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# AttPro Ally


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# How Lawyers Can SHARE OFFICE SPACES IN AN ETHICAL WAY

*By: Shari L. Klevins and Alanna Clair*

The pandemic changed the way many Americans, including lawyers, conduct business. Although most lawyers have returned to the office full-time, hybrid work schedules and remote depositions or court appearances remain commonplace. This has resulted in many firms or lawyers reevaluating the need for (and substantial cost of) traditional physical office spaces.

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Simple overhead to rent space for a law practice can include the costs of commercial leases, office supplies, and more. Firms with a number of lawyers can share the burden of such costs, but other solo practitioners or small firms are considering whether there is another option.

Some lawyers are seeing the appeal of co-working spaces or sharing an office space with other lawyers or professionals. Indeed, co-working spaces can be an appealing solution as lawyers develop new ways to operate following the pandemic. However, although these arrangements are becoming more common, they can still create some risks for practitioners.

Here are some tips to consider when deciding to use an alternative office space.

## Minimizing Risks When Sharing an Office Space

Sharing an office space with another lawyer or professional, even when not part of the same law practice, can be a completely ethical (and financially beneficial) endeavor. However, there are some ethical boundaries to consider when sharing office space.

One of the most significant risks when a lawyer shares office space with others is that a client may reasonably believe that the lawyer is part of a firm or partnership with the other lawyers or professionals in the office.

There is a risk that a client could bring a claim against unaffiliated lawyers in a shared office space, alleging a theory of general partnership, and asserting a claim against all lawyers sharing the office space based on the conduct of any one lawyer. Courts typically look at this issue from the perspective of what a client could reasonably believe.

If the lawyers in the shared space do not make it clear that they are separate, independent practices, they could face risk of a claim, or, perhaps more damaging, they could face a risk of losing their insurance coverage for that claim.

Indeed, the language of a legal malpractice policy may not provide coverage for a claim brought on a vicarious liability theory, or the insurance company could even accuse the lawyer of misrepresenting or omitting facts on an application if the lawyer did not confirm the intent to share office space.

To help minimize these risks, lawyers can consider using specific disclaimers in correspondence (or displaying disclaimers in the office) clarifying that the lawyers are part of separate law practices. Lawyers who share an office space can also use their engagement letters to confirm the precise lawyer retained and to note that the lawyer-client relationship does not extend to other lawyers sharing the physical space.

Further, lawyers sharing an office space can consider steps that outwardly demonstrate their independence from others working in the same office. For instance, lawyers may limit the use of common spaces for business purposes or take calls with clients in a private setting, rather than in shared common areas with other lawyers. Such behavior could serve as extrinsic evidence that the others in the suite do not share in any attorney-client privilege or similar confidences.

## Signage and Firm Materials

Another way to outwardly demonstrate to the public that lawyers are not affiliated in partnerships is to use signage. There could be signs in the physical space that confirm that there are, for example, two separate law offices operating out of the space, e.g., "The Law Office of Sarah Smith" and "The Law Office of Christopher Jones." Lawyers can consider using disclaimers on signage to indicate that the two law offices are separate entities and not affiliated with each other.

These considerations may additionally be required under the applicable ethical rules that prevent lawyers from misleading the public. In the ABA's Model Rules of Professional Conduct, Rule 7.1 provides that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Comment [5] to Rule 7.1 goes on to say that a firm's name, letterhead, and professional designation are communications that cannot be false or misleading.

Comment [5] also indicates that firm name is misleading "if it implies a connection with … a lawyer not associated with the firm."

## Shared Spaces, by Separate Systems

Although lawyers can share the same building and even the same receptionist while still complying with their ethical obligations, lawyers can also take steps to confirm that their practices are separate from any others in the shared space. One way to do this is to store files separately. Most lawyers sharing an office space will not share filing cabinets or storage areas with others.

Lawyers may also take steps to ensure that mail or other confidential communications are addressed to and opened by only those individuals affiliated with the law practice. These policies can be helpful both for outward appearances, but also to help the lawyer keep his or her obligation to maintain client confidences.

A lawyer in a co-working space can also implement policies and programs to restrict access to any online system or network that stores client confidential information. In addition, some practitioners may train staff and others in the office how to answer typical questions the staff might be asked that reinforce the fact that the law practice is distinct from others within the office space.

Adhering to these precautions can help lawyers enjoy the cost-saving benefits of shared office spaces while also minimizing the risks that can accompany these shared office arrangements.

# Line in the Sand

## ESTABLISHING BOUNDARIES IN THE "OF COUNSEL" RELATIONSHIP

*By: Erin McCartney, Esq.*

As a young associate, when I heard the "Of Counsel" title, I associated it with a senior attorney who had one foot out the door. However, along with law firm culture, the "Of Counsel" designation has evolved and is now used in many different contexts. For a solo attorney, becoming "Of Counsel" to another firm offers the opportunity to gain valuable experience while earning a consistent paycheck and benefits. From a small firm's perspective, designating an attorney "Of Counsel" provides the benefit of gaining an expert in an area of law in which the firm may not be well-versed. Young lawyers with children looking to scale back hours to accommodate a better work-life balance are finding the position of "Of Counsel" particularly appealing. It allows them to remain an asset to the firm without necessarily committing to billing 2500 hours per year. It also gives both the firm and the attorney the opportunity to see whether the relationship is a good fit.

