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**Nuts & Bolts:
Where to Look for Conflict Waiver
and Fee Agreement Templates**

Mark J. Fucile
Fucile & Reising LLP

Over the years in advising lawyers on conflicts and fee agreements, I discovered that while lawyers often have a good sense of when they need a template for a conflict waiver or a new fee agreement, they don't necessarily know where to look. Fortunately, Oregon lawyers have excellent resources readily available on both fronts. The Oregon State Bar recently revised its trusted treatise, *The Ethical Oregon Lawyer* (restyling it "Legal Ethics in Oregon" to address both lawyers and licensed paralegals), and it continues to feature a chapter dedicated to conflict waiver templates. The OSB also has a well-traveled *Fee Agreement Compendium* that has been updated multiple times since 1993 that includes templates for a wide variety of practice areas. Both are available in the "Bar Books" section of the OSB web site. The Professional Liability Fund's website largely mirrors these resources in its "Practice Aids" section.

In this column, we'll survey the OSB templates. Before we do, however, we'll briefly touch on why choosing the right template is so important.

Choosing the Right Template

Getting it right is critical for both conflict waivers and fee agreements.

With conflict waivers, the Oregon Supreme Court has long held lawyers to an exacting standard—with, for example, the Court noting in *In re Cobb*, 345 Or. 106, 135, 190 P.2d 1217 (2008), “that compliance with the letter of the rule is required.” Moreover, Oregon has a unique requirement when it comes to conflict waivers: they must include a recommendation that the client seek independent counsel regarding the waiver. Even an excellent template from another state, therefore, may not include this necessary ingredient. Speaking to this point in *Cobb*, the Supreme Court also recounted its own long history of finding waivers ineffective if they did not include all of the requirements of the applicable conflict rule. In other words, “close” isn’t good enough. In addition to the potential regulatory consequences of having an unwaived conflict, it is also important to remember that under *KAO v. Ferguson*, 315 Or. 135, 843 P.2d 442 (1992), the conflict rules reflect a lawyer’s underlying fiduciary duty of loyalty to clients. While every conflict will not lead to a civil damage claim for breach of fiduciary duty, the risk cannot be discounted outright in any given instance.

With fee agreements, the primary risk is having a contract that is unenforceable. In *Bechler v. Macaluso*, 2010 WL 2034635 (D. Or. 2010) (unpublished), for example, a California lawyer unfamiliar with Oregon’s requirements for contingent fee agreements under ORS 20.340, had his

contingent fee held unenforceable for failure to meet those mandatory standards. Although a lawyer in that circumstance may still be able to recover using a quantum meruit standard under *Robinowitz v. Pozzi*, 127 Or. App. 464, 872 P.2d 993 (1994), the lawyer loses the certainty that a well-drafted fee agreement provides.

Conflict Waivers

Conflict waivers are not typically something that most lawyers run into every day. When waivers are needed, however, they must be obtained to proceed. Further, as noted earlier, waivers also need to meet the letter of the law. Chapter 20 in the newly renamed Legal Ethics in Oregon includes a helpful overview of the key considerations with conflict waivers (including whether they are available in the first place in a given situation), check-lists to assist in the process of determining what kind of conflict is involved, and downloadable templates. The templates range from multiple client conflicts to forms addressing conflicts between the personal or business interests of the lawyer or law firm involved.

All waivers are predicated on the “informed consent” of the clients concerned. Inevitably, the information necessary for the lawyer to discuss with the client (and prudently, memorialize in the waiver) will vary with the

circumstances. A lawyer using the OSB templates, therefore, plays a critical role in discussing the positives and negatives of granting the waiver that are specific to the situation at hand so that any client consent granted will be truly informed. The OSB templates then provide the lawyer with a venue to memorialize the factors involved in a particular case within a document that meets the technical requirements of the Oregon RPCs.

Fee Agreements

Most lawyers in private practice are generally familiar with fee agreements. At the same time, newer lawyers may not have a library of “tried and true” forms and more experienced lawyers may not have templates specific to a new case or practice area. Further, templates have evolved over the years as law practice itself has changed. The OSB Fee Agreement Compendium blends explanations with templates in chapters that address general forms—such as hourly, contingent, and fixed—and templates tailored to specific practice areas—such as family, criminal, and probate.

Again, the lawyer-user plays a critical role. Using a written fee agreement is required in a few areas (such as contingent fees) but is equally prudent beyond the required areas. Even the best template, however, will be less effective if the client claims later they didn’t understand what they were signing. Coupling an

appropriate template with a thorough explanation will usually lead to an enforceable agreement that will guide both lawyer and client through a representation.

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.