



# The Fundamentals of Loss Prevention for Lawyers

EXCERPT

► **CHAPTER 16: Lawyer-to-Lawyer  
Relationships That Create Liability**

Serving Illinois Lawyers

# Chapter 16: Lawyer-to-Lawyer Relationships That Create Liability

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Every lawyer knows that they can be held liable for the wrongful acts of their law partners. Many are unaware, however, that there are other, less obvious relationships between lawyers that can create risks.

## Referrals

Lawyers remain legally responsible for matters they refer to other lawyers in *exchange for a fee*. Therefore, before you refer legal matters for a fee, make sure that you have confidence in the abilities of the lawyer to whom you are referring the matter (the “receiving lawyer”). You should of course always obtain the written, informed consent of the client pursuant to [Illinois Rules of Professional Conduct Rule 1.5 \(e\)](#).

In addition, always calendar any critical dates with respect to the referred matter, such as statute of limitations deadlines, and follow up with the receiving lawyer before the date expires. If the receiving lawyer misses the deadline, the referring lawyer can be held liable for the error. Finally, as the referring lawyer, you should also require proof that the receiving lawyer has sufficient legal malpractice insurance.

## Office Sharing Relationships

Lawyers often enter into a variety of office-sharing arrangements with colleagues to pool resources and share overhead costs. While there are certain advantages to office sharing, this relationship can pose significant risk for the unwary lawyer. Specifically, a court may hold that such practices have created a partnership by estoppel among the office-sharing lawyers and that one office sharer is therefore liable for the acts of the others.

In a real partnership, the partners establish controls to prevent malpractice claims and ethical violations. Those controls are often missing in an office-sharing arrangement. Lawyers who plan to share office space should take the following steps to avoid increasing their malpractice risk or breaching their ethical obligations:

- Put the office-sharing arrangement in writing.
- Require written verification that each office mate carries legal malpractice insurance. Ideally, each office mate should carry professional liability insurance with the same insurer, at the same limits and deductible, and with the same renewal date. The same principles should be employed in the case of an “of counsel” relationship with an associated lawyer in a separate office
- Do not use common stationery if you are not in fact partners. (See [Illinois Rules of Professional Conduct Rule 7.5 \(d\)](#) and [ISBA Advisory Opinion No. 764](#).)
- Review door signs, business cards, and telephone listings to make sure they are not misleading. For example, it can be misleading to simply list the names of all office sharers on the door to the office suite or on the reception wall. Instead, list the names as John Doe Law Firm, Law Office of Jane Smith, and Tom Johnson, Ltd. with gold lines between each firm’s name.

- Answer telephones properly. The safest option is for each office sharer to have a separate telephone number. If you share a common telephone number, answer the telephone by reciting the telephone number only (“Extension 4444”) or the phrase “law offices.”
- Protect client confidentiality. Review office procedures regarding files, mail, telephone calls, and faxes to prevent an accidental breach of confidence.
- Document work-sharing arrangements and obtain the client’s written permission whenever splitting fees.
- Do not file pleadings or tax returns as a partnership.

## Letterhead Listings

Some lawyers in Illinois engage in the disturbing practice of listing themselves on another lawyer’s stationery as if they were partners. For example, let’s suppose that Solo Practitioner Smith and Solo Practitioner Jones use stationery labeled “Smith & Jones.” Like some office-sharing relationships, such stationery-sharing practices can create a partnership by estoppel between the lawyers listed on the letterhead.

This practice raises ethical concerns as well. See [Illinois Rule of Professional Conduct 7.5](#) and [ISBA Advisory Opinion No. 764](#).

Increasingly, lawyers are forming relationships with other lawyers for limited circumstances to increase their capacity or maybe to utilize the expertise of another lawyer for a particular matter. The other lawyer may be given the designation “of counsel”; or the lawyer might be an independent contractor. Before creating these relationships, understand the [Illinois Rules of Professional Conduct](#) in relation to confidentiality and conflicts of interest will still apply and must be reviewed and analyzed.

## Co-Counsel/Local Counsel Relationships

As with fee referrals, a firm that hires co-counsel on a particular matter is basically forming a partnership with respect to that matter from a risk standpoint. Legal malpractice in these cases often stems from a miscommunication between the co-counsels. This can be avoided if the co-counsel begin their relationship by documenting the duties of each lawyer/firm and meeting regularly to check on the progress of each task. Like referrals, you should also have confidence in your co-counsel’s skills, calendar all important dates, and verify that the co-counsel has sufficient malpractice coverage.

## Of Counsel Relationships

Perhaps the biggest problem with “of counsel” relationships is defining their scope. The term “of counsel” means different things to different people.

There are four generally recognized types of “of counsel” relationships:

1. The part-time practitioner who practices law in association with a firm, but on a different basis as the firm’s partner’s or associates,
2. a retired partner of the firm who provides institutional recollections of their experiences and is available for consultation;

3. a lawyer brought into the firm with the expectation that the lawyer will shortly become an associate or partner; and
4. a lawyer who occupies a permanent senior position in the firm with no expectation of becoming a partner.

One risk inherent in the “of counsel” relationship is that a client may believe that the firm and its “of counsel” are working together on all legal matters. Therefore, if the “of counsel” commits an error, the client may name the firm as a defendant as well. Firms can reduce the likelihood of these risks by taking the following precautions:

- ***Put the “of counsel” relationship in writing.*** Lawyers should ensure that all parties involved—including the “of counsel” lawyer, the associated firm, and the client—are notified of the extent and any limitations upon the “of counsel” lawyer’s relationship with the firm, and of the firm’s and the lawyer’s respective roles in the client’s representation. When notifying the client, this information can be included in an engagement letter.
- Don’t allow an “of counsel” lawyer to use firm stationery for matters they undertakes for their own clients.
- The firm and its “of counsel” lawyers should verify that each is covered by legal malpractice insurance.

