

CONFLICT DISCLOSURE AND CONSENT LETTERS – DISCLOSURE OF POTENTIAL MALPRACTICE CLAIM

Do Not Use These Letters If a Non-Waivable Conflict Exists

In conflict situations, the determination of whether to continue as counsel or withdraw depends on the unique facts of each situation. Lawyers should analyze the particular facts giving rise to their conflict before using this form as the basis for a letter to the client. Lawyers are strongly encouraged to consult with a Claims Attorney at the Professional Liability Fund and/or private ethics counsel.

Disclaimer

These sample letters are templates intended to cover the basics. It is essential that each letter be customized to fit the facts and circumstances giving rise to the need for the letter.

Every situation is different and no one letter applies in every situation. These samples are only instructive guides. They do not and cannot replace consultation with a private ethics lawyer and/or a Claims Attorney at the Professional Liability Fund.

Letter 1

Personal Conflict Between Attorney and Client
Disclosure of Potential Malpractice – Continued Representation

Letter 2

Personal Conflict Between Attorney and Client
Disclosure of Potential Malpractice – Withdrawal from Representation

Resources

Use these letters in combination with our [Potential Malpractice Claim Checklist](#). See all our *Disclosure of Potential Malpractice* practice aids at www.osbplf.org.

IMPORTANT NOTICES

This material is provided for informational purposes only and does not establish, report, or create the standards of care for attorneys in Oregon, nor does it represent a complete analysis of the topics presented. Readers should conduct their own appropriate legal research. The information presented does not represent legal advice. This information may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund, except that permission is granted for Oregon lawyers to use and modify these materials for use in their own practices.

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LETTER 1 – DISCLOSURE OF POTENTIAL MALPRACTICE CLAIM: CONTINUED REPRESENTATION

Re: Personal Conflict of Interest Disclosure
Continued Representation
[Name of Case]

Dear [Name]:

As you know, I currently represent you in [describe matter or scope of representation, e.g. bringing an action for breach of contract]. I am writing now to confirm our recent discussion wherein I advised you of the following facts relevant to your legal matter: [provide brief description of relevant facts that may give rise to an alleged error, e.g., the running of the applicable statute of limitations]. In addition, I advised you that you may have a claim against me for [describe alleged act or omission that may have been faulty, e.g. failing to timely file the complaint].

The purpose of this letter is to explain the personal conflict of interest that has now arisen for me, and to seek your consent to my continued representation of you in this matter, despite the allegation that I may have made an error. However, I am not asking you to waive any claim you may have against me [or my firm].

The Oregon Rules of Professional Conduct (RPCs) prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client's, unless the client consents after being informed of the nature of the conflict, the risks involved, and possible alternatives to providing consent. Consequently, I can continue to act as your lawyer in this matter only if you give your informed consent, confirmed in writing.

Clients asked to waive or consent to personal conflicts should consider whether their attorney's professional judgment will be materially limited by the attorney's own personal interest in the matter due to the potential claim against them. For example, in your matter you might be concerned that I will pursue or avoid certain strategies in order to protect my own interests, or that my continued representation of you could or might affect the "zealousness" or eagerness with which I and my firm continue to represent you. Finally, you should consider whether or not my ability to protect your confidential client communications will be impaired in any way by my desire to protect my own interests. Although I believe these risks are minimal, you must necessarily decide this for yourself.

Alternatives to consenting to my continued representation include, but are not limited to, seeking replacement counsel or representing yourself. [Consider if there are other obvious alternatives in a given matter, such as retaining counsel on a limited scope to monitor and advise the client.]

When you and I spoke, you made it clear that you want me to continue as the attorney acting on your behalf. Nevertheless, the RPCs require me to recommend that you consult independent counsel to determine whether consent should be given, and I encourage you to do so. You are not obligated to consult such counsel if you do not wish to do so, however. The choice is yours.

I am happy to discuss this matter further with you or an attorney of your choosing. If you decide to consent to my continued representation of you, please sign the enclosed copy of this letter and return it to me for my file. Thank you.

Very truly yours,

[Attorney]

[Firm]

I HAVE READ THIS LETTER AND CONSENT TO THE REPRESENTATION SET FORTH ABOVE.

