

Don't Be Sued for Another Attorney's Malpractice

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Most attorneys know that they can be held vicariously liable for the wrongful acts of their law partners. Many are unaware, however, that there are other, less obvious relationships between attorneys that can pose liability risks.

Let's begin with a hypothetical that represents the manner in which many firms operate. Attorneys Pippen and Armstrong are partners in a general practice law firm. Pippen & Armstrong's professional liability insurance policy has limits of \$1,000,000 per claim and \$1,000,000 aggregate. The firm occasionally refers personal injury cases to Attorney Rodman for a fee and periodically hires the firm of O'Neal & Ainge as co-counsel when conducting litigation outside of its expertise, such as employment discrimination.

To reduce overhead, Pippen & Armstrong shares office space, some office equipment and a receptionist with sole practitioner Robinson. In addition, because neither Pippen nor Armstrong is well versed in complex corporate matters, they list a sole practitioner, Ewing, who practices across town, on Pippen & Armstrong's letterhead as "Of Counsel." They also decide to bring an experienced trusts and estates attorney, Barkley, to the firm as a lateral partner to help with their growing probate practice.

After a year, the firm is served with five different legal malpractice claims, none of which involve acts or omissions by Pippen or Armstrong. As a consequence, Pippen & Armstrong's malpractice policy may not be renewed, or at a minimum, the premium may rise significantly. Other attorney claims had a major impact on their firm — just as they can on yours. Let's examine the relationships that



Referrals, lateral hires, co-counsel and of counsel relationships, office sharing — they all pose malpractice risks. Here's how to avoid them.

created these risks.

Referrals for a fee. It is shocking how many attorneys fail to grasp the risk in referring matters to another attorney for a fee. Generally, attorneys who refer work for a fee become "partners" from a liability standpoint with the attorney to whom the matter was referred. This means that the referring attorney can be held legally liable for malpractice committed by the receiving attorney.

In a typical partnership, the partners work with one another daily. They institute common office procedures to ensure that statutes are not missed and other work is performed competently. These safeguards almost never exist in the "partnership" between referring

and receiving attorneys. In short, the referring attorney is at the mercy of the receiving attorney.

In our hypothetical, let's assume that Pippen & Armstrong refer a medical malpractice case to Rodman. Pippen and Armstrong are not aware that Rodman carries no malpractice insurance. Rodman misses the statute of limitations deadline for the case and the client sues Rodman and Pippen & Armstrong. The jury returns a verdict of \$800,000, all of which will

probably be paid by Pippen & Armstrong's professional liability carrier (except the \$5,000 deductible that comes out of Pippen's and Armstrong's pockets).

Co-counsel arrangements. As with fee referrals, a firm that hires co-counsel on a particular case is basically forming a partnership on that case from a risk standpoint. Malpractice in these cases is often caused by miscommunication between the co-counsel and the firm. For example, it may be unclear who is responsible for filing a document or researching a theory of law. This can be avoided if the co-counsel begin their relationship by documenting the duties of each lawyer and meet regularly to check on the progress in each task.

Also, the co-counsel may fail to share vital information. For example, Pippen may learn important new facts in a telephone conversation with the client, then forget to convey these facts to O'Neal, who is drafting a motion on which the new facts would have an impact. In short, a successful co-counsel relationship requires close teamwork and proper planning.

A poorly monitored co-counsel relationship can be disastrous. Let's assume that poor communication

between Phippen & Armstrong and co-counsel O'Neal & Ainge causes malpractice. The client sues both firms and the case settles for \$750,000. Unfortunately for Phippen & Armstrong, O'Neal & Ainge carries malpractice limits of only \$250,000 per occurrence. Phippen & Armstrong's carrier may therefore be on the hook for the \$500,000 excess over the O'Neal & Ainge policy. Of course, Phippen & Armstrong must once again pay the \$5,000 deductible, along with adding another major loss to their claims record.

Lateral partners. Law firms that hire lateral partners may assume hidden malpractice risks. Suppose that new lateral partner Barkley unknowingly committed a drafting error in preparing a will for a wealthy widow while at his former firm. After Barkley joins Phippen & Armstrong, the widow dies and the error is discovered. The beneficiaries of the estate sue Barkley, his former firm, and his current firm of Phippen & Armstrong. To make matters worse, Barkley's former firm has since dissolved and the members have scattered to firms throughout the state. The former partners did not purchase tail coverage, and there is no policy to insure Barkley except that of his new firm Phippen & Armstrong.

Smaller firms often disband without purchasing tail coverage. This means that there is no coverage for the dissolved entity. Furthermore, the individual partners of the dissolved firm are generally covered under their new firms' policies for their own wrongful acts but not for their vicarious liability for former partners. (This means that the Phippen & Armstrong policy would normally cover a malpractice committed by Barkley at his

former firm but not his vicarious liability for the acts of his former partners.) Even if Barkley's former firm still exists and maintains professional liability insurance, the limits may be lower than those of Phippen & Armstrong.

There are steps you can take to protect your firm against the lateral hire. First, ask the lateral partner for documentation of the insurance coverage maintained by his or her former firm. Second, have the lateral partner report any potential claims to the former firm's carrier before joining your firm. Third, check for any conflicts between the lateral partner's former and existing clients and the new firm's clients. Many conflicts can arise in these situations, creating ARDC and malpractice exposure for everyone.

Finally, if a lateral hire is coming to your firm with a checkered past, consider asking your carrier to add him or her to your policy with a "prior acts date." Thus, the lateral attorney will only be covered under his or her new firm's policy for a malpractice that the lateral partner committed after joining the new firm. The new firm will therefore not bear the burden of any malpractice that the lateral partner committed at his or her prior firm. (As long as the lateral partner's former firm continues its insurance coverage, the lateral partner should have coverage under the former firm's policy for any wrongful acts he or she may have committed while at that firm.)

Of counsel relationships. Perhaps the biggest problem with "of counsel" relationships is defining their scope. For example, in our hypothetical, Attorney Ewing may perform many different functions as "of counsel" to Phippen & Armstrong. Phippen & Armstrong may refer cases to Ewing and have no further contact with the

referred client, or they may engage Ewing as co-counsel on a particular matter. Ewing also maintains his own set of clients apart from his "of counsel" relationship.

Let's further assume that Ewing sometimes uses his own letterhead and sometimes uses the Phippen & Armstrong letterhead listing him as "of counsel," and that he often meets clients at the Phippen & Armstrong offices rather than his own. Each of these relationships may create liability for Phippen & Armstrong. Phippen & Armstrong may also be at risk, however, from Ewing's clients, because they may have the mistaken impression that he is a partner or that Phippen & Armstrong had some role in the clients' representation. Under the theory of partnership by estoppel, Phippen & Armstrong may be liable for Ewing's wrongful acts if the client reasonably believes that a partnership exists. At a minimum, the chances are good that Phippen & Armstrong will be named in a complaint until the relationship among Ewing, his client, and Phippen & Armstrong is defined.

Office sharing. If you share office space, review your office procedures carefully to ensure that you don't imply a partnership with the office sharer. Other jurisdictions have routinely held that the actions and representations of office sharing attorneys can create a partnership by estoppel. In particular, never list your name on common stationery in a way that implies a partnership, review door signs and telephone listings to make sure they are not misleading, and, if you use a common telephone number, answer by reciting the number or the generic phrase "law office."