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The New Geography of Law Firm Risk Management: Handling Hybrid, Remote Work

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Although time will ultimately tell, early indications suggest that one of the lasting impacts of the Covid-19 Pandemic on the legal profession is *where* lawyers practice. Before the Pandemic, some lawyers “telecommuted” to their physical offices while a few others dispensed with traditional space altogether and practiced “virtually” from home offices.¹ The predominate practice model, however, remained the “brick and mortar” office where lawyers and staff typically worked Monday through Friday. As the Pandemic enveloped us all in 2020, lawyers and law firms necessarily took advantage of technology such as email and video conferencing to work outside their traditional space—sometimes from home offices in their local communities but for others in distant locations.

As the Pandemic ebbed, many law firms moved to “hybrid” models where lawyers and staff work part of the week in their “brick and mortar” offices and part of the week from home. Some lawyers (and staff), however, continued working “remotely” from distant locations—occasionally in jurisdictions in which the lawyers are not licensed—through email, cloud-based files, and video conferencing. Practice guidance has generally accommodated this new dynamic. The ABA, for example, issued opinions in 2020 and 2021 addressing,

respectively, “remote” work and “virtual” practice.² Regionally, this past year saw both Oregon and Washington adopt opinions generally permitting “remote” work.³

For law firms, these sweeping changes have also ushered in a new risk management paradigm as we moved from Pandemic-driven expediency to “firm approved” long-term work models where lawyers and staff routinely work on client business outside their firms’ traditional office space. Before the Pandemic, if you were to click on the “locations” tab on most law firm web sites, they might show offices in Portland or Bend with accompanying photos of traditional office space. With firm lawyers and staff now routinely working off-site with firm approval, law firms also need to consider the risk management implications of effectively having additional *authorized* “locations” that may be a lawyer’s apartment or a paralegal’s house.

In this column, we’ll survey two aspects of this evolving dynamic that are particularly sensitive from the risk management perspective: supervision and confidentiality.

Before we do, however, two qualifiers are in order.

First, we’ll focus on the “outside” piece of “hybrid” offices and “remote” work—the home offices of the law firm lawyers and staff involved. As firms have moved to these new models, however, they have often discovered that they no

longer need as much “brick and mortar” space as they did before the Pandemic. This has led some firms to sublet space within their offices and others to make greater use of the flexibility of commercial co-working spaces. Sharing space can present its own risk management challenges.⁴

Second, having firm lawyers and staff working in approved home offices both within Oregon and beyond can touch on a host of other substantive legal areas ranging from employment law to tax considerations.

Supervision

Lawyers have supervisory duties under Oregon RPCs 5.1 and 5.3 for, respectively, the lawyers and staff working under their direction.⁵ Similarly, the leading national treatise on legal malpractice succinctly summarized law firm civil liability for lawyers and staff: “A law firm, of course, is liable for the conduct of its principals and employees.”⁶

Even when firms operated from traditional space before the Pandemic, Oregon lawyers had been disciplined for failing to supervise both law firm lawyers and staff.⁷ Similarly, pre-Pandemic malpractice case law both in Oregon and nationally included instances of law firm failures to adequately supervise lawyers and staff.⁸ More fundamentally, the ABA’s comprehensive “Profile of Legal Malpractice Claims” series reported in its last edition prior to the Pandemic

that nearly 20 percent of malpractice claims nationally involved “administrative errors” that often traced their origins to internal supervisory or communication failures.⁹ Even with the increasing adoption of sophisticated practice management software, that number has remained stubbornly persistent since the first edition of the “Profile” series in 1985.¹⁰ The Oregon State Bar Professional Liability Fund annual reports include more general statistics, but also underscore that the highest frequency of claims is typically in practice areas that are very “deadline intensive.”¹¹

Given the pre-Pandemic statistics on administrative errors when lawyers and staff were generally in the same physical offices, law firms need to rethink their risk management supervision as they transition to long-term models involving hybrid offices and remote work. Case management software will undoubtedly remain central, but, as pre-Pandemic statistics suggest, software alone will not protect firms against, for example, calendaring errors created by mistakes in entering relevant dates. Internal communication will also undoubtedly remain central, but firms should not assume that human “double-checking” of electronic systems that worked when lawyers and staff were in physical offices at the same time will necessarily function the same way with dispersed work forces.

Any blend of systems and procedures will understandably vary with firm size, practice and locations. For calendaring and related administrative tasks, firms need to re-imagine a combination of electronic and human systems that are the functional equivalent of a trusted assistant standing in a partner's office doorway saying: "Isn't that brief due today?" More subtly, but equally important, firms also need to re-imagine how to avoid, or at least meaningfully reduce, the risk of lawyers and staff becoming isolated from the firm while working outside the firm's "brick and mortar" offices. Before the Pandemic, most firms had some combination of formal and informal peer supervision for partners and mentoring for associates that not only fostered a sense of firm cohesion, but when done well could also detect and ideally prevent problems such as lawyers taking on too much work or work for which they were not well-suited. Although technology can do many tasks effectively, it is difficult to replace, for example, the litigation department chair sticking their head in a colleague's door and asking: "Is everything OK?"

