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Setting-Up Shop, Part 2: Top 10 Ethical Nuts & Bolts of Starting Your Own Firm

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Last month we began a two-part series on the ethical nuts and bolts of starting your own firm. In the first half of the Top 10, we looked primarily at transition issues associated with leaving your old firm. In this second half, we'll discuss creating a solid risk management foundation for your new firm. As with last month's topics, each of the points addressed this month is examined in more detail in my chapter on law firm organization and management in the Oregon State Bar's *Ethical Oregon Lawyer*.

6. **Conflicts and Conflict Systems.** When a lawyer leaves one firm and founds another, the old firm's clients who do not come with the lawyer become the lawyer's former clients for conflict purposes under RPC 1.9. The former client conflict rule allows the new firm to oppose those former clients as long as it does not involve the same or a substantially related matter that the lawyer worked on for those former clients or would not involve using a former client's confidential information against it. When you first open your doors, conflict checking may seem easy because you might not have that many clients. As business develops, however, you will soon need a conflict checking system. There are several software programs available from major vendors. The key is to have one. Conflict systems are a cornerstone of law firm risk management. In

fact, the Oregon Supreme Court disciplined a lawyer last year in *In re Knappenberger*, 338 Or 341, 355-56, 108 P3d 1161 (2005), for failing to have an adequate conflict checking system.

7. **Staffing.** Under RPC 5.3, lawyers are responsible for training law firm staff on the firm's ethical obligations. Similarly, partners and other senior lawyers at a firm are responsible for supervising the ethical conduct of junior lawyers at the firm. In recent years, contract lawyers who work with a firm on a temporary or other project-specific basis have become a common fixture for law firms big and small as they try to balance staffing imperatives with overhead. ABA Formal Ethics Opinions 88-356 and 00-420 discuss both the use of and billing for contract lawyers at length. Although RPC 1.0(d) excludes temporary lawyers from the definition of "firm," contract lawyers are subject to the same confidentiality and conflict rules governing other lawyers and can generally be included in a law firm's bill along with other lawyers without triggering the fee split requirements of RPC 1.5(d).

8. **Engagement Letters.** Part of competently representing clients and good law firm risk management is explaining to clients the scope of a given representation, how your fee will be calculated and how your rate may change over the course of a matter. Engagement letters offer a great venue for accomplishing all of these objectives. Developing and using a standard

engagement letter, therefore, is an important element of a new law firm's ethical infrastructure.

9. **Calendaring Systems.** Like conflict systems, docket programs that calendar due dates and generate reminders are another key piece of a law firm risk management. Again like conflict systems, several docketing software programs are available from major vendors. And, again like conflict systems, conscientiously using the calendaring program is as important as having one in the first place.

10. **Billing and Trust Accounts.** RPC 1.5 outlines our professional obligations in setting and communicating fees. Providing timely and accurate bills to clients plays a central role in meeting those professional obligations. It's also good business because it enhances the likelihood of being paid. Like conflict and calendaring systems, several major vendors offer time-keeping and billing programs. RPCs 1.15-1 and 1.15-2, in turn, require lawyers who handle client or third party funds to maintain a client trust account. Several OSB ethics opinions, including 2005-117, 2005-151 and 2005-172, address various elements of using trust accounts, including, most importantly, the need to segregate the lawyer's funds in a general business account from client funds in a client trust account. Most major banks in Oregon offer client trust accounts for lawyers.

There are many other pieces to building your own firm ranging from telephones to web sites to health insurance. The ethical nuts and bolts

described in the past two columns, however, provide a solid foundation on which to build the rest of your new firm.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.