

Sharing Offices: The Ethical, Risk Management, and Practical Considerations

By Del O’Roark

In good times and bad times sharing the cost of law office space, staff, and equipment with lawyers with whom you are not in practice has proven to be a good business model in Kentucky. It is often the only economical way for new lawyers to get started. Many solo practitioners and small firms practice in shared offices permanently. There is a downside, however, to sharing offices. Office sharing brings increased exposure to bar complaints, malpractice claims, disqualification motions, imputed knowledge of confidential information, and getting stuck with the office-share mate from hell.

The purpose of this article is to give an overview of office sharing issues and provide suggestions for establishing a shared office arrangement that avoids ethical, malpractice, and practical problems. Specifically covered are the questions of:

- ? With whom may lawyers share offices?
- ? With whom should lawyers share offices?
- ? What professional responsibility rules are paramount in shared office arrangements?
- ? What are the shared office vicarious malpractice liability risks?

The article concludes with risk management guidelines for evaluating office sharing arrangements along with a sample office-share agreement that offers ideas on how to structure a workable relationship.

The Basics of Office Sharing

With whom may lawyers share offices?

The short answer is with other lawyers in private practice, part-time government lawyers with some restrictions, and persons and entities not engaged in the practice of law. What follows is a brief examination of each situation.

Other Lawyers: Lawyers sharing offices with other lawyers in private practice has long been recognized as permissible in Kentucky. There is nothing inherently wrong with this method of delivering legal services, but it does raise a number of ethical and malpractice issues. Those issues are addressed below.

Part-Time Government Lawyers: Private practitioners sharing law offices with part-time Commonwealth attorneys, county attorneys, and other lawyers with government duties is a frequent subject of KBA ethics opinions. The primary issues are the potential for compromise of client confidentiality and the appearance of impropriety created because the public may perceive improper influence. It has been opined that a criminal defense lawyer may not share offices

with a full or part-time prosecutor; but if the part-time government lawyer's duties are limited to special functions, sharing offices with private practitioners may be permissible.ⁱ Read the KBA ethics opinions on point.ⁱⁱ If any question remains about sharing offices with a part-time government lawyer, call the KBA Ethics Hotline for guidance.

Persons or Organizations Engaged in Activities Other Than the Practice Of Law: For years the KBA Ethics Committee held the minority view that lawyers could not share offices with nonlawyers.ⁱⁱⁱ The Committee recently reversed its position in KBA E-417.^{iv} In a carefully crafted and well-written opinion the Committee provides a review of the basis for its prior position, the reasons for change, and guidelines on how to observe ethical requirements when sharing an office with nonlawyers. These guidelines are an adaptation of those recommended for lawyers sharing offices with other lawyers. They emphasize maintaining professional independence and avoiding any implication that the nonlawyer entity is being used as a feeder of legal business. This opinion does not permit multidisciplinary practice – it is an extension of the long-standing policy to ease the cost of delivery of legal service whenever feasible. Read KBA E-417 before entering an office-share arrangement with nonlawyers.

With whom should lawyers share offices?

Life from the time you leave home for college seems to be one episode after another of looking for the right roommate. This is true of dormitory living, significant others, marriage, and the practice of law in shared offices. An Alaska lawyer in an office-share arrangement tells of coming to work one day to find that the IRS had padlocked the door to her shared office because the other lawyer was behind in making payroll tax payments. Other office-share horror stories involve drunkenness, sexual harassment, and even discovering that an office-share lawyer was not admitted to the bar.^v

Lawyers with experience in office sharing stress the importance of thoroughly evaluating prospective office-share lawyers. You should consider whether the other lawyer is financially stable, has a profitable practice that is complementary to (not competitive with) yours, a personality compatible with yours, good personal habits, and a stable home life. Make sure you are in agreement over office technology to avoid later disagreements over resources to be expended on computer and communication systems. Keep in mind that a shared legal office has a culture of its own similar to a law firm. It is important to have a common appreciation of what that culture should be to avoid a client mix that is incompatible with one practice or another (*e.g.*, corporate and criminal defense) and to avoid disagreements over issues such as the level of expenditures for common area furnishings.^{vi} The Risk Management Guidelines at the end of this article include a list of preliminary matters that should be considered before entering a shared office agreement.

