



# Real Property, Trust and Estate Law Section Newsletter

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## Co-Working Spaces for Attorneys: Ethical Concerns and Best Practices

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### Introduction<sup>1</sup>

While flexible work environments and co-working spaces<sup>2</sup> like WeWork have been rapidly growing in popularity and availability over the last several years, most of us legal practitioners have stuck with a more traditional office space model, going to the same building every day, having our own reserved offices, and maintaining private conference rooms and common areas where we can receive clients. Then 2020 happened, and we collectively learned that we can work from home (or live at work, depending on how you look at it) with little to no need for the physical spaces of the past. Now that we are looking forward at what our practices will look like in a post-COVID-19 world, many attorneys are seeing the value of a weekly model with a hybrid of in-person and remote work. As a result, firms are re-evaluating their office space needs and considering shorter and more flexible terms than a traditional office lease can provide. While co-working spaces can provide a solution, attorneys need to carefully consider how their use can impact our professional responsibilities. This article explores these ethical concerns and some related questions to consider (after a quick refresher on license agreements, which are the primary agreement used for co-working spaces).

### License Agreements

Contracts governing co-working spaces typically take the form of a license agreement (if not in name, then at least in substance), which is legally distinct from a lease. A lease is governed by real property and landlord/tenant law and is typically a more legally stringent and involved document. Pursuant to a lease, the tenant is given a real property interest in the premises for the term set forth in the lease agreement and receives the benefit of landlord/tenant law in the jurisdiction where the property is located. Generally, the landlord under a lease can only evict a tenant prior to the expiration of the lease term in compliance with the default and remedies

provisions of the lease or pursuant to an eviction proceeding, which can be a lengthy process. Finally, since a lease is customarily a large commitment and investment, landlords often impose stringent underwriting requirements on tenants and require substantial security deposits, guaranties, and insurance coverage to protect themselves.

A license, on the other hand, is a creature of contract law and generally a more amorphous document. A license grants the licensee a contractual right to enter upon and use a space but does not bestow an interest in the underlying real property (meaning licensees do not receive the benefit of landlord/tenant law). Licenses are usually revocable and/or terminable upon 30 days' notice or less, without the necessity of an eviction proceeding. Law360 provides a more detailed discussion on license agreements.<sup>3</sup>

### **Duty of Confidentiality**

At the forefront of potential ethical concerns for an attorney using a co-working space is whether the space offers an attorney the ability to comply with their confidentiality obligations under New Jersey's Rule of Professional Conduct 1.6.

Of course, all attorneys are bound by the duty of confidentiality to protect their clients' and prospective clients' information. New Jersey RPC 1.6 provides that, absent any exception, an attorney "shall not reveal information relating to representation of a client unless the client consents after consultation..."<sup>4</sup> In 2016, the rule was amended to include a requirement that an attorney "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."<sup>5</sup>

In deciding to adopt this amendment, the Special Committee on Attorney Ethics and Admissions' Report and Recommendations noted that the "proposed new paragraph would explicitly require attorneys to take reasonable measures to prevent unintended disclosure of client information and unauthorized access by third parties. Attorneys will be put on notice that they must evaluate the adequacy of their electronic security measures."<sup>6</sup>

### **General Confidentiality Concerns in Co-Working Spaces**

The duty of confidentiality is a "fundamental principle" of the attorney client relationship.<sup>7</sup> Using

a co-working space as your main office leaves you potentially vulnerable to violations of this principle simply due to the nature of the set-up. Most co-working spaces function as large rooms with many desks, which may be a convenient and economical set up, but what happens when your client calls you with an emergent issue? Taking a call in the middle of a crowded room means anyone could overhear your call, which is especially likely if the room is noisy and you need to speak up in order to be heard by your client. When you are sharing space, your duty of confidentiality does not go away simply because you trust the people who may be overhearing your conversations. Further, if the co-users in your shared space are not your firm colleagues, you are not at liberty to discuss theories, your clients' case, their legal position, strategy, etc. Despite a collegial atmosphere, your clients are relying on you to maintain their confidentiality, and off-the-cuff questions and conversations can put this at risk. Questions to consider in order to mitigate such risks are:

- 1) Are private office spaces available for confidential phone calls, meetings, etc.?
- 2) How early do you need to reserve the spaces? Can you pop-in as needed?

### **Protection of Paper Files**

Another concern with co-working spaces is whether it is possible to adequately protect client files in the office. It is not necessarily easy to lock up a desk every time you get up or immediately snatch up your documents from the shared printer tray, and requires a lot of diligence on the part of the attorney. This raises a variety of questions:

- 1) Is there a secure, private file cabinet/file room, etc., where confidential files can be stored when not in use? Who can access this space? Who is responsible for making sure it is locked? Are they fireproofed?
- 2) How careful are you when leaving files out on your desks during the day? *E.g.*, are you locking up files when you walk away for lunch/coffee/bathroom breaks?
- 3) Does each user have their own printer? How private are they? Who has access to and/or visibility of each printer and any documents that could be sitting in the tray?
- 4) Is someone reading over your shoulder? Do you need to be worried about the (un)ethical practices of other attorneys sharing your space?

Attorneys in a law firm generally may not have these concerns, as clients are shared and the RPC 1.6 obligations flow to everyone. When you are in a co-working space, you cannot and should not be treating your co-users as colleagues in the same way. Your confidentiality obligations are your own, and you need to protect your clients' information from unintended eyes.

