

Episode 40 - Transcript

Legal Work on the Run

Intro

When pressed for time, it's convenient to answer an email or respond to a client while on the run, but it's important to remember that it does come with risk. Host Julian Morrow chatted with Cathryn Urquhart last year about the practicalities of working outside the office and what all solicitors need to be aware of when doing so – flagging risks and tips that are increasingly relevant in practice today.

Julian: Welcome to Risk on Air. I'm Julian Morrow and today we're discussing work on the run; why working anywhere can be risky. And we're joined by Cathryn Urquhart who's trained and worked as a lawyer but also spent a long time working in facilitating risk management for lawyers, and Cathryn is currently the facilitator of Legal Practice Management at the College of Law in Western Australia. Cathryn, welcome to Risk on Air.

Cathryn: Thank you, Julian, thanks for having me.

Julian: It's great to have you. And it's appropriate that we are having this conversation over Zoom because you are indeed working on the run at the moment at an undisclosed location.

Cathryn: Oh, I can disclose. I'm in Changu and I'm able to work up here and squeeze in a few yoga classes.

Julian: Well, we're all very jealous, but for lawyers, practising lawyers working anywhere, there are some real challenges. Let's start with the basics, Cathryn, what do you mean when we refer to working on the run?

Cathryn: Julian, I've been around for a while. I was admitted back last century and I remember when you only did work sitting at your desk in an office of the law firm that you worked for, that that was pretty much it. And in some places, taking home physical files was prohibited because of the risk of losing them. So when I think of working on the run in 2023, I'm really thinking of a situation where you are working somewhere other than your desk. And these days your desk might be in an office, but it may also well be the desk that you have at home or in some kind of designated co-working space or the clients' offices. People do work in lots of different places.

So I think that the starting point is - you are not working on the go when you are sitting at a desk, wherever that might be. And if you are not at that desk and you're working somewhere else, that's where I mean by you're working on the go. As soon as you've moved away from that desk, that physical place, that's when the risks start to go up because you don't have your tools of trade around you.

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You don't have the things that you use every day to keep your file notes. You don't have your full systems available to you. You don't often have a door that you can close so that people can't hear your conversations. The minute you move away from that desk, whatever that looks like to you in 2023, I think that's where the risks start happening.

Julian: And it's interesting when we think about that concept of working on the run, we've all been through the pandemic and working from home and I suppose unless you live by yourself and in a relatively soundproof place, even when you're at home, that is a place that has similar risks to some of the other places we might talk about as well.

Cathryn: For sure. I remember my daughter and her boyfriend were sharing a very small apartment during one of our lockdowns in Western Australia, which admittedly weren't that long. But she and her boyfriend had to talk about what they could do to share an apartment because he was a lawyer and she was a lawyer. They had one table that they shared. They faced their computer screens in opposite directions and put a little plant in between where they were sitting and called that their Chinese plant. And they also realised that if they went onto the balcony to do their telephone calls, x number of people in that apartment block might be able to hear their telephone calls. So they ended up doing telephone calls either in the bedroom or the bathroom. So these are the things you have to think about when you're not in the office.

Julian: And let's talk about some of the risk issues that come with working outside the office. Obviously, confidentiality is one that you've alluded to already. Maybe you could talk us through that and also some of the places where we might think that things are confidential but you can't really be sure.

Cathryn: Well, actually I work in co-working space when I am in Perth, which I am most of the time, to be honest. And I have already there experienced listening to a number of conversations that lawyers are having with their clients. And look, to be fair, I'm not eavesdropping, I just happen to be sitting in a place where I'm doing some work and a metre or so away from me a lawyer is having a conversation with their client. I remember one day hearing the intimate details of somebody's marital breakdown, which frankly I didn't want to hear, but it was a bit concerning to me because that is a conversation that should really take place in a room where there is a door and no one else is listening. And I just don't think that that lawyer really gave a lot of thought to the fact that they were meeting a client and aside from what you could hear, you could see that this person was having a meeting with the lawyer and then you could hear a lot of the conversation. So I don't think that having meetings in co-working spaces or extend that out to coffee shops or...

Julian: Lifts.

Cathryn: ...lifts. I just don't think it's a good idea because that is breach of confidentiality.

And also, let's just say as well, I don't think that that client consented to that situation. I don't think that there would've been a conversation around that. I think that the client might've just thought, oh is this what we all do these days? Like we just have these kind of casual catch-ups, but it's not up to the client to make a decision about what is appropriate. It's up to the lawyer to be keeping front of mind their duty to their client to maintain confidence.

