Hanging Your Own Shingle: Managing Risk and Compliance When Starting a New Law Firm

Frequently Asked Questions (and Answers)

As a member of ISBA Mutual Insurance Company's defense panel, the Chicago law firm of Tribler Orpett & Meyer, P.C., represents ISBA Mutual insureds in the defense of legal malpractice claims. Tribler Orpett & Meyer, P.C., also provides free Risk Management Consultations to ISBA Mutual insureds who seek to avoid malpractice claims before they happen. ISBA Mutual insureds can obtain referrals for Risk Management Consultations by calling ISBA Mutual at (866) 473-4722 or by submitting a request on the web at https://www.isbamutual.com/resources/hotline/. Below, the lawyers at Tribler Orpett & Meyer, P.C., provide answers to questions posed during the webinar ***Hanging Your Own Shingle: Managing Risk and Compliance When Starting a New Law Firm*** (edited for this format) and frequently asked during Risk Management Consultations.

Q: Is it appropriate to use the plural term "Law Offices" in the name of a law firm that has only one office (e.g., "The Law Offices of Jo Lawyer")?

A: Rule 7.5 of the Rules of Professional Conduct forbids a law firm from using a firm name that violates Rule 7.1, which in turn prohibits lawyers from making "false or misleading communication[s] about the lawyer or lawyer's services," and the Rules have generally been interpreted to forbid law firm names that mislead the public. Use of the term "offices" when there is only one office could be considered misleading. In an Ohio disciplinary decision based on similar rules of professional conduct to those applicable in Illinois, the disciplinary authorities concluded that a law firm name using the term "Centers" would be misleading if the firm did work in only one location. *Medina Cty. Bar Assn v. Grieselhuber*, 78 Ohio St. 3d 373, 374, 678 N.E.2d 535, 536 (1997).

Q: Is it improper to use the term "...and Associates" in your law firm's name if you do not actually have any associates?

A: As discussed above, a law firm name cannot be misleading. There is wide-ranging agreement among ethics authorities that it is improper to use the term "& Associates" in the name of a law firm that has no associates. It is not clear whether use of the term "& Associates" would be improper for a firm that had multiple associates at the time that the firm name was given, but which has only one associate at present. One out-of-state bar association has concluded that, based on rules similar to the Illinois Rules, use of such a term for a firm that currently has only one associate is not inappropriate where it is "normal" for the firm to have more than one associate. D.C. Bar Association Ethics Opinion No. 189.

Q: I understand that 40% of the lawyers in Illinois do not have malpractice insurance. As malpractice insurance is not that expensive how do you explain this?

A: In 2019, 45% of Illinois-licensed lawyers reported that they did not have malpractice insurance. ARDC Annual Report of 2019. This figure includes many lawyers with government or in-house jobs where malpractice claims generally will not arise. Among lawyers engaged in private practice, the ARDC reported that the figure was much lower. Only about 12.5% of lawyers in private practice did not have malpractice insurance in 2019. The ARDC asked lawyers who reported that they did not carry malpractice insurance to explain why. More than half responded that the nature of their practices involved minimal risk of liability, and about 18% reported that the cost of malpractice insurance was too great. As lawyers who defend other lawyers in legal malpractice claims, we recommend that every lawyer actively engaged in private practice should carry professional liability insurance. There is a not-insignificant risk of being held liable on a malpractice claim and a much greater risk that an uninsured lawyer will incur significant defense fees defending against a malpractice claim, or that the lawyer will attempt to defend him- or herself and will only make matters worse. Moreover, all attorneys should be aware that their insured or uninsured status is available to the public at https://www.iardc.org/lawyersearch.asp. Savvy potential clients will check the ARDC's website to make sure that the lawyer they are considering hiring has liability insurance.

Q: Is there any advantage to setting up an LLC as a sole practitioner?

A: Pursuant to Supreme Court Rule 721 and Supreme Court Rule 722, an Illinois law firm can only be a limited liability legal entity if it is organized as such—either a corporation or limited liability company, and it can demonstrate sufficient financial responsibility, usually via evidence of sufficient insurance liability limits. Being a limited liability legal entity does not protect a lawyer from potential personal liability for his or her own personal errors or omissions, either as a handling or supervisory lawyer, but it generally protects a lawyer from being held vicariously liable for the malpractice of others with whom he or she works. A sole practitioner has no reason to be concerned about such vicarious liability, but there may nevertheless be advantages to an LLC business form. For instance, the LLC business form may provide the single member of the LLC some protection against personal liability for commercial debts. The LLC business form may also provide the law practice with additional avenues to obtain equity financing. Any lawyer considering forming a solo practice should speak with a business lawyer about the decision.

Q: How long of a tail should we keep on our malpractice liability insurance? Does it need to extend beyond the statutes of limitations and repose for legal malpractice claims?

A: Everyone's insurance needs, including those relating to tail coverage, are going to be determined by their particular situation, including the nature and length of their former practice. In most instances, we recommend obtaining tail coverage for no fewer than seven years. After seven years, most claims—with some notable exceptions—will be barred by the statute of repose. We recommend speaking with your insurer about your specific needs.

Q: Many clients have asked me to accept payments via credit card? Is there any reason not to do so?

A: The primary disadvantage to accepting credit-card payments lies in the processing fees. Merchants accepting credit cards, including law firms, typically have to pay 3%-5% to process a

credit card transaction. Lawyers who are willing to accept credit card payments must consider who is going to be responsible for paying the processing fee, and if the client is going to be responsible, this should be clearly spelled out in the retainer agreement. If the lawyer is going to be responsible for paying the processing fees, the lawyer must consider how the processing fee is going to affect credit card deposits into a client-trust account. For instance, if a client delivers to her lawyer $1,000 to be deposited into a client trust account as a security retainer, the lawyer must ensure that the full $1,000 is credited to the account. This may mean pre-funding the trust account with the approximately $30-$50 that will be taken from the deposit in the form of a processing fee so that the total deposit equals the intended $1,000. A failure to account for the processing fee could constitute a violation of Rule 1.15 of the Rules of Professional Conduct.

Q: I am an associate attorney at a law firm and I will be leaving form a solo practice. I would like to maintain relationships with clients of the firm that I will be leaving. May I reach out to those clients after I leave the firm?

A: Under most circumstances, an attorney leaving one firm may contact firm clients with whom the lawyer had a relationship, but the content and nature of such communications will depend on the circumstances. We strongly recommend that any lawyer leaving a law firm to form or join a new law practice should read the decisions in Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 181 Ill.2d 460, 230 Ill.Dec. 229 (1998) and Dowd and Dowd, Ltd. v. Gleason, 816 N.E.2d 754, 287 Ill. Dec. 787, 352 Ill. App. 3d 365 (1st Dist. 2004) as well as ISBA Professional Conduct Advisory Opinion 12-14.