What professional responsibility rules are paramount in a shared office practice?

Since office sharing has been permissible for many years, the ethical considerations are well established. The primary issues are to avoid misleading the public into thinking the shared office is a partnership and to maintain client confidentiality. Conflicts, fee abuse, and staff supervision are also significant professional responsibility concerns. What follows is an analysis of the key Kentucky Rules of Professional Conduct^{vii} that apply to office sharing practices.

Misleading the public into thinking shared offices are a partnership (RPCs 7.02(a); 7.10; 7.50): Some major benefits of office sharing are conferring with other lawyers, arranging for reliable backup for extended absences, making and receiving referrals, and occasionally associating with an office-share lawyer on a matter. These benefits unfortunately tempt lawyers to enhance their status and client confidence by implying that the relationship among the lawyers in the shared office is like that of a partnership with all its resources available to the client. This wrong impression is communicated by signs, letterhead, and business cards depicting the shared office as “Jones & Jones,” “Associates,” and “Law Offices of Smith, Jones, and Black.” Other ways in which misleading impressions are given is misuse of the designation “Of Counsel” among office-share lawyers, the manner in which the telephone is answered, the office layout, and the demeanor of the lawyers in their daily office interaction. KBA ethics opinions uniformly require accurate and clear communication of firm names.^{viii} The first order of business in shared offices is to comply with the spirit as well as the letter of the rules on not misleading the public about the nature of the legal services offered.

Confidentiality of client information (RPC 1.6): One leading ethics expert opines that confidentiality of client information is the paramount ethics concern in shared offices. He stresses that disclosure of client information to other lawyers in a shared office is permissible only with client consent.^{ix} Control of access to information within a shared office is crucial to confidentiality. Strict procedures are required for separate maintenance of files and accounts. Computer systems, fax machines, copiers, and telephones must be secure. Shared staff is an especially difficult confidentiality issue. It is an accepted practice in many jurisdictions for lawyers in shared offices to employ a common receptionist. Sharing secretaries and other staff routinely dealing with confidential information is much more problematic and is generally discouraged.^x KBA E-406 contains guidance for Kentucky lawyers on this issue. While the opinion provides that sharing secretaries is not categorically forbidden, the thrust of the opinion is that the risk of improper disclosure of confidential information with shared secretaries is so great that sharing secretaries should be avoided. Otherwise it is much more likely that the lawyers will be considered a partnership for malpractice and disqualification actions. KBA E-417 in authorizing office sharing with nonlawyers requires a stricter standard for staff sharing. It provides, “Neither a shared receptionist nor any other shared staff may handle confidential client information.”

Conflicts of interest (RPCs 1.7 and 1.10): Lawyers practicing in shared offices are not categorically forbidden from representing adverse interests. The conflict of interest

pitfalls, however, are significant. As already explained sharing offices with part-time government lawyers may disqualify office-share lawyers from accepting some matters because of an appearance of impropriety. If the shared office operates in a way that causes it to be treated as a partnership, RPC 1.10 Imputed Disqualification applies to all the lawyers in the shared office.^{xi} Sharing a legal secretary is particularly conducive to a determination that client confidentiality is not protected and the lawyers should be considered a partnership for imputed conflict of interest disqualification motions. At bottom it is all about client confidentiality. Protect it and adverse representation is feasible.^{xii} An important reason for office sharing by lawyers with complementary instead of competitive practices is that conflicts seldom arise. The safest office-share arrangement is to forbid adverse representation or allow it only in exceptional circumstances.

Sharing fees (RPC 1.5(e)): One of the hoped for benefits of sharing offices is that lawyers in the office will refer cases to each other and when appropriate associate on a matter. RPC 1.5(e) governs how fees may be shared and is often misunderstood. It is important to remember that sharing fees for simply referring a case to another lawyer and nothing more is not permitted under the rule.^{xiii} Informing the client of any fee sharing arrangement is required. Avoid agreeing to pay office share expenses in a way that appears to be sharing fees of individual clients. Read the rule.

