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Hybrid Offices, Part 1: Inside the Brick and Mortar

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One of the most significant impacts of the pandemic on the legal profession was on *where* lawyers work. Before the pandemic, most lawyers primarily worked in "brick and mortar" offices. In the wake of the pandemic, many lawyers are now working in "hybrid" arrangements where they spend part of their time in traditional offices and part working from home offices.

So far, this new dynamic has influenced law offices in two fundamental ways. First, many firms now find themselves with excess space and are examining the possibility of either subletting portions of their offices or becoming subtenants themselves. Second, although before the pandemic lawyers often worked beyond traditional offices in a variety of settings when traveling, hybrid arrangements envision lawyers and staff working from home more routinely. Each aspect of hybrid work touches on different law firm risk management considerations. This month, we'll survey risk management issues arising when firms share space with other lawyers and nonlawyers. Next month, we'll look at corresponding issues when firms "institutionalize" working from home.

Sharing space is nothing new. Oregon State Bar Formal Opinions 1991-50 and 1991-2 addressed sharing space with, respectively, other lawyers and nonlawyers over thirty years ago. Just as practicing law is not the same as it was

30 years ago, however, risk management issues from sharing space have also evolved. In this column, we'll look at two: confidentiality and conflicts.

Before we do, two preliminary comments are in order.

First, although we will focus on confidentiality and conflicts, this is not an exclusive list of risk management issues that can flow from shared space. OSB Formal Opinion 2005-2 (rev 2021), for example, addresses referrals among office-sharers. OSB Formal Opinion 2005-12 (rev 2015), in turn, discusses law firm names when lawyers share space.

Second, insurance considerations can also come into play whether a law firm is the landlord or the tenant. Although the PLF basic plan in Oregon does not involve a renewal questionnaire, excess policies usually do and will often ask whether a law firm shares space. Firms considering subletting their space or becoming subtenants should discuss this with their carrier to understand any implications this may pose for continued coverage. Carriers are also a great resource for practical guidance in this area. The PLF, for example, has a set of suggested guidelines for office-sharing available for download in the forms section of its web site.

Confidentiality

Confidentiality is one of our bedrock duties—whether painted against the backdrop of the lawyer confidentiality rule (RPC 1.6), the attorney-client privilege (OEC 503) or work product (ORCP 36B(3)). Although older office-sharing opinions offer useful analytical insights, they are often framed in terms of landline telephones and paper files. The technological transformation in law practice that began before the pandemic and accelerated rapidly over the past two years has impacted sharing space as well. At the same time, the human dimension to protecting confidentiality in shared space cannot be overlooked.

On the technological side, the transition to mobile telephones and cloud-based electronic mail and files has largely put the confidentiality accent on ensuring that firms sharing space have their own secure networks. Preferably, printers should not be shared and should be stationed where sensitive materials are not visible to other office-sharers who do not work for the law firm involved.

On the human side, modern offices are often more open and use more glass internally than in years past. This can put a premium on closing doors or using internal sound-proof telephone "booths" for confidential client calls and ensuring that sensitive documents are not left visible to non-firm office-sharers in either offices or conference rooms. Similarly, confidential conversations should

not be held in locations where non-firm office-sharers might overhear, such as break-rooms or reception areas. For firms that have long had their own space, these human considerations may mean retraining lawyers and law firm staff alike.

Conflicts

OSB Formal Opinion 2005-50 (rev 2014) addresses situations where office-sharers are representing opposing parties in the same lawsuit. It is an updated, albeit pre-pandemic, version of its 1991 cousin. The current opinion, like its predecessor under the former Oregon Code of Professional Responsibility, does not foreclose office-sharers handling opposite sides of the same case as long as appropriate confidentiality safeguards are in place.

Especially when sharing space with nonlawyers, conflicts (and other risk management implications) can also arise in more subtle ways. A nonlawyer, for example, may look to the lawyer for legal advice over coffee in the break room and, without much forethought, the lawyer may have inadvertently acquired a client. The standard for determining whether an attorney-client relationship exists in Oregon is twofold and was set out in the paradigm case of *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). Under the *Weidner* test, a putative client must subjectively believe the lawyer is representing the client and

that subjective belief must be objectively reasonable under the circumstances. Importantly for present purposes, neither a written engagement agreement nor the payment of fees is necessary for an attorney-client relationship to be recognized. Returning to our illustration, what seems to the lawyer as simply a friendly conversation over break-room coffee may appear altogether different to the nonlawyer suitemate who is earnestly looking for legal advice from a knowledgeable professional.

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.