## Independent Contractors

Independent contract lawyers or temporary lawyers are usually paid by the hour to handle a specific matter and to achieve a specific result. The firm cannot dictate specifically how the contract lawyer arrives at such a result. If the contract lawyer works without direct supervision, the client must be informed and consent must be obtained. Care should be taken to ensure that the independent contractor has access to the matters related to the assignment but is restricted from accessing materials relating to other firm clients.

## Former Associates/Partners

Former members of the firm can sometimes leave hidden exposures behind. After a lawyer departs from your firm, document all the files that the lawyer was working on and which ones went with the departing lawyer. Have someone review the remaining files to check for any looming problems. Next, send your clients a letter informing them of the departure and allowing them to select who will represent them in the future. Finally, never rely on the departing lawyer to file a substitution of counsel. Instead, send the client a letter stating the date your firm ceased its representation and if appropriate, obtain the court’s permission to withdraw.

See the section [Sample Letters and Forms](#) for a [Sample Notice to Client of Departure of Partner/Associate from Firm](#).

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## ***Lawyer to Lawyer Relationship Do's and Don'ts***

### ***Do...***

- ✓ Put office sharing, work sharing and “of counsel relationship” agreements in writing.
- ✓ Require written verification that each office mate carries legal malpractice insurance.
- ✓ Review door signs, business cards, and telephone listings to make sure they are not misleading.
- ✓ Protect client confidentiality.

### ***Don't...***

- ⊗ Don't use common stationery if you are not in fact partners.
  - ⊗ Don't add an “of counsel” lawyer without verifying they have legal malpractice insurance.
  - ⊗ Do not file pleadings or tax returns as a partnership.
  - ⊗ Don't allow “of counsel” lawyers to use firm stationery for matters they undertakes for their own clients.
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# Addenda: Sample Letters and Forms

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## Sample Notice to Client of Departure of Partner/Associate from Firm

*[Date]*

*[Client Address]*

RE: *[Smith v. Jones]*

Dear *[Client Name]*:

Effective *[date of withdrawal]*, *Mr. B* will be withdrawing from the law firm of *A B & C, Ltd.* which will thereafter be known as *A & C, Ltd.* Effective that same day, *[state date]*, *Mr. B* will begin practicing law with the firm of *B & Associates, 123 LaSalle Street, Chicago, IL; telephone number: 312-123-4567.*

We have appreciated the opportunity to serve you in the past. During the transition period, *Ms. H.* of the firm of *A & C, Ltd.* will handle your ongoing legal work without any interruption of service.

You have the right to select the lawyers who will represent you in the future. You may choose *A & C, Ltd.* or you may choose to retain the firm of *B & Associates.* Alternatively, you may request that your file be delivered to new lawyers other than *A & C, Ltd.* and *B & Associates.* If you wish, you may use the attached form to designate your choice of lawyers. In the event you choose another lawyer, we will of course cooperate in the smooth transition of your files.

Should you have any questions related to these matters, please contact us for further information. Sincerely,

*A & C, Ltd.*

By: \_\_\_\_\_

*B & Associates*

By: \_\_\_\_\_

Comments:

1. See Illinois Rules of Professional Conduct Rule 1.16 for ethical guidelines concerning withdrawal from representation and termination of the lawyer-client relationship.
2. Remember when withdrawing from representation, you must take reasonable steps to avoid foreseeable prejudice to the rights of the client, including the following:
  - a. giving due notice to the client in writing;
  - b. allowing time for employment of other counsel;
  - c. delivering to the client all papers and property to which the client is entitled; and
  - d. refunding promptly any part of the fee that was paid in advance but which has not been earned.

3. Don't forget to promptly file substitutions of counsel with the court.
4. If the client has decided to retain other counsel, send a closure letter. If the client has opted to move his/her file to your new firm, send an engagement letter.

DISCLAIMER: This sample form is designed to reduce the likelihood of being sued for legal malpractice. It is not intended to be nor should it be considered legal advice. It is not the intent of this form to suggest or establish practices standards or standards of care applicable to a lawyer's performance in any given situation. Rather, the sole purpose of this sample form is to assist lawyers insured by ISBA Mutual in avoiding legal malpractice claims, including meritless and frivolous claims. To that end, the intention is to advise lawyers insured by ISBA Mutual to conduct their practices in a manner that is well above the accepted norm and standards of care established by substantive legal malpractice law. The recommendations contained in these materials are not necessarily appropriate for every lawyer or law firm and do not represent a complete analysis of each topic.

Adapted with permission of Warren Lupel of Much Shelist, P.C.



**[Date]**

**A & C, Ltd. 111 Main Street  
Chicago, IL 60000**

RE: **Smith v. Jones**

Dear **Ms. A:**

- We choose to have **A & C, Ltd.** continue to handle the above-referenced file in the future.
- We choose to discharge **A & C, Ltd.** and transfer the above-referenced file to **B & Associates.**
- We choose to transfer our file to the law firm of **[new law firm]**, thereby discharging the firm of **A B & C, Ltd.**

With respect to any files which we have decided to transfer to **[new law firm]**, please make arrangements to transfer those files promptly in an orderly manner. We recognize that **A B & C, Ltd.** has a compensation claim for services rendered and expenses advanced on our behalf to date.

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Signature

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Print Name

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Date



**ISBAMUTUAL.COM**  
**(312) 379-2000**