Although the "Of Counsel" designation has many benefits, this relationship also has its challenges. Misconceptions about what constitutes the "Of Counsel" designation, along with how to ethically separate the relationship from the firm's independent representation, can be complicated. Ethics rules, malpractice coverage and client perception all need to be considered.

The term "Of Counsel" is defined by the ABA as a "close, regular, personal relationship" between the "Of Counsel" attorney and the firm.[1] Examples of acceptable relationships for the "Of Counsel" designation have included, but are not limited to: retired lawyers, withdrawing partner or associate, part-time practitioner, and partner on leave. The continuing relationship requisite requires ongoing, regular, and frequent contact for the purpose of consultation and advice. This means that the "Of Counsel" attorney must be more than an advisor on just one case and not simply a forwarder or receiver of legal business. So, an affiliation that amounts to merely a referral relationship, or sharing office space would most likely not merit "Of Counsel" designation.

### Malpractice Coverage:

In the event of a malpractice claim, using the "Of Counsel" title incorrectly can trigger coverage issues for attorneys. Clearly, the affiliated firm should not be liable for the acts and omissions of the "Of Counsel" attorney that were outside of the scope of their involvement with the affiliated firm. However, coverage issues can arise based upon a client's perspective of the affiliation. A common scenario involves the "Of Counsel" lawyer providing independent legal services but using the affiliated firm's letterhead or misleading clients into thinking that the lawyer has the backing of the firm on their legal matter. Despite the affiliated firm having no involvement in or awareness of the matter, it may be named as a co-defendant in a malpractice suit because the client reasonably believed the firm was representing them as well. This same

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[1] American Bar Association's Formal Opinion 90-357

*As AVP of Risk Management & Marketing at AttPro, Erin spends her days trying to come up with innovative ways to get lawyers to listen her advice and expertise. Truth be told, she has much more success with attorneys than with her three teenage kids.*

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situation can occur when the firm uses letterhead with the "Of Counsel" attorney's name when the "Of Counsel" attorney was not involved in a matter. Should this "Of Counsel" attorney not have coverage under the affiliated firm's malpractice policy, there may be a significant problem. This is because the "Of Counsel" attorney's own policy will often not afford coverage either since the policy is meant to cover work done on behalf of clients of the "Of Counsel's" own firm. To avoid any complications with the malpractice coverage, or with the local bar's ethics committee, do your best to avoid any potential misrepresentations when utilizing the designation.

### Client Perception Matters

When a malpractice claim is alleged, courts will view the matter through the lens of a reasonable client. Therefore, client perspective is an important factor to consider when using the "Of Counsel" title. For instance, unrestrictive use of letterhead listing the "Of Counsel" attorney by the affiliated firm would lead a reasonable person to assume that all parties listed are involved on any and all matters of the firm. Therefore, if the "Of Counsel" lawyer is providing legal services independently, and not in connection with the firm, they should use their own stationery. The name listed on the letterhead should also match the name listed in their policy as the named insured. Consequently, two versions of letterhead should be created with one listing the "Of Counsel" language and the other not. The letterhead showing the "Of Counsel" language should only be used when that attorney is actually working on a matter with the affiliated firm. Likewise, make sure that the affiliated firm abides by the same rule.

With or without the use of the "Of Counsel" designation, if an attorney is sharing office space with another firm, the relationship between the suitemates should also be well-defined. If it is not clear that the offices are operating independently, the firm could be putting itself at risk for a malpractice claim based on client perception. It could also be putting its own insurance coverage into question.

Although the "Of Counsel" designation can offer lawyers and firms many benefits, it is important to understand how the relationship is defined by the ethics rules. Keep in mind that to be "Of Counsel" to another lawyer or law firm, the requirement is maintaining a continuing professional relationship with that firm other than as a partner or an associate. So, merely referring cases and sharing office space will most often not fit the designation. Be clear about professional partnerships so that clients have no misconception about the relationship. Metaphorically, instead of drawing a line with sand, I recommend using a permanent marker.

# Defending Your Good Name

## HIGHLIGHTING ATTPRO DEFENSE COUNSEL

As an AttPro insured, you can feel confident knowing that if a disciplinary action or a legal malpractice claim is filed against you that you have a team of seasoned experts by your side.

Christine Mast is a senior partner at Hawkins Parnell & Young in Atlanta. She is a go-to attorney for legal professionals faced with malpractice claims, lawsuits, disciplinary, licensing, and ethics issues. With 30 years' experience defending lawyer claims, Christine has a deep understanding of legal standards of care and ethical requirements enabling her to swiftly assess each situation to develop an effective and appropriate defense and resolution strategy.

Christine also dedicates herself to service within Hawkins Parnell and she has the distinction of being the first woman elected to the compensation committee, the executive committee, and in 2020 to the role as Hawkins Parnell's managing partner.

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### *Social Awareness:* BEST PRACTICES FOR ETHICALLY USING SOCIAL MEDIA IN YOUR LAW PRACTICE • *APRIL 26, 2023 | 1:00pm ET*

FaceBook, Twitter, Instagram, oh my! New social media platforms seem to be emerging all the time creating ethical minefields for attorneys. Recent changes to the Model Rules of Professional Conduct hold lawyers to a higher standard of digital competence. Ethics opinions across the country are addressing these issues, including what you can advise your client to "delete" from their FaceBook page, whether you can contact witnesses via social media, and even researching the online profiles of prospective jurors.