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Jarvis, Mark J. Fucile & Bradley F. Tellam</p> <p>Eleven different Oregon Disciplinary Rules ('DRs') require an attorney who wishes to take certain actions to obtain client consent based on full disclosure.¹ All of these sections point to the definition of 'full disclosure' in DR 10-101(B):</p> <p>(1) 'Full disclosure' means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent.</p> <p>(2) As used in DR 5-101, DR 5-104, DR 5-105, DR 5-107, DR 5-109, or when a conflict of interest may be present in DR 4-101, 'full disclosure' shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing. Three things should be obvious. First, the DRs require disclosure to protect clients. Attorneys are their clients' fiduciaries and owe their clients duties of reasonable care and undivided loyalty. See, e.g., OSB Legal Ethics Op Nos 1991-95, 1991-76, 1991-33, and 1991-26. For the most part, the circumstances under which full disclosure is required are those in which there is reason to believe that an attorney's own interests may diverge from the client's interests or that the interests of multiple current or former clients of an attorney may be inconsistent. In such circumstances, it is appropriate for potentially affected clients to be given a choice about what they do and do not want.</p> <p>Second, attorneys whose actions fall under a DR that requires client consent after full disclosure and who do not comply with DR 10-101(B) are subject to discipline. Although it may be a matter of mitigation, it is no defense that the lawyer did not understand that a client waiver was necessary or that the client was not actually injured. See, e.g., In re Altstatt, 321 Or 324, 330, 897 P2d 1164 (1995) (attorney failed to make required full disclosure when he did not contemporaneously confirm any of his disclosures in writing).</p> <p>Third, and quite apart from the matter of discipline, attorneys who do not make full disclosure to clients when required to do so are far more likely to be sued and may well have the added burden of defending against a breach-of-fiduciary-duty claim. The defendant's burden in a breach-of-fiduciary-duty context may be significantly higher than in a simple negligence-malpractice case. Cf. OSB Legal Ethics Op No 1991-95.</p> <p>This article reviews the general logic of conflicts-waiver letters. Attorneys who write good conflicts-waiver letters help their clients and themselves.</p> <p>DISCLOSURE AND CONSENT IN GENERAL</p> <p>The Components of the Definition</p> <p>1. DR 10-101(B)(1). DR 10-101(B)(1) provides: 'Full disclosure' means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent.' This language was borrowed in significant part from the definition of 'consult' or 'consultation' in the ABA Model Rules (1983). The drafters of the Oregon rule also believed, however, that their definition of 'full disclosure' was largely consistent with what the Oregon Supreme Court and other state courts had required of lawyers in prior conflicts cases.² See, e.g., In re Germundson, 301 Or 656, 661, 724 P2d 793 (1986); In re Montgomery, 297 Or 738, 741-42, 687 P2d 157 (1984); see also In re Brandt/Griffin, 331 Or 113, 135-36, 10 P3d 906 (2000).</p>	<ul style="list-style-type: none"> Public Legal Info Main Page Popular Legal Topics Bankruptcy Family/Marriage Landlord/Tenant Traffic Additional Topics... Hiring A Lawyer Lawyer Referral Service Online Referral Request Form Unlawful Practice of Law Problem With Your Lawyer? Client Assistance Office Client Security Fund Fee Arbitration Foreign Language Legal Information Español РУССКИЙ Tiếng Việt Nam Publications Juror Handbook — HTML Version — PDF Version Legal Issues for Older Adults Voting in Oregon Legal Info on TV LegalLinks Cable Show Public Volunteers Public Member Application Form

One way to think about DR 10-101(B)(1) is that it contains four overlapping requirements:

- The lawyer must give 'an explanation.' In other words, the lawyer who says nothing whatsoever to the client is subject to discipline even if the client fully understands what the lawyer is doing. Cf. In re Brandt/Griffin, 331 Or at 137.
- The explanation must be 'sufficient to apprise the recipient.' This means that less sophisticated or less knowledgeable clients will require more disclosure. Cf. Restatement (Third) of the Law Governing Lawyers §122 (2000) ('Restatement'). Although one might think that the word 'sufficient' implies that the disclosure is adequate so long as the actual recipient understands what is being said, some commentators believe that In re Brandt/Griffin holds that a subjective approach is inadequate and that the test is whether a reasonable recipient would have understood the message. In our opinion, this is not the preferred reading of In re Brandt/Griffin, because the court in that case also found that the accused lawyers made material misrepresentations and concealed material facts. 331 Or at 137-39. So construed, the case may hold that disclosure is inadequate only when it contains material misrepresentations or conceals material facts. We submit that disciplining lawyers whose clients subjectively do 'get it' based upon wholly truthful disclosures, just because a hypothetical client might not have 'gotten it,' is inconsistent with the purposes underlying the requirements of full disclosure.³
- The appraisal must be about 'the potential adverse impact on the recipient.' It is not enough for a lawyer simply to tell the client what the lawyer proposes to do. The lawyer must also tell the client why the client might care about what the lawyer proposes to do or about the downside of giving consent. Is there, for example, a risk that the client's confidences or secrets may be improperly used or disclosed to another? Is there a risk that the client's own interests will be less than maximally represented due to the lawyer's own interests or due to the lawyer's potential duties to other clients? To give effective consent, the client has a right to know what these potential impacts are. Cf. Restatement §122.
- The disclosure must concern 'the matter to which the recipient is asked to consent.' The disclosure need not be about issues unrelated to the conflict for which a waiver is being sought.

2. DR 10-101(B)(2). DR 10-101(B)(2) provides:

As used in DR 5-101, DR 5-104, DR 5-105, DR 5-107, DR 5-109, or when a conflict of interest may be present in DR 4-101, 'full disclosure' shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing. The writing requirement exists to protect the client, the attorney and the bar. The client is protected because the existence of the letter is more likely to bring home the importance of considering the matter carefully than is a mere verbal discussion. The attorney is protected because documentation will exist that shows disclosure has been made and consent obtained. The bar is protected because disciplinary proceedings should be rendered less complex (or perhaps not necessary at all) to the extent that the bar can focus directly upon the presence or absence of an effective disclosure and consent letter. Cf. Restatement §122.

The broad definition of 'full disclosure' contained in DR 10-101(B)(1) was written with matters such as multiple-client conflicts under DR 5-105 or conflicts between attorney and client under DR 5-101 or DR 5-104 in mind. This broad definition, and the related written-confirmation requirement, is clearly appropriate and must be followed in circumstances involving conflicts. It makes little sense to say, however, that an attorney who advises a client to waive the attorney-client privilege during a routine deposition or a more typical business negotiation in which no conflict of interest is present must go through the same process to the same degree (i.e., recommending that the client seek independent legal advice and preparing a contemporaneous written confirmation) just because the phrase 'full disclosure' appears in DR 4-101. That is why the requirement of contemporaneous writing and independent counsel recommendation in DR 10-101(B)(2) is more limited in scope. Cf. The Ethical Oregon Lawyer §7.6 (OSB CLE 1991 & Supp 1998) ('EOL'); In re Brandt/Griffin, 331 Or at 137 (treating separately duty to make disclosure and duty to recommend counsel).

Warning: Disclosure and Consent Letters Are Not a Panacea

Even with consent based on full disclosure, an attorney may not represent multiple

current clients if doing so would result in an actual conflict. See, e.g., DR 5-105(A) (1)-(2), 4 (E), (F); 5 EOL §§12.7-.16 (OSB CLE 1991 & Supp 1998). Similarly, DR 5-101(B) absolutely prohibits attorneys from drawing instruments for nonfamily members that provide for substantial gifts to the attorneys or the attorneys' family members. See also *In re Carey*, 307 Or 315, 767 P2d 438 (1989) (suggesting, albeit in dicta and without consideration of text of DR 5-101(A), the existence of additional per se prohibited category under DR 5-101(A)).⁶ The point is that unless the DRs provide an applicable disclosure and consent exception, an attorney who proceeds even with consent based upon full disclosure is still subject to discipline.

CAVEAT: Attorneys facing potential issues under DR 5-104(A) should also review Form DR5 of the PLF Plan. See EOL §11.12 (OSB CLE 1991 & Supp 1998).

Nevertheless, it Is Better to Be Safe than Sorry

On the other hand, it is never a disciplinary offense to send a disclosure and consent letter or a nonrepresentation letter.