### Protection of Electronic Files

As the Special Committee noted, as of 2016, attorneys are “on notice” that they must be vigilant in protecting their clients' electronically stored information. Given that law firms have become victims of hackers in the very recent past, this is a legitimate and growing concern, especially for attorneys working in co-working offices.<sup>8</sup> More alarmingly, the cybersecurity section of the 2019 American Bar Association Tech Report notes that while 26% of respondents had already been the victim of a hacker, an additional 19% were unsure and could not confirm one way or the other.<sup>9</sup> Questions to consider are:

- 1) Who is in control of the internet network? Can you individualize access; create your own VPN, etc.? Are there safeguards in place to protect against unauthorized access to the network?
- 2) Do you have the ability to encrypt your emails and documents? How locked down is your document management system?
- 3) Is the Licensor liable under the License Agreement for any data breaches? Does the License Agreement address these concerns?
- 4) Does your computer/laptop/tablet have the capability to lock immediately, so that it is not unattended and accessible? Do you make sure to lock it every time you get up?
- 5) Do you have a “cheat sheet” to help you keep track of your passwords, and if so, is it accessible by others in your workspace?

### Creating and Imputing Conflicts of Interest

RPC 1.10(a) states that when “lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 or RPC 1.9....”<sup>10</sup> Simply stated, an attorney's conflict of interest will be imputed to all other attorneys with whom they are “associated.” As such, when lawyers work together in law firms, the conflict of one generally becomes a

conflict for all. While it would seem that lawyers who merely share space would not be “associated” under RPC 1.10, it is not that simple. Courts in New Jersey have held that “if lawyers ‘present themselves to the public in a way that suggests that they are a firm ... they should be regarded as a firm for the purpose of the Rules.’”<sup>11</sup> As such, your presentation to the public matters.

Any signage you are allowed within in the co-working space and any advertisements (including social media) should clearly indicate who is part of your practice. If you are in solo practice, your signs and ads should state this. If you are affiliated with any other attorney in the co-working space, this should be clear as well. RPC 7.1 requires that communications with the public may not be “false or misleading.”<sup>12</sup> A generic sign, such as “Attorney X and Associates” would certainly be misleading if you are a solo practitioner, and could lead potential clients to believe that more than one person in the space is affiliated with you. You may want to consider including a short paragraph in your engagement letter that explains your office arrangement and makes clear that any other attorneys in the same space are not related to your practice.

As a general rule, you should not discuss work matters with your co-users in the shared space. Beyond the RPC 1.6 confidentiality concerns, if you discuss matters with your co-users, you run the risk of a variety of conflicts. First, how do you know you are not talking to your adversary? Second, if you start discussing cases with your co-users, bouncing ideas and strategies off them, are you unintentionally creating an association with them?

You might be considering using your co-users as per diem attorneys, or vice versa. While creating an occasional per diem relationship is unlikely to cause an “association” among you, you might still run afoul of a potential conflict of interest. Once you have appeared in court adverse to a party, it is highly likely that you could be conflicted out of later representing that party in a related matter. As such, you should exercise caution in creating any sort of informal overlap between your practice and a co-user's. If you do decide to go this route, you should also keep careful track of all per diem matters you handle for your co-users, including all parties to the matter, their respective attorneys, and a brief description of the matter. These matters should be included in any conflict check you run when engaging new clients or matters. Of course, it goes without saying

that if you continue aiding one of your co-users beyond the occasional per diem assistance, your odds of creating an association rise dramatically. ■

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## Endnotes

1. This article has been drafted for publication in New Jersey and as such, all references to the Rules of Professional Conduct are the New Jersey version. Please note that each jurisdiction has adopted its own version of the rules, and as such, they may not be entirely the same. If your co-space office is in a state other than New Jersey, or you are licensed to practice in other jurisdictions, please be sure to review the rules of those jurisdictions.
2. Typically this takes the form of a large space within an office building that is broken down into cubicles, conference rooms, offices, and ancillary spaces (such as a cafeteria or a message center) that are shared by multiple users from different organizations. Users are allotted a certain amount of work space within the larger shared space, but the space is typically not separately demised (i.e., there are no walls or locking doors separating one user's space from another's). The space is usually fully furnished and operational so all a user needs to do to start working in the space is sit down and plug in their laptop.
3. [law360.com/realestate/articles/1088714/pros-and-cons-of-office-sharing-agreements](http://law360.com/realestate/articles/1088714/pros-and-cons-of-office-sharing-agreements)
4. New Jersey Rule of Prof'l Conduct R. 1.6(a).
5. New Jersey Rule of Prof'l Conduct R. 1.6(f).
6. Hon. James R. Zazzali & Paula A. Franzese, Special Comm. On Attorney Ethics and Admissions, Report and Recommendations, May 12, 2015; at p.23.
7. *Id.*
8. Y. Peter Kang, *Cravath, Weil, Other BigLaw Firms Hacked*, Mar. 29, 2016, [law360.com/articles/777708/cravath-weil-other-biglaw-firms-hacked](http://law360.com/articles/777708/cravath-weil-other-biglaw-firms-hacked).
9. John G. Loughnane, *2019 Cybersecurity*, Tech Report 2019, Oct. 16, 2019, [americanbar.org/groups/law\\_practice/publications/techreport/abatechreport2019/cybersecurity2019/](http://americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/cybersecurity2019/).
10. New Jersey Rule of Prof'l Conduct R. 1.10(a).
11. *United States ex rel. Bahsen v. Boston Scientific Neuromodulation Corp.*, 147 F.Supp.3d 239, 246 (D.N.J. 2015) (quoting ABA Model Rule of Prof'l Conduct R. 1.0, Comment [2]).
12. New Jersey Rule of Prof'l Conduct R. 7.1(a).