

CHAPTER 12

**LAW PRACTICE ORGANIZATION,
MANAGEMENT AND SALES**

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I. (§12.1) INTRODUCTION

This chapter deals with ethical issues flowing from the structure, management, and sale of private law practices. The words *law firm* and *firm* are broadly defined to include “a law partnership, professional corporation, sole proprietorship or other association authorized to practice law.” RPC 1.0(d). Although the focus of this chapter is on private law practices, RPC 1.0(d) also includes corporate and governmental legal departments, legal aid and public defender organizations, and public interest law firms in this definition of *law firm*.

In each major section, the law in Oregon is surveyed first. A brief comparative summary follows of the law in Oregon’s reciprocity partners, Washington, Idaho and Utah.

II. LAW PRACTICE ORGANIZATION

A. (§12.2) Organizational Forms

The principal organizational forms used in Oregon for private law practices are the sole proprietorship, the partnership, and the professional corporation. *See* RPC 1.0(d). Each organizational form raises a distinct set of substantive ethical issues.

1. (§12.3) Sole Proprietorships and Office Sharing

Traditionally many sole practitioners maintained individual offices. With the increasing expense of operating a private law practice, however, it is now common for sole practitioners to share offices with other sole practitioners to spread the cost of commonly used services such as computers, telephone systems, and sometimes secretaries. *See generally* OSB Formal Ethics Op 2005-50. These arrangements can raise unique ethical considerations—particularly if the lawyers involved occasionally handle cases against each other.

a. (§12.4) Conflicts of Interest

An office-sharing arrangement would not, in and of itself, preclude a lawyer from representing clients adverse to those of a fellow office sharer. *See* OSB Formal Ethics Op 2005-50. Under RPC 1.0(d), office sharers are not generally construed to be members of the same firm for conflict purposes:

“Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

Therefore, as long as the lawyers involved do not hold themselves out to the public as members of the same firm, through joint letterhead, advertising, or the like, their practices will be considered separate for conflict purposes. *See* OSB Formal Ethics Op No 2005-50.

b. (§12.5) Maintaining Client Confidences

Office sharers may generally use the same telephone systems, file rooms, secretaries, and other jointly employed personnel. *See* OSB Formal Ethics Op 2005-50. Secretaries and other jointly employed personnel are normally considered to be the individual employees of each of the lawyers involved for purposes of client confidences under RPC 1.6. OSB Formal Ethics Op 2005-50.

If the lawyers involved in an office-sharing arrangement handle matters against each other, they must take specific steps to ensure that client confidences are maintained. *See* OSB Formal Ethics Op 2005-50. Telephone systems, for example, must be configured so that client confidences and legal advice are not available to shared personnel. Mail must not be opened or read by shared personnel. Files can be maintained in the same space, but they must be segregated and access must be limited to nonshared personnel only. Finally, lawyers may not use the same secretary if they are handling matters against each other. OSB Formal Ethics Op 2005-50.

2. (§12.6) Partnerships

For many years, Oregon lawyers have been permitted to organize themselves as general partnerships. *See* ORS 67.005(7) (and predecessors). In 1995, however, the legislature significantly altered the scope of partnership law as it applies to professionals—including lawyers—by permitting them to register with the Secretary of State as “limited liability partnerships.” 1995 Or Laws ch 689; *see* ABA Formal Ethics Op 96-401 (discussing advent of limited liability partnership model). In 1997, the legislature included the new limited liability partnership provisions in the Oregon Revised Partnership Act, ORS chapter 67. *See* 1997 Or Laws ch 775. Under the limited liability form, the personal liability of an individual lawyer-partner for professional malpractice is generally limited to the partner’s own acts or omissions or to the professional misconduct of persons under the partner’s direct supervision. *See* ORS 67.105(3)–(4). Although joint and several liability for the professional malpractice of partners continues for acts committed in Oregon by Oregon-licensed professionals or others under their supervision, liability in this regard is subject to the same adjustable annual limit that applies to shareholders of Oregon professional corporations. *See* ORS 67.105(4), 58.185(4)–(10), 58.187 (setting \$300,000 base per lawyer to be adjusted in \$50,000 increments for inflation/deflation by Secretary of State every six years). Partners in traditional general partnerships, by contrast, remain jointly and severally liable for all of their partners’ wrongful acts or omissions. *See* ORS 67.105(1). Out-of-state limited liability partnerships may operate in Oregon if they register with the Secretary of State. ORS 67.700(1). By limiting use of the limited

liability partnership form to licensed professionals under ORS 67.500(1)(a), a profession's standards of conduct are not altered by the changes to the partnership law. Therefore, whether a law partnership is operated as a traditional partnership or a limited liability partnership, ownership of law partnerships is limited solely to lawyers (except for the fiduciary representative of a deceased lawyer while the estate is being administered). RPC 5.4(a); *see also* RPC 5.4(b) (prohibiting lawyer from forming partnership with nonlawyer for practice of law).

