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**New Normal:
Risk Management for “Hybrid” Offices**

“[E]mployees will increasingly be working in what we call the hybrid office—moving between a home work space and a traditional office building.”

~*Designing the Hybrid Office*

Harvard Business Review¹

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

One of the most profound impacts of the pandemic on the legal profession has been the way lawyers and their law firms work. When the Covid-19 pandemic enveloped the country, lawyers and law firms largely moved to “remote” work with most, if not all, lawyers and staff functioning outside their traditional “brick and mortar” offices. The Harvard Business Review article quoted above observes that what was once the province of technology visionaries became the practical reality for businesses large and small across the economy.

Now that law firms are migrating back to their office space, trends—at least in the intermediate term future—suggest something different than the pre-pandemic norm. As the opening quote notes, the emerging “new normal” appears to be the “hybrid” office—with some work from home² and some work from a traditional office.³ Along with that, many firms are also looking at the possibility of reducing their office “footprint” in light of continued home work by subletting now excess space to lawyers and nonlawyers alike.

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In one sense, neither of these trends is new. Although traditional office space was just that—“traditional”—before the pandemic, technology made both “mobile lawyering”⁴ and “virtual” offices⁵ increasingly common. The WSBA, for example, issued an advisory opinion on “virtual” offices in 2016.⁶ Similarly, WSBA advisory opinions dating back to the 1980s discuss office-sharing arrangements with both lawyers and nonlawyers.⁷ With the hybrid model transitioning from pandemic-born expedient to an institutionalized practice model, however, many firms are fundamentally rethinking where lawyers and staff work going forward. In this column, we’ll focus on the attendant risk management considerations for work both “outside” and “inside” traditional law firm office space.

Before we do, however, two caveats are warranted.

First, other substantive areas may also come into play as firms assess their operations going forward ranging from employment law considerations for remote staff to commercial landlord-tenant law for firms re-evaluating their need for office space.

Second, because this is an evolving area, the topics discussed should not be regarded as static. For example, the hybrid model may alter both the way office space is configured and how lawyers and staff work in their office space.⁸

As firms gain experience with the hybrid model, new challenges may emerge in risk management and others that were potential concerns may recede. In short, firms will also likely need to institutionalize the flexibility they have demonstrated since the beginning of the pandemic.

Outside

When lawyers and staff are operating outside traditional office space, supervisory and confidentiality considerations are particularly sharpened.

Supervision. We have both regulatory⁹ and civil¹⁰ duties to supervise law firm lawyers and staff. Firms discovered the challenge of “remote” supervision during the pandemic. The blended aspect of hybrid offices will not necessarily lessen that challenge.

Even when lawyers and staff were predominantly in traditional office settings, conflict checks were forgotten, engagement agreements were overlooked and statutes of limitation were missed.¹¹ The ABA’s periodic *Profile of Legal Malpractice Claims* was last updated just before the pandemic. For the four-year period through 2019, administrative errors comprised nearly 20 percent of all malpractice claims nationally. The difficulty of systematically performing routine but critical tasks when everyone was in the same place suggests that firms will need to pay even closer attention to these tasks when lawyers and staff

are at least partially dispersed on an ongoing basis. Although cloud-based software accessible from inside and outside offices is central in this regard, training lawyers and staff to both use the tools available and to speak up if, for example, a deadline is looming is equally critical.

Confidentiality. Whether the accent is on privilege,¹² work product¹³ or RPC 1.6¹⁴, confidentiality is one of our core duties regardless of location.¹⁵ Both the ABA and the WSBA provided excellent practical guidance before the pandemic on applying the duty of confidentiality to electronic communications, data transmission and cloud-based storage.¹⁶ The pandemic reinforced these considerations on a very practical level as lawyers and staff adjusted to practicing from home.

The abrupt shift to remote work in early 2020 meant for many lawyers and law firm staff that kitchen tables suddenly became desks and closets became telephone booths. Longer term, firms moving to hybrid models need to assess how they support lawyers and staff to maintain both electronic and physical security when working from home. The former includes the technology necessary for secure communications and data transmission and the latter includes mundane but essential equipment like paper shredders. The duty of confidentiality—and associated client expectations in that regard—do not vary

whether a lawyer is working out of a home office or a downtown high rise.

Although the initial immediacy of the pandemic produced understandable improvisation, firms institutionalizing hybrid models will likely have a corresponding institutional interest in ensuring that physically dispersed lawyers and staff meet the firm's confidentiality standards.¹⁷ In some instances, this may be handled informally. In others, it may mean having written firm policies that are formally acknowledged by those working from home. In still others, it may involve the firm providing the technology for home offices—and the supervision of that technology—directly through the firm's IT department.

Inside

Given the expense of office space, the move to hybrid work is in many instances causing firms to reconsider their overall need for space with fewer people in the office at the same time. For some firms, that change means reconfiguring existing space to accommodate more transient workers. In others, it means subletting newly excess space or moving their firms into shared space. In some situations, the shared tenants are other lawyers or law firms. In others, they are non-lawyers.¹⁸

Although combinations of co-tenants and corresponding risk management challenges vary,¹⁹ sharing space uniformly requires law firms to pay close

attention to protecting client confidentiality. While older advisory opinions still provide useful analytical insights, they are often painted against the backdrop of landline telephones and paper files.²⁰ Although technology has evolved since the older office-sharing opinions were issued in the 1980s and 1990s, human behavior has not. Protecting confidentiality in shared space continues to have both technological and human dimensions.

For the technological dimension, the switch to mobile telephones and cloud-based email and files has changed the dynamics of protecting confidentiality in shared space. The focus today is on ensuring that lawyers and law firms have their own secure electronic networks so that client confidential materials are not accessible to others within their shared space. Similarly, printers should be placed where sensitive client materials are not visible to those not working for the lawyer or law firm.

