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The Blurred Boundaries of Office Sharing: Officemate and Co-Defendant?

The daily practice of law comes with many challenges, not the least of which is the bottom line. Attorneys want to provide their clients with the best possible representation and still be able to pay their own bills. One of the methods to address this juxtaposition is sharing office space. In today's legal market, attorneys share space with other attorneys, various types of professionals, or anyone able to rent the office next door.

There are many benefits for practitioners in sharing office space beyond saving on rent. The shared office environment provides social interaction with other attorneys, cost-saving benefit of sharing office equipment and allowing attorneys to vent about challenges with clients or seek advice on how to deal with a client representation. However, with those benefits may come a heightened risk of legal malpractice claims from clients and from non-clients.

Consider the Client's Perspective

Attorneys have a clear understanding that their law office is a separate business entity from the attorney in the law office next door in a shared space office. Attorneys know they have separate client trust accounts, operating accounts, employee payroll, and insurance. But what is clear to the attorneys likely is not obvious to a prospective or current client. It is the client's understanding and perspective that will matter in a claim of legal malpractice.

When taking steps to avoid any confusion as to who is representing a client, consider the client's perspective and experience with the attorney representing them and other attorneys in the shared office space.

How did the prospective client come into contact with his/her attorney? Was it an advertisement that complied with ABA Model Rules of Professional Conduct 7.1 (Communication Concerning a Lawyer's Services) and 7.2 (Communication Concerning a Lawyer's Services: Specific Rules)? Did the client find the attorney on a consumer website that clarified which attorneys make up the law firm? Did the client find a unique website for the law firm that listed the attorneys in practice?

When the prospective client called the law firm, was the phone answered with a generic "Law Firm" or with "Law Offices of Larry Lawyer"?

When the prospective client first visited the shared office space, did they see signage that clarified that separate law offices were in the shared space? Was there signage in the lobby that listed the separate entities rather than "Law Offices"? When assessing the image being presented to prospective clients, the attorneys need to "step into the shoes of the client" and consider what they see and experience when dealing with attorneys in the shared office space.

Shared Office Spaces May Implicate

Several Model Rules of Professional Conduct

It is essential that clients understand who is and is not involved in their representation. A prospective client may look around a busy office and agree to representation due to their misunderstanding of who is representing them. The prospective client may feel more assured in hiring a law firm with multiple attorneys rather than a solo practitioner. It is the responsibility of the attorney to make sure the client understands who is representing them, and the terms of that representation should be documented in a clearly-written engagement agreement.

If an attorney goes beyond the engagement agreement and decides without express client authorization to discuss his or her client's case with an unaffiliated officemate, "Paul down the hall," the disclosing attorney is risking a lot of problems. Depending on the circumstances, unauthorized conversations with unaffiliated cotenant lawyers could waive the attorney-client and work product privileges, create a conflict of interest, or even violate the ABA Model Rules of Professional Conduct. For example, see ABA Model Rule of Professional Conduct Rule 1.6 (a lawyer generally may not reveal information about the representation without the client's consent, and the lawyer must take reasonable efforts to prevent inadvertent disclosure), and Rule 1.2 (a lawyer may take only such action as the client impliedly authorizes, and the client must give informed consent for any limitation on the scope of that attorney's representation). The attorney also could be sending the client the wrong message about who really is involved in the case. For instance, if the attorney recommends a course of action and comments that s/he discussed that recommendation with "Paul down the hall," who agrees, the client may be justifiably confused about Paul's involvement in the case.

From "Paul's" perspective, casually advising on another firm's client in their shared office space creates its own set of complementary problems. A few well-intentioned comments supporting an officemate's advice, or chatting up the client informally in the waiting area while the officemate attorney is out of the room may or may not be enough to result in "Paul" being named as a defendant in a legal malpractice case, but it fosters confusion and risks triggering various unanticipated obligations with respect to "Paul's" own current or prospective clients. See also ABA Model Rules of Professional Conduct Rules 1.7-1.9 (conflict of interest rules pertaining to current and former clients), Rule 1.18 (imposing various duties on lawyers with respect to possible or prospective clients), Rule 1.10 (conflicts of interest rules which apply when lawyers are, or appear to be, holding themselves out as being associated in a firm), and Rule 4.2 (attorney will not knowingly communicate with

another lawyer's client about the subject of representation without the lawyer's consent). A good rule of thumb is "do not provide legal advice to anyone that is not a client." If "Paul's" legal advice or services are needed, then the client should execute a written engagement agreement explaining the co-counsel arrangement, the scope of representation and associated legal fees.

Know Your Neighbor

Before entering into a lease for a shared office space, attorneys should investigate the other attorneys or professionals who will be in that office. Just as an attorney would research a prospective client or prospective partner, a prospective renter should gather as much information as possible to determine if the office environment imposes any unusual or unanticipated risks or burdens on their ability to practice law.

Questions to think about include the reputations in the legal community of the other attorneys in the shared office space. Do they have an extensive history of grievances or legal malpractice cases? Do they appreciate the need to keep their law practices separate and distinct from the perspective of the clients that will be in the office? Do they have legal malpractice insurance? Would they respect the need to avoid the appearance of providing legal advice to non-clients? What are their procedures for physical and IT security? The earlier and more thoroughly attorneys perform this kind of due diligence, the better.

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Confidentiality

Confidentiality is critical to every attorney-client relationship and is more vulnerable to exposure in a shared office space. Obviously, shared workspaces impose additional challenges related to the storage of physical client documents and other materials, personal attorney work spaces, and secure storage of financial and medical information, but an equally challenging issue relates to clients' electronic data.

As more law firms "go green" or "paperless," and law firm records and data transition to electronic formats, confidentiality concerns extend to shared computer systems and the IT security plans, assets, and sophistication of officemates. Examples of questions to consider include: (1) do officemates share common computer servers or administrative systems, and if so, what is being done to ensure that client data is kept confidential, secure, backed up, and segregated; (2) does the office provide a single WiFi system, and if so what kind of security is in place to prevent outside intrusion; (3) does the office provide Ethernet, and if so, what kind of security is in place for officemates to access other attorneys' clients' data; (4) does the office employ shared staff, and if so what systems are in place to prevent them from accessing client records without authorization; and (5) to what extent do special kinds of data – for instance, clients' personal medical information or financial records – impose a heightened standard of care. In a shared office setting, attorneys may need to work with an IT professional to segregate and protect client files, and to minimize the likelihood and impact of intrusion or data loss.

ABA Model Rule of Professional Conduct 5.3: Responsibilities Regarding Nonlawyer Assistance should be considered in the context of shared office space. Legal support staff and any third party vendors must be educated and reminded of the importance of maintaining confidentiality of all clients. If there is shared office staff, they should be instructed on the importance of keeping law firm records separate and distinct.

Conclusion

Sharing office space provides many benefits to solo and small firm practitioners looking to save money on the overhead expenses of running a law firm. But attorneys must avoid blurred boundaries between officemates and take their clients' perspectives into account when they meet with and retain counsel.

The first step to avoiding legal malpractice exposures in the shared office setting is acknowledging the risk and mitigating the exposure. Attorneys in a shared office spaces must work together to create an environment that clearly defines the separate law firm entities in the space and communicate with clients to make sure they understand who is representing them and avoiding any "overlap" between separate firms and their separate client matters. Investing the time early on to address these issues may make all of the law practices in a shared office environment more profitable by reducing the risk of legal malpractice claims.

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