3. (§12.7) Professional Corporations

Oregon lawyers may form professional corporations. ORS 58.037(1)(a). A professional corporation may be formed for the purpose of providing professional services, including the practice of law. *See* ORS 58.076. *But see Erwin & Erwin v. Bronson*, 117 Or App 443, 446-47, 844 P2d 269 (1992) (under *former* ORS 58.075 professional corporation could not act as trustee because statute limited scope of services that professional corporation could offer to “professional service . . . and services ancillary thereto”); *see generally* ABA Formal Ethics Op 303 (discussing professional corporations as organizational form for law firms). As with the limited liability partnership form, the personal liability of an individual lawyer-shareholder for professional malpractice is generally limited to the shareholder's own acts or omissions and to the professional misconduct of persons under the shareholder's direct supervision. *See* ORS 58.185(3). Although joint and several liability for the professional malpractice of shareholders is maintained for acts committed in Oregon by Oregon-licensed professionals or others under their supervision or control, liability in this regard is subject to an adjustable annual limit. *See* ORS 58.185(4)–(5). Out-of-state law firms organized as professional corporations may operate in Oregon if they register with the Secretary of State. ORS 58.129. Although practicing in a corporate form, lawyers in a professional corporation remain subject to the rules of professional conduct. *See* ORS 58.185(2). Therefore, a nonlawyer cannot own an interest in a professional corporation (except for the fiduciary representative of a deceased lawyer's estate while the estate is being administered). RPC 5.4(a).

4. (§12.8) Group Legal Plans

Although a group legal plan is not technically a form of law firm organization, ORS 750.505–750.715 permit the formation of “legal expense organizations” or, as they are more commonly known, group or prepaid legal plans. *See generally LegalClub.com, Inc. v. DCBS*, 182 Or App 494, 50 P3d 1196 (2002) (discussing “legal expense plans” under ORS 750.505, et seq., and finding that such plans are generally subject to regulation by the Oregon Department of Consumer and Business Services). Under these plans, the sponsoring organization

contracts with lawyers to provide legal services to group members. *See* ORS 750.505(2); *see generally* OSB Formal Ethics Ops 2005-46, 2005-79. A group legal plan may recommend, employ, or pay a lawyer as long as the recipient of the legal services is recognized as the client and the plan does not impose conditions or restrictions on the exercise of the lawyer's professional judgment on behalf of the plan member. RPC 7.2(c); *see also* OSB Formal Ethics Ops 2005-46, 2005-79.

B. (§12.9) Relationships with Other Businesses

A lawyer is permitted to own and operate both law-related and nonlaw-related businesses in addition to the law practices. *See generally* OSB Formal Ethics Ops 2005-10, 2005-168. In conducting these other businesses, a lawyer remains subject to the rules of professional conduct to the extent that nonlaw-related activities reflect on the lawyer's fitness to practice law and to the extent that law-related businesses constitute the "practice of law." *See generally* RPC 8.4(a); RPC 5.4(a)-(b).

1. (§12.10) Lawyers Operating Other Businesses

Nothing in Oregon's professional rules expressly prohibits a lawyer from owning or operating another business in addition to the lawyer's law practice. *See* OSB Formal Ethics Ops 2005-10 (real estate and title insurance businesses), 2005-106 (tax return preparation business), 2005-107 (business selling audiotapes and videotapes on general legal information topics), 2005-137 (joint venture to create online legal information system), 2005-168 (lawyer-owned referral service).

Even when operating another business, however, a lawyer is still subject to three primary professional rules. First, a lawyer may be disciplined for dishonest conduct in the other business if the conduct reflected on the lawyer's fitness to practice law. *See* RPC 8.4(a); OSB Formal Ethics Op 2005-107; *see, e.g., In re Hendricks*, 306 Or 574, 761 P2d 519 (1988) (lawyer was disbarred for defrauding investors in tax shelter investment scheme). Second, a lawyer cannot use the other business for improper in-person solicitation of potential clients for the lawyer's law practice. *See* RPC 7.3; OSB Formal Ethics Op 2005-106. Third, if the other business engages in transactions with the lawyer's clients, the conflict rules governing situations in which the lawyer's own financial interests are involved would apply. *See* RPC 1.8(a); OSB Formal Ethics Op No 2005-10.

