



Online CLE

“Hybrid” Offices and “Remote” Work: Law Firm Risk Management Considerations

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Chapter 3

“Hybrid” Offices and “Remote” Work: Law Firm Risk Management Considerations

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Contents

Presentation Slides: “Hybrid” Offices and “Remote” Work: Law Firm Risk Management Considerations	3–1
Resource Guide	3–15

“HYBRID” OFFICES AND “REMOTE” WORK: LAW FIRM RISK MANAGEMENT CONSIDERATIONS

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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 for the WSBA *Legal Ethics Deskbook* and is 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.

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INTRODUCTION

“Hybrid” Offices/“Remote” Work

- ▶ “Hybrid” Offices
 - ◆ New term for old concept
 - ◆ Technological dimension
 - ◆ Human dimension
- ▶ “Remote” Work
 - ◆ Old idea applied in new ways
 - ◆ Technological dimension
 - ◆ *Possible UPL issues*

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INTRODUCTION

Risk Management

- ▶ Lawyer discipline
- ▶ Civil damage claims
- ▶ Data breach laws
- ▶ Reputational harm

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LOGISTICS

- ▶ **Materials**

- ▶ **Questions:
At any time**

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FOCUS

- ▶ **Risk management concepts
that can be applied in varying
settings**

- ▶ **Rather than particular
products or technologies**

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“HYBRID” OFFICES

New Term for Old Concept

- ▶ **“Hybrid” Offices vs. “Mobile Lawyering” and “Virtual” Offices**
 - ◆ How they are the same
 - ◆ How they are different

- ▶ **Virtual offices as a guide**
 - ◆ WSBA Advisory Op. 201601 (2016)
 - ◆ ABA Formal Op. 498 (2021)

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“HYBRID” OFFICES

New Term for Old Concept

- ▶ **Historically, ethics opinions looked at:**
 - ◆ Confidentiality
 - ◆ Supervision
 - ◆ Outsourcing

- ▶ **Focus on confidentiality today**

- ▶ **But a note about supervision**

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“HYBRID” OFFICES

Technological Dimension

- ▶ **ABA Model Rule 1.1, Comment 8**
Competence in using technology
(A note about comments in Oregon.)
- ▶ **RPC 1.6(c)**
Reasonable safeguards for confidentiality
- ▶ **ABA Model Rule 1.6, Comments 18-19**
Balancing sensitivity with means

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“HYBRID” OFFICES

Technological Dimension

- ▶ **RPC 1.1:**
Competence—Comment 8
“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” (Emphasis added.)

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“HYBRID” OFFICES

Technological Dimension

▶ RPC 1.6(c):

Confidentiality

“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.” (Emphasis added.)

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“HYBRID” OFFICES

Technological Dimension

▶ ABA Model Rule 1.6, Comments 18-19:

“Acting Competently to Preserve Confidentiality”

“[18] ... Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.” (Emphasis added.)

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“HYBRID” OFFICES

Technological Dimension

“[19] ... When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.” (Emphasis added.)

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“HYBRID” OFFICES

Technological Dimension

- ▶ **Electronic Communication**
 - ◆ ABA Formal Op. 99-413 (1999)
- ▶ **Electronic Data Transmission**
 - ◆ ABA Formal Op. 477R (2017)
- ▶ **Electronic Data Storage**
 - ◆ OSB Formal Op. 2011-188 (rev 2015)
 - ◆ OSB Formal Op. 2016-191 (2016)
 - ◆ ABA Formal Op. 483 (2018)

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“HYBRID” OFFICES

Technological Dimension

- ▶ **Some examples:**
 - ◆ **Network security**
 - ◆ **Communications security**
 - ◆ **Device security**

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“HYBRID” OFFICES

Human Dimension

- ▶ **Same principles apply**
- ▶ **“Prying Eyes”**
- ▶ **“Prying Ears”**

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“HYBRID” OFFICES

Human Dimension

- ▶ **Some examples:**
 - ◆ **Computer screens**
 - ◆ **Telephone conversations**
 - ◆ **Space**
 - ◆ **Shredders**

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“REMOTE” WORK

Old Idea Applied in New Ways

- ▶ **“Remote Work” vs. “Mobile Lawyering”**
 - ◆ **How they are the same**
 - ◆ **How they are different**

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“REMOTE” WORK

Old Idea Applied in New Ways

- ▶ **Historically, ethics opinions looked at:**
 - ◆ **Confidentiality**
 - ◆ **Sometimes UPL**

- ▶ **Focus on UPL today**

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“REMOTE” WORK

Old Idea Applied in New Ways

- ▶ **Unauthorized Practice of Law**
 - ◆ **ABA Model Rule 5.5(a)-(b)**
(and state equivalents)
 - ◆ **State statutory law**

- ▶ **“Mobile Lawyering” v. “Remote Work”**
 - ◆ **The family trip to Disneyland**
 - ◆ **Working from a second home**
in a state where you are not licensed

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“REMOTE” WORK

Old Idea Applied in New Ways

- ▶ **Relatively uncharted territory**
 - ◆ **ABA Formal Op. 495 (2020)**
 - ◆ **Some rules: Arizona and New Hampshire (as examples)**
 - ◆ **Some opinions: Florida and New Jersey (as examples)**
 - ◆ **Washington: Possible revisions to Advisory Op. 201601 on virtual offices**

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“REMOTE” WORK

Old Idea Applied in New Ways

- ▶ **Consequences**
 - ◆ **Regulatory discipline for the lawyer: RPCs 5.5(a)-(b) & 8.5(a)**
 - ◆ **Regulatory discipline for the supervisor: RPCs 5.1 & 8.5(a)**
 - ◆ ***Possible* impact on the attorney-client privilege**

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“REMOTE” WORK

Old Idea Applied in New Ways

- ▶ **Where do we go from here?**

- ▶ **Good question, few firm answers for now**
 - ◆ **Traditionally a very parochial area**
 - ◆ **But, the long-term impact of the pandemic can’t be discounted**

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QUESTIONS?

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THANK YOU!

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Resource Guide

“Hybrid” Offices

Oregon RPCs

- 1.6(c) (confidentiality)
- 5.1, 5.3 (supervision)

ABA Model Rule Comments

- Rule 1.1, Comment 8 (competence in using technology)
- Rule 1.6, Comments 18-19 (competence and confidentiality)

Oregon State Bar Ethics Opinions

- Formal Op. 2011-188 (rev 2015) (cloud computing)
- Formal Op. 2016-191 (2016) (electronic files)

ABA Ethics Opinions

- Formal Op. 99-413 (1999) (electronic communications)
- Formal Op. 477R (2017) (electronic data transmission)
- Formal Op. 483 (2018) (data breaches)
- Formal Op. 498 (2021) (virtual offices)

Other Resources

- Mark J. Fucile, *New Normal: Risk Management for “Hybrid” Offices*, December 2021-January 2022 Washington State Bar News
- Mark J. Fucile, *Sharing Space: Risk Management Issues When Coworking*, July 2018 Oregon State Bar Bulletin

“Remote” Work

ABA Model Rules

- Rule 5.5(a)-(b) (unauthorized practice)
- Rule 8.5(a) (disciplinary authority)

ABA Ethics Opinions

- Formal Op. 495 (2020) (remote work)

Other Resources

- Arizona RPC 5.5(d) (remote work)
- New Hampshire RPC 5.5(d)(3) (remote work)
- Florida Advisory Op. SC20-1220 (2021) (remote work)
- New Jersey Advisory Op. 742 (2021) (remote work)
- Alaska Bar Ethics Op. 2010-1 (2010) (exclusively federal forum practice)