Most attorneys have at least heard of or been concerned about instances such as the following: A potential client comes in to seek advice about a possible representation or discusses a legal matter briefly with an attorney at a cocktail party. For whatever reason, the attorney does not take the case, and the potential client does not do anything to protect his or her rights until after the statute of limitations has run. The potential client then retains another attorney, who decides to sue the first attorney for malpractice on the ground that the first attorney had agreed to undertake the representation and then did nothing, had expressly or impliedly advised the potential client that he or she had no case when in fact there was a viable case, or, at a minimum, had failed to inform the potential client that he or she needed to look elsewhere for representation. However frivolous they may seem, such cases can be lost by attorneys who do not protect themselves. Cf. EOL §6.3 (OSB CLE 1991 & Supp 1998). Because the modern test for the existence of an attorney-client relationship is the so-called reasonable-expectations test and because this test can sometimes lead to an attorney 'acquiring' clients that the attorney did not expect or intend to have, the best means of defense against such possibilities is for the attorney to write a nonrepresentation letter. See *id.*

Similarly, there are some situations involving the simultaneous representation of multiple clients in which the possibility of a conflict is sufficiently remote or theoretical that the disclosure and consent process is not triggered. See, e.g., EOL §§12.14-.16. Suppose, however, that a conflict subsequently does develop. The attorney who has not made full disclosure and obtained client consent at the outset may find that the bar or the Oregon Supreme Court takes a different view of the time at which the conflict became reasonably apparent⁷ and may therefore impose discipline. See *In re Moore*, 299 Or 496, 507, 703 P2d 961 (1985). An early disclosure and consent letter helps defend against this risk. It also protects against the potential for procrastination by an attorney if a conflict later develops and the attorney is unsure of what to do and when to do it. Finally, an early disclosure and consent letter gives the attorney something to refer back to if a conflict does develop, because it allows the attorney to use the letter to explain why the attorney must cease representing some or all of the clients. Clients are less likely to be shocked and are probably less likely to report an attorney to the bar, if the attorney alerted them to the risks and consequences of conflicts at the outset.

GUIDELINES FOR DISCLOSURE AND CONSENT LETTERS

Send the Letter Contemporaneously

There are times when an attorney must begin work on a matter without delay and when the writing of a disclosure and consent letter will be somewhat postponed. The drafters of DR 10-101(B) realized this, and DR 10-101(B) was intended to require only that disclosure and consent letters be sent fairly close to the time that the need for consent is recognized and verbal consent is obtained. Cf. *In re Jeffery*, 321 Or 360, 371, 898 P2d 752 (1995) ('consent' document signed by clients 'fell short in form, because the written consent was not obtained at the time the accused undertook the dual representation'); see also *In re Brandt/Griffin*, 331 Or 113 (four-day delay is still contemporaneous).

Attorneys should not unduly press the point, however. In addition, the verbal consent should not be delayed at all.

When in Doubt, Spell it Out

One can assert that technically speaking, the written-confirmation portion of DR 10-101(B)(2) requires that only "full disclosure" ... be contemporaneously confirmed

in writing' and not that any or all of the matters discussed between attorney and client actually be referenced in the writing. Nevertheless, an attorney who does not specifically address all significant matters in a disclosure and consent letter may be asking for trouble. Cf. *In re Brandt/Griffin*, 331 Or 113.

If nothing else, the failure to reference the major topics of discussion in the letter leaves it open for the recipient, the bar, or the Oregon Supreme Court to assert that a particular issue was not raised or was inadequately explained during the disclosure and consent process and that any consent is therefore invalid. It is also possible that the Oregon Supreme Court may hold in the future (as it arguably has in *In re Brandt/Griffin*) that if key issues are not included in the writing, the consent is not valid.

Get the Client to Sign a Copy of the Letter and Return It

Also technically speaking, DR 10-101(B)(2) requires only that the attorney send a contemporaneous letter to the client, confirming the disclosure and consent process.⁸ It is far better practice, however, to enclose an extra copy of the letter to the client with a space for the client's signature so that the client can then sign and return a copy to the attorney.

The obvious benefit to the attorney is that this process further establishes that the matter was actually drawn to the client's attention and that the client actually considered the matter. In addition, and from a fiduciary standpoint, forcing the client to read and sign the letter is a good way to make sure that the client knows what he or she is consenting to.

Avoid Using Waivers with Unsophisticated Clients

Although the DRs do not require any particular level of client intelligence before the disclosure and consent process can be used, attorneys should use the process with care and common sense. There is clearly a greater likelihood that unsophisticated clients will be able to argue successfully at a later time that they did not understand, and therefore should not be bound by, a consent that was based upon disclosure that they did not or could not understand.

