

FORMAL OPINION NO 2025-206

Advance or Prospective Waivers of Conflicts of Interest

Question 1:

Lawyers *A* and *C* are partners at Firm *ABC*. Firm *ABC*'s practice is to seek an advance conflict waiver from a client at the start of representation, providing informed consent in writing about future conflicts. Lawyer *A* obtains such an advance conflict waiver from Client *X* and begins representing Client *X* in making a claim against real property.

During the representation of Client *X*, Lawyer *A* discovers that Client *Y*, a current client of Firm *ABC*, is represented by Lawyer *C* and owns the real property at issue. Lawyer *C* represents Client *Y* on legal issues unrelated to both the real property and the dispute with Client *X*. Client *Y* also signed an advance conflict waiver with Firm *ABC* for future representations. Client *Y* has retained a lawyer outside of Firm *ABC* to represent Client *Y* in the dispute with Client *X*.

May Lawyer *A* continue the representation of Client *X* in the property dispute matter?

Question 2:

Lawyer *F* begins representation of Client *S*. As part of the representation, Client *S* provides informed consent in writing and agrees to waive any future conflicts that may arise, and Lawyer *F* agrees not to utilize any of the information obtained in the course of representation of Client *S* to the benefit of a future client and/or to the detriment of Client *S*. Lawyer *F* successfully completes the representation.

A year later, Lawyer *F* represents Client *T*, and he notices that former Client *S* is a potential witness for the opposing party in the case.

May Lawyer *F* continue the representation of Client *T*?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.

Discussion:

Conflicts of interest arise out of a lawyer's duty of loyalty to a client. Nothing in the Oregon Rules of Professional Conduct (RPCs) prohibits requesting and obtaining a blanket or advance waiver so long as the lawyer adequately explains the material risks and available alternatives.¹ More specifically, if the requirements for waiver by a client are met under the RPCs, then a prospective or advance waiver of conflict is, in general, permissible.

Question 1:

Firm *ABC*'s representation of Client *X* in a matter directly adverse to Client *Y*'s interests gives rise to a conflict of interest under Oregon RPC 1.7(a).² Conflicts arising under RPC 1.7(a) are generally waivable under RPC 1.7(b) so long as

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

¹ See OSB Formal Ethics Op 2005-122.

² Conflicts of interest are imputed between lawyers at the same firm under RPC 1.10; see also OSB Formal Ethics Op 2005-128 (rev 2016) (addressing imputation of client conflicts of interest).

(4) each affected client gives informed consent,³ confirmed in writing.⁴

To determine whether Firm *ABC* can rely on the advance waivers signed by Clients *X* and *Y*, the firm must analyze whether all the requirements of RPC 1.7(b) have been met. This analysis necessarily takes into account the nature of the representation, the potential risks to the clients and their confidential information, the legal sophistication of the affected clients, and the language of the advance waiver.⁵

The advance waivers obtained in Question 1 are potentially enforceable. Lawyer *C*'s representation of Client *Y* does not relate to Lawyer *A*'s representation of Client *X*, even

³ Oregon RPC 1.0(g) defines informed consent as follows:

“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 of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

New York State Bar Association Ethics Opinion 990, <https://nysba.org/wp-content/uploads/2013/11/Opn-990.pdf>, also addresses informed consent. The opinion states that “Whether each affected client can give informed consent to a future conflict depends on the extent to which the lawyer is able to explain adequately the material risks of the proposed course of conduct and reasonably available alternatives, and on the sophistication of the client.” The opinion notes, among other things, that as a part of meeting the required ethical obligations, the lawyer should consider factors including but not necessarily limited to whether the client is likely to understand the content and implications of the lawyer’s disclosures, the client’s experience in dealing with lawyers, the steps to be taken to protect or limit harm to each client, the scope of the future waiver being sought, and whether the client is independently represented by in-house or outside counsel in deciding whether to waive the conflict.

⁴ RPC 1.7(b).