2. (§12.11) Lawyers in Business with Nonlawyers

A lawyer is effectively barred from practicing law with a nonlawyer by RPC 5.5(a) (prohibiting aiding unlawful practice of law), RPC 5.4(a) (generally prohibiting division of fees for legal services with nonlawyer), RPC 5.4(b)

(prohibiting formation of partnership between lawyer and nonlawyer for practice of law), RPC 5.4(d) (generally prohibiting nonlawyer from acquiring ownership interest in professional corporation or association organized for practice of law) and ORS 9.160 (generally limiting practice of law in Oregon to members of Oregon State Bar).

As noted in OSB Formal Ethics Op 2005-101, “[t]he practice of law involves the application of a general body of legal knowledge to the problem of a specific entity or individual.” *Accord In re Morin*, 319 Or 547, 562–563, 878 P2d 393 (1994) (summarizing appellate decisions on this issue). A lawyer, therefore, may operate a law-related business with a nonlawyer as long as that law-related business does not constitute the “practice of law.” *See, e.g.*, OSB Formal Ops 2005-101 (lawyer could join with psychologist to form family mediation business), 2005-107 (lawyer could join with nonlawyers to produce and distribute audiotapes and videotapes providing general legal information), 2005-137 (proposed joint venture between lawyer and nonlawyer to develop interactive online legal information service did not constitute practice of law), 2005-168 (lawyer could own referral service that was separate incorporated entity).

If an activity falls within the ambit of “practicing law,” however, a lawyer is prohibited from jointly operating that business with a nonlawyer. OSB Formal Ethics Ops 2005-101, 2005-107, 2005-137, 2005-168. In other words, if part of the business can *only* be performed by a lawyer, then it will likely be considered the “practice of law” and a lawyer will be prohibited from jointly owning the business with a nonlawyer. Moreover, a lawyer is subject to discipline under RPC 5.5(a) for even assisting a nonlawyer in the unlawful practice of law. *See* OSB Formal Ethics Ops 2005-20, 2005-24; *see, e.g., In re Morin, supra*, 319 Or at 562–564 (lawyer was sanctioned under former DR 3-101(A) for allowing legal assistants to counsel clients and potential clients on living trusts); OSB Formal Ethics Op 2005-87 (lawyer may not ethically assist “estate planning service” composed of nonlawyers in transacting business when nonlawyers are providing legal advice); OSB Formal Ethics Op 2005-115 (lawyer may not represent out-of-state estate planning service’s Oregon customers when estate planning service’s activities constitute practice of law).

Although a lawyer is now effectively barred from practicing law with a nonlawyer, the concept of “multidisciplinary practices” (MDPs), which would combine legal and other professional services in single firms—such as legal services and management consulting—remains a topic of lively and unresolved debate. In 2000, the ABA House of Delegates rejected an amendment to the ABA

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Model Rules of Professional Conduct that would have permitted MDPs. Nonetheless, the debate over MDPs is likely to continue. Short of completely integrated firms, other MDP arrangements have been proposed that envision more decentralized structures based on a system of contractual cross-referrals. More information about MDP issues is available from the ABA Center for Professional Responsibility at www.abanet.org/cpr.

3. (§12.12) Lawyers in Business with Clients

Chapter 8, *supra*, discusses in detail the ethical implications of transactions or business ventures involving lawyers and their clients. In general, RPC 1.8(a) prohibits those transactions or ventures absent full disclosure and client consent when the lawyer and the client have differing financial interests and the lawyer's professional judgment will or reasonably may be affected by those differing financial interests. RPC 1.8(a) also imposes substantive fairness requirements on business transactions between lawyers and their clients. *See also* ABA Formal Ethics Op 00-418 (addressing related topic of taking stock in lieu of attorney fees).