Consequently, if a lawyer is attempting to obtain a waiver from a relatively unsophisticated client, the lawyer should consider increasing the scope and amount of disclosure accordingly.

Use Plain Language

As a corollary to the foregoing, attorneys should explain things in language that clients can understand.

Clearly Identify the Clients and Issues Involved and the Consent Sought

If, for example, consent is being sought to represent a current client against a former client, the letter should identify the current and former clients and should clearly state that the attorney proposes to represent one against the other in a particular type of matter (e.g., negotiation of a contract, the pursuit of a collection action, the filing of marital dissolution proceedings). EOL §12.17 (OSB CLE 1991 & Supp 1998).

If what is involved is a conflict between a personal interest of the attorney and the client pursuant to DR 5-101, the attorney's personal interest should clearly be identified. EOL §11.14.

If what is involved is a joint business transaction between attorney and client, the letter should clearly identify the proposed participants, their proposed roles, the nature of the business to be undertaken and the like. It is risky to assume that the client knows all of these things and will always remember having known them if a dispute subsequently arises. *Id.*

Pursuant to OSB Legal Ethics Op No 1991-120, it is permissible in some circumstances to seek a blanket waiver of future conflicts. When a blanket waiver is sought, the attorney should be especially careful to delineate its intended scope in the disclosure and consent letter. See Restatement §122 cmt d.

CAVEAT: As is noted in OSB Legal Ethics Op No 1991-120, there are limitations on the use of blanket waivers that must be observed. Most specifically, a blanket waiver is unlikely to be held effective if the critical facts at the time that the

matter is similar, to be more effective in the critical days of the time that the consent or waiver is sought turn out to be materially different than they were at the time the consent or waiver was sought and obtained. In addition, there are certain categories of situations (such as actual conflicts between multiple current clients) in which consent is ineffective in any case. See *id.*

Explain How the Attorney's Separate Interests or the Interests of Other Clients May Adversely Affect the Client from Whom Consent Is Being Sought

Spelling out the nature of the potential adverse risks to the client in writing forces the attorney, as well as the client, to think about them. If the risks, once placed on paper, do not look palatable or like something that a client should be willing to accept, the attorney should seriously consider whether discretion may be the better part of valor. If, on the other hand, the attorney is subsequently called to account for the adequacy of disclosure and consent, a detailed letter is likely to be of greater assistance than a terse one.

In the case of a representation adverse to a current or former client pursuant to DR 5-105, at least two issues should always be discussed. One is zealotry: Is there a risk that the zealotry of an attorney's involvement on behalf of one client may be adversely affected by the interests of the attorney on behalf of the attorney's other current or former clients? If the attorney believes that there is a significant likelihood of diminished zealotry, the representation should, of course, not be undertaken. Even if the attorney is convinced that there is no such risk, however, this subject should be raised so that the client can review it to his or her own satisfaction. Cf. EOL §12.17.

Another potential risk that should be addressed in the context of a current- or former-client disclosure and consent letter is the risk of adverse use of client confidences and secrets. If, because of a prior or concurrent representation, the attorney would be in a position to use confidences or secrets of one client adversely to that client, any disclosure process that fails to identify this particular risk and the particular confidences or secrets involved is likely to be held invalid. Even if the attorney is convinced, however, that there is no material risk of an adverse use of client confidences or secrets, it is better to call the issue to the client's attention and let the client consider it.⁹

In fact, these two basic issues - zealotry and the risk of adverse use of client confidences or secrets - should probably be raised and discussed in all, or almost all, disclosure and consent letters. There are also some more specific risks or considerations that should probably be discussed in various situations:

1. In the event of a personal conflict under DR 5-101 or a business conflict under DR 5-104, it is essential to describe how, in practice and in principle, the attorney's specific interest could or might affect the attorney's exercise of independent professional judgment on behalf of the client. This matter should be called to the client's attention even if the attorney is convinced that there is no material risk. If the lack of any need for concern by the client is indeed obvious, the client will presumably agree. See EOL §11.14. This is especially important in a stock-for-fees situation. See, e.g., ABA Formal Ethics Op No 00-418 (2000).

2. If it is clear that a client will not be looking to the attorney for advice with respect to an attorney-client business transaction and thus that DR 5-104 might not apply at all, the letter should so state.

