

October 2004 *Multnomah Lawyer Ethics Focus*

## **Deja Vu All Over Again: OSB Considers New Ethics Rules**

**By Mark J. Fucile  
Fucile & Reising LLP**

At its annual meeting on October 16, the Oregon State Bar House of Delegates will consider adopting a new set of ethics rules patterned on the ABA's Model Rules of Professional Conduct. If this sounds familiar—it is. Reflecting the Yogi Berra quote in the column title, the House of Delegates approved a similar package of rule changes last year. The proposal, however, stalled on the steps of the Oregon Supreme Court. The OSB—with guidance from the Supreme Court—then retooled the specific elements of the package that gave the Supreme Court pause. The OSB's Board of Governors has approved the revised package and it is that version that the House of Delegates will consider later this month.

If approved by the House of Delegates and then by the Supreme Court, the current Oregon Disciplinary Rules would be replaced by new Oregon Rules of Professional Conduct. Although the DRs date to 1970, the change would be less sweeping in practical effect than you might think. At the same time, Oregon lawyers would gain the benefit in an era of increasing cross-border practice of having a set of rules that is closer in form and format to the rest of the country.

Let's start with some background. When the Oregon DRs were adopted in 1970 they were based on the ABA's then-current Model Code of Professional

Responsibility. Although some of our rules have been revised over the years, the ABA significantly reshaped its model format in 1983 with the adoption of the Model Rules of Professional Conduct and then updated those further in 2002. Since the ABA moved to its “Model Rules” format, over 40 states have followed and more are considering doing so. In light of this trend, the OSB Board of Governors appointed a special committee in 2001 to study whether changes were warranted to the Oregon rules. The committee issued a comprehensive report in January 2003 recommending that Oregon move to the “Model Rules” format. Although several twists and turns have followed since then, the proposal now on the table still includes the shift to the ABA Model Rules format and retains most of the substance of the original package that was proposed last year.

Although the new rules would *look* different, the *practical effect* would be much the same. In other words, a conflict under the old rules would still be a conflict under the new rules, the requirements for consent would be very similar and a lawyer’s duty of confidentiality would essentially be the same. So, why change? The OSB study committee initially took the approach that “if it ain’t broke, don’t fix it.” After reviewing the ABA’s Model Rules, however, it concluded that they would offer Oregon lawyers two major advantages over the current ones.

*First*, although the new rules retain the content of the old set, they recast them in form and format in a way that meshes better with the rest of the country. Several thousand OSB members are already members of other bars and our reciprocity partners Washington and Idaho both use the Model Rules. For lawyers whose practices take them across state lines, moving to a more uniform system will make life simpler. But, even for those lawyers whose work is solely in Oregon, the ability to draw on guidance from other jurisdictions using a similar set of rules shouldn't be understated.

*Second*, the new rules contain provisions we currently lack in Oregon that would bring additional clarity to several key areas including duties to prospective clients, spelling out who the client is when representing an entity and regularizing specific categories of temporary multijurisdictional practice.

The proposed rules are available on the OSB's web site at [www.osbar.org](http://www.osbar.org). On balance, the new rules would be a good fit for the practice environment that has evolved for Oregon lawyers since the DRs were adopted in 1970.

*Note: By way of "full disclosure," your columnist was a member of the OSB study committee that recommended the new rules.*

## **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.