C. (§12.13) Comparison Washington, Idaho and Utah

Like Oregon, Washington and Idaho permit lawyers to practice in limited liability partnerships and professional corporations. *See generally* RCW 25.05.500 et seq. (Washington limited liability partnerships); RCW ch 18.100 (Washington professional service corporations); RCW 25.15.045 et seq. (Washington professional limited liability companies). IC 53-3-1001 et seq. (Idaho limited liability partnerships); IC 30-1301 et seq. (Idaho professional service corporations); IC 53-615 et seq. (Idaho professional service limited liability corporations). Washington and Idaho also have similar rules governing both lawyer-operated businesses and lawyers in business with nonlawyers. *See* Washington RPC 5.4-5.5; Idaho RPC 5.4-5.5. Beyond the Northwest, Oregon's other reciprocity partner, Utah, also permits lawyers to operate as professional corporations and partnerships, including limited liability partnerships. *See* Utah RPC 1.0(d); UCA 1953 § 48-1-42, *et seq.*

III. (§12.14) LAW PRACTICE MANAGEMENT

Every lawyer, from a sole practitioner to a member of a large multistate practice, is confronted with a variety of ethical issues that arise from the general operation of the lawyer's practice in addition to those flowing purely from individual cases or transactions being handled for clients. These issues are examined in §§12.15-12.32, *infra*.

A. (§12.15) Naming a Law Practice

Generally, a law practice may have any name, including a trade name, as long as the name is not misleading. *See* RPC 7.5(c); *see also* RPC 7.1(a); OSB Formal Ethics Ops 2005-101, 2005-153 (insurer-employed lawyers' firm name). If the law practice is either a limited liability partnership or a professional corporation, then those terms or their respective abbreviations must appear as part of the firm's name. ORS 67.625(1), 58.115. The designation of a law practice as a professional corporation or limited liability partnership should also appear in a firm's advertising. OSB Formal Ethics Op 2005-49.

CAVEAT: OSB Formal Ethics Op No 2005-49 deals only with potential violations of the RPCs. Although portions of the opinion draw on issues of professional liability, this opinion, in and of itself, would not bind a court in its interpretation of the potential effect on liability of a firm's failure to comply with ORS 67.625(1) or 58.115 in its advertising.

1. (§12.16) Including of the Names of Deceased, Retired, or Inactive Lawyers

A law firm may use the names of deceased, retiring, or retired lawyers of the firm or its predecessors in a firm name. RPC 7.5(c)(3). However, except as provided in RPC 7.5(c)(3), a law firm name may not include a lawyer who is not actively practicing law. RPC 7.5(d). *See generally* OSB Formal Ethics Op 2005-169 (discussing use of retired partner's name in law firm names). This rule does not apply if the absence from practice is for one year or less and the lawyer is expected to return to the firm within the year.

2. (§12.17) Affiliation with Public Officials

Oregon does not prohibit the use of the names of temporary public officials in law firm names, but RPC 7.1(a)(5) prohibits a lawyer from implying the ability to improperly influence a government agency or official.

3. (§12.18) Multistate Practices

As long as a firm name meets the requirements of RPC 7.5(c), a law firm practicing in more than one state is permitted under RPC 7.5(f) to use the same name in each jurisdiction. *See also* OSB Formal Ethics Op 2005-109 (permitting out-of-state law firm to be listed on Oregon firm's letterhead as "associated office"). A firm, however, must indicate on its letterhead any members of a local office who are not admitted to practice in that particular jurisdiction. RPC 7.5(f). It is also important to note that RPC 7.5(f) governs only the name of a law practice in

Oregon. Other states in which a multistate firm operates may have different requirements and those will need to be consulted and complied with as well.

4. (§12.19) Office Sharing

Lawyers who are merely sharing an office may not imply that they are affiliated or in partnership with the other lawyers with whom they share space. *See* OSB Formal Ethics Ops 2005-12, 2005-50. Therefore, lawyers sharing space may not refer to themselves as “associates” or “of counsel” or “1, 2, and 3, Attorneys at Law.”

B. (§12.20) Relations Among Lawyers Within a Firm

The lawyers within a firm owe simultaneous duties to their clients, the firm, and the profession.

1. (§12.21) Responsibility for a Lawyer’s Own Conduct and for Others Whom the Lawyer Supervises

Regardless of how a law practice may be organized or a lawyer’s position within a given organization, a lawyer is always responsible for his or her own professional conduct. *See* RPC 8.4(a).

Moreover, supervisors cannot engage in unethical conduct through, or accept the benefits of such conduct by, their subordinates, whether they are lawyers or nonlawyers:

RPC 5.1 governs responsibilities toward lawyer subordinates:

“A lawyer shall be responsible for another lawyer’s violation of these Rules of Professional Conduct if:

“(a) the lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved; or

“(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

RPC 5.3, in turn, governs responsibilities toward nonlawyer subordinates:

“With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

“(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

“(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

“(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

“(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

Finally, RPC 5.2 deals with the duties of subordinate lawyers:

“(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

“(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”

2. (§12.22) A Lawyer’s Duty to the Firm

The disciplinary rules do not explicitly require lawyers to be honest in their dealings with partners or employers, but on at least two occasions involving the intentional diversion of firm clients or funds, the Oregon Supreme Court has found that the duty is inherent in former DR 1-102(A)(3) and now found in RPC 8.4(a). *See also* OSB Formal Ethics Op 2005-70.

