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## **Risk Management for Virtual Offices**

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With the revolution in both the technology and economics of law practice over the past decade, many lawyers have increasingly moved to a “virtual office” model. Although individual applications vary, most include cloud-based file storage and email and a physical location that is not a traditional “brick and mortar” law office. Some “virtual” practitioners are solos and others are firms that practice in whole or in part “virtually.” In this column, we’ll look at three primary risk management considerations virtual offices frequently confront: confidentiality; marketing; and supervision.

### ***Confidentiality***

Confidentiality is a bedrock duty regardless of our physical location. Therefore, the confidentiality rule (RPC 1.6) and the attorney-client privilege (OEC 503) apply with equal measure to traditional and virtual practices. On a very basic level, this means that virtual practitioners may need some physical space where they can meet confidentially with clients. Depending on the sensitivity of the information that a lawyer typically handles, this may mean having a rented conference suite available for occasional meetings, traveling to clients’ offices or using some other location where conversations won’t be overheard.

The advent of cloud-based file storage and email has greatly benefited virtual offices. As a practical matter, a lawyer’s “office” today is often where both the lawyer—and the lawyer’s computer—are located. The Oregon State Bar in 2011 released (and in 2015 further updated) a comprehensive ethics opinion—Formal Opinion 2011-188—on cloud-based file storage that has ready application to cloud-based email as well. The opinion, which is available on the OSB web site, concludes that cloud-based systems may be used in law practice as long as both the storage and the associated transmission of data are sufficiently secure to meet our duty of confidentiality. The opinion stresses, however, that lawyers must both conduct adequate due diligence when selecting a particular system and stay abreast of changes in technology that may affect the security of that system. This doesn’t mean that a lawyer using cloud-based systems needs to get a master’s degree in computer science. But, it does mean that a lawyer without a technical background needs to get assistance from someone with that expertise.

***Marketing***

RPC 7.1 sets the baseline standard that all lawyer marketing communications must be truthful and RPC 7.2 applies this requirement broadly to

all forms of advertising. These standards can come into play in two particular aspects of virtual practices.

First, a lawyer practicing “virtually” should not misrepresent the lawyer’s address to give the impression that the lawyer has a traditional office. For example, a lawyer using a spare bedroom on the second floor of the lawyer’s home should not list the address as “100 Main Street, Suite 200” to make it appear the lawyer has a traditional office if, in fact, there is no separate “Suite 200.” This is the functional equivalent of the scenario addressed in OSB Formal Ethics Opinion 2005-12, where the Bar concluded RPC 7.1 would prohibit three independent office sharers from describing themselves as a single law firm.

Second, RPC 7.2(c) requires that “[a]ny communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.” Our rule is now based on the corresponding ABA Model Rule. States have varied on whether a post office box meets the “office address” requirement, with, for example, Pennsylvania concluding that it does (Pennsylvania Bar Association Formal Opinion 2010-200) and New York finding that it does not (New York State Bar Association Ethics Opinion 964). Pending further clarification by the Oregon Supreme Court or the Oregon State

Bar, there is nothing to suggest that a truthful listing of a mailing address would violate Oregon's version of the rule.

### ***Supervision***

RPC 5.1 places overall supervisory responsibility on law firm partners or the equivalent. This typically includes training and supervision of both junior lawyers and non-lawyer staff. RPCs 5.1 and 5.3 further address direct supervision of, respectively, subordinate lawyers and non-lawyer staff. Importantly, the duty of supervision involves both employees and independent contractors who assist us in delivering legal services to our clients.

In a traditional law firm setting, supervision often means interacting with someone just down the hall. With virtual offices or firms, however, supervision may mean being responsible for someone who is across town—or perhaps across the country or beyond—and who may be an independent contractor rather than an employee. ABA Formal Opinion 08-451, which was released in 2008 and is available on the ABA Center for Professional Responsibility's web site, does a good job of cataloging risk management considerations when outsourcing both legal and non-legal support services. It also usefully incorporates earlier ABA opinions on contract lawyers and related services. The opinion addresses issues ranging from conflicts to confidentiality in the particular

setting of “remote” supervision. The OSB Professional Liability Fund also has practice management resources and checklists available on its web site for both virtual office practice generally and outsourcing specifically.

### **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.