July-August 2026 *Multnomah Lawyer Ethics Focus*

What Was Old Is New Again: New OSB Opinion on Advance Waivers

Mark J. Fucile
Fucile & Reising LLP

Advance waivers of future conflicts are not new. The first Oregon State Bar ethics opinion touching on advance waivers was issued in 1991. Similarly, the ABA released its first ethics opinion on advance waivers in 1993. The 1991 Oregon opinion has since been updated to reflect the current Oregon RPCs and was reissued as OSB Formal Opinion 2005-122. The ABA, in turn, withdrew its 1993 opinion when it revised the ABA Model Rules in the early 2000s and issued a replacement in 2005—ABA Formal Opinion 05-436.

While OSB Formal Opinion 2005-122 discusses advance waivers, it (and its 1991 counterpart) does so in the context of conflicts generally involving governmental clients. Late last year, the Oregon State Bar issued a new opinion—Formal Opinion 2025-206—squarely addressing advance waivers. The new opinion, along with its 2005 companion, are available on the OSB website. The 2005 opinion cites ABA Formal Opinion 05-436 while the new opinion does not. By contrast, the new Oregon opinion cites the comment to ABA Model Rule 1.7 on advance waivers—Comment 22—but the 2005 opinion does not. Here, we'll blend the Oregon opinions and the ABA guidance together to first survey the requirements for advance waivers and then their limitations. (The OSB also issued a companion opinion on using advance waivers with prospective clients that we'll look at in a future column.)

Requirements

The basic idea with an advance waiver is that the client is agreeing to waive conflicts before they actually arise. On a practical level, they offer law firms the ability to take on clients who might otherwise present conflicts with existing clients. They offer clients access to firms that might not be available without the assurance of an advance agreement on conflicts. A paradigm example is a law firm with special expertise that primarily represents technology start-ups that routinely negotiate against an industry leader. If the industry leader approached the law firm about an unrelated project, the law firm would be understandably reluctant to take on the work without an advance waiver in place allowing it to continue to represent its primary clientele.

Like any conflict waiver, the crux of an advance waiver is "informed consent," which is a defined term under Oregon RPC 1.0(g): "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct." Because a client is being asked to waive a conflict that has not yet occurred, the quality of the disclosure looms especially large. Comment 22 to ABA Model Rule 1.7, which is cited in the most recent Oregon opinion, puts it this way: "The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding."

Like Oregon conflict waivers generally, an advance waiver must include a recommendation that the client seek independent counsel on whether the waiver should be granted (under Oregon RPC 1.0(g)) and consent must be confirmed in writing (under Oregon RPC 1.7(b)(4)). Further, although an advance waiver permits a law firm to oppose the client involved if a conflict arises in the future, Oregon RPC 1.7(b)(4) also requires consent of the client the firm wishes to represent in the matter involved.

Templates for advance waivers are available on both the OSB and the PLF websites.

Limitations

The collective resources noted at the outset suggest four principal limitations on the use of advance waivers.

First, an advance waiver cannot waive a nonwaivable conflict. For example, a law firm could not use an advance waiver to represent both sides in the same litigation.

Second, while there is no "sophisticated user" requirement for advance waivers, the client granting one has to understand what they are waiving to provide the requisite "informed consent." Given that a client is being asked to waive something that, by definition, hasn't occurred yet, prudent law firms are appropriately wary about using advance waivers with clients who do not have significant legal sophistication. In short, what might be fine when dealing with an in-house legal department at a large corporation may not when dealing with the proverbial "Mom and Pop" store. For most firms, therefore, an advance waiver is an occasional practice management tool rather than a routine part of new client intake.

Third, ordinarily an advance waiver does not convey client consent to use the client's confidential information adversely. Because all multiple client conflict waivers under RPC 1.7(b) must involve unrelated matters, the risk of confidential information being used inappropriately is usually low. Depending on the sensitivity of the information, however, a sophisticated client may condition an advance waiver on the law firm voluntarily screening the work team handling its matter from those handling other matters against the client.

Finally, an advance waiver is limited to its terms. OSB Formal Opinion 2005-122 concludes (at 4-5): "Lawyer must be sensitive, however, to situations that were not contemplated in the original disclosure or that constitute nonwaivable conflicts. In the former situation, Lawyer would need to obtain informed consent of each affected client as to the new conflict. In the latter situation, Lawyer would have to decline representation in the new matter that gives rise to the conflict."

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and was a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also taught legal ethics for over a decade as an adjunct at the University of Oregon School of Law. Mark is admitted in Oregon, Washington, Idaho, Alaska and the

District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.