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**Legal Capital:  
Affiliated Businesses**

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

With the changing landscape in law firm economics over the past decade, some firms are examining the possibility of creating affiliated businesses. For large firms, it may be to offer non-legal expertise to a broader array of customers than their law firm clientele. OSB Formal Opinion 2005-137, for example, addresses lawyer participation in a separate business involving consumer legal self-help software. For solos or smaller firms, it may be a way to diversify the portfolio of activities that generate income for the lawyers involved. OSB Formal Opinion 2005-106, for example, discusses lawyer ownership of a tax preparation business. In this column, we'll look at two common risk management considerations from the law firm perspective when lawyers operate other businesses: the continuing regulatory reach over conduct that reflects negatively on a lawyer's fitness to practice law; and conflicts when customers of the affiliated business are also clients of the law firm.

Before we do, two qualifiers are in order.

First, lawyers who are practicing across state lines in the Northwest and may wish to do the same with their affiliated businesses should look carefully at those other jurisdictions' versions of ABA Model Rule 5.7—which deals specifically with affiliated businesses. ABA Model Rule 5.7 contains a definition

of “law-related services” and provides general boundaries for when an affiliated business will—and won’t—be subject to *all* of the RPCs based on the degree to which the affiliate is connected to the firm. Oregon did not adopt this rule when we moved from the old “DRs” to the RPCs in 2005. In our RPCs, that provision is simply listed as “Reserved.” The report from the OSB committee that developed our version of the ABA Model Rules in the early 2000s mentions that it did not include ABA Model Rule 5.7 “[a]t least in part because the OSB House of Delegates has indicated a desire not to pursue multidisciplinary practice issues[.]” Regardless of whether that remains true today, in the meantime Alaska, Idaho and Washington have all adopted versions of ABA Model Rule 5.7.

Second, other RPCs may come into play in particular circumstances. OSB Formal Opinion 2005-106, for example, notes that a lawyer cannot use an affiliated business to improperly solicit legal work in violation of RPC 7.3. In other instances, “material limitation” conflicts under RPC 1.7(a)(2) may arise, for example, if an affiliate customer is on the opposite side of litigation the lawyer is handling for a client.

### ***Regulatory Reach***

RPC 8.4(a)(3) classifies as professional misconduct “dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to

practice law[.]” Importantly for present purposes, the dishonest conduct does not need to occur in the practice of law for there to be a violation of RPC 8.4(a)(3)—simply that it “reflects adversely” on the lawyer’s fitness to practice law. Last year, for example, the Supreme Court disbarred a lawyer in *In re Herman*, 357 Or 273, 348 P3d 1125 (2015), for dishonest conduct in a manufacturing business. Similarly, in *In re Hendricks*, 306 Or 574, 761 P2d 519 (1988), the Supreme Court disbarred a lawyer involved in a fraudulent tax shelter scheme. Although these cases are extreme examples, they underscore the broad sweep of the Supreme Court’s regulatory jurisdiction over lawyers for misconduct that “reflects adversely on the lawyer’s fitness to practice law[.]”

### ***Conflicts When Customers Are Clients***

RPC 1.8(a) governs lawyer-client business transactions. In *In re Spencer*, 355 Or 679, 330 P3d 538 (2014), the Oregon Supreme Court applied RPC 1.8(a) to a lawyer who ran an ancillary real estate brokerage business. The lawyer had been representing a client who was financially hard-pressed and advised her to purchase a home as part of a strategy to preserve assets in the event bankruptcy became necessary. He then assisted her in purchasing a home in his capacity as a real estate broker—for which he received a commission. The lawyer and the client later parted ways and the client filed a bar complaint against the lawyer.

RPC 1.8(a) contains a very high and exacting disclosure and consent standard for lawyer-client business transactions and there was no dispute that the lawyer had not obtained the requisite conflict waiver before engaging in the brokerage transaction. The Supreme Court disciplined the lawyer.

The Supreme Court's approach is by no means novel. Comment 1 to ABA Model Rule 1.8, upon which Oregon's rule is now patterned, notes that "[t]he Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice." OSB Formal Ethics Opinion 2005-10 makes this same point using a similar example. Therefore, a lawyer who also owns a restaurant at which the lawyers' clients sometimes dine doesn't trigger the rule because the transaction is not "related to the practice of law." But, when there is a connection between the lawyer's practice and the affiliated business as it relates to a particular client, then the rule is triggered and the lawyer must satisfy RPC 1.8(a).

### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also

a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.