

Special Considerations for Sole and Small Firm Practitioners

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Introduction

According to ABA statistics, most malpractice claims occur in firms of one to five lawyers. In and of itself this is not news because nearly 80 percent of lawyers in the United States currently practice in firms of this size. When these practitioners pause a moment think about this reality, however, they become alarmed because the statistic is inconsistent with the attorney's self-image: "I am a servant of my loyal clients who would never make a claim against me." Statistics show that lawyers need to recognize that claims are made against attorneys, just like you, every day.

This article will look at several areas of special and current interest to the small firm practitioner seeking to avoid ethical and professional liability problems.

Office Sharing: Implied Partnership Can Constitute Liability

Lawyers know the economic benefits of office sharing. Overhead dollars go far further when sharing rent, library and research materials, scanner, copier and other equipment and even personnel. Another well-known benefit is simply having others with which to work, i.e., the social factor. A lawyer may appear to be having his or her cake and eating it too by gaining the benefit of apparent association, while still maintaining his or her own work schedule, clients and responsibilities.

A nasty surprise may await the lawyer practicing in a shared space arrangement when confronted with a legal malpractice case arising out of the negligence of an office "sharer," or worse, a lawsuit demanding recovery for fraud committed by a perceived "partner." Office sharers who share a trust account may be found to be responsible for the embezzlement of another lawyer. Missed statute of limitations on the part of one office sharer could result in malpractice claims against all office sharers. Claims of this kind may not be successfully defended unless each office sharer has informed all actual and potential clients that his or her practice is a separate professional entity.

What does an office sharer need to consider?

There are a number of concerns, both ethical and practical, raised by an office sharing relationship. These concerns are also present where a lawyer is sharing offices with non-lawyers or where a lawyer is operating another business, such as a title insurance company, from a law office.

The Model Rules of Professional Conduct give lawyers some guidance. For example, §7.1 states that a lawyer is not allowed to make false or misleading communications about services being rendered.

A communication is false or misleading if it contains a material misrepresentation or omits a necessary fact. In addition, firm names and letterheads cannot be misleading. Model Rule 7.5 provides that lawyers may state or imply a partnership practice or other arrangement only when this is true. Regarding communication, Model Rule §1.4(b) states that a lawyer must explain a matter to the extent that is reasonably necessary to permit the client to make an informed decision regarding representation, including the lawyer's status as a sole practitioner or as a member of a firm. A number of other rules also apply to office sharing, including confidentiality of client information (Model Rule §1.6) and conflict of interest (Model Rule §§1.7, 1.8 and 1.9).

Imputed disqualification rules may also apply to office sharing arrangements. The comment to Model Rule §1.10(a) states that two practitioners sharing office space who consult or assist each other occasionally would not ordinarily constitute a firm. If, however, the practitioners represent themselves to the public in a way that is suggestive of a law firm relationship or conduct themselves as a firm, they shall be regarded as a firm for purposes of the Model Rules. This implied law firm relationship is cited prominently in case law as well. The comments to the imputed disqualification rule make it clear that it is prudent for lawyers practicing in this kind of setting to have a formal office sharing agreement. This rule also serves as a reminder of the importance of safeguarding client confidentiality. These are practical, everyday concerns for office sharers and for their clients.

Some practical suggestions to protect office sharing status

Since the determining factor in both the case law and the Model Rules is grounded in perception, office sharers need to be vigilant with respect to common office situations.

- Name Plates: Display separate name plates for each lawyer and explicit designation on the office door such as "a sole practitioner" or "not a partnership"
- Printed Materials: Letterhead, business cards, invoices, brochures, etc. should be separate for each practitioner
- Telephone: Separate telephone lines with different telephone numbers is preferable to sharing a single line and using a generic greeting such as "law offices"
- Standard Language: Engagement letters should include language indicating the lawyer is neither affiliated with nor responsible for other lawyers
- Notification: The difference between a partnership and an office sharing arrangement should be explained to new clients
- Referrals: When making referrals to an office sharer, a disclaimer should be included that states clearly the office sharer is neither a partner nor a professional associate; inclusion of attorneys other than office sharers in a referral is advisable
- Confidentiality: Office sharers must be cognizant of all aspects of confidentiality, including office design, acoustics, soundproofing, file and computer access, whereabouts of unattended materials and shared personnel (see Wis. Formal Op. 86-13(1996) regarding supervising and instructing personnel about strict observance of ethical rules)