Other rules (RPCs 5.3, 5.4, and 5.5): The Law Firms and Associations section of the Kentucky Rules of Professional Conduct contain three rules applicable to office-share arrangements. Under RPC 5.3 all lawyers in a shared office have responsibility for proper training of shared staff. RPC 5.4 requires the professional independence of lawyers by prohibiting sharing fees with nonlawyers and multidisciplinary practice. Finally, RPC 5.5 forbids aiding any person in the unauthorized practice of law. RPCs 5.4 and 5.5 take on added significance now that office sharing with nonlawyers is permitted.

What are the vicarious malpractice liability risks when sharing offices?

In Kentucky lawyers are personally liable for their own malpractice and that of lawyers they supervise.^{xiv} In addition law firm partners, unless practicing in a limited liability form of practice, have joint and several vicarious liability for the malpractice of other members of the firm even if they had no knowledge of the acts or omissions of malpractice.^{xv} The risk for lawyers in shared offices is that by giving the false impression they are a partnership they will be considered as one for the purpose of imposing vicarious liability on all the lawyers practicing in the office.

Legal Malpractice has this explanation of how a shared office becomes a *de facto* partnership:

De facto partnerships usually involve a group of individual lawyers who practice together. That consequence can follow, however, for a joint venture among law firms, which is treated as a partnership for a specific matter. The potential for a *de facto* partnership exists in a loose

association of attorneys who share office space, secretarial and administrative help, and help each other when the need arises. There is no precise formula identifying the indicia that suffice to create an apparent partnership. The primary test is whether the attorneys led the client to reasonably believe that the representation was being provided by an entity and to rely on the representation. (*footnotes omitted*)^{xvi}

The best way to avoid the risk of vicarious liability in office-share practices is to scrupulously follow professional responsibility requirements. Use the following Risk Management Guidelines to assist in evaluating what needs to be done. Be sure that all lawyers with whom offices are shared carry professional liability insurance, preferably with the same insurance company with the same coverages, deductibles, and renewal dates. This discourages cross-actions by attorneys seeking indemnity or contribution from *de facto* partners.^{xvii}

Office Sharing Risk Management Guidelines^{xviii}

A. Choosing An Office-Share Mate

Professional Considerations:

- Office share arrangements work best when lawyers have diverse practices that are complementary and not in direct competition for clients. This avoids conflicts and facilitates cross-referrals.
- Each lawyer should enjoy a good professional reputation with a strong and profitable practice comparable in volume to the other lawyers in the shared office.
- All lawyers must be financially responsible and should be capable of serving as a trustworthy backup.
- Verify that all lawyers are members of the bar in good standing. Ask about bar complaint and malpractice claim experience. Do the lawyers carry professional liability insurance? For how long and with what coverage? Have there been any interruptions in coverage? Why?
- Inquire about membership in organizations; officer, director, or other interests in business; and fiduciary services such as trustee, conservator, administrator, or executor that could have a bearing on the office-share arrangement.
- Be sure there is agreement on what the office “culture” should be – consider the desired professional atmosphere; whether there will be a compatible client mix in the reception area; what the quality of office furnishings should be; and make sure there is a shared standard for office order and cleanliness.

- Ascertain whether the lawyers have the same level of interest in office technology.

Personal Considerations:

- Do the lawyers have even dispositions, balanced personalities, and good personal habits? Is there any indication of substance abuse or dysfunctional behavior?
- Do the lawyers have good family situations?
- Are the lawyers financially reliable and responsible in their personal lives?

B. Written Agreement

Always use a written agreement containing all terms and conditions of the office-share arrangement. Appendix A is a sample office-share agreement that contains ideas on how to begin to structure an agreement. Some of the most important things to consider are:

1. Allocating office space between private and common areas and on what terms.
2. Identifying what expenses are to be shared and in what proportion. Consider libraries, computer research, common area furniture, office equipment, telephone systems, staff, and supplies. What is to be purchased and what leased?
3. Allowing for a common office budget account to pay for office expenses, but requiring strict separation of each lawyer's client trust account and general account.
4. Prohibiting representation of the shared office as a partnership.
5. Requiring all lawyers to use a letter of engagement that includes an explanation that the shared office is not a partnership and to what extent, if any, the client will receive services from other lawyers in the shared office.
6. Requiring client consent before conferring with other lawyers on a client's matter.
7. Requiring compliance with RPC 1.5(e)'s client notification and fee division rules when another lawyer in the shared office is associated on a compensated basis.
8. Requiring that all lawyers carry professional liability insurance, preferably with the same insurance company and with the same limits, deductible, and renewal date.
9. Requiring lawyers not to accept clients that are adverse to clients of other lawyers in the office.

