## **Letter 1**

Letter to Client with Potential Malpractice Claim Against Attorney

## **Letter 2**

# Letter to Client with Potential Malpractice Claim Against Attorney Where Attorney Requests Withdrawal

NOTE: Use in conjunction with the “Checklist for Potential Malpractice Claim Against Attorney.”

**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. © 2023 OSB Professional Liability Fund

**Letter 1 – Letter to Client with Potential Malpractice Claim Against Attorney (See Checklist for Potential Malpractice Claim Against Attorney)**

# Do Not Use This Form If Non-Waivable Conflict Exists

Determination of whether continuing as counsel or withdrawing in this situation is very dependent upon the unique facts of each situation. Before using this form as the basis for a letter to the client, the lawyer should analyze the particular facts giving rise to the conflict and is strongly encouraged to consult with a Claims Attorney at the Professional Liability Fund and/or private ethics counsel. In addition, while this form is a template intended to cover the basics, it is essential the letter be customized to fit the facts and circumstances giving rise to the need for the letter.

# DISCLAIMER: Every situation is different and there is no one form that is applicable in every situation. This form is designed only as an instructive guide but it does not, and cannot, replace consultation with a private ethics lawyer and/or a Claims Attorney at the Professional Liability Fund.

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<**Name**>

<**Address**>

<**Email**>

Re: Personal Conflict of Interest Disclosure

<**Case Caption/Case No.**> [or other identifying matter information]

Dear <**Name**>:

As you know, I currently represent you in <**describe action taken on client’s behalf or scope of representation, e.g., bringing an action for breach of contract**>. I am writing now to confirm our recent discussion wherein I advised you of the following facts relevant to your legal matter: <**provide brief description of relevant facts that may give rise to an alleged error, e.g., the running of the applicable statute of limitations**>. In addition, I advised you that you may have a claim against me for <**describe alleged act or omission that may have been faulty, e.g. failing to timely file the complaint**>.

The purpose of this letter is to explain the personal interest conflict of interest that has now arisen for me and to seek your consent to my continuing to represent you in this matter despite the allegation that I may have made an error. I am not, however, asking you to waive any claim you may have against me <**or my firm**>.

The Oregon Rules of Professional Conduct (ORPCs) prohibit an attorney from representing a client when the attorney’s personal interests conflict with those of the client’s, unless the client consents after being informed of the nature of the conflict, the risks involved and possible alternatives to providing consent. Consequently, I can continue to act as your lawyer in this matter only if you give your informed consent, confirmed in writing.

Clients that are asked to waive or consent to personal conflicts typically should consider whether their attorney’s professional judgment will be materially limited by their own personal interest in the matter due to the potential claim against them. For example, in your matter you might be concerned that I will pursue or avoid certain strategies in order to protect my own interests, or that my continued representation of you could or might affect the “zealousness” or eagerness with which my firm and I continue to represent you. Finally, you should consider whether or not my ability to protect your confidential client communications will be impaired in any way by my desire to protect my own interests.

Although I believe these risks are minimal, you must necessarily decide this for yourself.

Alternatives to consenting to my continued representation include, but are not limited to, seeking replacement counsel or representing yourself. [**Consider if there are other obvious alternatives in a given matter, such as retaining counsel on a limited scope to monitor and advise the client.**]

When you and I spoke, you made it clear that you want me to continue as the attorney acting on your behalf. Nevertheless, the ORPCs require me to recommend that you consult independent counsel to determine whether consent should be given, and I encourage you to do so. You are not obligated to consult such counsel if you do not wish to do so, however. The choice is yours.

I am happy to discuss this matter further with you or an attorney of your choosing. If you decide to consent to my continued representation of you, please sign the enclosed copy of this letter and return it to me for your file. Thank you.

Very truly yours,

# <Attorney>

**I hereby consent to the representation set forth above:**

<**Client**>

Dated:

# Letter 2 – Letter to Client with Potential Malpractice Claim Against Attorney Where Attorney Requests Withdrawal (See Checklist for Potential Malpractice Claim Against Attorney)

This form may be appropriate when a lawyer has concluded he/she/they may have committed an error in the representation, the client may have a claim against the lawyer as a result of the error, and/or the lawyer intends to withdraw from the representation either because the error has created a nonwaiveable conflict of interest under ORPC 1.7(b), the conflict is waivable under ORPC 1.7(b) but the lawyer chooses not to seek a waiver from the client to continue the representation, or because the client may be better served with alternate counsel going forward.

