ALPS
Practice Management Pointers

Office Sharing Considerations

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Someone recently shared a comment on a blog that talked about how malpractice insurance companies and those who write our rules of professional conduct are behind the times. Apparently those of us who run in the ethics or insurance circles just don't understand how lawyers practice in today's world. Let's just say that I respectfully disagree and the following explains one of the many reasons why.

Years ago I visited a small law firm that was part of an office share arrangement located in Chicago's Loop. Of course I understood that the cost of maintaining an office in the Loop would be prohibitively expensive for the typical solo or small firm so this was no surprise. What did take me off guard was the reception area. As soon as I walked in, the first thing that I saw was a large reception desk staffed by six to eight receptionists. I quickly realized that far more than two or three distinct firms were operating out of this common space which made me think that this was going to be a longer day than I had planned. Why? Well, while I do appreciate the benefits that can come with office share arrangements, there are ethical, malpractice, and insurance coverage concerns that can easily arise in the context of an office share situation. Due to the amount of client traffic in that reception area I suspected little thought had been given to any of those concerns by anyone in this group.

In order to set the stage, let's talk about my response to walking into that space. From the outset, I viewed the arrangement as misleading and thus a possible ethics violation in and of itself because there were no clear signs informing the public that the space housed a number of independent firms. Making matters worse, anyone entering simply approached the first available receptionist. The result was that the common reception area suggested that all of the attorneys who practiced in that space practiced together as one firm when in fact they did not and that's a problem. For example, should one of the solo attorneys practicing there ever be sued for malpractice, other occupants may also be named in that suit given the public presentation of the group as a firm. Now here is where it gets interesting. Malpractice policies generally exclude coverage for any and all claims that arise out of or in connection with any act,

error or omission committed by an attorney with whom an insured shares common office space and who is not an insured under the insured's policy. So if your independent office suite mate gets sued for malpractice and you are named in that suite, had no involvement with or perhaps even awareness of the client who filed suit, don't be surprised if your insurance carrier says "good luck with that" after you put your own carrier on notice. Given this, the following tips are provided as a guide in order to assist you in avoiding this coverage problem and others like it.

- **Focus on clear indicia of separation**. Signage should emphasize the existence of separate practices or firms and not simply be a list of attorney names. Establish and maintain separate phone numbers, letterhead, fax numbers, offices, business cards, file storage areas, support staff, and computer systems. Directory listings and other advertising should not contradict the indicia of separation. Thus running an ad referring to the group with something along the lines of "The Southern Illinois Law Center" might not be in your best interests. Try to look at your space through a client's eyes. If a first-time client might view or experience the arrangement as a firm, you're inviting trouble. Finally, include a statement in every firm's engagement letter and fee agreement that explains there is no partnership relationship with the other attorneys or firms who also occupy the space.

- **Prioritize maintaining client confidences!** This isn't optional. There should be no talking in the halls, no common fax machine, and file cabinets (or office doors) should be locked when attorneys are away from their offices. Don't leave client material in public places such as shared conference rooms. Close doors when visiting with clients or taking on the phone. Computers should be password protected. If there is a common staff person, this individual should not be involved in opening mail, taking detailed messages, receiving faxes, etc. because a common staff person should never be privy to sensitive client information as the attorney/client privilege could easily be lost as a result.

- **Don't minimize conflict of interest issues**. If the office sharing arrangement calls for a common employee or the indicia of separation are weak in nature, representation of adverse parties by separate practitioners in the space is ill advised and, in a number of jurisdictions, would be ethically prohibited. Regardless, if adverse parties will be represented by separate attorneys in the space, always obtain client consent in writing at the outset.

- **Don't mislead the public.** The use of common advertising to include terms such as "of counsel," "an association of solo practitioners," or "affiliated with" can be a significant misstep if the actual relationship does not support the use of these terms. For example, of counsel means more than being available for an occasional consultation or question. Of counsel is defined as having a close and continuing relationship which involves frequent and continuing contact. If this isn't going to be the case, don't use the term.

- **Put the office sharing agreement in writing**. Issues worth considering include, what equipment will be shared and who will be responsible for its maintenance and repair? If there will be shared staff, who will hire and fire? How will work be prioritized for the staff, their salaries paid, and who will evaluate these shared employees? Plan for the inevitable attorney arrivals and departures. Who will decide who comes into the space and under what conditions? Will departing attorneys be responsible for finding someone to take their space? Detail all financial responsibilities and the consequences of a failure to meet those responsibilities. Most importantly, require that all office sharing attorneys maintain professional liability insurance in order to remain in the space each year because the lack of insurance is one of the reasons why every attorney in the shared space gets named in malpractice suits.

In contrast to the Chicago situation mentioned at the beginning of this piece, I have also visited a number of office share situations where I have found all of the above ideas fully implemented. It really is possible to avail oneself of the benefits of an office sharing relationship, yet minimize the risks normally associated with these types of arrangements. The key is in striving to identify and avoid conflicts, in implementing strong policies and procedures that preserve client confidences, and most importantly in doing all that you can to maintain professional independence as viewed and experienced by any and all clients. That said, always remember that in spite of what you might say to a client, if you and your officemates conduct yourselves in a way that would lead a reasonable person to believe you are a firm, ethical and/or liability trouble may be just around the corner. This is a great example of where that old saying “If it walks like a duck, talks like a duck, then it’s a duck” rings true.

Now, in reference to the comment left on the blog. It really isn’t about us insurance or ethics types being stuck in the 1950’s that’s the problem. It’s that we as lawyers need to deal with the reality that some of our peers will bring a malpractice action against all attorneys practicing in an office share setting and at times that’s exactly what should be done because to those of you actually practicing in this setting, understand that you don’t get it both ways. You really do need to have your ducks in a row.

Risk Management Questions?

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