Law Society
of British Columbia

Practice Resource

Lawyers Sharing Space

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LAWYERS SHARING SPACE

INTRODUCTION

This article addresses the *Code of Professional Conduct for British Columbia* (*Code*) provisions that relate to space sharing, as well as some of the practical aspects that affect space-sharing relationships. When lawyers, who are not partners or associates in a traditional firm, share space, immediate concerns are raised about potential conflicts of interest between the clients of the space-sharing lawyers and about the duty of confidentiality owed to clients.

The specific provisions in the *Code* that relate to space-sharing are embodied in rules 3.4-42 and 3.4-43.

> **Space-sharing arrangements**
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> **3.4-42** Rule 3.4-43 applies to lawyers sharing office space with one or more other lawyers, but not practising or being held out to be practising in partnership or association with the other lawyer or lawyers.
>
> **3.4-43** Unless all lawyers sharing space together agree that they will not act for clients adverse in interest to the client of any of the others, each lawyer who is sharing space must disclose in writing to all of the lawyer's clients:
>
> (a) that an arrangement for sharing space exists,
>
> (b) the identity of the lawyers who make up the firm acting for the client, and
>
> (c) that lawyers sharing space with the firm are free to act for other clients who are adverse in interest to the client.
>
> **Commentary**
>
> **[1]** Like other lawyers, those who share space must take all reasonable measures to ensure client confidentiality. Lawyers who do not wish to act for clients adverse in interest to clients of lawyers with whom they share space should establish an adequate conflicts check system.
>
> **[2]** In order both to ensure confidentiality and to avoid conflicts, a lawyer must have the consent of each client before disclosing any information about the client for the purpose of conflicts checks. Consent may be implied in

some cases but, if there is any doubt, the best course is to obtain express consent.

CONFLICTS

Section 3.4 of the *Code* contains the conflict rules. Rule 3.4-1 requires that a lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under the Code. In particular, see commentary [11] (f) to rule 3.4-1, which points to one example of an area where a conflict of interest may occur being cost-sharing or space-sharing arrangements where practices are integrated physically and administratively.

Space sharers who will act for clients adverse in interest

Rule 3.4-43 requires that lawyers sharing space who will act for clients who are adverse in interest to clients of lawyers with whom they share space, must each disclose the following *in writing* to their clients:

- that an arrangement for sharing space exists;
- the identity of the lawyers who make up the firm acting for the client; and
- that the lawyers sharing space with the firm are free to act for clients who are adverse in interest.

We suggest that lawyers should disclose to the client the identity of the space sharers in addition to the identity of the lawyers who make up the firm acting for the client.

Space sharers who agree not to act for clients adverse in interest

If all lawyers in the space-share arrangement agree that they will not act for clients who are adverse in interest to clients of lawyers with whom they share space, commentary [1] to rule 3.4-43 applies to say the lawyers should establish an adequate conflicts check system. In order for the conflicts system to function, the names of the clients need to be disclosed to all the lawyers who are sharing the space; therefore, commentary [2] to rule 3.4-43 says “in order to ensure confidentiality and to avoid conflicts, a lawyer must have the consent of each client before disclosing any information about the client for the purposes of the conflicts checks”.

In both types of space-sharing situations measures to ensure confidentiality must be taken. The only exception to the duty of confidentiality expressly addressed in the rules for space-sharing is the disclosure of the names of the clients and affiliated parties as necessary to conduct a conflicts search, in situations where the lawyers do not wish to act for adverse parties, and then only with the consent of the client.

See the Model conflicts of interest checklist on our website for more information on conducting conflicts searches.

In both types of space-sharing situations something in writing must be given to or obtained from the client. If adverse clients are being taken on by the space-sharers, the writing must conform to the requirements of subrules 3.4-43 (a) to (c). If no adverse clients are being taken, then the client's consent to disclosing information for a conflicts search must be obtained, and the definition of "consent" in rule 1.1-1 entails a written component. Commentary [2] to rule 3.4-43 says consent may be implied in some cases, but it is difficult to know in what circumstances this may arise and if there is any doubt, express written consent is always best. The written component can be included in the retainer agreement or in a separate communication.