- **Avoid Obvious Conflicts:** Opposing parties in a particular litigation should not be seated simultaneously in the same reception area
- **Selection of Office Sharers:** Selection of office sharers should include consideration of attitudes toward and willingness to adhere to proper ethical standards since office sharers will impact one's professional reputation
- **Malpractice Insurance:** All office sharers should have malpractice insurance and be adequately insured for the possible finding of a de facto partnership
- **Office Sharing Agreement:** All office sharers should partake in the drafting and annual review of their office sharing agreement and abide by its terms
- **Be Prepared:** Office sharers should anticipate and be prepared to establish, by client practices, business management, bank accounts, trust accounts, tax returns, etc. that they are not partners

Maintaining client confidences

Maintaining confidences within a shared setting is critical. Office shares must be extremely vigilant about making certain that procedures and office layout ensure client confidentiality.

- **Receptionist Area:** Work stations should be designed such that computers and files are not visible to third parties
- **Office Soundproofing:** Lawyers' offices, conference rooms and work areas must be designed adequately to eliminate the ability to hear conversation in adjacent offices
- **Common Areas:** Conversations about client matters should not occur in the reception area or other common areas
- **Storage:** Client files should be stored in private, locked storage areas and access to storage areas should not be shared
- **Work-In-Process:** Work-in-process should be protected from idle curiosity
- **Client Identities:** Client identities should be protected in terms of physical proximity to common areas, e.g., ideally, conference room should not be visible from the reception area
- **Disposal of Paper Waste:** Use of a paper shredder will reduce the ease of client confidentiality breaches (just because it isn't privileged, doesn't mean it's not confidential!)
- **Limitation of Access to Interior Areas:** Access to offices, filing and fax areas, etc by vendors, maintenance personnel or others who make a simple request to use the telephone, service the copier or water the plants should be monitored closely
- **Notification:** Employee handbooks should instruct all personnel (attorneys and staff) of their respective responsibilities in maintaining the separation and distinction of individual practices

- Disposal of electronic equipment: Hard drives for all electronics must be destroyed or overwritten in a responsible way before disposing of or donating the equipment. Pay attention to all electronic equipment, including phones, laptops and whatever other communications equipment is storing confidential information.

Have a plan

Comments to the above mentioned Model Rules indicate that a written plan is an important component of an office sharing arrangement. A lawyer who is office sharing needs to review the situation as carefully as a lawyer joining a partnership or a corporation. The ability of lawyers in any group to maintain their separate practices, and to be held responsible only for their separate practices, is directly related to the procedures the group has agreed upon and the way each lawyer implements those procedures to notify the public of the true nature of their relationship. That relationship should be written down in some kind of periodically reviewed agreement, which requires compliance with its terms. One of those terms should be that all members of the group maintain adequate professional liability insurance coverage. Depending on a particular state's liability laws and their application to attorneys, an attorney may wish to include a requirement for each officer sharer to maintain insurance coverage for a period of time even after leaving the office.

If a lawyer is involved in an office sharing arrangement for the marketing potential and the perceived power that comes from practicing in a group, the lawyer should consider seriously the liability he or she is undertaking and may wish, in fact, to create a partnership or a corporation.

What Happens to Your Clients When Something Happens to You?

Disaster can strike. And when it does, it may not be due to calamities such as drugs or alcohol or death. Applications for professional liability insurance often ask sole practitioners about their plans for handling the practice in the event of an extended absence. Many lawyers respond by stating that any extended absence would be for vacation purposes only and taken only if planned well in advance. Such a narrowly circumscribed response denies reality. Inadequate planning in the case of unforeseen disaster is a major problem that plagues most lawyers, but is especially true for sole practitioners, many of whom are practicing without or with inadequate support. Adequate planning for disaster means more than taking an updated computer disk home on a regular basis. Although lawyers can not anticipate all contingencies, it is incumbent upon attorneys to engage in some planning and to take reasonable precautionary measures to avoid a disaster or at least be prepared to deal with one.