For the human dimension, modern offices are often more open and use more glass internally than a generation ago. These features of modern office design put a premium on closing doors when conducting confidential client calls or meetings and being careful not to leave sensitive documents where they can be seen (whether on a computer screen or a conference table). Similarly, conversations about clients and their work should not be conducted in common

areas with others around—such as break rooms or reception areas. Especially for those moving from an environment of space occupied by a single law firm, we need to be appropriately guarded in our comments so that the very familiarity of seeing others not in our firm every day will not lead us to inadvertently disclose client confidential information in our casual conversations.

Although the technological challenges of shared space can usually be addressed through good IT support, the human dimension largely involves continual training and reinforcement for lawyers and staff alike.

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.

¹ Anne-Laure Fayard, John Weeks and Mahwesh Kahn, *Designing the Hybrid Office*, Harvard Business Review, Mar.-Apr. 2021 at 3, available at <https://hbr.org/2021/03/designing-the-hybrid-office>.

² “Home” is a relative term. ABA Formal Opinion 495 (2020) addresses remote work on an extended basis from locations such as vacation homes in jurisdictions in which the lawyer may not be licensed. Because “hybrid” work typically envisions a regular presence at a firm’s “brick and mortar” office, this column is framed primarily from the perspective of lawyers who are splitting time between their primary residence and their firm’s office in the same jurisdiction.

³ The concept of the “hybrid” office goes by varying names, including “flexible” workspace. See generally Dealbook Newsletter, *How to Navigate the Postpandemic Office*, N.Y. Times, Apr. 26, 2021, at B2 (U.S. national print edition).

⁴ “Mobile lawyering” is often used to describe lawyers who have traditional offices but use technology to practice in a wide variety of other venues ranging from airports to client facilities. See generally Joe Dysart, *The Mobile Lawyer*, ABA Journal, Apr. 2013, available at: https://www.abajournal.com/magazine/article/the_compleat_mobile_lawyer.

⁵ See ABA Formal Op. 498 at 1-2 (2021) (discussing virtual practice).

⁶ See WSBA Advisory Op. 201601 (2016). See also Mark J. Fucile, *New Ways, New Issues: Law Firm Risk Management for Virtual Offices*, WSBA NWLawyer, Jul.-Aug. 2017, at 10. The WSBA Committee on Professional Ethics is currently examining possible updates to Advisory Opinion 201601 to reflect developments since it was issued in 2016. Information on the CPE’s review is available on its committee page on the WSBA web site at www.wsba.org.

⁷ See, e.g., WSBA Advisory Ops. 1304 (1989) (lawyers sharing office space), 896 (1985) (law firm sharing space with nonlawyers).

⁸ Emma Jacobs, *How the Frontiers of Hybrid Work Are Taking Shape*, Financial Times, Apr. 26, 2021, at 12 (U.S. print edition).

⁹ See RPCs 5.1(b) (supervision of lawyers), 5.3 (staff supervision); see also *Ali v. American Seafoods Co., LLC*, 2006 WL 1319449 (W.D. Wash. May 15, 2006) (unpublished) (disqualifying law firm based on conflicts of both lawyers and staff). For a discussion of outsourced services, see ABA Formal Opinions 88-356 (1988) (contract lawyers), 00-420 (2000) (same), 08-451(2008) (outsourced legal and nonlegal support services).

¹⁰ See generally *Sherry v. Diercks*, 29 Wn. App. 433, 434, 628 P.2d 1336 (1981) (legal malpractice claiming naming law firm, partners and associate); *Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 877, 30 P.3d 8 (2001), remanded, 150 Wn.2d 102, 75 P.3d 497 (2003) (discussing lawyer responsibility for staff negligence).

¹¹ See, e.g., *Jones v. Rabanco, Ltd.*, 2006 WL 2237708 (W.D. Wash. Aug. 3, 2006) (unpublished) (conflict check not done); *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (engagement agreement not sent); *Huff v. Roach*, 125 Wn. App. 724, 106 P.3d 268 (2005) (statute of limitation missed).

¹² See RCW 5.60.060(2)(a).

¹³ See CR 26(b)(4).

¹⁴ RPC 1.6(c) reads: “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.” See also RPCs 1.1, cmt. 8 (casting the use of technology as part of the duty of competence); 1.6, cmts. 18-19 (weaving together the duties of competence and confidentiality).

¹⁵ In the event of a breach, state and federal data security laws may also come into play. See generally ABA Formal Op. 483 (2018) (addressing lawyers’ obligations following a data breach); RCW 19.255.010 (data breach notification).

¹⁶ See ABA Formal Ops. 99-413 (1999), 477R (2017) (data transmission); WSBA Advisory Op. 2215 (2012) (cloud storage).

¹⁷ See generally WPI 174.04 (standard of care); RPCs 5.1, 5.3 (supervisory duties over lawyers and staff).

¹⁸ Other variants are “coworking spaces” that can range from “hot desks” to private offices within a larger shared space. See generally Mark J. Fucile, *Sharing Space: Risk Management Issues When Coworking*, Oregon State Bar Bulletin, July 2018, at 36.

¹⁹ Other risk management issues from office-sharing include (but are not limited to) potential conflicts arising from being opposing counsel to another office-sharer and avoiding the implication that office-sharers are a firm. See generally WSBA Advisory Ops. 1793 (1997) (conflicts), 1817 (1998) (conflicts), 1271 (firm names), 1304 (1989) (answering shared central telephone line with “law offices” greeting); see also RPC 7.1, cmt. 13 (avoiding implication that independent office sharers are firm).

²⁰ See, e.g., WSBA Advisory Op. 1793 (1997) (discussing landline telephones and paper files in the office-sharing context).