

July 2018 Oregon State Bar Bulletin

**Sharing Space:
Risk Management Issues When Coworking**

**By Mark J. Fucile
Fucile & Reising LLP**

Practicing law from space shared with others—whether lawyers or not—is nothing new. Oregon State Bar ethics opinions dating back to the early 1990s, for example, have addressed issues arising when lawyers who are not in the same firm share space with other lawyers.¹ Similar opinions reaching back to the early 1990s also discuss lawyers sharing space with non-lawyers.² The Oregon opinions concluded that sharing office-space with either other lawyers or non-lawyers was permitted as long as appropriate precautions were taken to conform to the professional rules—particularly on protecting client confidentiality. Oregon was by no means unique in this regard. Washington, for example, issued ethics opinions in the 1990s reaching the same general conclusions.³

The office-sharing arrangements that formed the backdrop of these early opinions were typically individual offices in a shared suite. Although some services, such as reception or copying were shared, others, such as telephone lines and file storage, were not.⁴ The emphasis in these early opinions, therefore, was primarily on physical separation within a shared suite to meet both the requirements of the professional rules and corresponding law firm risk management controls.⁵

The technological revolution that has transformed law practice over the past 25 years has also affected office-sharing. For many lawyers today, their “office” is effectively wherever their laptop computer and an internet connection may be. Shared space, too, has evolved. In larger cities, “coworking” spaces that feature open physical areas, high speed internet connections and a “community” environment are emerging. With their flexibility, coworking spaces are increasingly attracting both independent entrepreneurs and large firms seeking “scalable” space—including law firms.⁶ In smaller communities, coworking spaces may range from the local coffee shop to sharing an office within another local business.

In this column, we’ll examine how the risk management considerations identified as office-sharing developed in the 1990s have been altered by the technological developments that have impacted both the way that lawyers practice law and the physical space in which they practice. In doing so, we’ll focus on two bedrocks of law firm risk management: confidentiality and conflicts.

Confidentiality

Recent ethics opinions in Oregon and Washington discuss the duty of confidentiality in the context of both electronic communications and cloud-based electronic files.⁷ Understandably, the ethics opinions focus on the duty of

confidentiality under state counterparts to ABA Model Rule 1.6—the “confidentiality rule.” Under state variants of ABA Model Rule 1.6(c) in both Oregon and Washington, lawyers have a duty to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Our duty of confidentiality, however, also includes the attorney-client privilege and work product.⁸ The duty of confidentiality is also expressed in fiduciary terms.⁹ A failure to meet this fundamental responsibility, therefore, potentially exposes a lawyer to both regulatory discipline and a civil claim for damages.

Although the focus on the electronic aspects of confidentiality when evaluating or configuring shared space is critical in today’s practice environment, “old fashioned” physical security should not be overlooked.

Electronic Security. One of the standard features of commercial coworking spaces is a high-speed internet connection provided through a shared network. These networks are typically password protected. But, they remain a network that all tenants share. In this respect, the networks are similar to those provided by hotels or conference centers. Commercial coworking spaces often offer the option of configuring access through a customized virtual private network—or “VPN”—that is specific to the user or set of users. Lawyers who are

leasing commercial coworking spaces, therefore, should use a VPN or similar means to protect the confidentiality of both their communications and their access to cloud-based files. For lawyers in smaller communities where “coworking” may mean sharing space with another local business, it may be possible to configure separate internet access entirely. If that is not an option, then VPN services offered by a variety of commercial providers may be a solution.

Physical Security. Some coworking spaces offer an option of enclosed private offices that are similar to the older office suite concept that the early ethics opinions addressed. More typically, however, they have an “open” plans that include glass-enclosed cubicles—which can vary by building on whether the glass reaches the ceiling. Lawyers need to carefully assess the kind of physical space needed to accommodate their particular practices. For example, a lawyer with a telephone advice practice would want space configured so that the lawyer’s conversations could not be overheard. By contrast, a lawyer with an email-oriented practice who viewed clients’ commercially sensitive information on a large computer monitor would want space configured so that the content could not be readily seen by other tenants. These considerations would apply with

equal measure to lawyers in commercial coworking spaces and lawyers sharing space with a local business.