It can happen to you - disaster can be environmental or personal

Examples of unexpected or unplanned for disasters are many and diverse. How about the law offices made inaccessible by flooding from hurricanes, overflowing rivers, earthquakes or other natural disasters? Terrorism is now more than an academic notion. Family or personal medical emergencies can occur at any age. For example, the 42 year old lawyer who suffered a stroke, was recovering well physically, was anxious to return to his small firm practice and in his doctor's judgment only his communication skills and judgment continued to be affected by his condition. How about the client who could not locate his attorney less than two weeks before his hotly contested divorce trial was to begin?

The client knew his sole practitioner attorney had cancer. Then there was the lawyer who had no staff, so his answering machine was his interface between him and his clients. The client's numerous messages went unanswered. One lawyer told of looking at office space occupied formerly by another lawyer and felt as if he had entered "ghost premises." The office, indicative of a sudden disappearance, was abandoned with a half cup of coffee, unopened mail and papers spread all over a desk.

Professionalism requires planning

Lawyers are professionals. Duties owed to clients do not cease or lessen because a lawyer is having a bad day or is unable to serve clients, even if for a legitimate reason. The Model Rules require lawyers to act competently and with diligence even in these circumstances. . Lawyers should have a written plan containing instructions for a trusted third party who could step in and administer the practice in the event of a sudden unavailability. Reciprocal arrangements between trusted colleagues are a good idea.

Additionally, whatever contingency arrangements are in place by a sole practitioner should be explained to clients at the time of hire. The burden that befell the divorce client mentioned above would have been eased greatly had he been able to contact another lawyer to assist him. Too many lawyers believe they can rely on their spouses to handle these kinds of dilemmas. This is ethically inappropriate as well as shortsighted from a practical standpoint. The unpredictable emergency is likely to render not only the attorney, but the spouse as well, over burdened and unable to attend to the lawyer's clients.

Have a Plan

What requests should be made of the attorney being considered for the reciprocal arrangement?

- Calendar: Instructions regarding accessing computer calendars
- Addresses: Up-to-date addresses so clients and courts can be notified
- Tickler: Access to the tickler file or work management system
- Critical Information: Statute of limitations deadlines, account payables and receivables pertaining to each client (added bonus is that keeping a file current increases efficiency)
- Financial Responsibilities
- Passwords for access to e-mail, voice mail, files and accounts
- Salaries - amounts and date payable
- Rent - consider negotiating a clause providing for automatic cession of rental obligation and surrender of premises in the event of death or disability rendering lawyer incapable of practicing law
- Equipment - mortgages or leases which need to be paid, including amounts, creditor names and location of contracts

- Utility bills
- Bank account information - identification of signatories and person(s) who deal with trust funds, releases, escrows or any other financial obligation; passwords, if required
- Location and access to safe and safety deposit boxes
- Billing and accounts receivable procedures
- Fee agreements between attorney and clients or with other counsel
- Location of insurance policies; location of professional liability insurance policy; ability to receive or purchase extended reporting feature; adequacy of policy limits; applicability of deductibles
- Location of other contracts affecting the practice

By informing clients and prospective clients that an attorney's professional responsibility encompasses planning of this kind, clients are assured their attorney is placing as much attention on their matters as the attorney would place on his or her own matters. Forward thinking of this nature can serve as a powerful marketing tool.

Managing Conflicts of Interest: They are Unavoidable so Engage in the Best Possible Management

Sole practitioners in small communities face unique challenges to the practice of law that are different from their big city counterparts. For example, it is not atypical that in a small town both the buyer and the seller of a farm enlist the services of the same attorney to help them in this transaction. The lawyer, a sole practitioner, has known the buyer and the seller for his or her entire life. The attorney has done legal work for both of them, knows both of them well and possesses information about each of them that could impact the negotiation. According to the Model Rules, the attorney should send the buyer and the seller to different attorneys in adjacent towns, 20 miles in opposite directions. Furthermore, if the attorney were to represent them both, he or she must obtain written permission to engage in a dual representation that will not allow the attorney to render separate advice to either or keep confidences of either party from the other in the transaction. The lawyer believes these mandates are unreasonable, disruptive of the attorney-client relationship and would drive him and others like him out of business. What is a lawyer facing this dilemma supposed to do?