3. Although no one can predict the future, it often is advisable to refer to the possibility that additional conflicts may arise at a later time and to describe the possible effects of those conflicts. The letter could explain, for example, that if the interests of two jointly represented defendants in a civil case subsequently diverge, the attorney may have to withdraw from representing both and the clients may then be stuck with the bother and expense of obtaining new counsel. See, e.g., OSB Legal Ethics Op No 2000-158.

When Applicable, Address Joint-Defense Privilege Issues

Pursuant to OEC 503(4)(e), and consistent with the law in other U.S. jurisdictions, the attorney-client privilege applies somewhat differently when an attorney has several clients in a matter than when the attorney has only one. In the former instance, communications by one of the clients to or from the attorney are privileged as against the rest of the world but are not privileged as between the

clients. In other words, and at least absent an express agreement to the contrary, the attorney in such a situation cannot refuse to disclose to one client matters that are material to that client's representation and that are conveyed to the attorney by another client. See EOL §7.6. In addition, the privilege is likely to be of no help if the jointly represented clients subsequently have a falling-out and sue each other. See *id.*

These possibilities are somewhat counterintuitive and may not be expected by many clients. Attorneys in such situations should expressly disclose this exception to attorney-client privilege and make sure that it is documented in any disclosure and consent letters.

Consider Additional Special Limitations

It sometimes happens that attorneys can, and arguably should, take special steps or precautions to either obtain a client's consent or protect a client's interests. Suppose, for example, that a firm is seeking to obtain a former client's consent to a representation adverse to that former client in a matter-specific or information-specific situation. In addition to the normal requirements of the disclosure and consent process, the firm may wish to offer that it will not permit attorneys who worked on the former client's matter to work adversely to the former client in the new matter and will not permit attorneys who work on the new matter to review the former client's file.¹⁰

Alternatively, it may be that consent should only be sought, or will only be given, to handle a part of a matter: for example, consent could be sought to negotiate against a current client but not to litigate against that client if negotiations fail. Any such limitations should, of course, be included in the disclosure and consent letters.

Recommend Independent Counsel

Whenever DR 10-101(B)(2) applies, the recommendation to consult independent counsel is a necessary part of a disclosure and consent letter. See *In re Jeffery*, 321 Or at 371 (consent held insufficient because it did not contain recommendation to seek independent legal advice). To avoid hairsplitting at a later time, it is undoubtedly safer to write, 'I recommend that you consult independent counsel before consenting,' rather than, 'You should consider consulting independent counsel before consenting,' or 'You have a right to consult independent counsel before consenting.' There is no reason, however, that the letter cannot also state that whether the client ultimately chooses to make use of independent counsel is up to the client. See EOL §12.17.

A related question that sometimes arises is whether the recommendation to consult independent counsel must be contained in a letter that is written to independent counsel. Suppose, for example, that an attorney proposes to defend a client in an action brought by a former client of the attorney. Suppose further that the defense of the matter brought by the former client would create a matter-specific or information-specific conflict under DR 5-105(C). If the attorney seeks consent from the former client through counsel who has just brought the litigation on the former client's behalf, it would seem senseless to recommend that this counsel obtain a review by independent counsel.

Pending clarification on this point from the Oregon Supreme Court, however, the cautious attorney may prefer to write something like 'Pursuant to DR 10-101(B), I am also required to recommend that XYZ Corporation consult independent counsel before consenting. As independent counsel, I assume you will provide XYZ Corporation with that review.'

Make Sure That All Necessary Parties Are Sent Letters

In conflict situations concerning multiple former or current clients, for example, consent must be sought from all the clients - both those that an attorney is representing in a matter and those that an attorney is not. See, e.g., EOL §§12.6 (OSB CLE 1991 & Supp 1998), 12.17; OSB Legal Ethics Op Nos 1991-17, 1991-11. For example, even if you already have a 'blanket waiver' from the client whom you intend to oppose, you still need to obtain a waiver from the client whom you plan to represent.

In many cases in which multiple disclosure and consent letters are necessary, it is preferable to write separate, albeit substantially similar, letters to each client from whom consent is being sought. There are two related reasons for this. One is that there are often issues pertaining to the disclosure and consent process that should

be discussed with only one or the other of the clients (for example, matters pertaining to risks regarding the possible adverse use of confidential information). The second is that, as a practical matter, each client may feel he or she is better treated if separate letters are sent.