Although there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, the obligation is implicit in RPC 8.4(a)(3)’s

prohibition against dishonesty. *See also* OSB Formal Ethics Op 2005-70. (For more on the dishonesty rule, see Chapter 21, Negotiation Ethics.) Moreover, such conduct is a violation of the duty of loyalty owed by a lawyer to his or her firm based on their contractual or agency relationship. *In re Smith*, 315 Or 260, 266, 843 P2d 449 (1992) (diversion of firm clients); *accord In re Busby*, 317 Or 213, 217, 855 P2d 156 (1993) (diversion of firm funds) (quoting *Smith*).

3. (§12.23) The Duty to Report Misconduct Within a Firm

A lawyer who has personal knowledge from nonprivileged sources that another lawyer has violated the RPCs in a way “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” has a duty to report the lawyer to the bar. RPC 8.3(a). *See generally* OSB Formal Ethics Op 2005-95. The rule does not draw a distinction between conduct occurring within or outside a firm. For a complete discussion of this rule, see chapter 13, *infra*.

4. (§12.24) Contract Lawyers

In recent years, “contract lawyers” who work with a firm on a temporary or other project-specific basis as either short-term firm employees or independent contractors have become increasingly common. *See generally* ABA Formal Ethics Ops 88-356 (discussing the use of contract lawyers generally); 00-420 (addressing charging for contract lawyers). Arrangements of this kind pose two principal conflict issues—one for the contract lawyer and one for the firm hiring the lawyer.

The contract lawyer is subject to the same rules of client confidentiality and conflicts under RPCs 1.6, 1.7 and 1.9 that would govern any other lawyer undertaking a possible new representation. Therefore, a contract lawyer must maintain any confidences gained through a former representation and would be precluded from representing a party adverse to a former client without disclosure and consent if there is either a “matter specific” or “information specific” former-client conflict.

For a firm, RPC 1.0(d) specifically excludes lawyers “working for or with a firm on a limited basis” from the definition of firm member unless the facts of a particular situation dictate otherwise. “Of counsel” lawyers, by contrast, are included within the definition of firm member under RPC 1.0(d). *See also Contrast* OSB Formal Ethics Op 2005-155 (noting that lawyers designated as “of counsel” are classified as firm members under RPC 1.0(d)). Given this definition, therefore, a firm would not normally be subject to an imputed disqualification under RPC 1.10(a) when a contract lawyer is retained.

PRACTICE TIP: Despite the definition of firm member in RPC 1.0(d), it remains a prudent practice to handle conflict issues arising from hiring contract lawyers under the screening procedures found in RPC 1.10(c). In that way, even if a contract lawyer were later found to be a “firm member” based on the facts of his or her particular situation, the hiring firm would still be protected from RPC 1.10(a)’s imputed disqualification rule.

ABA Formal Ethics Opinion 00-420 also addresses billing for contract lawyers and concludes that they may be billed as either fees for legal services or costs for incurred by the retaining lawyer. Although the distinction is somewhat artificial, in the former situation, the opinion concludes that the amount billed can include a surcharge (above what the contract lawyer bills the retaining lawyer), but in the latter it cannot. Similarly, ABA Formal Opinion 88-356 concludes that as long as the contract lawyer is operating under the supervision of the retaining lawyer and will not share in the fee paid by the client, the requirements of RPC 1.5 on division of fees are not triggered.

C. (§12.25) Employment of Nonlawyers

Under RPC 5.3(a), “a lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” The application of the RPCs to a lawyer’s nonlawyer staff typically arises in two contexts: client confidences and conflicts.

A lawyer must take reasonable steps to ensure that a client’s confidences are preserved by nonlawyer staff. RPC 1.6(a); *accord* OSB Formal Ethics Op 2005-44.

With conflicts, “there is no clear basis for applying . . . [the conflict rules] directly to nonlawyers.” OSB Formal Ethics Op 2005-44. Nonetheless, the opinion goes on to conclude that if a nonlawyer had acquired client confidences or secrets in the course of other employment and then was employed by a firm on a matter adverse to that former client, consent of both the former and the current clients would be required.