For the purpose of addressing conflicts arising from the transfer of lawyers between firms, the *Code* treats space-sharing lawyers as a law firm (see commentary [2] to rule 3.4-17, and the language in subrules 3.4-43(b) and (c)).

CONFIDENTIALITY

Like all lawyers, those who share space must take all reasonable measures to ensure client confidentiality (see rules 3.3-1 to 3.3-2 and commentary [1] to rule 3.4-43).

Space sharers who will act for clients adverse in interest

If you share space in a situation where the lawyers in the space will act for clients that are adverse in interest, you must be vigilant about protecting your client's confidentiality. You should be mindful of the risk of advertent or inadvertent disclosure of confidential information, even if you institute systems and procedures that are designed to insulate your practice (see rule 3.3-1, commentary [7]). Without the client's express consent, you cannot share client information with anyone except your own staff. This means you should not be sharing staff with the other lawyers in the space (including receptionists), nor should you share fax machines, printers or photocopiers where documents could be left unattended for a period of time. To the extent documentation is ever in a shared part of the space, it should be under supervision and cleared from the area immediately after completion of the task at hand. All recycled paper with client information should be kept in a locked container that cannot be reopened by anyone until it is shredded. You can share meeting rooms but you must be vigilant to make sure all conversations with clients are held in spaces where the exchange cannot be overheard. All client files and other client information must be kept separate from the work spaces of others in the shared space, and must be locked off from others who may have access to the space when it is not under your supervision (e.g. evenings, weekends or holidays).

Space sharers who agree not to act for clients adverse in interest

But what about the space-sharing situation where conflicts checks are done and there are no clients in an adverse situation? Isn't it okay to share staff and confidences with the other space-sharers much like you would in a traditional firm situation? The prudent answer to this question is 'no', not without specific client consent. Commentary [2] to rule 3.4-43 and commentary [5] to rule 3.3-1 are clear that even the name of the client should not be disclosed without the client's consent, so equally so no other lawyer in the space, nor staff except your own, should learn anything about your client without his or her consent. If you do want to share some of this information and treat confidences of the client as confidences of the shared-space group, language such as the following should be included in a written communication with the client:

> "As you know, my office arrangement involves sharing space with X, Y and Z lawyers. X, Y, Z and I have agreed that we will not act for clients who are adverse in interest to each other's clients. Accordingly, I confirm I have received your consent to conduct a conflicts' search through our system with respect to [the other parties] and no conflict is apparent. I have also advised you that my space-sharing arrangement includes sharing legal assistants, secretaries, receptionists and such services as photocopying and fax machines with the other lawyers in the group. From time to time, I may want to discuss aspects of your matter with the other lawyers in this group, if I believe it would be in your interest to do so. Further I may also ask other lawyers in the group to provide coverage for me during a temporary absence, although I would not give permanent conduct of the file to anyone else without your more specific instructions at the time. I ask that you indicate your consent to these arrangements by signing and returning to me a copy of this letter."

Absent this kind of consent from the client, there really is little that is different when it comes to the protection of client confidentiality between space-sharers who take clients adverse in interest and those who do not. However, it would be inappropriate to ask a client to consider a consent letter, such as the one above, in a space-share situation where space-sharers accept clients that are adverse in interest.

MARKETING OF LEGAL SERVICES

Chapter 4 of the Code contains the rules with respect to marketing of legal services. A "marketing activity" is widely defined and includes any publication or communication in the nature of an advertisement, promotional activity or material, letterhead, business card, listing in a directory, a public appearance or any other means by which professional legal services or clients are solicited (rule 4.2-4). Any marketing activity undertaken or authorized by a lawyer must not be reasonably capable of misleading the recipient or intended recipient (rule 4.2-5(d)).

How you market yourself in relation to the lawyers sharing space who are not part of your firm could have implications leading to a complaint to the Law Society or more substantively, with a

court claim that you were practising in an apparent partnership with the other space sharers who are not part of your firm.