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Julian: That's really interesting because we've all got devices that mean we can be contacted anywhere at any time and sometimes it's very tempting to, you know, just answer the phone even though you weren't really thinking of yourself as being at work. And I suppose it's probably not a bad thing to make clear the circumstances in which you're speaking, but I take that point that you are making, which is it's still the lawyer's duty to preserve the confidentiality no matter what.

Cathryn: I don't know about you Julian, even if it's not work-related, if I take a telephone call in the car, I'm usually very quick to tell the person on the other end whether or not I've got others in the car. Like my children are grown up now, so luckily I don't have to ferry them around very often, but back in the day when I was, I'd still make a point of just letting the person know that I would have like my children in the car because you never really know what someone's going to be calling about, right? So this is not legal related that they could be having a bit of vent about someone and you've got like three little kids sitting in the back of the car and you're like, ah... But we could take that into the legal setting and whether you've got your family in the car, whether you've got a friend in the car, if the client calls you, you've got to be really clear upfront whether or not you know there's somebody else in the car and they can't just launch into telling you something about their legal matter.

Julian: And it's interesting you mention the car because that brings up another aspect of communication which is multitasking and even if you are speaking hands-free, you're not using your hands, but you are still driving at the same time. Could you tell us a little bit about problems that lawyers can encounter doing their practise while on the road?

Cathryn: I actually think it's quite a big issue. A lot of the time when I'm in-person and doing training and I ask people about who works in their car, people shake their head and they look away and they don't know what I'm talking about, and I look back at them and I'm like, seriously, you all work in your car. And then we start talking and it doesn't take me very long to till I've got most of them around to my point that a reasonable amount of work can take place and does take place in the car. So we start with telephone calls. Depending on what arrangements you have set up with your client, whether they have your mobile number, whether they feel free to call you at any time, et cetera, it may well be that they call you when you are driving.

Now as the lawyer, before we even get onto legal risk, I think it's important to talk about risk and personal risk and safety. And I'm not going to start quoting any science Julian, but there is science to say that we as humans can't really multitask. So then let's just believe that that's true and think about the fact that if you are driving that is one task that takes up mind space. And if you are on a telephone call with someone, that is another task that also takes up mind space. Particularly if it is a client call that relates to something, you know, fairly substantial. It's not just the client calling you to tell you that they're going to be a bit late, so there's two tasks. Now, if you are concentrating fully on the telephone call, the science would then say that you're not really concentrating on the driving. Now that's not good in the context of safety, but if you are concentrating on the driving then the science would say you're not really concentrating on the telephone call, which is not good from your professional perspective because I think the client, particularly if they're getting billed, would like your full attention.

Now people would say to me, “Cathryn, it’s okay, I just do the telephone calls between the office and going home. I drive that way twice a day, five times a week. It’s all fine.” And I’m like, we know driving is about being ready for the danger. So if you do that same trip over and over and over again and nothing ever changes, then sure that’s fine, but that’s not what safe driving’s about.

Julian: And I suppose it’s worth clarifying at this point, Cathryn that I’m certainly not driving currently and I don’t think you are either. So we have full focus on our conversation about the risk issues of working on the run. But Cathryn, are you really saying that you should never take legal work calls when you’re driving?

Cathryn: I don’t really think that’s for me to say. I think at the end of the day people make their own decisions about what’s appropriate for them. I think what I’d really like as a takeaway is that there’s an awareness that you do need to have a think about what is appropriate for you, what is appropriate given your clients and the kind of work you do and how you might be traveling.

So it might be easier if I give an example. I remember doing a training session with a team of lawyers and one of the most senior people in the room actually gave an example here, and he said that he commutes something like half an hour to an hour each morning and each afternoon and he has rules for himself, and these are his rules.

He says that he will take telephone calls or make telephone calls in the morning on his way from home to work. He will not do the kind of telephone calls that are going to go for 5, 10, 15 minutes; anything that’s kind of substantial, he won’t do that. But he will do some telephone calls on his way to work. He makes a very conscious decision to sit down at his desk when he arrives at work and make file notes for each of those calls and does that straight away, while he can still remember the content of the call. He then told his team that he pretty much never does telephone calls in the car on the way home from work at the end of the day for a couple of reasons. He said that after a full day at work, he’s tired, he’s not got the capacity to really be able to concentrate on the call and the driving, he doesn’t think it’s safe. And also the driving conditions in the late afternoon tend to be a little bit more difficult than what they are in the morning. So he doesn’t think that it’s appropriate from a work perspective or from a safety perspective to be doing telephone calls. And I thought that that was a very good set of rules that he’d had set up for himself.

Julian: Yes, very interesting. And shows that he really has thought through the implications of something that can sort of take you by surprise when someone just calls and, you know, there might be exceptional circumstances where things differ but good to have practises that minimise those risks that we’re talking about.