Confidentiality

Lawyers have a regulatory duty of confidentiality under Oregon RPC 1.6 that includes, but is broader than, either the attorney-client privilege or work product standing alone.¹² The regulatory standard for confidentiality also reflects

our underlying fiduciary duty in that regard.¹³ Depending on the circumstances, statutory and contractual duties can also enter the mix.¹⁴

As sensitive client information has moved from paper files stored within the four walls of physical space to electronic data on cloud-based servers, law firms have increasingly become targets for criminals attempting to either steal sensitive information outright or hold it hostage for ransom.¹⁵ The Oregon Department of Justice maintains an online collection of data breaches large enough to require reporting under Oregon law.¹⁶ It includes many professional service firms.¹⁷ A federal court summarized both the threat and the aftermath for institutions breached in a case involving a law firm defendant:

Malicious cyberattacks have unfortunately become a routine part of our modern digital world. So have the lawsuits that following them, alleging, as this one does, that the hacked institution failed to take sufficient precautions to protect the plaintiff's data.¹⁸

With firm-authorized home offices—whether full or part-time—effectively becoming additional firm “locations,” law firms also need to rethink their approach to both electronic and physical security to meet their multi-faceted duties of confidentiality.¹⁹ Again, approaches will vary with firm size, practice and locations. In some instances, firms may require the use of either firm supplied or approved equipment for firm business. In others, firms may set policies for the

security of electronic devices used in home offices and provide related training and support. Although data breaches today occur most often in the electronic context, firms also need to provide clear guidance on maintaining physical security and confidentiality in home offices. Paper shredders, for example, are an inexpensive but essential tool for home offices to complement confidential recycling services often used in traditional offices.²⁰

Summing Up

Last year, the ABA published a report on hybrid offices and remote work. It was called: “Where Does the Legal Profession Go from Here?”²¹ The report was a mix of statistical and anecdotal evidence surveying lawyers across a broad spectrum nationally. While early in the post-Pandemic period, nothing in the report suggested that the answer was: “Back to the way we did it in 2019.” Given the fundamental shift in where lawyers work, risk management must also be recalibrated to this new geography of law practice.

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¹ See, e.g., *In re Application of Carlton*, 708 F. Supp.2d 524 (D. Md. 2010) (discussing “telecommuting”); Washington State Bar Association Advisory Op. 201601 (2016; amended 2022) (addressing “virtual” practice).

² See ABA Formal Ops. 495 (2020) (remote work), 498 (2021) (virtual practice).

³ See OSB Formal Op. 2022-200 (2022), WSBA Advisory Op. 201601 (2016; amended 2022).

⁴ See generally Mark J. Fucile, *New Normal: Risk Management for “Hybrid” Offices*, Washington State Bar News 14 (Dec. 2021/Jan. 2022); Mark J. Fucile, *Sharing Space: Risk Management Issues When Coworking*, 78 OSB Bar Bulletin 34 (July 2018).

⁵ The responsibility for supervision generally applies regardless of the particular internal classification of law firm personnel—ranging from traditional employees to independent contractors. See generally ABA Formal Ops. 88-356 (1988) (contract lawyers), 08-451 (outsourced legal and support services); see also Oregon RPC 1.0(d) (defining “firm”).

⁶ Ronald E. Mallen, *Legal Malpractice* at 572 (rev. 2020 ed.). Restatement (Third) of the Law Governing Lawyers, §58(1) (2000) makes this same point.

⁷ See, e.g., *In re Kang*, 32 DB Rptr. 191 (Or. 2018) (failure to supervise law firm lawyer); *In re Gregory*, 33 DB Rptr. 169 (Or. 2019) (failure to supervise law firm staff).

⁸ See, e.g., *Bill Parker & Associates v. Rahr*, 456 S.E.2d 221 (Ga. App. 1995) (asserted failure to supervise associate); *Wythe v. Harrell*, 224 Or. App. 215, 197 P.3d 601 (2008) (alleged failure to supervise paralegal).

⁹ ABA, *Profile of Legal Malpractice Claims 2016-2019* at 22-23 (2020).

¹⁰ *Id.*

¹¹ OSB Professional Liability Fund 2021 Annual Report at 10.

¹² See Oregon RPC 1.0(f) (definition of “information relating to the representation of a client”). See generally *In re Conry*, 368 Or. 349, 491 P.3d 42 (2021) (discussing duty of confidentiality under RPC 1.6).

¹³ See, e.g., *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp.3d 30 (D. D.C. 2020) (claims by law firm client against law firm for legal malpractice and breach of fiduciary duty stemming from data breach).

¹⁴ See, e.g., ORS 646A.600-.628 (Oregon Consumer Information Protection Act); *Hiscox Insurance Company v. Warden Grier, LLP*, 474 F. Supp.3d 1004 (W.D. Mo. 2020) (breach of contract claim against law firm arising from data breach).

¹⁵ See generally ABA, *Cybersecurity Handbook*, ch. 2 (3d ed. 2022) (surveying risks and noting that law firms are “prime targets”). See also ABA Formal Op. 483 (2018) (addressing data breaches).

¹⁶ See <https://www.doj.state.or.us/consumer-protection/id-theft-data-breaches/data-breaches/>.

¹⁷ *Id.*

¹⁸ *Guo Wengui v. Clark Hill, PLC*, 338 F.R.D. 7, 9 (D. D.C. 2021).

¹⁹ See generally ABA Formal Ops. 99-413 (1999) (electronic communications), 477R (2017) (electronic data transmission); OSB Formal Op. 2011-188 (rev. 2015) (cloud-based electronic storage).

²⁰ See generally OSB Formal Op. 2005-141 (rev. 2015) (addressing the duty of confidentiality in the context of recycling paper documents).

²¹ ABA, *Where Does the Legal Profession Go from Here? Lawyers Tell Us How and Where They Want to Work* (2022).