[Client]

[Date]

LETTER 2 – DISCLOSURE OF POTENTIAL MALPRACTICE CLAIM: WITHDRAWAL FROM REPRESENTATION

[NOTE: This letter may be appropriate when a lawyer concludes that the lawyer may have committed an error in the representation, that the client may have a claim against the lawyer as a result of the error, and/or that the lawyer intends to withdraw from the representation (either because the error has created a non-waivable conflict of interest under RPC 1.7(a), or because the conflict is waivable under RPC 1.7(b) but the lawyer is choosing not to seek a waiver from the client to continue the representation, or because the client may be better served with alternate counsel going forward).]

Re: Personal Conflict of Interest Disclosure
Withdrawal from Representation
[Name of Case]

Dear [Name]:

As you know, I currently represent you in [*describe matter or scope of representation, e.g. bringing an action for breach of contract*]. I am writing now to confirm our recent discussion wherein I advised you of the following facts relevant to your legal matter: [*provide brief description of relevant facts that may give rise to an alleged error, e.g., the running of the applicable statute of limitations*]. In addition, I advised you that you may have a claim against me for [*describe alleged act or omission that may have been faulty, e.g. failing to timely file the complaint*]. As a result, and as we discussed, a personal conflict of interest has now arisen, because you may have a claim against me.

Due to the conflict of interest identified above, I do not believe I should continue as your attorney in this matter. There are two ways to accomplish my withdrawal from your representation:

1. You can retain new counsel to take over and substitute as counsel for me; or
2. I can file a motion to withdraw for the court to consider. If the court grants the motion, you will be without representation until you retain new counsel.

In general, the transition is smoother for the client (you) if the client first retains counsel, and then there is an orderly substitution. Unless required by the court, no motion will generally need to be filed and there will be no gap in representation. If you would like to proceed in this fashion, we need to have the substitution of counsel completed by [*enter date*]. If it is not completed by then, I will file the enclosed motion and order to withdraw as counsel. I will forward you a copy of the order granting my withdrawal when I receive it.

[*Explain the status of the matter, whether there is a relevant statute of limitations, and/or any pending motions, deadlines, trial dates, or other significant events that could affect the litigation going forward.*]

If client has confirmed retention of new counsel:

This will confirm you retained [*Attorney*] to represent you going forward in this matter, and that you [*do/do not*] consent to my speaking with [*him/her/them*] about your case. I will cooperate with successor counsel to effect a substitution of counsel and ensure an orderly transfer of files. Please have your new attorney contact me to accomplish this substitution. I have informed opposing counsel and indicated that [*he/she/they*] should contact your new lawyer directly.

If client has not retained counsel:

We encourage you to seek alternate counsel as soon as possible to protect your interests in this matter. If you have not located counsel, you can contact the Oregon State Bar Lawyer Referral Service for options. They can be reached online at <https://www.osbar.org/public/ris/lrsform.html>, by phone at 503-684-3763, or toll-free in Oregon at 800-452-7636. I have informed opposing counsel you will represent yourself going forward, and that [he/she/they] can contact you directly. Please let me know right away if you retain new counsel, so I can let opposing counsel know to contact your lawyer instead. Also, if you do retain new counsel before [enter date], have [him/her/them] contact me to arrange for substitution.

If you wish to initiate a claim against me, you can do so by contacting my professional liability carrier, the Oregon State Bar Professional Liability Fund, at 503-639-6911 or 1-800-452-1639 (toll-free in Oregon). Additionally, I encourage you to discuss all issues related to a possible claim against me with your new attorney. Because of the conflict between my interests and yours with respect to your possible claim, I cannot give you any legal advice about those issues.

When unearned money remains in trust:

Please find enclosed an accounting of your matter, reflecting an unearned trust account balance of [\$\$\$\$]. I have enclosed a check for this balance.

When a balance is owed the attorney/firm:

[NOTE: When there is a balance owed the attorney or firm, the lawyer may choose not to seek payment given the circumstances of the conflict.¹ If, however, the lawyer chooses to seek payment:]

Please find enclosed a final invoice for your matter, reflecting a total amount of fees and costs due of [\$\$\$\$]. This amount is now due and payable. Please make a prompt payment for the services rendered.

Please contact me if you have any questions.

Very truly yours,

[Attorney]

[Firm]

¹ If a lawyer intends to resolve a dispute as to remaining funds in trust by requesting the client release the attorney from any potential claims of liability, the lawyer should first review Oregon RPC 1.8(h)(2) regarding conflicts of interest, and consider consulting private ethics counsel or a Claims Attorney at the Professional Liability Fund.