OSB Formal Ethics Op 2005-24 deals with the comparatively rare situation of employing a suspended or disbarred lawyer as a nonlawyer assistant.

D. (§12.26) Lawyers Joining and Leaving Firms

When a lawyer joins a firm, the focus of ethical considerations is on conflicts and preserving client confidences from former representations. When a lawyer leaves a firm, however, the focus shifts to issues flowing from the competition for clients.

1. (§12.27) Lawyers Joining a Firm

When a lawyer leaves one firm and joins another, the lawyer's clients from the "old firm" become former clients for conflict purposes under RPC 1.9. Similarly, the clients of the "new firm" become the lawyer's current clients for conflict purposes under RPC 1.7. In the absence of disclosure and consent, the "new firm" may not accept or continue employment for current clients if there is a conflict between the new lawyer's former and current clients. RPC 1.10(c).

The prohibition that would normally flow from RPC 1.10(c), however, may be avoided if the new lawyer is screened from any matters that give rise to conflicts between the former and current clients. RPC 1.10(c)(1)-(3). *See generally* OSB Formal Ethics Op 2005-120 (discussing screening systems). Under RPC 1.10(c)(1)-(3), the new lawyer must serve an affidavit on the "old firm" certifying that the lawyer will not participate in any way in the conflicting matters. The "new firm" also must serve an affidavit on the "old firm" stating that it has taken appropriate steps to inform all members of the "new firm" that the new lawyer should be screened from any participation in the conflicting matters. RPC 1.10(c)(1)-(3).

PRACTICE TIP: To ensure the effectiveness of RPC 1.10(c)(1)-(3)'s screening procedure, it is prudent to complete the required steps at or before the point that the new lawyer actually reports for work at the "new firm."

2. (§12.28) Lawyers Leaving a Firm

When a lawyer leaves a firm, issues relating to when and how the lawyer's clients and colleagues at the lawyer's former firm are informed are especially sensitive.

a. (§12.29) Conflict Issues

When a lawyer departs a firm and takes all of a client's work, that client then becomes a "former client" of the firm. *See* RPC 1.10(b); OSB Formal Ethics Op 2005-128. At that point, the lawyer's "old firm" may represent clients adverse to the former client unless, under RPC 1.10(b), the proposed new matter is substantially related to a matter that the "old firm" handled for the former client and "any lawyer remaining at the firm has information protected by Rules 1.6 and

1.9(c) that is material to the material to the matter.” See OSB Formal Ethics Ops 2005-128, 2005-174. As with all former-client conflicts, however, this prohibition can be waived if the former and current clients give their consent after full disclosure under RPC 1.9.

CAVEAT: If some of a client’s ongoing work remains at the “old firm,” then the client would remain a current client for conflict purposes. In that situation, any conflicts would be determined and resolved under the current-client conflict rules. See RPC 1.7.

b. (§12.30) Taking Firm Clients on Departure

In leaving a firm, a lawyer’s first duty is to his or her clients. See *In re Smith*, 315 Or 260, 264, 843 P2d 449 (1992); OSB Formal Op 2005-70. The lawyer must honor this fiduciary duty by ensuring that work for clients continues to be handled in a timely and competent manner during any transition.

A lawyer owes a duty of loyalty to the current employer or partners as well. See *In re Smith, supra*, 315 Or at 266. A lawyer may breach that duty if the lawyer attempts surreptitiously to recruit the firm’s clients while the lawyer is still being paid by that firm. See *In re Smith, supra*; OSB Formal Ethics Op 2005-70. If the lawyer’s conduct amounts to dishonesty, then the lawyer may be disciplined under RPC 8.4(a)(3). See OSB Formal Ethics Op 2005-70; see, e.g., *In re Smith, supra*, 315 Or at 263, 266-67 (lawyer violated former DR 1-102(A)(3) when, in 10 weeks before his departure from firm, he induced 31 clients who met with him at firm to sign individual retainer agreements and did not open any files for those clients until he had left to form his own firm). Similarly, a lawyer may not misrepresent the lawyer’s status or intentions to the lawyer’s present employer or partners. See OSB Formal Ethics Op 2005-70; see also *In re Smith, supra*, 315 Or at 266.