There are some situations, however, in which one common letter may be more appropriate. If, for example, several individuals approach an attorney at the same time and ask the attorney to represent them in forming a corporation so that they can do business together, it may well be more appropriate for the attorney to send one letter to all because all will be on equal footing. If, on the other hand, one of the individuals was a longtime client of the attorney and that client stands to be particularly affected by the proposed new representations, a separate letter should probably be written to each party involved.

CAVEAT: When a party to whom a letter is to be sent has counsel in that matter or in a significantly related matter, the letter must be sent to that counsel and not to the party directly. See DR 7-104(A)(1).

CONCLUSION

No one has yet been disciplined for writing a disclosure and consent letter in a circumstance in which a court later decides that no such letter was needed. Similarly, no one is likely to be disciplined for a letter that makes additional disclosures beyond the required minimum. If a disciplinary or malpractice claim is subsequently filed, any 'extra' disclosure may prove to be a welcome friend.

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ENDNOTES

1. The term 'full disclosure' is used in DR 2-107(A)(1) (divisions of fees), DR 4-101(B)(3) and (C)(1) (waiver of client confidences and secrets), DR 5-101(A) (personal conflicts between attorneys and clients), DR 5-104(A) (business relations between attorneys and clients), DR 5-105(A)(3) (issue conflicts), DR 5-105(D) (former-client conflicts), DR 5-105(F) (current-client conflicts), DR 5-106(C) (mediations), DR 5-107(A) (settling similar claims of multiple clients), DR 5-108(A) (avoiding influence by nonclients), DR 5-109(A) (conflicts of interest for former judges, arbitrators and law clerks), DR 5-109(B) (conflicts of interest for other former government employees), DR 6-102(B) (agreements to arbitrate lawyer-client disputes) and DR 7-101(D) (third-party opinion letters).

2. One of the authors of this article was also one of the drafters of Oregon DR 10-101(B).

3. On the other hand, the *In re Brandt/Griffin* court may also have held 'sufficient' to mean 'sufficient by itself' - i.e., without significant independent analysis or investigation by the client in which the lawyer plays no part.

4. DR 5-105(A) provides:

Conflict of Interest. A conflict of interest may be actual or likely.

(1) An 'actual conflict of interest' exists when the lawyer has a duty to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client.

(2) A 'likely conflict of interest' exists in all other situations in which the objective personal, business or property interests of the clients are adverse. A 'likely conflict of interest' does not include situations in which the only conflict is of a general economic or business nature.

(3) A conflict of interest is not present solely because one or more lawyers in a firm assert conflicting legal positions on behalf of different clients whom the lawyers represent in factually unrelated cases. If, however, a lawyer actually knows of the assertion of the conflicting positions and also actually knows that an outcome favorable to one client in one case will adversely affect the client in another case, the lawyer may not continue with both representations or permit the other lawyers at the same firm to

do so unless all clients consent after full disclosure.

5. DR 5-105(E) and (F) provide:

(E) *Current Client Conflicts-Prohibition.* Except as provided in DR 5-105 (F), a lawyer shall not represent multiple current clients in any matters when such representation would result in an actual or likely conflict.

(F) *Current Client Conflicts-Permissive Representation.* A lawyer may represent multiple current clients in instances otherwise prohibited by DR 5-105 (E) when such representation would not result in an actual conflict and when each client consents to the multiple representation after full disclosure.

6. We believe that this dictum in Carey does not reflect Oregon law and that it should not be followed in future cases. Cf. EOL §11.14 (OSB CLE 1991 & Supp 1998).

7. DR 5-105(B) provides: 'Knowledge of Conflict of Interest. For purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer.'

8. The decision not to require a client signature under DR 10-101(B) was a deliberate one. If a signed writing from the client were a necessary part of the process, an attorney would have to delay any work until that writing was received. Because such delays could be prejudicial to the client and because a good disclosure and consent letter can take some time to prepare, it was decided not to require a writing signed by the client.

The Washington State Bar Rules of Professional Conduct originally contained a requirement that the client consent in writing, but this provision was deleted for the reason noted above. See Washington Rules of Professional Conduct, definition of 'consents in writing.'

9. Once again, if there is a significant likelihood of a material adverse use of confidences or secrets, serious consideration should be given to not proceeding with the proposed representation.

10. For a general discussion of when screening is available to avoid disqualification or a DR violation, see EOL §12.21 (OSB CLE 1991) and OSB Legal Ethics Op No 1991-120.

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