

## CONFLICT INFORMED CONSENT CHECKLISTS

*The following checklists 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 (2021).*

Checklist 1 – Multiple Current Client Conflict Informed Consent

Checklist 2 – Former Client Conflict Informed Consent

Checklist 3 – Personal Conflict Informed Consent

## CONFLICT INFORMED CONSENT CHECKLISTS

### CHECKLIST 1—MULTIPLE CURRENT CLIENT CONFLICT INFORMED CONSENT

#### 1. Do You Have Two or More Current Clients?

- If “yes,” proceed to question 2.
- If “no,” disclosure and consent is not required, but consider sending non-engagement letters. Also consider whether, if a former client is involved, the former client rules may apply. If so, proceed to Checklist 2 regarding former client conflict disclosure and consent.

#### 2. Are the Clients’ Interests Directly Adverse?

(For example, are they buyer and seller in the same transaction; multiple criminal defendants, divorcing spouses, or the like?)

- If “yes,” the conflict is not waivable; you may not undertake the representation.
- If “no,” proceed to question 3.

#### 3. Are the Clients’ Interests Currently Aligned?

- If “yes,” proceed to question 4.
- If “no,” consider whether the areas where their interests are not aligned may be isolated outside your representation and separately agreed upon by them. If they can, proceed to question 4; if not, you may not undertake the representation.

#### 4. Is Informed Consent Confirmed in Writing Necessary?

- The answer to this question is almost always yes; even if no conflict is present and none is foreseeable, it is better to go through the process now, and update later if necessary. Go to question 5.

#### 5. Have You Discussed the Conflict Issues with All of the Clients?

- If “yes,” proceed to question 6.
- If “no,” proceed to question 6, but consider the benefits of *confirming* the consent in writing instead of having the initial request come in letter form.

#### 6. Have You Prepared and Sent the Letters “Promptly” with any Oral Informed Consent?

- If “yes,” proceed to question 7.
- If “no,” your consent may be invalid.

## CONFLICT INFORMED CONSENT CHECKLISTS

### **7. Does Your Letter Plainly and Clearly Identify the Clients, the Issues Involved, and the Terms of the Consent That Is Sought?**

- If “yes,” proceed to question 8.
- If “no,” the consent may not be consistent with what you think it is.

### **8. Does Your Letter Identify How the Clients’ Interests Are Or May Be Different?**

- If “yes,” proceed to question 9.
- If “no,” work on the letter some more, and repeat this question.

### **9. Does Your Letter Discuss the Effects that Multiple Client Representation May Have on Attorney-Client Privilege?**

- If “yes,” proceed to question 10.
- If “no,” work on the letter some more, and repeat this question.

### **10. Does Your Letter Recommend That Each Client Seek Independent Counsel to Determine If Consent Should Be Given?**

- If “yes,” proceed to question 11.
- If “no,” work on the letter some more, and repeat this question.

### **11. Are All Necessary Parties Sent a Letter, and Does it Include a Place for the Client to Sign the Consent and Return it to You?**

- If “yes,” proceed to question 12.
- If “no,” work on the letter some more, and repeat this question.

### **12. If There Are Special Issues That Are Part of the Consent (Such as Limitations on the Scope of Your Representation, Who Will Work on the Matter, and Future Waivers), Are Those Discussed in the Letter?**

- If “yes,” you are done and have complied with ORPC 1.0(g) and 1.7.
- If “no,” work on the letter some more, and repeat this question.

## CONFLICT INFORMED CONSENT CHECKLISTS

### CHECKLIST 2—FORMER CLIENT CONFLICT INFORMED CONSENT

**1. Have You Been Asked to Represent a Current Client in a Matter Where the Current Clients' Interests Are Materially Adverse to Those of a Former Client?**

- If “yes,” proceed to question 2.
- If “no,” disclosure and consent are not required.

**2. Does the Proposed Representation Involve the Same or Substantially Related Matter?**

- If “yes,” proceed to question 4.
- If “no,” proceed to question 3.

**3. Did Your Representation of the Former Client Provide You with Information Protected by Rule 1.6 that is Material to the Matter?**

- If “yes,” proceed to question 4.
- If “no,” disclosure and consent are not required.

**4. Have You Discussed the Conflict Issues with All of the Clients?**

- If “yes,” proceed to question 5.
- If “no,” proceed to question 5, but consider the benefits of *confirming* the consent in writing instead of having the initial request come in letter form.