10. Requiring lawyers to give timely notice of any significant change in practice (*e.g.*, becoming a part-time government lawyer) or plans to withdraw from the office-share.

11. Providing procedures for resolution of disputes.

C. Organizing A Shared Office To Comply With Ethics Requirements And To Avoid *De Facto* Partnership Malpractice Claims.

Avoid creating a de facto partnership.

Office Signs:

Exterior – Building marquees, building directories, and office entrance door signs must clearly indicate the relationship among the lawyers practicing in the office. Insert a line between the names of separate practices. Include descriptive language as appropriate; *e.g.*, add “Sole Practitioner” after the name of those lawyers practicing alone.

Interior – Place on individual lawyer office doors signs that indicate that the lawyer’s practice is separate from others in the office.

Documents and Advertising: Business cards, letterhead, and pleadings should indicate only the lawyers practicing together in the shared office. Telephone listings, yellow page ads, brochures, and other advertising should be done in the name of the separate practices – never jointly.

Office Layout: Organize office space to separate practices to the maximum extent feasible. Lawyers should have private offices and workspace for their staff and individually owned equipment. Use interior walls, screens, and cubicles to indicate separate office practices.

Common Receptionists: Common receptionists must be trained on how to answer the telephone in a way that avoids giving the impression of a partnership and how to answer questions about who employs them. The best procedure is for each practice to have a separate telephone number. If a common telephone number is used, the receptionist should answer with a recitation of the number only or the generic phrase “law offices.”

Letters of engagement: Require that all lawyers use a letter of engagement that includes a paragraph explaining the shared office arrangement and exactly whose services are being retained. If there is common staff, describe their duties in the letter of engagement making it clear that client confidentiality is protected. If appropriate, use the letter of engagement to get client consent for use of common staff on their matter.

Referrals: Make referrals to other lawyers in the shared office carefully. Be sure the client understands any further involvement the referring lawyer has in the matter. Some lawyers give referred clients several names of lawyers, both inside and outside the shared

office, or a lawyer referral service telephone number to avoid any confusion on relationships.

☑ Lawyer Office Demeanor: Do not be too casual in the office with other lawyers in the presence of clients and visitors thereby giving the impression that there is a close professional association. Knock before entering another lawyer's office and do not discuss business with another lawyer in front of clients or visitors.

2. Maintain confidentiality and avoid conflicts of interest.

☑ Staff: All office-share lawyers are ultimately responsible for training their staff and common staff on client confidentiality and other professional responsibility requirements. Sharing legal secretaries and paralegals with access to client confidential information should be avoided. Temporary employees must be thoroughly instructed on office-share procedures before working even a short time in the office.

☑ Files and Office Procedures: Filing systems must be separate -- complete non-access. General bank accounts and client trust accounts cannot be combined. Office procedures should be established for mail handling, telephone messages, answering machine playback, and fax receipt that protect confidentiality.

☑ Office Machines: Shared telephone systems, fax machines, answering machines, scanners, and copiers should be located and operated on a basis that protects client information from inadvertent disclosure. Computer systems should not be networked in the office. Each practice should use a stand-alone computer system with password security and controlled access. If an office system is networked to be eligible for volume licensing on software and upgrades, firewalls and password security measures must be used to make absolutely certain files cannot be accessed by unauthorized persons.

☑ Conflict of Interest Check System: Each practice should maintain its own conflict of interest check system. Check for conflicts with other lawyers at the time the office-share is started and thereafter for all new clients and matters. The surest way to avoid disqualification motions for office-share lawyers is to agree not to represent adverse interest. Exceptions to this agreement should be made only with the consent of both clients.

Note: During the winding up period following a law firm breakup, what was one firm often becomes for a time a shared office. Lawyers remaining in the shared office should take aggressive action to remove any impression that they are still in practice together by following the guidelines suggested in this article.

APPENDIX A

The Professional Liability Fund of the Oregon State Bar developed this sample office-share agreement. It is modified and reprinted here with permission.

OFFICE-SHARE SAMPLE AGREEMENT

This sample is offered for the purpose of generating ideas. Inclusion of these materials is not an endorsement or recommendation of its terms.

