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Hybrid Offices, Part 2: Beyond the Brick and Mortar

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In June, we surveyed risk management considerations involved in sharing newly excess office space due to the reordering of work routines spawned by the pandemic. This month, we'll discuss the risk management aspects of home offices at which many lawyers now split their time in "hybrid" work arrangements.

As with sharing space, working outside a traditional office is nothing new. In fact, the last CLE program I did in early 2020 before the pandemic overran so many aspects of our lives was on "mobile lawyering." Although there were a few early adopters of completely "virtual offices," most of the focus on "mobile lawyering" was on lawyers who were traveling and who were accessing firm electronic resources from places like hotels and airport departure lounges. With the move to formal hybrid arrangements, working from home offices has become "institutionalized" in the sense that firms will likely be found responsible for those arrangements in both an ethical and liability sense. Firms, therefore, should institute policies appropriate to their size and focus to communicate and monitor their expectations about how home offices are managed now that they are effectively integrated into the firm's overall practice.

In this column, we'll focus on supervision and confidentiality. By focusing on these, I don't want to leave the impression that these are the only areas that

law firms need to think about. For example, employment law issues raised by remote work should be reviewed. Similarly, this column assumes that the home office component of the hybrid arrangement is in the same jurisdiction as the firm's physical office. The ABA issued an ethics opinion in late 2020—Formal Opinion 495—addressing remote work in jurisdictions where a lawyer is not licensed. This opinion—together with any applicable guidance in the state involved—should be read closely by firms with lawyers who are working fully remotely in a location where they are not licensed.

Supervision

We have both regulatory and civil duties to supervise law firm lawyers and staff. RPCs 5.1 and 5.3 speak to the former. Common law, in turn, has long made law firms vicariously liable for the malpractice of individual firm lawyers and staff. Firms discovered the challenge of “remote” supervision during the pandemic. Hybrid work arrangements don't necessarily lessen that challenge.

The most recent edition of the ABA's Profile of Legal Malpractice Claims was published just before the pandemic and covered 2016 through 2019. The ABA's “Profile” series is the preeminent national set of malpractice statistics compiled by the ABA in cooperation with malpractice insurers throughout North America. The series has been published periodically since 1985. For the most

recent period, nearly 20 percent of malpractice claims nationally were due to “administrative errors.” That general percentage has remained stubbornly persistent since the series was first published in 1985. Although case management software has seen dramatic improvements over time, having law firm lawyers and staff closely monitor impending deadlines remains essential. The Profile series suggests this was a difficult task for many firms even when lawyers and staff were in the same place. A physically dispersed workforce that is at the heart of the hybrid approach will require even closer attention to the mundane but critical supervisory tasks of monitoring and meeting key—and sometimes very unforgiving—deadlines.

Confidentiality

The abrupt shift to remote work in early 2020 caused many lawyers and their firms to adjust “on the fly.” Kitchen tables became desks and closets became telephone booths. Before the pandemic, there was nothing novel about lawyers and staff working out of hotel “war rooms” while in trial in other cities or returning calls or emails from coffee shops when traveling for business meetings or depositions. What was “new” for many lawyers, however, was using a dedicated space within their home as a semi-permanent office. Firms, in turn,

found themselves with, effectively, disparate locations for which they were responsible but didn't control.

Moving forward, hybrid working arrangements put a premium on both individual lawyers and their law firms applying the lessons learned during the pandemic to this "new normal."

For individual lawyers, the duty of confidentiality doesn't change simply because we are working from home rather than a traditional office. RPC 1.6(c) makes plain that the duty of confidentiality is not location-dependent: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." This means that we generally need to take the same steps to protect client confidentiality at home as we would in a traditional office. In terms of technology, networks should be secure and software routinely updated. Beyond technology, space should be configured to assure client calls remain confidential and a modest investment in a paper shredder can be essential.

For firms, a recent ABA opinion on virtual practice—Formal Opinion 498 (2021)—noted pointedly (at 3) on the duty to supervise: "Practicing virtually does not change or diminish this obligation." Depending on firm size and practice,

informal arrangements may be feasible. In many others, however, firms may implement written policies and expectations that are formally acknowledged by those working from home. In still other situations, firms may choose to provide the technology for home offices and supervise that technology directly through the firm's IT department.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management 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 a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* 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.