



SHARING OFFICE STAFF

Ellen Freedman, CLM
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It is not uncommon for solo or small firms to share office space. However there is much to consider when establishing this type of arrangement, which can have many pitfalls you need to avoid. I have written about this previously, and I encourage you to contact me for a reprint if you are contemplating sharing office space. Frequently, along with considerations on sharing space, there are also considerations regarding sharing of actual staff. This article addresses the more practical aspects of sharing staff.

The first two broad issues to deal with are ethical and include Rules 1.7 (Conflicts of Interest) and 1.6 (Maintaining Client Confidentiality). Let's examine how these apply to your day-to-day operations.

It's not difficult to imagine how dicey it can become, and how uncomfortable your client would be, if your client's adversary were represented by another attorney in your office space. By the same token, it would be virtually impossible to have one staff member working on both sides of the case. So it is important to have a written agreement between all the attorneys involved in the office sharing arrangement to check for potential conflicts with one another. If a conflict *does* arise and neither attorney is willing to decline the matter, then the decision goes to the clients to decide whether they are comfortable with the arrangement. If the clients agree in writing to proceed with the matter, then in this particular instance the work should be *outsourced* by *each* attorney so that a common staff member is not involved in either or both sides of the matter.

In a case where the work needs to be outsourced, you may want to consider using a web-based service such as Cyber Secretaries (<http://www.youdictate.com>). It is also possible that there is a former legal secretary in your area who offers contract services, including pickup and delivery, when the need arises. Ask around, and check your local bar publication for advertising.

Similar problems can arise if the shared staff member is working part time for you and part time for another firm not in your office space. In this case you must have a written agreement with the employee to promptly inform you of any

potential conflicts. And then the client should be notified and given the option of taking their work elsewhere.

Should an actual conflict arise which the client is willing to work with, you will have to build a Chinese or Ethical Wall around your employee to keep him or her away from any work involving the matter. That means applying a password unfamiliar to the staff member to client documents and emails produced on or received by your computer, providing instructions not to open mail addressed from a variety of individuals, and instructions to clients and others to leave phone messages with only a telephone and name, and with no additional details on the message. The staff member should also be alerted to the listing of people from whom he/she should not take any detailed messages, so that an uninformed or forgetful caller can be cut off before disclosing confidential information. Client files must be clearly labeled to advise the staff member against reviewing anything in the file, and such files should be separated from other files and kept under lock and key when you are not in the office.

With respect to confidentiality issues, there are many practical procedures to put into place. First, you need to ensure that your shared staff member is familiar with the Rules of Professional Conduct which apply, and how that impacts their daily functioning. I suggest a checklist of Do's and Don'ts be utilized.

Do not assume that anyone, no matter how seasoned, is on the same page as you. It is your responsibility as an attorney under Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) to make sure that you have properly educated your staff member such that his/her conduct is compatible with your professional obligations. That means you should personally review the Rules and how they apply from a practical perspective, even before providing the checklist.

From a practical standpoint it means you should at least implement the following:

- Separate message pads for each attorney.
- Separate in boxes for each attorney, preferably in their office.
- Separate out boxes for each attorney, preferably in their office.
- Separate file cabinets for each attorney, which are locked when the attorney is not in the office.
- For attorneys who choose to use their floors as their filing cabinets—(the hair is standing up on my neck as I write this)—a locked office door when the attorney is not in the office.



- No conversations regarding matters between the staff member and the attorney or anyone else in a public area, including the reception area.
- No discussions about anything you are working on with any other attorneys or staff in the office who are not part of your firm.
- Fax receipt directly into the attorney's email box using a service like efax. If not, only the staff member should review and separate the faxes, to ensure one attorney does not handle and accidentally review faxes of the other attorney.
- Separate log sheets for faxes, packages, postage, copies or anything of a "soft cost" nature.
- A "no paper" policy in the library or conference room(s). Nothing should ever be left behind when the attorney departs these locations.
- Separate folder passwords for each attorney's documents on the computer, even if each attorney provides a separate computer for the staff member to use on their behalf.

Let me focus for a moment on the organization and passwording of documents. It is always a good idea for the attorney to set forth in writing exactly how documents should be organized on the computer. (If you are using a document management package this is not necessary. Otherwise it is.) This document should be short and clear, so that even a temporary employee can follow the rules.