This is an agreement with respect to the practice of law among [Name], [Name], [Name], and [Name], all sole practitioner lawyers in the Commonwealth of Kentucky, executed and effective this _____ day of [Month], [Year].

The named parties shall practice law in shared offices according to the terms of this agreement as unaffiliated sole practitioners.

MANAGEMENT:

Each of the parties shall have one vote with respect to any matter which is subject to the agreement.

One of the parties shall be [*designated/elected*] “managing attorney,” and shall carry on the day-to-day operations of the office, set up an office account, collect, and disburse funds on behalf of the office, purchase common supplies (books, furniture, and equipment,) supervise the common employees of the parties, and generally manage the affairs of the office. The managing attorney shall serve in this capacity until another lawyer is [*designated/elected*] managing attorney.

Once each year, the managing attorney shall submit a proposed budget for office expenditures to the other parties. The parties shall adopt a budget, which shall constitute an authority for the managing attorney to expend funds.

The parties shall adopt a Manual of Personnel Policies and Procedures, and each of them shall require their employees to abide by the policies and procedures established.

PROPERTY:

Exhibit A, attached hereto and made a part hereof, contains a list of all furnishing, equipment, and research and educational materials contained within the office. The name of the contributor of each item is listed next to the item personally contributed along with the approximate value of the item. Exhibit A also contains a list of all jointly owned furnishings, equipment, and research and educational materials along with their approximate value.

Each of the parties shall furnish his or her personal office at his or her own expense, provided that furniture and decoration shall meet commonly accepted professional standards for quality and appearance. The parties may jointly or personally purchase and provide furniture, rugs, drapes, wall coverings, and other items of décor for all of the common areas of the offices including staff working areas, waiting and reception rooms, conference rooms, file rooms, and halls. All such items will be added to Exhibit A with an indication as to ownership and value. However, each of the parties

shall provide his or her own office equipment for use of his or her staff, including but not limited to typewriters, calculators, computers, printers, and like equipment. The parties shall agree on the type or types of filing cabinets to be used and on their color, and each of the parties shall provide file cabinets for his or her own use and at his or her own expense.

A law library shall be jointly operated, and all research and educational materials on the office premises shall be the property of the office. Library expenses shall be equally shared by all of the parties.

[Alternative paragraph]

Each party shall maintain his or her own library and purchase any additional research and educational materials at his or her own expense. The use of any research and educational materials may be shared with the other parties, but will remain the exclusive property of the party purchasing it.

ACCOUNTS:

Each of the parties shall maintain his or her own general and client trust accounts, receive and deposit his or her own fees and reimbursed expenses, and shall be professionally responsible for any escrow or trust funds of his or her clients.

The managing attorney shall establish an office account in the name of the office [*parties jointly*], and shall assess each of the parties each month for anticipated expenses. Upon execution of this agreement, each of the parties shall make a deposit in the firm account of approximately two months of operating expense.

Expenses shall be allocated to each of the parties, as follows: Space cost (rent, utilities, and lease-hold improvements, depreciation of commonly owned furniture, etc.) shall be allocated on the professional office, secretarial, and file areas. The cost of occupancy for the reception area, waiting room, library, conference room, and hallways shall be shared equally by the parties. Library costs for research and educational materials, online services, and subscription services shall be shared equally. Other expenses, including supplies, telephone equipment charges, and like expenses shall be shared equally, unless the parties shall, from time to time, determine a different allocation.

SEPARATENESS:

In an attempt to maintain their separate identities and to avoid the appearance of a partnership, the parties will each have their own telephone lines and telephone numbers, letterhead, pleadings, retainer agreement, business cards, yellow page advertising, etc. Any signs in front of or on the building and/or office door shall list each attorney separately.

CLIENTS:

Each of the parties shall be responsible for the work done on behalf of his or her own clients. However, it is the intent of the parties to take advantage of their different areas of legal expertise, and they expect [*to work together on various legal matters/confer with each other on various legal matters.*]

When one party obtains the professional assistance of another party to this agreement, they shall enter into an arrangement with respect to division of fees, or failing any arrangement in advance, the assisting party shall be paid at the rate of \$ [Amount] for each hour of work performed.