⁵ See Mark Kimball Blongewicz, *Looking into the Crystal Ball; Advance Waivers of Future Conflicts*, 84 Okla Bar J 2645 (2013); see also DC Bar Ethics Op 309 (2001), <https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-309> (“The changes in the Model Rules recommended by the ABA Ethics 2000 Commission include a comment on the subject of advance conflict waivers. Commission on Evaluation of the Rules of Professional Conduct, Report to House of Delegates (May 2001 rev.) (“Ethics 2000 Report”), prop. Model Rule 1.7, comment [22]), available at www.abanet.org/cpr/e2k-report_home.html. The general test of such a waiver is ‘the extent to which the client reasonably understands the material risks that the waiver entails.’ *Id.* This in turn depends on the completeness of the explanation of possible conflicts and the ‘actual and reasonably foreseeable adverse consequences’ of such conflicts. *Id.*”) (Footnote omitted.).

though Client *X* and Client *Y* are directly adverse in Client *X*'s matter, the representation is not prohibited by law, and there are no facts that would lead us to believe that either Lawyer *A* or Lawyer *C* could not provide competent and diligent representation to their respective clients despite the conflict.

However, additional analysis is necessary. Logically, as to waivers generally, and particularly advance waivers, the greater the scope of the advance conflict waiver, the greater the amount of disclosure needed to adequately inform the client. Advance conflict waivers should be no broader than needed in the particular situation.⁶ Identifying and including as much specificity as possible regarding the circumstances of potential future conflicts should increase a practitioner's ability to obtain an enforceable advance conflict waiver.

Counsel should also provide the client with the basis for the lawyer's belief that they will be able to provide "competent and diligent" representation under the circumstances presented. If there is a possibility that future events might render the lawyer unable to continue the multiple representations, counsel's disclosure should indicate that in such circumstances they would have to withdraw from the representation absent further consent from the affected clients.⁷ Lawyers should also recommend that their clients seek independent legal advice and discuss alternatives before consenting to the advance conflict waiver. The clients may or may not follow this recommendation. Where the client is an entity working with the lawyer through its in-house counsel, this recommendation is not necessary.

Case law also suggests a client with a high degree of business and legal sophistication is much more likely to be able to give a suitably and sufficiently informed advance conflicts waiver⁸ than, for example, many criminal defendants and family law clients (e.g., clients that may not have a high degree of business and legal sophistication). This makes sense because a sophisticated client is more likely to understand both what the client is in fact waiving and how that waiver might affect the client in the future.

⁶ *The Ethical Oregon Lawyer* ch 20 (OSB Legal Pubs 2015).

⁷ See David H. Dugan III, Practical Skills Series: Manual on Legal Ethics, III.A. (NJ Inst for Continuing Legal Educ 2014), available at <https://njsba.com/legal-ethics-skills-3-volume-set-practical-skills-series>; Blongewicz, *Looking into the Crystal Ball*.

⁸ See Peter Jarvis et al., *A 'Safe Harbor' for Future Conflicts Waivers*, ABA/BNA Lawyers' Manual on Professional Conduct, Vol 29, No 13 (June 19, 2013) (noting that legal sophistication is different from business sophistication); *Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC*, 927 F Supp 2d 390 (ND Tex 2013).

Question 2:

A similar analysis is required for Question 2. Here, Lawyer *F* must first determine whether a conflict of interest exists. Since Client *T* is a former client of Lawyer *F*, Lawyer *F* must analyze whether a conflict arises under Oregon RPC 1.9.

If the representation gives rise to a conflict under RPC 1.9, Lawyer *F* may proceed only if they have obtained informed consent in writing from each affected client. To determine if the advance waiver signed by Client *T* satisfies this requirement, Lawyer *F* should consider the same factors discussed above with regard to Question 1.

Approved by the Board of Governors, November 2025.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 20 (OSB Legal Pubs 2015) (conflicts-waiver letters); *Restatement (Third) of the Law Governing Lawyers* § 19 (agreements limiting lawyer duties), § 122 (client consent to conflict) (2000).