Clients should be informed of a lawyer’s decision to change firms once the departing firm has been notified. During the interim between the departing lawyer’s notice to the firm and the lawyer’s actual departure, the lawyer’s ability to market the new firm to clients may be limited (absent the departing firm’s consent) by remaining fiduciary or contractual duties to the old firm. See ABA Formal Ethics Op 99-414 (1999) (discussing the information that the departing lawyer can share with the client during this often awkward and sometimes tense period when there is still a remaining relationship with the old firm). Once a lawyer has actually left a firm, the lawyer may market the new firm to clients whom the lawyer represented at the former firm in any manner consistent with the professional rules. RPC 7.3(a); accord OSB Formal Ethics Op 2005-70; ABA Formal Ethics Op 99-414;

see also In re Smith, supra, 315 Or at 263–264 (letters sent to third parties announcing new practice contained misrepresentations in violation of former DR 1-102(A)(3)).

The decision to retain work at the “old firm,” move it to the departing lawyer, or seek entirely new counsel remains the client’s alone. *See In re Smith, supra*, 315 Or at 264; OSB Formal Ethics Op 2005-70.

If a client decides to have the departing lawyer continue handling the client’s work, then (assuming that the firm does not have a lien for unpaid fees) the “old firm” must relinquish the client’s file and other property to the departing lawyer on the client’s direction. *See OSB Legal Ethics Op 2005-70*. Whether the “old firm” charges the client for photocopy and associated charges for reproducing file materials depends largely on the nature of the materials involved and the particulars of the fee agreement between the “old firm” and the client. *See generally OSB Formal Ethics Op 2005-125* (dealing specifically with photocopy charges for client files on termination of representation). In any event, both the “old firm” and the departing lawyer must take all steps reasonably necessary during a period of transition to protect the client’s interests. *See RPC 1.16(d)*; OSB Formal Ethics Op 2005-70.

c. (§12.31) Covenants Not to Compete

Agreements are prohibited among lawyers that restrict the ability of another lawyer to practice law after the termination of the relationship created by the agreement, except as a condition to payment of retirement benefits. RPC 5.6(a). The court has interpreted former DR 2-108(A), which was very similar to RPC 5.6(a), as expressly prohibiting covenants not to compete among lawyers. *Gray v. Martin*, 63 Or App 173, 181–182, 663 P2d 1285 (1983); *Hagen v. O’Connell, Goyak & Ball*, 68 Or App 700, 703, 683 P2d 563 (1984). *See OSB Legal Ethics Op 2005-29*. Similarly, the court held that, for the same reason, financial penalty provisions in employment agreements are prohibited as well. *Hagen v. O’Connell, Goyak & Ball, supra*, 68 Or App at 703–704; *accord OSB Formal Ethics Op 2005-29*.

A partnership or shareholder agreement, however, may contain a provision allowing for the valuation of the departing lawyer’s interest in a partnership or professional corporation that reflects the reasonably foreseeable financial effect when the departing lawyer takes clients. *See Hagen v. O’Connell, Goyak & Ball, supra*, 68 Or App at 704; OSB Formal Ethics Op 2005-29. The outright sale of a law practice under RPC 1.17 also may be conditioned on the seller’s terminating

the seller's practice in whole or in part for a reasonable period within the geographic area in which the practice has been conducted. *See* RPC 5.6(a).

E. (§12.32) Comparison with Washington, Idaho and Utah

The rules governing law practice management in Washington and Idaho are generally, but not completely, similar to Oregon. Washington RPC 7.5 and Idaho RPC 7.6, which deal with law firm name issues, are very similar to the Oregon rule. Likewise, Washington RPC 5.1–5.3 and Idaho RPC 5.1–5.3 are very similar to Oregon's rules on relations among lawyers and staff within law firms. *See generally Holman v. Coie*, 522 P2d 515, 11 Wash App 195 (1974) (fiduciary duties of law firm partners); *Richards v. Jain*, 168 F Supp2d 1195, 1202–1204 (WD Wash 2001) (supervisory responsibilities for law firm staff). An important point of divergence, however, is lateral-hire screening. Washington permits screening and uses a rule—WRPC 1.10(b)—that is very similar to former Oregon DR 5-105(I). *See also Daines v. Alcatel, S.A.*, 194 FRD 678, 681–682 (ED Wash 2000) (discussing Washington screening rule and its application to nonlawyer staff). Idaho does not have screening by “black letter” rule for lawyers or staff moving laterally in private practice. *See* Idaho RPC 1.10. Beyond the Northwest, Oregon's other reciprocity partner, Utah, generally takes the same approach to duties within a firm. *See generally Prince, Yeates & Geldzahler, P.C. v. Young*, 94 P3d 179 (Utah 2004) (discussing fiduciary duties of firm lawyers to the firm). Like Oregon and Washington, the newly amended Utah RPCs now permit lateral-hire screening under Utah RPC 1.10(c).