The parties shall advise their clients in advance in writing of any arrangements for assistance with other parties to this agreement. However, if the client objects to such association that party shall refrain from asking the assistance of another office sharer.

For purposes of avoiding conflicts of interest, each party shall maintain his or her own conflict of interest system and shall not take cases against clients of another party to this agreement.

EMPLOYEES:

The office shall employ a receptionist, and such other employees as the parties shall, from time to time, determine. Each of the parties shall employ his or her own secretaries and legal assistants, and shall be responsible for their compensation, work, and behavior. If any employee of one party works for another party, [*the employer shall be paid for each hour at double the employee's average hourly rate/or whatever other equitable arrangement the parties want to make.*]

NEW MEMBERS - BAR MEMBERSHIP:

Any party who is suspended from or loses the privilege to practice law shall be deemed to have withdrawn from this office sharing agreement.

Other lawyers may be added to this agreement with the unanimous consent of the existing parties hereto.

DEATH AND WITHDRAWAL:

A party to this agreement who dies, or who fails to pay an assessment for office expenses within 30 days of issuance, or who loses the right to practice law shall be deemed to have withdrawn from this office sharing agreement. The remaining parties or party shall have the right to continue with the office sharing agreement and to occupy the premises upon such withdrawal.

A withdrawing party shall remain financially responsible for the common obligations of the parties for leases, subscriptions, and other obligations, but shall not be responsible for on-going expenses such as common employees, telephone systems, newly purchased supplies, and the like. A withdrawing party shall have the right to take furniture, equipment, research and educational materials, etc., personally belonging to the withdrawing party. The withdrawing party shall be reimbursed for his or her share of the appraised value at the time of withdrawal of any commonly purchased and jointly owned furniture, equipment, research and educational materials, etc.

ARBITRATION:

Any disagreement or dispute among the parties hereto involving or resulting from their practice of law under the terms and conditions of this agreement shall be resolved only by final and binding arbitration under the Rules then existing of the American Arbitration Association.

Signed the date above written.

ⁱ KBA E-322.

ⁱⁱ See generally, KBA E- 44, 61, 94, 128, 129, 143, 159, 167, 194, 238, 243, and 322.

ⁱⁱⁱ See KBA E-192.

^{iv} KBA Bench & Bar, Vol. 65 No. 6, p. 36, Nov. 2001.

^v See "Office Sharing Can Be An Ideal Arrangement For Solos," Eric Berkman, Lawyers Weekly USA, 99 LWUSA 1134, 12/13/01.

^{vi} See "Room For Compromise," Barbara L. Morgenstern, p. 92, ABA Journal, May 1997; and "Office Sharing Can Be An Ideal Arrangement For Solos," Eric Berkman, Lawyers Weekly USA, 99 LWUSA 1134, 12/13/01.

^{vii} SCR 3.130.

^{viii} See generally, KBA E-219, 259, 299, 302, 311, 338, and 396.

^{ix} Wolfram, Modern Legal Ethics (1986), § 16.2.5 Associated Lawyers.

^x ABA/BNA Lawyers' Manual on Professional Responsibility, Sharing Office Space, p. 91-601 at 606.

^{xi} See KBA E-418 for a comprehensive review of the application of conflict rules RPC 1.9(b) and 1.10 to shared offices and *de facto* partnerships.

^{xii} ABA/BNA Lawyers' Manual on Professional Responsibility, Sharing Office Space, Conflicts of Interest, p. 91-601 at 91-605.

^{xiii} KBA E-366.

^{xiv} SCR 3.024.

^{xv} Mallen & Smith, Vol.1 Legal Malpractice (5th ed., 2000), § 5.3, Partners, p. 461 and 465.

^{xvi} Mallen & Smith, Vol.1 Legal Malpractice (5th ed., 2000), § 5.3, Partners, p. 474.

^{xvii} Mallen & Smith, Vol.1 Legal Malpractice (5th ed., 2000), § 5.3, Partners, p. 477.

^{xviii} These guidelines are based on general research and office-share materials developed by several risk management organizations and lawyer related publications. Primary sources are Professional Liability Fund, Oregon State Bar; Texas Lawyers' Insurance Exchange; Lawyers Mutual Insurance Company of North Carolina; ABA Journal; ABA/BNA Lawyers' Manual on Professional Responsibility; and Lawyers Weekly USA.