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BUSINESS LAW TODAY

Ethics Corner:

Preventing Legal Malpractice and Disciplinary Complaints: Ethics Audits as a Risk-Management Tool

By [Susan Saab Fortney](#)

After a long week of putting out fires as managing partner of a 20-lawyer firm, you are ready for the weekend. On the way out of the office, a senior partner approaches you. Looking stunned, the partner gives you a demand letter from a plaintiffs' lawyer. The letter states that the partner's failure to advise a tax client on changes in the law resulted in the client having to pay over \$1 million in taxes and penalties. On reflecting on the assertion, you suggest that the firm should be able to successfully defend the claim, in part, because boilerplate language in the firm's engagement letter limits the scope of representation. In addition, you note that language in the firm's termination letter clarifies that the firm's responsibilities cease at completion of the particular engagement. You indicate that on Monday morning you will pull the file from archives and consult the partner on the next step. On Monday morning, you learn why the partner was upset. The file did not include either an engagement or termination letter. Upon further investigation, you learn that the senior partner frequently disregarded firm policies, regularly failing to send engagement and termination letters to clients.

* * *

From the standpoint of risk management, it is unfortunate that the managing partner's discovery was only made after a claim was asserted. The senior partner's failure to use engagement and termination letters could have been detected and addressed earlier

if the firm periodically reviewed lawyers' compliance with firm policies and practices. Such a systematic review is a type of "ethics audit." This column examines the value of firm lawyers conducting and supporting ethics audits as an integral feature of a comprehensive risk-management program.

For decades, legal malpractice experts have urged lawyers to implement systems, policies, and procedures related to the delivery of legal services. Once a firm adopts systems, policies, and procedures, a meaningful risk-management system requires a periodic examination to monitor lawyers' compliance. Rather than waiting for a professional liability insurer to recommend or require such a systematic examination, proactive firm leaders and lawyers should seriously consider devoting time and resources to periodic ethics audits.

Lawyers who are fiercely independent may resist such reviews of their work. Individual lawyers may see an ethics audit as interfering with their autonomy. To address such resistance, firm leaders can use research findings from Australia to help lawyers recognize the positive difference that can be made with systematic reviews of compliance with firm policies and procedures.

In Australia, a requirement for firms to evaluate their management systems evolved out of legislation allowing nonlawyer ownership in incorporated law firms. To allay concerns related to nonlawyer ownership

and limited liability, the legislation included safeguards related to professional responsibility and the management of the firm. The first provision required the appointment of a legal practitioner director to be generally responsible for the management of the firm. The second provision required that the legal practitioner director ensure that the firm implement and maintain "appropriate management systems" (AMS) to enable the provision of legal service in accordance with obligations imposed by law.

To develop an approach for determining whether a firm has successfully implemented AMS, the legal services commissioner in the State of New South Wales assembled a group of interested parties tasked with giving AMS meaning and with developing an approach for determining whether a firm implemented AMS. As a starting point, the commissioner and stakeholders articulated 10 objectives of sound practice. These objectives were based on the types of concerns that commonly lead to client complaints, such as fee issues and conflicts of interest. In addition to the 10 objectives, the LSC and stakeholders devised an "education toward compliance" strategy requiring firms to complete a self-assessment form. The self-assessment form asks the firm to rate its compliance with each of the 10 objectives on a scale from Compliant-Plus to Non-Compliant. If a firm notes that they are non-compliant or partially compliant, then a representative with the commission-

er's office works with the firm to achieve compliance. Because the self-assessment process provides guidance on how firms can develop management systems to prevent and mitigate risk, the Australian program is a prototype for what is now called "proactive, management-based regulation of lawyers." Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 *Hofstra L. Rev.* 233, 236 (2013). Unlike reactive regulation that disciplines lawyers for violating particular rules, management-based objectives address the principles of sound practice.

Findings from empirical studies on the Australian approach made a compelling case for firms devoting time and effort to ethics audits. In 2008, a study on complaints data revealed a dramatic decrease in the number of complaints lodged against firms that had completed the self-assessment process. First, the study found that complaints rates for incorporated firms went down by two-thirds after the firms completed their initial self-assessments. Second, the results indicated that the complaints rate for firms that completed the self-assessment process was one-third of the number of complaints registered against non-incorporated legal practices.

To learn more about the impact of the AMS requirement and the self-assessment process, I conducted a mixed method study in 2012. The study findings revealed that the management-based approach is providing firm lawyers the incentive, tools, and authority to take steps to improve the delivery of legal services. This was illustrated by one question that asked respondents to note the steps that they had taken in connection with the firm's first completion of the self-assessment process. The majority of respondents (84 percent) reported that they had reviewed firm policies and procedures and 71 percent

indicated that they revised firm systems, policy, and procedures. Close to half (47 percent) reported that they actually adopted new systems, policies, and procedures.

From the interviews, we learned that many respondents recognized the benefits of systematic review of their practices. Some noted that they had not thought about particular controls until they read examples described in the self-assessment tool. Others described how the self-assessment process gave them a handle to enlist firm personnel to get on board in implementing systems. A number indicated that they wanted to do more to improve, but needed help in doing so. A few of the larger firms reported that they were continuing to build their firm's ethical infrastructure and to obtain a relatively new certification for management systems based on standards developed for the International Organization for Standardization. These firms planned to use the certification as a business-development tool to distinguish their firms from competitors.

The study results are noteworthy because they provide empirical support for what legal malpractice experts know – systematic review of a firm's ethical infrastructure makes a difference in lowering and mitigating complaints and involving all firm lawyers in the firm's risk-management program. Think back to the hypothetical that introduced this column. Had the firm conducted a practice review, it would have learned that the senior partner regularly disregarded firm policies and procedures. This discovery would have enabled firm leaders to address the issue with the senior partner before problems arose. As stated by one malpractice expert, "most malpractice errors are avoidable when appropriate risk-management systems are established, maintained, and religiously utilized by all attorneys and staff. (It only takes one: 'You can't make me do this' at-

titude to put the entire firm at high risk of a malpractice claim or claims.)" Nancy Byerly Jones, "Protecting Yourself from the 'Costs' of Malpractice." *Law. Wkly.*, USA, Nov. 21, 2005.

Various tools and resources are available to lawyers interested in systematically reviewing their practices. A firm's professional liability carrier may assist a firm in conducting a loss prevention review. Law practice management divisions of state bar associations also provide assistance. Some tools are available online. See *Legal Malpractice Self-Audit* from Texas Lawyers Insurance Exchange, at <http://www.texasbar-acle.com/materials/special/lomselfaudit.pdf>. A popular book by Anthony E. Davis and Peter R. Jarvis, *Risk Management: Survival Tools for Law Firms* (ABA 2d ed. 2007, new edition forthcoming), includes a number of questionnaires to be used in evaluating firm practice, policies, and procedures.

Regardless of the resources and approach used, ethics audits are an important feature of a successful risk-management program. Although such reviews take time and effort, they will reap benefits in terms of client and lawyer satisfaction, risk management, and malpractice prevention. As noted by one firm manager in my study, an added bonus is that implementation and review of management systems also helped him sleep better at night.

Susan Saab Fortney serves as the Howard Lichtenstein Distinguished Professor of Legal Ethics at the Maurice Deane School of Law at Hofstra University. She also directs the Institute for the Study of Legal Ethics. "Ethics Corner" is sponsored by the Professional Responsibility Committee, and is edited by Robert Evans III, a partner at Shearman & Sterling LLP.