requires that in addition to obtaining your consent, I recommend that you consult independent counsel in order to help you decide if you should consent. Whether or not you actually consult independent counsel is, however, up to you.

If you have any questions that you would like me to address before you decide, please let me know. If you do decide to consent, please sign and date the enclosed extra copy of this letter in the spaces provided below and return it to me.

Very truly yours,

\_\_\_\_\_

I hereby consent to the representation set forth above:

\_\_\_\_\_

Client 1

\_\_\_\_\_

Client 2

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

**LETTER 5—PERSONAL CONFLICT  
BETWEEN ATTORNEY AND CLIENT**

CAVEAT: This letter should not be used for investment in client situations or for situations in which the lawyer is concerned that the lawyer may have malpracticed while representing a client.

Dear \_\_\_\_\_:

This letter confirms that we have discussed the conflict of interest that has arisen as a result of [insert factual description].

The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you give informed consent based upon disclosure of the material risks of and reasonable alternatives to consenting.

In this case, my personal interest may conflict with your interests as follows [give examples].

Please consider this situation carefully and decide whether or not you consent to my representation of you notwithstanding this conflict. In addition, the Oregon Rules of Professional Conduct require me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Whether or not you consult independent counsel, however, is up to you.

If you have questions that you would like me to answer before you decide, please let me know. If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.

Very truly yours,

\_\_\_\_\_

I hereby consent to the representation set forth above:

Dated: \_\_\_\_\_

\_\_\_\_\_ Client

**LETTER 6—FUTURE CONFLICTS WAIVER LETTER**

Dear \_\_\_\_\_:

In accordance with our phone conversations, the purpose of this letter is to provide a framework for addressing present and future conflict of interest that may arise when attorneys from this firm represent clients in matters adverse to you. Before our firm agrees to represent you, we believe that it is appropriate to spell out in writing the expectations or standards that will govern our relationship.

In light of the conflict of interest rules that govern attorneys, we would appreciate it if you would give us your consent and acknowledge that our representation of you in this matter will not disqualify the firm from opposing you on other matters. More specifically, we ask that you consent to our representation of other clients in unrelated matters adverse to you as long as all of the following are true:

1. The representation does not involve any work that the firm has done for you; and
2. The representation would not place the firm in a position to use your confidences or secrets adversely to you.

As in any potential conflict of interest situation, you should consider whether the arrangement that I have outlined above could or might affect the “zealousness” or eagerness with which the firm represents you. You should also consider whether our representation of clients adversely to you would place the firm in a position to use your confidences or secrets against you. Although I do not believe that the likelihood of harm to you is material in light of the limitations that I have outlined above, these are necessarily issues that you should review for yourself. In fact, the ethical rules governing an Oregon attorney’s conduct require that I recommend that you seek independent counsel to determine whether consent in this matter should be given. Whether or not you consult independent counsel, however, is up to you.

If you are willing to consent to the terms outlined above, please sign the enclosed extra copy of this letter and return it to me for my files. If you have any questions, or if there is any other information that I can provide which might help you make a decision on this matter, please let me know.

Very truly yours,

\_\_\_\_\_

Consent to the terms outlined above is hereby granted.

Dated: \_\_\_\_\_

By \_\_\_\_\_

**LETTER 7—FORMER CLIENT CONFLICT WAIVER LETTER—  
TO FORMER CLIENT BEING OPPOSED**

Dear [Former Client]:

As you know, [my firm and I] have been asked to represent [Client X] adverse to you with respect to [describe]. As you also know, [my firm and I] represented you in the past concerning [describe].

As we have discussed, the Oregon Rules of Professional Conduct, which apply to all Oregon attorneys, do not allow me to represent [Client X] against you without the informed consent of both of you based upon an explanation of the material risks of and reasonable alternatives to consenting. This means that I must discuss the pros and cons of consenting with both of you and that I cannot proceed unless both of you agree to allow me to do so.

In any former client conflict situation, the former client is typically concerned about whether there is a material risk that his confidences or secrets may be used adversely to him and about whether there is a material risk that the work that the lawyer now proposes to do adversely to that former client will unfairly or inappropriately undercut the work that the lawyer previously did for the former client.

In the present context, I personally believe that these risks are minimal. For example, [describe]. Nevertheless, these are issues that you should consider for yourself. In fact, the Oregon Rules of Professional Conduct also require that I recommend that you consult independent counsel prior to reaching a decision on this matter. You are not obligated to consult such counsel if you do not wish to do so, however; the choice is yours.

Please review this subject and let me know whether you are willing to consent notwithstanding my prior representation of you. Needless to say, if there is any additional information that I can provide in order to assist you in your review, please let me know.

If you are willing to consent after such review as you deem appropriate, please sign the enclosed extra copy of this letter and return it to me for my files.

Very truly yours,

\_\_\_\_\_

Consent to the terms outlined above is hereby granted.

Dated: \_\_\_\_\_

By \_\_\_\_\_

**LETTER 8—FORMER CLIENT CONFLICT WAIVER LETTER—  
TO CURRENT CLIENT BEING REPRESENTED**

Dear [Current Client]:

As you know, you have asked me to represent you adverse to my former client [Name] with respect to [describe]. As you also know, [my firm and I] previously represented former client [Name] concerning [describe].

As we have discussed, the Oregon Rules of Professional Conduct, which apply to all Oregon attorneys, do not allow me to represent you against former client [Name] without the informed consent of both of you based upon an explanation of the material risks of and reasonable alternatives to consenting. This means that I must discuss the pros and cons of consenting with both of you and that I cannot proceed unless both of you agree to allow me to do so.

In any former client conflict situation, the current client is typically concerned about whether there is a material risk that her confidences or secrets may be used adversely to her and about whether there is a material risk that the work that the lawyer now proposes to do for her will be less zealous due to the work for the former client.

In the present context, I personally believe that these risks are minimal. For example, [describe]. Nevertheless, these are issues that you should consider for yourself. In fact, the Oregon Rules of Professional Conduct also require that I recommend that you consult independent counsel prior to reaching a decision on this matter. You are not obligated to consult such counsel if you do not wish to do so, however; the choice is yours.

Please review this subject and let me know whether you are willing to consent notwithstanding my prior representation of him. Needless to say, if there is any additional information that I can provide in order to assist you in your review, please let me know.

If you are willing to consent after such review as you deem appropriate, please sign the enclosed extra copy of this letter and return it to me for my files.

Very truly yours,

\_\_\_\_\_

Consent to the terms outlined above is hereby granted.

Dated: \_\_\_\_\_

By \_\_\_\_\_

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