I suppose we started Cathryn talking about confidentiality risks and people listening in. These days, there’s more than one type of listening in and it’s not always humans either. Could we talk a little bit about technology for recording and listening devices I suppose you could call them to make them sound even more sinister, and maybe use that to bridge into a discussion about what are the technology and cyber security issues that we need to be particularly aware of if we’re working on the run?

- Cathryn:** So, I might stay with the car scenario. Without being an expert on electronic cars and the new breed of cars that are coming through, it's pretty clear if you've ever been in a Tesla or some other vehicle like that, that the car likes to get to know you. I was in a friend's Tesla a while back and I said that I would put some music on so I plugged my phone into the system and as I was doing it, it occurred to me that that Tesla now...yes, well not just that car, but Tesla now knows who I am and potentially could be accessing my phone. I don't have a lot of confidential information on my phone. I'm not currently practising as a lawyer. I don't have a practice certificate. But then as I thought about it, I thought well if you only have one phone as a lawyer and you are using that phone for work and for private and then you're using that phone to link into your car's system, potentially there is a possibility of the car and then the business that runs that car, being able to access data that's on your phone.
- Julian:** And potentially other people as well. I've certainly used share cars and if you connect to the music, I think it's an option whether or not the contacts are shared, but if you use the phone function it's likely to happen. And I've certainly got into share cars and seen the phone name of somebody who I know. It's worth bearing in mind as well that even the existence of the lawyer-client relationship is a piece of confidential information in itself.
- Cathryn:** It is, it is. Whenever I get a chance to talk about it, I always talk about the idea that I think that pretty much from 2023 onwards it's going to be reasonable for lawyers to have two phones.
- Julian:** Well, I was going to ask you about that, yeah because you alluded to the intermingling of information and there certainly are some lawyers who I've come across who have more than one phone and I don't think they were dealing drugs except in one possible exception. But would you recommend lawyers having a work phone and a non-work phone?
- Cathryn:** Yeah, I think it's actually the way of the future. We've already heard the stories about TikTok and the issues of having TikTok on your phone and we're seeing government defence, all sorts of people now saying that you cannot have TikTok on your, certainly not on your work phone, but also preferably not on other phones that might be using the same Wi-Fi and linked in the same system. And look, I'm not going to get into, you know, the reality of whether, you know China is hacking everyone's data through TikTok or not.
- Julian:** We'll save that for another podcast.
- Cathryn:** But, let's just be clear, people are concerned about things like TikTok. So, if you were wanting to be safe, the better thing to do I think would be to have two phones. One would be your work phone that has your work email and don't get me started on people having only one email address. But you should have your work email on your work phone, internet and then only the apps that are approved by your work. You've got some apps that are to do with time recording or some apps to do with productivity or et cetera et cetera. And that's fine. But then you should have another phone and that other phone is the one that has your private email, again internet, and then whatever apps you want and no one needs to know what they are. I think that's how you keep things safe.

And then you should have your work phone turned off as much as possible when you're not at work. Again, let's not go into the whole realm of work-life balance and burnout, et cetera. But if you can turn your phone off that's good, you don't keep getting the pings and bings of the emails coming in, they'll be there later when you go to look at them. And likewise, when you're at work you might want to be able to turn your private phone off because I think also this is just about good mental health, it's just turn that off and focus on what you're doing, which is work and not have all the other stuff going on. But then also turn it off because it's not secure.

Julian: And you mentioned the internet connection there. I think we can just say as a broad general rule, don't use public Wi-Fi. That's not just for lawyers, that's a general cyber safety rule. But are there other cyber security considerations that you think people working away from the office desk should really be taking into account?

Cathryn: It seems to me having discussions with people working in law firms who have given this some consideration that they will ensure that they have a VPN—a virtual private network. Again, without going into the ins and outs of it, what is happening in that space is developing, so there may well be new technology that creates an even safer version and not just in Australia but also overseas as people get back to doing a little bit more travel. You want to ensure that when you're working either away from your desk in Australia or in another country that you are using a safe network or when in doubt a hotspot off your phone, but don't, yeah, don't use Westfield or the airport or anything that just kind of pops up that looks handy because it's free and you don't need a password.

Julian: And it's funny, so many things come back to the car at the moment, but one of the criminal indictments that Donald Trump is facing comes from the fact that one of his lawyers made an audio recording file note while in the car after a meeting. Could we talk a little bit about record keeping and some of the restrictions on our ability that do follow from working on the run and what your advice is for ways to minimise the risks that follow from that?

Cathryn: So again, if I sort of go back to the olden days as we sat at our desk, we would make a file note of a telephone call. We would make notes of the things that we were doing. If we were sitting in a meeting with a client, we would make notes and those handwritten notes would get put onto the file straight away. So best case is to do a contemporaneous file note because when you are in the moment, your ability to recall is let's say a 100% or maybe a little bit less, but let's say a 100%. As time goes by, if you don't do the file note contemporaneously, as time goes by your ability to recall diminishes.