Determination of whether continuing as counsel or withdrawing in this situation is very dependent upon the unique facts of each situation. Before using this form as the basis for a letter to the client, the lawyer should analyze the particular facts giving rise to the conflict and is strongly encouraged to consult with a Claims Attorney at the Professional Liability Fund and/or private ethics counsel. In addition, while this form is a template intended to cover the basics, it is essential the letter be customized to fit the facts and circumstances giving rise to the need for the letter.

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<**Name**>

<**Address**>

<**Email**>

Re: Personal Conflict of Interest Disclosure Withdrawal from Representation

<**Case Caption/Case No.**> [or other identifying matter information]

Dear <**Name**>:

As you know, I currently represent you in <**describe action taken on client’s behalf or scope of representation, e.g., bringing an action for breach of contract**>.

I am writing now to confirm our recent discussion wherein I advised you of the following facts relevant to your legal matter: <**provide brief description of relevant facts that may give rise to an alleged error, e.g., the running of the applicable statute of limitations**>.In addition, I advised you that you may have a claim against me for <**describe alleged act or omission that may have been faulty, e.g. failing to timely file the complaint**>. As a result, and as we have discussed, a personal interest conflict of interest has now arisen because you may have a claim against me.

Due to the conflict of interest identified above, I do not believe I should continue as your attorney in this matter. There are two ways to accomplish my withdrawal from your representation:

1. You can retain new counsel to take over and substitute as counsel for me; or
2. I can file a motion to withdraw for the court to consider. If the court grants the motion, you will be without representation until you retain new counsel.

In general, the transition is smoother for the client (you) if the client (you) first retains counsel and there is an orderly substitution. Unless required by the court, no motion will generally need to be filed and there will be no gap in your representation. If you would like to proceed in this fashion, we need to have the substitution of counsel completed by <**enter date**>. If it is not completed by then, I will file the enclosed motion and order to withdraw as counsel. I will forward to you a copy of the order granting our withdrawal when I receive it.

# Explain the status of the matter, whether there is a relevant statute of limitation, and/or any pending motions, deadlines, trial dates, or other significant events that could affect the litigation going forward.

**If client has confirmed retention of new counsel:**

This will confirm you have retained <**Attorney**> to represent you going forward in this matter and that you <**do/do not**> consent to my speaking with <**him/her/them**> about your matter. We will cooperate with successor counsel to effect a substitution of counsel and to ensure an orderly transfer of files. Please have your new attorney contact me to accomplish the substitution. I have informed opposing counsel and indicated that <**he/she/they**> should contact your new lawyer directly.

# If client has not retained counsel:

We encourage you to seek alternate counsel as soon as possible who can protect your interests in this matter. If you have not located counsel, you can contact the Oregon State Bar Lawyer Referral Service for options. They can be reached online at [https://www.osbar.org/p](http://www.osbar.org/public/ris/lrsform.html)ublic[/ris/lrsform.ht](http://www.osbar.org/public/ris/lrsform.html)ml, by phone locally at 503-684-3763, or toll-free in Oregon at 800-452-7636. I have instructed opposing counsel you will represent yourself going forward and that <**he/she/they**> can contact you directly. Please let me know right away if you retain new counsel so I can let opposing counsel know to contact your lawyer instead. Also, if you do retain new counsel before <**enter date**>, have him/her/them contact me to arrange for substitution.

If you wish to initiate a claim against me, you can do so by contacting my professional liability carrier, the Oregon State Bar Professional Liability Fund, at 503-639-6911 or 1-800-452-1639 (toll-free in Oregon). Additionally, I encourage you to discuss all issues related to a possible claim against me with your new attorney. Because of the conflict between my interests and yours with respect to your possible claim, I cannot give you any legal advice about those issues.

# When there is an outstanding trust balance:

Please find enclosed an accounting on your matter, reflecting a trust account balance of <**$$$$**>. I have enclosed a check for the remaining trust balance.

# When there is an outstanding balance due on the account, the lawyer may choose to not seek payment given the circumstances of the conflict. If the lawyer, however, chooses to seek payment:

Please find enclosed a final invoice on your matter, reflecting a total amount of fees and costs due of <**$$$$**>. This amount is now due and payable and I request that you make a prompt payment for the services rendered.[[1]](#footnote-1)

Please contact me if you have any questions.

Very truly yours,

<**Attorney**>

1. A lawyer may write off a balance due, or resolve a dispute as to remaining trust funds, by requesting the client release the lawyer from any potential claims of liability. In doing so, the lawyer should be mindful of ORPC 1.8(h)(2), which provides that a lawyer shall not “settle a claim or potential claim for [liability to a client for malpractice] with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.” Nonetheless, a lawyer should consider consulting private ethics counsel or a Claims Attorney at the Professional Liability Fund before requesting payment in such a situation. [↑](#footnote-ref-1)