Conflicts

Like confidentiality, conflicts can result in both regulatory and civil damage risk. Current multiple-client conflicts are regulated by state variants of ABA Model Rule 1.7 in both Oregon and Washington. Again in both states, the regulatory requirement in the respective versions of RPC 1.7 is a reflection of the underlying fiduciary duty of loyalty.¹⁰

The older ethics opinions on office-sharing, such as OSB Formal Opinion 1991-50 and its contemporary counterpart OSB Formal Opinion 2005-50, discussed conflicts primarily in the office suite context where lawyers also share some common secretarial staff and handle a case against each other. Newer coworking spaces, however, ordinarily do not include secretarial or other staff who are privy to client confidential information. Instead, newer coworking arrangements—whether commercial coworking spaces in larger cities or more informal arrangements with local businesses in smaller communities—present more subtle conflict risks.

One of the benefits of coworking spaces is the interaction among the tenants who make up the “community.” The potential benefits go beyond the

purely social. It is not hard to imagine that an enterprising IP lawyer might attract business in a building filled with high tech start-ups. The same economic benefit might also follow in a smaller community where a lawyer shares office space with, for example, a successful local realtor. The lawyers involved, however, need to take care that in their interactions in these environments they don't inadvertently create attorney-client relationships that might, in turn, lead to conflicts. Oregon and Washington use similar tests to determine whether an attorney-client relationship exists—focusing on the subjective belief of the putative client and whether that subjective belief is objectively reasonable under the circumstances.¹¹ Therefore, if a lawyer is going to provide legal advice to another tenant or guest, the lawyer should do it following appropriate conflict checks and with a fee agreement.

Summing Up

Technology has driven significant change in both how and *where* we practice law. Newer space options for lawyers bring with them new risk management considerations for both confidentiality and conflicts.

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.

¹ OSB Formal Opinion 1991-12 (1991), for example, addressed firm names in the office sharing context. OSB Formal Opinion 1991-50 (1991) discussed confidentiality and conflicts when office-sharers handle matters for opposing parties. Both opinions were subsequently updated and are now, respectively, OSB Formal Opinions 2005-12 (2015 rev) and 2005-50 (2014 rev).

² OSB Formal Opinion 1991-2 (1991), for example, discussed a lawyer sharing space with a CPA. OSB Formal Opinion 1991-106 (1991), in turn, addressed a lawyer purchasing a tax preparation business while continuing to practice tax law. Both opinions were later amended and are now, respectively, OSB Formal Opinions 2005-2 (2014 rev) and 2005-106 (2016 rev).

³ See, e.g., WSBA Advisory Ops 1837 (1998) (office-sharing with other lawyers), 1836 (1998) (office-sharing with non-lawyer).

⁴ See, e.g., OSB Formal Op 1991-50, *supra*; WSBA Advisory Op 1836, *supra*.

⁵ *Id.*

⁶ See e.g., Marc Stiles, *Fast-Growing WeWork Now Open in Seattle*, Puget Sound Business Journal, Mar. 12, 2014, available at: <https://www.bizjournals.com/seattle/blog/techflash/2014/03/fast-growing-wework-now-open-in-seattle-slide-show.html>. This article discusses the use of coworking space by both independent contractors and large companies—including a large law firm.

⁷ OSB Formal 2011-188 (2015 rev) and 2016-191 (2016) address, respectively, cloud-based file storage and electronic files generally. WSBA Advisory Opinion 201601 (2016) discusses a variety of “virtual office” issues. WSBA Advisory Opinion 2215 (2012), in turn, discusses cloud computing. For a national perspective, ABA Formal Opinion 477R (2017) outlines issues and duties involved in electronic communications with clients.

⁸ See OEC 503 (Oregon privilege); ORCP 36B(3)(a) (Oregon work product); RCW 5.60.060(2)(a) (Washington privilege); CR 26(b)(4) (Washington work product).

⁹ See generally Restatement (Third) of the Law Governing Lawyers § 16(3) (2000).

¹⁰ See generally *Kidney Association of Oregon, Inc. v. Ferguson*, 315 Or 135, 142, 843 P2d 442 (1992); *Eriks v. Denver*, 118 Wn2d 451, 457-63, 824 P2d 1207 (1992).

¹¹ See *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990); *Bohn v. Cody*, 119 Wn2d 357, 363, 832 P2d 71 (1992).