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**New Ways, New Issues:
Law Firm Risk Management for Virtual Offices**

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With the revolution in both law firm technology and economics over the past generation, many lawyers have increasingly moved to a “virtual office” model. Some virtual office practitioners are solos and others are firms that practice in whole or in part “virtually.” Although individual practices vary, most include cloud-based file storage and email and a physical location that is not a traditional “brick and mortar” office. While opening new opportunities for lawyers, this developing way of practicing also poses new challenges for law firm risk management. In this column, we’ll look at three of the most common: marketing; confidentiality; and supervision.

Marketing

One of the most central features of a virtual office is, as the name implies, a physical location that differs from traditional law firm space. In some instances, virtual office practitioners work out of their homes. In others, they practice in shared office suites or other “co-working” spaces. In still others, they have no static physical location at all. By contrast, virtual offices often have a significant electronic marketing presence through web sites and social media.

RPC 7.2(c) requires that any advertising “include the name and office address of at least one lawyer or law firm responsible for its content.” Many

virtual offices, however, use a post office box (or the private equivalent) to receive “old fashioned” surface mail. Last year, the WSBA Committee on Professional Ethics clarified in Advisory Opinion 201601 that the “office address” requirement in RPC 7.2(c) can be met by listing “a post office box, private mail box, or a business service center as an office address in advertisements.” Advisory Opinion 201601 reaches this same conclusion regarding “office address” reporting requirements in the WSBA bylaws and the Admission and Practice Rules.

At the same time, Advisory Opinion 201601 cautions that virtual offices are still bound by the same baseline requirement of RPC 7.1 that all law firm marketing communications be truthful—offering an example that may not meet that standard where an out-of-state lawyer lists a Seattle address in advertising when the lawyer is not actually available to meet in Seattle. Similarly, 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 that the lawyer has a traditional office if, in fact, there is no separate “Suite 200.”

Confidentiality

Confidentiality is a bedrock duty regardless of physical location. The confidentiality rule (RPC 1.6) and the attorney-client privilege (RCW

5.60.060(2)(a)) apply with equal measure to both traditional and virtual practices. Further, through amendments to the Washington RPCs adopted last year following their ABA Model Rule counterparts, Washington lawyers now have an express duty under RPC 1.6(c) to “make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

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 concerned, this may suggest having a rented conference suite available for occasional meetings, traveling to clients’ offices or using some other location where conversations won’t be overheard.

Many, if not most, virtual offices today, however, are built around cloud-based communications and file storage. The WSBA in 2012 issued Advisory Opinion 2215 that discusses cloud-based platforms for both traditional and virtual offices. Advisory Opinion 2215 counsels that law firms may use cloud-based systems as long as the system chosen meets our duty of reasonable care in protecting client confidentiality. It is important to underscore that the comments to the RPCs frame our responsibility in this regard under the duties of both confidentiality (Comments 18-19 to RPC 1.6) and competence (Comment 8 to

RPC 1.1). The title to Comments 18 and 19 to RPC 1.6 reflects these interconnected duties succinctly: “Acting Competently to Preserve Confidentiality.” As Advisory Opinion 2215 notes on this point, lawyers must undertake sufficient “due diligence”—either directly or with competent technical assistance—to have reasonable assurance that any electronic systems selected will meet these standards both when chosen and continuing over time.

Supervision

RPCs 5.1 and 5.3 generally require that law firm management have in place appropriate “infrastructure” so that the firm as a whole can meet its ethical obligations. This can range from conflict-checking systems to procedures for securing client confidential information. The specifics will depend on the size and scope of the firm involved. On conflicts in particular, Washington defines the term “firm” broadly under RPC 1.0A(c) to include “a lawyer, lawyers, an LLLT, LLLTs, or any combination thereof in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law[.]” Whether in a virtual or traditional form, therefore, lawyers who are considered a “firm” will share each other’s conflicts under the so-called “firm unit rule,” RPC 1.10(a).

RPCs 5.1 and 5.3 also address direct supervision of, respectively subordinate lawyers and non-lawyers. The duty of supervision involves both

employees and independent contractors who assist us in delivering legal services to our clients. The Washington Supreme Court has emphasized that lawyers may be disciplined under these provisions if they did not exercise adequate supervision. In *In re Trejo*, 163 Wn.2d 701, 727, 185 P.3d 1160 (2008), for example, a lawyer was disciplined for failing to supervise his assistant who had used the lawyer's trust account for a check-kiting scheme. The Supreme Court in *Trejo* drew a distinction between the underlying theft by the assistant and the failure to supervise by the lawyer: "[A]lthough he did not know about or participate in . . . [the assistant's] . . . check floating and misappropriation, . . . [the lawyer] . . . knew he had completely abdicated all responsibility for complying with the ethical requirements of trust accounting to a nonlawyer assistant."

In a traditional law firm setting, supervision often means interacting with someone just down the hall. With virtual offices, 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 and confidentiality in the particular setting of “remote” supervision. It emphasizes that while we can outsource the services that assist us in representing our clients, we can’t outsource the fundamental responsibility to our clients to supervise the tasks involved.

Beyond Washington

Because virtual offices are not tethered to a specific location, they can also lend themselves to practicing relatively seamlessly across geographic boundaries. Virtual practitioners who wish to practice in another jurisdiction in which they are licensed, however, should carefully consult the rules and other authorities in those jurisdictions for nuances specific to virtual offices (in addition to any general rules or standards that may vary from Washington). Regionally, California has an ethics opinion—2012-184—that addresses virtual office practice. Although Alaska and Oregon do not have virtual office opinions, both have ethics opinions discussing cloud computing (Alaska Bar Ethics Opinion 2014-3; Oregon State Bar Formal Opinion 2011-188) and electronic files (Alaska Bar Ethics Opinion 2008-1; Oregon State Bar Formal Opinion 2016-191). Idaho does not currently issue ethics opinions, but the comments to its RPCs are

similar to the Washington comments discussed earlier. Finally, although a web-based practice may allow virtual office lawyers to extend their electronic reach, they need to remain sensitive to the unauthorized and related multijurisdictional practice rules in any jurisdiction in which they are not licensed.

Summing Up

Technology has made it possible for both individual lawyers and even entire firms to practice as virtual offices. Although this emerging model can provide real benefits to the lawyers (and their clients) involved, virtual offices are subject to the same rules governing their traditional counterparts. Meeting those obligations, however, can present unique challenges when the lawyers involved do not occupy or share the same “brick and mortar” space.

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