Philip C. Williams, in his book, From Metropolis to Mayberry: A Lawyer's Guide to Small Town Practice (General Practice Section - ABA 1996), recognizes that small town relationships "make mincemeat" of conflict systems, ethical canons included. He recognizes that conflicts "descend on the unwary like a morning fog." The biggest benefit in this lawyer's practice, of course, is that the lawyer in the small town knows nearly everyone and nearly everyone knows the lawyer. The biggest disadvantage, of course, is that the lawyer knows nearly everyone and nearly everyone knows the lawyer.

It is Time to recognize that society is changing

Twenty years ago, these kinds of problems were blips on the horizon. The lawyer's role as a trusted family friend and counselor is disappearing as our society becomes more complex and more consumer oriented and where, in many cases, social change has made the lawyer the guarantor of the financial success and prosperity of his or her clients. While these forces may have taken longer to reach the small community practitioner, every lawyer should expect that clients are getting information on-line and from other people, and any advice given will be "second guessed." Areas of particular concern are intra-family transactions, such as estate planning, transfer of the family business, or representation of both shareholders or partners and a company, where goals are compatible initially, but later change or are perceived to have changed.

Conflicts: do's and don'ts

- Development of a thorough, reliable means of performing a conflicts check
- Discussion with clients: Do not underestimate the need for frank discussion of issues created by joint representation, including conflicts between the attorney and his or her clients. The Model Rules require lawyers to communicate adequate information and explanation of the material risks and reasonably available alternatives so the client can give "informed consent" to the dual representation. Clients deserve to understand potential problem areas that may arise from the attorney's representation. A letter confirming the discussion and decision in which the client provides written consent should follow verbal conversations. This process has a tendency to enhance rather than detract from client relationships
- Reduce agreements and understandings to writing: Memories will fade or become convenient
- Creation: Do not limit the check to your billing system
- The scope of the inputted names is extremely important. While not so obvious, the following should be included: staff, spouses of attorneys, spouses of non-attorney staff, employers of attorneys' staff and spouses, pro bono clients and current and former names (spouses and children may have different last names)

The area of practice may lead the inclusion of other names. Consider each representation to determine what is appropriate. For example, a business or real estate transactional attorney may require the names of buyers, sellers, partners, shareholders, corporate names, partnership names, directors, officers, subsidiaries, affiliate businesses and opposing parties in a transaction.

When do you need to use your conflict system?

A conflicts check should occur at the time of the first client contact and prior to the client's divulging of any confidential information. Adhering to this rule may be difficult since attorneys are likely to meet people under casual circumstances such as at church or the grocery store and are likely to be asked for legal advice. Some lawyers give "general advice" even when asked a question on the telephone or in an e-mail by someone who has not been identified. This is a dangerous practice. Small community practitioners face an even tougher challenge. A small community practitioner is more likely to be viewed as a respected advisor whom people think they can call upon for advice and thoughtful opinions at any

time. Additionally, the small community practitioner is likely to have more walk-in clientele. This results in a greater tendency to skip the conflicts checks for these unscheduled clients, raising the risk of later ethics or malpractice claims.

Providing legal advice under circumstances such as these is very risky. Lawyers must understand that for the purposes of assessing unethical conduct or malpractice liability, the failure to bill a client or the lack of intention to do so is not determinative. In most jurisdictions it is the expectations of the recipient of the legal advice that governs whether an attorney-client relationship has been established.

If an attorney has office staff, the staff must be trained to obtain the information necessary to conduct a conflicts check before the initial client meeting and before the receipt of any confidential information that would prohibit continued representation. Additionally, throughout the representation of a client, the conflicts check should be updated. For example, initial representation of the seller of a piece of real estate may not be problematic until the prospective buyer of the property is identified.

