

OREGON LAW PRACTICE MANAGEMENT

Can I Practice “On the Side?”

Lawyers sometimes ask if they can start a law practice “on the side” while maintaining their current position. This question raises several red flags.

Conflicts of Interest

Assuming your employer agrees to let you “moonlight” (and that’s a big assumption), you must address potential conflicts. At first blush, you might think this concern applies only to lawyers who currently work in a law firm and wish to “work on the side” in a solo practice. Not true! If your other job is working as a real estate broker, mortgage broker, financial planner, psychologist, mediator, arbitrator, etc., [you must also screen for conflicts](#).

In her article, [Multidisciplinary practice: When Wearing Two Hats May Get You Burned](#) OSB General Counsel Helen Hirschbiel points out:

Recognizing and avoiding conflicts of interest is one of the more common concerns for lawyers who have side businesses, particularly when their clients do business with those other companies. Oregon RPC 1.7(a)(2) provides that a current conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer...” Thus, when there is a significant risk that a lawyer’s personal or other financial interests in a non-legal business will materially limit the lawyer’s responsibilities to a client, that lawyer has a conflict under RPC 1.7(a)(2).

In addition, when a lawyer’s side business is doing business with the lawyer’s client, consideration must be given to the limitations set forth in RPC 1.8(a), which provides more stringent requirements for obtaining client consent than those under RPC 1.7(b). RPC 1.8(a) provides:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

1. The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
2. The client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
3. The client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

Other Ethical Concerns

A “side practice” coupled with another job also raises potential concerns about advertising, solicitation, and fee sharing. [Here are Helen’s comments](#):

Advertising

“Oregon RPC 7.1 generally provides that any communication about a lawyer may not be false or misleading. Determining whether a statement is false may be simple, but assessing whether it is misleading can be more difficult. The cautious approach in making that assessment requires considering how the statement is likely to be interpreted by an unsophisticated consumer. Thus, OSB Formal Op 2005-108 concludes that a lawyer who has an active mediation practice may advertise the practice under “counselors — marriage, family, child and individual” sections of the yellow pages as long as the advertisement reflects the lawyer’s status as a lawyer offering mediation services.”

Solicitation

“Lawyers should also take care to observe the ban on in-person solicitation of legal business when providing non-legal services. The non-legal business may not be used to solicit clients with legal needs in a manner that violates RPC 7.3... (L)awyers would be wise to exercise extra caution when confronted in their non-legal business with an individual who has legal needs as well.”

Fee Sharing

“... (L)awyers should be mindful when setting up an ancillary business, not to allow non-lawyers any control or influence over their law practice.”

Employment Law and Liability Implications

Before you set up a side practice, check your employer’s policy and personnel manuals. Some employers prohibit moonlighting altogether, others require preapproval of “outside employment activities.” If you are a contract lawyer and a true independent contractor you should be completely free to have your own solo practice *and* perform contract work for other lawyers. Be sure the principal lawyers who hire you agree. Review the *Practical Contract Lawyering* CLE on the [PLF Web site](#) > Programs on CD/DVD for more information on setting up a contract practice. **Query:** If a lawyer commits malpractice in the course and scope of his or her “side practice,” could the lawyer’s primary law firm employer be held vicariously liable? (Food for thought.... as clients have attempted to hold firms responsible for the negligence of “sole practitioners” who were leasing space in the firm’s office suite.)

Professional Liability Coverage

Lawyers engaged in the private practice of law in the State of Oregon are required to carry professional liability coverage through the [Oregon State Bar Professional Liability Fund](#). This requirement applies equally to full-time and part-time practitioners. In other words, if you are a lawyer in private practice in Oregon (as defined in the [PLF](#) plan), it does not matter whether you provide legal services 50 hours per week or 10 hours per week – coverage is required in either case – and the cost of coverage does not vary based on the hours worked. With that said, liability coverage in Oregon is complex. Your best bet is to [contact](#) our coverage experts Jeff Crawford or Emilee Preble for more information.

Is it Worth it?

It may not be. If you are not an active member of the Oregon State Bar, it will be necessary to pay bar dues. If you intend to engage in the private practice of law and require professional liability coverage, the cost is \$3500 per year (assuming coverage is not prorated and no discounts apply). To assess whether a “side practice” makes sense, go through all the steps you would normally follow to set up a full-time law practice. This includes forming an entity (or not), naming your business, choosing a space option, developing a business plan and budget, opening appropriate bank accounts, consulting with a CPA, creating (and implementing) a marketing plan, and establishing office systems. If it sounds like your proposed “side practice” is getting more complicated by the minute, it is. Don’t assume setting up a “side practice” is any less work than committing to the full-time private practice of law.

Now What?

Oregon lawyers are welcome to contact the practice management advisors at the [PLF](#) any time with questions about “side practice” or related issues. If you are outside Oregon, [follow this link to find a practice management advisor in your state](#).

Copyright 2012 Beverly Michaelis

Originally published August 28, 2012 at <http://oregonlawpracticemanagement.com/2012/08/28/can-i-practice-on-the-side/>.