Again, I don't need to go into a lot of science, but there is this graph that I love referring to, called the Ebbinghaus Forgetting Curve, you can google it if you wanted to see what I'm talking about. I think everyone can understand that from a human perspective that your ability to recall goes down over time. And then I think also you could factor into that, that if you were doing multiple telephone calls that would also impact on your ability to be able to make a good file note. Because if you do 5, 5-minute telephone calls, what is the likelihood that when you sit down at your desk, each of those file notes will be 100% accurate. So that'd be the first thing to have a think about is whether you, if you're doing your file notes later, is that impacting on their reliability.

Then the second thing to think about is if you are going to be doing file notes contemporaneously, what does that look like? And I have heard people tell me that they have set up through their phone the ability to dictate their file notes and whether that's a dictate-to-text mechanism or whether it's something that is dictated and then sent to someone who might type them up later. Either way, I think that that is okay that you are recording something contemporaneously.

And I've also heard people tell me that after the telephone call in the car that they will pull the car over to the side of the road, stop, which is always good, and then send an email to themselves or I've even had people tell me that they ring themselves and leave a message. So they're still thinking about trying to capture what was in the telephone call as soon as possible after it takes place.

Julian: Now, Cathryn, we've mentioned the phones a few times and I suppose with all technology they can be a blessing and a curse. What are some of the issues that you'd like to draw our attention to when you are working on a different device from the thing you might use as your main device, your desktop or laptop computer in the office, are there particular things to be aware of there?

Cathryn: I think that, you know, lawyers do a lot of work on their phone and the minute you've moved away from your desk and you are..., say let's stick with reading emails on your phone, I think that does give rise to some risks. I think the first point and a bit of an overarching point is if you are reading email on your phone, chances are you're not sitting at your desk; you're somewhere else.

You're at your kids' assembly, or you are standing in the line at the coffee shop, or you're, you know, walking down the street. And in those kinds of situations you're in a situation where you're much more likely to be distracted and therefore it's not ideal for reading and concentrating. I think that's kind of the first point.

The second is when you are reading emails on your phone, the fact that you are on your phone and not looking at them on a larger screen and that the device, the phone has less functionality than a computer or a laptop is also an issue. So, I mean aside from the fact that you can't really see very much on a screen, it's smaller and that the text is formatted a different way, there's lots of other things that come up. You potentially can't see, or download, or read various attachments. Certainly difficult to open them and be reading them at the same time as the email. If you are responding to a message, your phone can do all kinds of fun stuff with autocorrect.

Julian: Yeah, or reply all instead of reply to one.

Cathryn: Yeah, yeah. It also can pick up your personal contact on your phone and therefore sometimes it can also autofill the wrong name and you can send something to Aunt Mary that you actually meant to send to one of your clients. So that I think is an additional risk.

And I don't know about you, but like again, not necessarily work-related, but there's many a time where I'll read something on my phone and when I go back and read the email on my laptop, which is much bigger, I'll sort of have an understanding that what I was actually reading on the phone, I didn't really understand what the message was.

Now, that happens to me in my day-to-day life. So I always think, gosh, what could that mean in relation to a lawyer and a legal matter if they kind of miss the real meaning of a message because they're reading it quickly and they're reading it on this little tiny screen.

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And someone just brought up an issue with the other day as well, which was if you do get an email and you go to reply to it or click on a link, you may actually be clicking on something that's a phishing email because you lose that capacity to kind of be able to check the email address and see whether it's the actual email address of the person, or whether it's that gobbledygook, which you can do quite easily when you're on your computer or your laptop.

Julian: Yes

Cathryn: There's all different kinds of potential risks that come up there. So again, I'm not saying don't use your phone or don't read your email on your phone. I think that we have lots of amazing pieces of technology that allow us to work more efficiently and to do, you know, manage our work-life balance, but just be aware that you're not as safe, there's risk for when you're working on your phone.

Julian: And a special hello to all those people listening to Risk on Air on their phones. As I imagine, a very large proportion of the audience is. When it comes to phones as well, something that there is, in fact, case law on is the fact that emoticons appear differently on different operating devices and that has led to misinterpretations sometimes with quite dire consequences and sometimes with hilarious ones. But in either case, just worth bearing in mind that the mode of communication that we use can have significant implications.

Cathryn, thank you very much for speaking with us on Risk on Air.

Cathryn: Thank you, Julian, thanks for having me.

Outro

Thanks for listening to Risk on Air by Lawcover. Join us for the next episode on current risks in legal practice to stay up to date.