Lawyer as scrivener

Especially in transactional work, buyer and seller will approach one attorney to "just review the papers and make sure everything is okay" or just "write up" what the parties have already decided to be the deal. A lawyer may proceed, thinking that he or she is acting merely as a scrivener. The comments to Model Rule 1.7 make it clear that this is a direct conflict of interest and must be handled as such by the lawyer. Comments to Rule 1.3 make clear that any doubt about the existence of an attorney-client relationship should be clarified by the lawyer and preferably reduced to writing. This can be a heavy burden where two clients ask the attorney merely to "draft the documents to do the deal." Many lawyers try to deal with this by choosing to represent only one party. That works where the lawyer is clear about which party is the client and then resists the impulse to "help" or give advice to the other side.

Rule 1.7 and comments caution a lawyer to refuse joint representation unless he or she reasonably believes the lawyer can provide competent and diligent representation to each client, and that the joint representation can be accomplished on compatible terms in a way to ensure that clients are fully informed, little risk of material prejudice exists and no other ethical obligations, such as confidentiality, are impaired. Providing adequate disclosure of the advantages and disadvantages of joint representation and getting informed consent in writing is a challenge, but doing so can protect against the loss of the license to practice law, although it may not avert a malpractice claim.

The rule and reality part ways

Even if clients pay close attention to their lawyer's litany of the disadvantages of joint representation and the lawyer documents the conversations with each client, obtains signed informed consent from each client and acts only in the capacity of scrivener, a malpractice claim from a dissatisfied client is still a possibility. More often than not, clients believe that their lawyer never would have asked for a waiver unless he or she was confident that no problems would arise from the joint representation. When problems arise, clients feel the lawyer has violated this "guarantee." A failed joint representation in any form involves cost, embarrassment, possible recrimination and often a malpractice claim. A lawyer undertaking joint representation must be aware of the risks, must be willing to draft the appropriate information and waiver letters, must obtain informed consent in writing from both clients and be willing to face a malpractice claim if the object of the representation is not achieved. In the face of

failing to document the making of appropriate disclosures and failing to obtain written consent from each client, an ethics grievance may await the lawyer as well.

Non-clients as claimants

Exposure to claims of professional liability is no longer limited to clients in privity with their lawyers. In many states certain situations may give rise to exposure from third parties. For example, the lawyer found negligent in supervising the execution of a will faces exposure to liability from a disenfranchised beneficiary. The requirement of privity between contracting parties varies from state to state. The fact is that lawyers are being held to have duties to non-clients more frequently today than in the past.

To add to the conundrum, claims can be made against lawyers who never recognized the claimant as a client, but find later that a court has determined that such a relationship existed. One example occurred when a lawyer representing the bank at a closing made casual comments to the buyer regarding the status of title. He later found his words to be relied upon by the buyer. Another example occurred when the lawyer's client, the bank, desiring to obtain adequate documentation of the buyer's assumption of the loan, referred both the buyer and the seller to one lawyer to draft a document memorializing their agreement and splitting the fee. Unless the lawyer identifies who the client is and who the client is not, the lawyer has left the door open for a malpractice claim if the transaction is not concluded or if the buyer decides at a later date that the seller misrepresented the property. It takes little creativity to imagine the buyer's comments should such a situation arise: "certainly my lawyer, whom I paid, owed me the duty to properly advise me of the risks." As an aside, if the lawyer is merely documenting a transaction for both parties, he or she is likely foreclosed from giving any legal advice. The decision to accept dual representation and not an advisor, however, belongs to the informed client. Ultimately, the decision about the role and duty of the lawyer will turn on the care the lawyer took to make sure he or she was working with informed clients. When in doubt, it is a sobering thought to consider a scenario involving a 25-year practitioner being asked in deposition if the plaintiff was his or her client on a particular date and having to pause to consider the answer.

It is not unusual for lawyers to have claims made against them by unidentified people to whom they have spoken on the telephone, to whom they gave advice which proved to be erroneous, or by people to whom they have given informal advice in a social situation. The potential for these risks are multiplied by electronic or voice mail. Practicing law in a small community drives these claim possibilities even higher because every contact made is a potential client contact. All of these "sins" are fine as long as the client or non-client is pleased with the result. That more often than not things do go right has a tendency to lull lawyers into a false sense of security. Consequently, lawyers think of themselves as professionals serving clients and find protective letter writing to be a distasteful job. Lawyers should see the drafting of a letter to a client both as a means of educating the client and clarifying their respective roles.