IV. (§12.33) LAW PRACTICE SALES

Before 1995, a law practice could be sold in Oregon, but the practical limitations on the sale of a law practice were substantial. *See* OSB Formal Ethics Op 2005-106. In 1995, the Oregon Supreme Court approved former DR 2-111 and related amendments to former DR 2-103(A), 2-107(B), 2-110(C), and 4-101(C). The cumulative effect of these changes was to significantly alter the practical ability of Oregon lawyers to sell their law practices. Those amendments have now largely been incorporated into RPC 1.17.

A. (§12.34) Specific Recognition of the Right to Sell a Law Practice

A lawyer or a law firm has a clear right to sell or purchase all or part of a law practice. RPC 1.17(a). The rule specifically includes the sale of goodwill. Payments received for the sale of a law practice do not constitute an impermissible division of fees. *See* RPC 1.5(e).

B. (§12.35) Required Notice and Client Consent

The selling lawyer (or, in the case of a deceased or disabled lawyer, the lawyer's legal representative) must provide the following written notice by certified mail to each current client whose work may be subject to transfer:

- (1) That a sale is proposed;
- (2) The identity of the proposed purchaser and a brief description of the purchaser's practice;
- (3) That the client may object to the transfer of its work, may take possession of the client's files and property, and may retain other counsel;
- (4) That the client's work will be transferred to the purchaser and that the purchaser will undertake the client's representation if the client does not object within 45 days after the notice was mailed; and
- (5) Whether the selling lawyer will withdraw from the representation not fewer than 45 days after the notice was mailed regardless of whether the client consents to the transfer of its work. RPC 1.17(b).

The notice may describe the purchaser's qualifications, including the seller's opinion of the purchaser's suitability to assume the client's representation if the seller has made a reasonable effort to come to an informed opinion. RPC 1.17(c). The purchaser can ethically pay the seller for the seller's recommendation as long as it is truthful and represents the seller's informed opinion. RPC 1.17(a). If certified mail is not effective to give a client notice of the proposed sale, the seller must take reasonable steps to give the client actual notice of the proposed sale and the other information required under RPC 1.17(b). RPC 1.17(d). A client's consent is presumed if no objection is received within 45 days after the notice is mailed. RPC 1.17(e).

C. (§12.36) Effect on Fee Agreements

A purchaser may not increase the fees being charged to the client unless the client agrees to a new fee schedule. RPC 1.17(g). *See* OSB Formal Ethics Op 2005-97 (dealing with fee schedule modifications generally).

D. (§12.37) Substitution and Permissive Withdrawal

The seller must ensure that appropriate substitutions are filed as necessary in any ongoing proceedings. RPC 1.17(f). The sale of a law practice is a basis for permissive withdrawal. RPCs 1.16-1.17.

E. (§12.38) Restrictions on the Seller's Practice

The sale of a law practice may be conditioned on the seller's agreeing to terminate the lawyer's practice in whole or in part for a reasonable period within

the geographic area in which the practice had been conducted. RPC 1.17(h). *See* §12.31, *supra*.

F. (§12.39) Client Information Revealed During Sales Negotiations

In conjunction with RPC 1.17, RPC 1.6(b)(6) permits a limited disclosure of client information from the seller to a prospective purchaser. A seller may reveal “the client’s identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information.” RPC 1.6(b)(6).

The prospective purchaser must not reveal the information disclosed regardless of whether the sale is consummated and regardless of whether the clients involved eventually choose to retain the purchaser as their lawyer. RPC 1.6(b)(6). This constraint leads to the conclusion that, if the sale is not completed or the purchaser is not retained to continue the representation of the client involved, the prospective purchaser could be disqualified from representing a party adverse to the client if the prospective purchaser would be called on to use the confidential information that the prospective purchaser had acquired through this disclosure. RPC 1.6(b)(6).

G. (§12.40) Comparison with Washington, Idaho and Utah

Both Washington and Idaho permit the sales of law practices on terms that are generally similar to the Oregon rule. In Washington, an amendment is pending that would allow sales of law practices under Washington RPC 1.17. Pending adoption of that amendment, law practice sales are permitted under Washington State Bar Formal Ethics Opinion 192 (1996). In Idaho, law practice sales are governed by Idaho RPC 1.17. Beyond the Northwest, Oregon’s other reciprocity partner, Utah, permits sales of law practices under Utah RPC 1.17.