The easiest and probably most prevalent method is to create a folder for each client, a subfolder for each matter, and to create a minimum number of subfolders under each matter, depending on the area of practice. So for example, a litigation matter would probably have a pleadings subfolder in addition to one for correspondence, whereas a real estate matter might have a closing documents folder in addition to correspondence. Don't go overboard on the categories of folders, such that you might ever have a document which might apply to more than one folder. At that point you lose the advantages of the organizational scheme, and actually make it more difficult to find things. So keep your categories of subfolders broad and clear.

There will also be separate folders created for things like firm administration, seminars, forms, marketing, and so forth. Again, keep the categories broad and unambiguous.

Each attorney in an office sharing environment should create one password to be applied to all of their documents, regardless of the type of document. That means that the password would be applied regardless of whether it is a Word document, Excel spreadsheet, PowerPoint presentation etc. The staff member must be instructed not to disclose the password to any other attorneys or staff in the



shared office space, and to make sure that the password is applied 100% of the time.

The application of a password is particularly important in view of a case (*Trulock v. Freeh*, 275 F.3d 391) which determined that if separate passwords are used, then a separate search warrant or consent is required to access those separately passworded documents. One party may not give consent for the other. This helps to safeguard your client's documents in the event that an attorney in your office share arrangement is subjected to a search warrant, even if your documents are housed on the same computer and share the same application software.

Another question commonly asked about staff sharing arrangements is how to compensate the employee. There are many schemes to consider. First, you have to take into account whether or not you will be offering benefits to the employee. Your answer will depend upon what the perceived impact that decision will have upon the quality of applicant you are able to hire, and retain. Must you offer medical insurance, life insurance, retirement contributions, sick, personal and/or vacation time in order to attract and retain the type of candidate you desire? Depending on your geographic location, the local unemployment rate, the type of legal work, and even the personalities within the share arrangement, your answer may vary.

If your answer is yes to any of these questions, you will have essentially two choices. First, you can seek to establish an entity specifically for leasing of staff, or contact an existing staff leasing agency. (These are different from temporary agencies, in that they are designed to offer on-going regular employment, with benefits, to the employee.) The employee actually works for the leasing entity. The leasing entity pays all taxes, benefits, and so forth. The employee is then leased to the lawyer(s) in the staff sharing arrangement at a rate which includes all costs.

The manner of splitting up the leased employee's hours can vary. They can be evenly split among those sharing staff, which is what I would recommend. The alternative is to split up the lease based on the number of hours "consumed" by each attorney. But this method is subject to lots of pitfalls. First, in order to save dollars, one or more attorneys in the share arrangement may try to minimize use of the staff member, which can lead to less hours paid to the staff member than otherwise agreed to. That will produce turnover rather rapidly. Also, there will be lots of time spent by the staff member which cannot readily be broken down between attorneys, and this "common time" becomes contentious when the methodology is consumption-based. An exception to the even split would arise if it were mutually agreed that one attorney in the share agreement would continuously consume a greater share of the staff resources, in which case the split might be 2/3 : 1/3 or something else mutually agreed upon.



Another method would be for one attorney in the sharing arrangement to employ the staff member, and receive reimbursement from the other attorney(s) in the sharing arrangement. The one attorney would be responsible for payment of all benefits, taxes and so forth, and these costs would be included in the gross cost basis charged to other attorney(s) participating in the sharing.

One thing is clear. Whatever the arrangement made to share the employee, it must be reduced to a clear written understanding, including specifically what each is obligated to pay (e.g. for what portion of hours, what will be “included” in addition such as taxes, insurance, retirement etc.), and what each is obligated to do in the event that the office sharing and/or staff sharing arrangement ends. For example, if Attorney “A” actually employs the staff member and you are reimbursing “A” regularly for wages and taxes, what obligation do you have for penalties, taxes and interest if “A” fails to remit payroll taxes, or remits them late? Likewise, if you employ the staff member and “B” leaves the office share arrangement abruptly, or fails to pay for his portion of wages and taxes, what recourse do you have?

These are not insurmountable issues to get through. But these are issues which have already “bitten” some of your peers. Therefore, you want to make sure you acknowledge them, and address them up front through a frank discussion and a clear written agreement. Then you can actually relax and enjoy the economy of scale that office sharing and staff sharing can provide.

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