**5. Have You Prepared and Sent the Letters “Promptly” with any Oral Informed Consent?**

- If “yes,” proceed to question 6.
- If “no,” the consent may be invalid.

**6. Does Your Letter Plainly and Clearly Identify the Current and Former Client and the Facts that Raise the Conflict?**

- If “yes,” proceed to question 7, but remember not to reveal any of the former client confidences to the current client.
- If “no,” work on the letter some more, and repeat this question.

**7. Does Your Letter Recommend That Each Client Seek Independent Counsel to Determine If Consent Should Be Given?**

- If “yes,” proceed to question 8.
- If “no,” work on the letter some more, and repeat this question.

## CONFLICT INFORMED CONSENT CHECKLISTS

### **8. Are All Necessary Parties Sent a Letter, and Does it Include a Place for the Client to Sign the Consent and Return to You?**

- If “yes,” proceed to question 9.
- If “no,” work on the letter some more, and repeat this question.

### **9. If There Are Special Issues That Are Part of the Consent, Such as Who Will Work on the Matter, Are These Discussed in the Letter?**

- If “yes,” you are done and have complied with ORPC 1.0(g) and 1.9.
- If “no,” work on the letter some more, and repeat this question.

## CONFLICT INFORMED CONSENT CHECKLISTS

### CHECKLIST 3—PERSONAL CONFLICT INFORMED CONSENT

#### 1. Is Your Representation of a Client Materially Limited by a Personal Interest?

- If “yes,” proceed to question 3.
- If “no,” proceed to question 2.

#### 2. Are You Entering into a Business Transaction with a Client or Knowingly Acquiring an Ownership, Possessory, Security or Other Interest Adverse to a Client?

- If “yes,” proceed to question 9.
- If “no,” disclosure and consent are not strictly required.

#### 3. Have You Discussed the Conflict Issues with All of the Clients?

- If “yes,” proceed to question 4.
- If “no,” proceed to question 4, but consider the benefits of *confirming* the consent in writing instead of having the initial request come in letter form.

#### 4. Have You Prepared and Sent the Letters “Promptly” with any Oral Informed Consent?

- If “yes,” proceed to question 5.
- If “no,” the consent may be invalid.

#### 5. Does Your Letter Plainly and Clearly Describe the Personal Conflict?

- If “yes,” proceed to question 6.
- If “no,” work on the letter some more, and repeat this question.

#### 6. Does Your Letter Recommend That Each Client Seek Independent Counsel to Determine If Consent Should Be Given?

- If “yes,” proceed to question 7.
- If “no,” work on the letter some more, and repeat this question.

#### 7. Are All Necessary Parties Sent a Letter, and Does it Include a Place for the Client to Sign the Consent and Return to You?

- If “yes,” proceed to question 8.
- If “no,” work on the letter some more, and repeat this question.

## CONFLICT INFORMED CONSENT CHECKLISTS

### **8. Are Any Special Limitations on the Scope of the Representation or Personal Conflict Discussed in the Letter?**

- If “yes,” you are done and have complied with ORPC 1.0(g) and 1.7.
- If “no,” work on the letter some more, and repeat this question.

### **9. Is the Transaction and the Terms on which the Lawyer Acquires the Interest Fair and Reasonable to the Client?**

- If “yes,” proceed to question 10.
- If “no,” the transaction is prohibited.

### **10. Have you Fully Disclosed the Terms in Writing in a Manner that can be Reasonably Understood by the Client?**

- If “yes,” proceed to question 11.
- If “no,” make the full disclosure.

### **11. Does your Letter Advise the Client of the Desirability of Seeking and Give the Client a Reasonable Opportunity to Seek the Advice of Independent Counsel on the Transaction?**

- If “yes,” proceed to question 12.
- If “no,” work on the letter some more, and repeat this question.

### **12. Has the Client, in a Writing Signed by the Client, Given Informed Consent to the Essential Terms of the Transaction and Your Role in the Transaction, Including Whether you are Representing the Client in the Transaction?**

- If “yes,” you have complied with ORPC 1.8.
- If “no,” work on the letter some more, and repeat this question.

© Peter R. Jarvis, Mark J. Fucile, and Bradley F. Tellam. All Rights Reserved. Reprinted with Permission.

## IMPORTANT NOTICES

This material is provided for informational purposes only and does not establish, report, or create the standard 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. © 2021 OSB Professional Liability Fund