Extending yourself can backfire

Helping others is a tenet of the legal profession. Yet, some lawyers find themselves enmeshed in malpractice claims when they undertake to help someone, such as a relative or a friend of a friend, whom they do not perceive as a "real client." For example, the answer to the friend's question is not readily available and needs some research. Notwithstanding good intentions, when the demands of paying clients intrude, the assistance promised to the friend tends to be postponed or buried by more pressing obligations. Eventually, the friend talks to another person with a similar problem who received a great

solution and the "do good" lawyer is in trouble. In a small community, this kind of problem can be exacerbated due to the ease with which one can become involved in the disputes of friends, neighbors, business acquaintances and others.

When to say "No"

One of the very best ways to protect oneself in terms of professional liability risk, while protecting one's sanity, family and colleagues, is to know when to say "no." A lawyer should say "no" when lacking the time, expertise or resources to handle a matter, when clients attempt to take over the lawyer's job of lawyering, when a statute of limitations is about to run, when the merits of the case are highly questionable or when one's stomach suggests the lawyer take action that is contrary to his or her best professional judgment.

Most importantly, a lawyer must trust his or her instincts. A good client for one lawyer may not be a good client for another lawyer. It is important to pay attention to those subliminal messages when talking to a prospective client during an initial interview. Difficult client relationships or client control issues are likely to worsen as time goes on. It is important for a lawyer to have self-respect and respect for one's family and staff when considering a new client. Lawyers should be mindful of past occurrences when they ignored their intuition and became entangled in difficult client control or relationship issues. A lawyer's concern about attracting business should not prevail over his or her common sense.

How to say "No"

The clearer the "no," the better the end results. Too many lawyers try to be gentle about this and in so doing, confuse the message. If the lawyer's delivery of the message is ambiguous, the client will interpret the communication to mean that the lawyer is considering the matter. It is not a good idea to promise things that cannot be delivered, such as offering to look for another solution. Unless several potential referrals are available at the moment, lawyers should not promise to help find a client a lawyer. (That is what your state lawyer referral or local bar's service is there to do. Providing that telephone number can get a lawyer off the hook.) Lastly, the "no" message should be confirmed in writing.

A lawyer's assumption of responsibility for handling a trial where time or resources are lacking is analogous to being a little pregnant. If a lawyer were to conclude, after an initial client interview and case assessment, that a case was not one worth pursuing, the lawyer should adhere completely to that decision. An example is illustrative of this point. A sole practitioner made it absolutely clear at the outset of the attorney client-relationship that although he was unable to fund a medical malpractice case to conclusion, he would do the initial work-up, attempt to get a settlement and if unsuccessful, would find substitute counsel to handle the trial. There was no settlement. No lawyer agreed to take the case. The statute of limitations was about to run. The lawyer's choices were untenable: risk filing and responsibility for a case he or she was not equipped financially or professionally to handle, or face a malpractice claim for allowing the statute of limitations to run. What started out as a helpful gesture became a no-win situation for the lawyer.

Conclusion

There are both disadvantages and advantages to practicing as a solo practitioner or in a small firm setting. Often a solo or small firm practitioner is situated in a smaller community. Clients and potential

clients will expect the lawyer to be the solver of all problems. Lawyers may find that support services are more limited and salaries are depressed. Collection of fees may become a social problem. Lawyers may be required to take less desirable cases.

On the other hand, the sole or small firm practice has some advantages over large firm practice. That lawyer is closer to the law and to the people he or she serves. That lawyer has an eye witness opportunity to see tangible results of his or her representation in a very personal way. Generally speaking, that lawyer's clients are more appreciative and deferential. That lawyer's caseload, being more diverse, brings excitement and interesting challenges. That lawyer will see how his or her services impact the lives of others.

By being aware of and prepared for the unique issues, he or she will be able to ensure competent representation while enjoying the perks of the lifestyle and the practice.