APPARENT PARTNERSHIPS

Generally you want to avoid being in an apparent partnership. Under the general law of partnership, if your 'partner' incurs a debt or makes a mistake, you may be liable (see s. 16 of the *Partnership Act*, R.S.B.C. 1996, c. 348). It is never wise to inadvertently go down the road of a partnership when none is intended. To understand more about the legal issues with respect to apparent partnerships and liability, review cases such as *Jajj v. 100337 Canada*, 2014 ONSC 3411 CanLII) *Kent v H.A.D. Oliver et al*, 2000 BCSC 1154 (CanLII), *Westfair Foods Ltd. v Coopers & Lybrand*, 1997 CanLii3656 (BCSC), and *Tiago v. Meisels*, 2011 ONSC 5914 (CanLII).

On a practical basis, here are some things you can do in a space-share situation to avoid being deemed in a partnership with those with whom you are sharing space. Make sure your signage, your retainer letter, your business cards, your web presence, and all other marketing material makes it clear that you are "sharing space with X, Y and Z who are practitioners independent from each other (or law corporations or limited liability partnerships who are independent from each other) not in a partnership". Do not answer phones, create letterhead, or create other marketing material that in effect says "X,Y,Z & Associates" or any variation of that. Do not render bills or send out accounts under any name other than your own. And most importantly, you must keep your own general and trust accounts separate from the accounts of all others in the space.

ARE SPACE SHARERS COVERED BY THE INDEMNITY POLICY?

See generally My Policy: Questions and answers on the Lawyers Indemnity Fund webpage.

For other coverage questions, not answered contact an advance ruling advisor at the Lawyers Indemnity Fund.

WHAT ABOUT SPACE SHARING WITH NON-LAWYERS?

The Ethics Committee has opined that although there is no prohibition against space sharing with non-lawyers, it is an insecure position given that non-lawyers cannot be expected to appreciate the importance of lawyer-client confidentiality and the Law Society is not in a position to discipline non-lawyers for breaking client confidences. Accordingly, the Committee is of the view that the standard for sharing with non-lawyers is even higher than it is for sharing with lawyers. So for example, non-lawyers who space share should not be able to access the space after hours when there are no members of the lawyer's staff available to supervise, and there should be even more vigilance about ensuring that all conversations, files and other documentation are kept confidential. This in turn means there can be no cross-use or sharing of

staff, and no shared fax machines, printers or photocopiers. For more information see the Ethics Committee December 13, 1995 opinions (items 5 and 6).

Rules 7.3-1 and 7.3-2 of the Code generally remind lawyers that their outside interests and involvements should not in any way jeopardize integrity, independence or independent judgment. The standards of your practice and your public image should not be impaired by those with whom you choose to associate, including those with whom you may enter into space-sharing relationship.

As well, the temptation when you share space with others, especially those in another but related profession such as insurance, accounting, real estate, immigration consultants and the like, is to refer clients and keep the business in-house so to speak. This may lead to confusion, to loss of confidentiality or of solicitor-client privilege, and in some cases to complaints by clients that the lawyer did not exercise his or her independent judgment in making the referral, or that the lawyer was in a conflict of interest as he or she had a vested interest in keeping business volumes up so that shared overhead expenses are met (see the definition of "conflict of interest" in rule 1.1-1 of the *Code*). Finally, remember that you cannot split your fee with, or receive or pay a referral fee or other reward to, any person other than another lawyer (see rules 3.6-6.1 and 3.6-7).

In some situations a multi-disciplinary practice ("MDP") may be a possible structure to explore for businesses that are to be owned by lawyers and non-lawyers. See the definition of an MDP in Rule 1 and Rules 2-38 to 2-49 of the Law Society Rules.

CONCLUSION

Space sharing with other lawyers can be a benefit for all concerned if it is done properly. If in doubt as to the nature of your set-up or the type of activities you can safely carry out within the parameters of the rules of the *Code*, consider calling a Practice Advisor who will be happy to discuss the matter with you.