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## Setting-Up Shop, Part 1: Top 10 Ethical Nuts & Bolts of Starting Your Own Firm

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A year ago this month, I set-up my own firm with my long-time trial partner and our paralegal. Before then, I had written the chapter for the Oregon State Bar's *Ethical Oregon Lawyer* on law firm organization and management. As is often the case, however, "doing" was the best teacher. Since then, I've helped several lawyer-clients with the simultaneously exciting and exhausting process of setting-up new firms. Through that, I've developed a "Top 10" list of ethical nuts and bolts for starting a new firm. We'll look at the first five this month and follow with the second half next month. I've also since revised my *Ethical Oregon Lawyer* chapter to reflect this experience and that offers more detail on each of these points.

1. **Setting-Up Before You Leave.** In most circumstances, it is not practical to tell your old firm before you leave that you are setting-up your new firm. For equally practical reasons, it is important to have the logistics of a new firm in place before leaving your old firm. A lawyer cannot mislead the old firm about the lawyer's intention if asked as we have a fundamental duty of honesty under RPC 8.4(a)(3). At the same time, the leading ABA ethics opinion in this area, 99-414, notes that there is nothing wrong with locating office space and handling other start-up logistics confidentially before informing the old firm.

2. **Leaving Your Old Firm.** Being able to serve your clients directly is often a primary reason for setting-up your own firm. Key questions, therefore, are when and what you can tell your clients about your plans. Lawyers owe fiduciary and often contractual duties to their firms. On the fiduciary side, OSB Formal Ethics Opinion 2005-70 and *In re Smith*, 315 Or 260, 843 P2d 449 (1992), counsel that clients can be told of a lawyer's plans once the old firm has been notified. On the contractual side, the firm's partnership or shareholder agreement may set a specific advance notice period before departure as long as the notice period does not amount to a non-compete, which are prohibited as a matter of public policy by RPC 5.6(a). During any interval between the departing lawyer's notice to the old firm and the lawyer's actual departure for the new one, the lawyer's ability to market the new firm may be limited (absent the departing firm's consent) by remaining fiduciary or contractual duties to the old firm. Once a lawyer actually leaves, however, the lawyer has broad latitude to recruit clients of the old firm whom the lawyer represented.

3. **Getting Files from Your Old Firm.** Once a client decides to move its work from the old firm to the new, the primary duty for both firms is to ensure that the client's work continues to be handled competently during the transition. Assuming the old firm does not have a lien for unpaid fees, OSB Formal Ethics Opinion 2005-70 directs that the old firm must transfer the client's file to the new firm promptly. Whether the old firm can charge the client for any

photocopy or related activities in the transfer will be governed by the old firm's fee agreement with the client (see OSB Formal Ethics Opinion 2005-125, which deals specifically with file transition issues).

4. **Firm Structure and Name.** Oregon allows lawyers to practice in limited liability forms and from a risk management perspective that makes good sense. ORS 67.105 deals with limited liability partnerships and ORS 58.185(4)-(5) does the same for professional corporations. Generally, a law practice may have any name, including a trade name, as long as the name is not misleading as defined by RPC 7.5(c). If a firm is either a limited liability partnership or a professional corporation, those terms or their respective abbreviations must appear as a part of the firm's name under ORS 67.625(1) (limited liability partnerships) or ORS 58.115 (professional corporations).

5. **Office Space.** The ethical component of office space largely comes into play from our duty of client confidentiality. It is simplest if your firm has its own dedicated office space that is physically separate from other building tenants. Office suite arrangements, either with other lawyers or nonlawyers, are also permitted under OSB Formal Ethics Opinion 2005-50 as long as communications, files and work are configured so that client confidences will not be compromised. Formal Ethics Opinion 2005-50 applies the same standard to any joint employees in an office suite.

In next month's column, we'll continue with the Top 10 and shift the focus from transitioning from the old firm to the new to creating a solid risk management foundation for 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.