

# Guard Against Criminal, Civil and Disciplinary Liability: A Practical Guide

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The first article in this series on law firm management problems (NYPRR, May 1998) surveyed disciplinary cases in which partners and associates in large firms had been disciplined for engaging in a variety of billing fraud schemes.

Law firms (and partners and supervisory attorneys) may be held liable criminally, civilly and in disciplinary proceedings for misconduct ranging from billing fraud to conflicts of interest, from breaches of confidentiality to defiance of court orders. Law firms also face liability for results traceable to the emotional and other disabilities of partners and employees, weaknesses in caseload management systems and the inadequate supervision of partners and associates.

Careful law firms in New York City now devote considerable resources to office management systems designed to reduce their liability and exposure. This article will explore several of the systems and mechanisms in use by specific (although here unnamed) New York City law firms to prevent problems and to protect themselves and their partners from the negligence or misconduct of other partners and of associates and employees. The information ~ interviews with law firm partners.

## Screening For Conflicts Of Interest

Professional ethics codes have long required that lawyers not engage in conflicting representations. Two years ago, New York's Code of Professional Responsibility was amended to require every law firm to maintain a conflicts check system for all client matters and a policy for using that system before taking on any new client or matter. (Failure to have a conflicts check system or a policy for using it is a per se violation of the Code of Professional Responsibility, even if no conflicting representation results.)

While it may be relatively easy to devise a conflicts check system — the essential ingredients are a complete list of clients and of matters handled by the law firm — it is clear from the literature and the case law that many ethical and reputable law firms have found themselves in the middle of conflicts they did not anticipate or recognize. What can law firms do to avoid conflicts and professional liability?

An effective and mandatory conflicts check system is essential. One partner in a large corporate New York City law firm with more than two hundred partners explained that his firm has a policy that no attorney may work on a new matter and no billing number may be issued until a conflicts check is completed.

## **Computerized Data Base**

This law firm maintains a computerized data base, which includes the names of all clients (and their corporate affiliates) and of parties with adverse interests (including lenders). Before the firm takes on a new client, a conflicts sheet must be completed and all names (of the client and potential adverse parties) run through the computerized data base. In addition, a "new matter conflicts memo" is e-mailed to all lawyers in the firm and a hard copy of the memo is also circulated. In the firm's experience, the "new matter" memos are reviewed carefully by the partners, who take their responsibility seriously, and also by most associates. In addition to providing the data for resolving conflicts, the memos offer vital information about what matters the firm is handling and who is generating new business.

Although the firm requires that a conflicts check be completed before any new matter is accepted, even on behalf of an existing client, the partner interviewed for this article acknowledged, that this policy is hard to enforce. Clients frequently call the partner they work with to "run something by" him or her. The partner, anxious to help the existing client, often offers advice "off the cuff" without doing a conflicts check first. This can be problematic if it turns out that the question impacts an existing firm client with interests adverse or potentially adverse to the inquiring client. The firm has not yet found out how to ensure that conflicts checks are done for all new matters involving existing clients as effectively as they are for new matters involving new or prospective clients.

## **Maintaining The Data Base**

A partner in another multi-jurisdiction law firm observed that a common obstacle to effective conflicts checks was the lack of currency in the law firm's computerized database. While most large firms have created sophisticated database programs for their clients, client matters, and affiliated entities, a conflicts check is only as good as the information in the database. If a party is added to an ongoing litigation or if a client merges with or acquires another corporate entity or division, the new names must be added to the database immediately or the firm risks missing an actual or potential conflict the very next day.

The partners interviewed by the author stated that their firms placed the responsibility for updating the firm's database on the partner responsible for the litigation or for the client. Most acknowledged that the database is not always updated as to ongoing matters and that, as a result, some conflicts are not identified when they first arise.

For the most part, however, maintaining an up-to-date computerized client database and circulating "new client" and "new matter" memos before taking on any new representations will enable a law firm to avoid almost all conflicts. Lawyers who are aware of the consequences of neglecting these precautions -- lost fees, lost clients, impaired reputation -- will generally work together to ensure that the conflicts check system is well maintained and as complete and current as possible.

## **Most Firms Supervise Their Associates But Not Their Partners**

Many lawyers, even those practicing in large law firms, have their own clients and work on their own matters. Often, they resent intrusions by their partners. While associates are generally carefully supervised by more senior lawyers, the supervision of partners by other partners is one of the most difficult problems, even for prudent law firms. Given that lawyers (and law firms) will be held responsible for the conduct and misconduct of their partners, careful supervision of the work of partners should be imposed, certainly to a greater extent than is presently the case.

None of the law firms interviewed for this article provides a system which enables partners to supervise other partners. However, all of the law firms train and supervise their new associates. Some firms have even become authorized CLE providers under the mandatory CLE program for newly-admitted lawyers. Some firms require that all filings prepared by associates be reviewed by a partner before being submitted to a court. Yet these same law firms rarely, if ever, require peer review of partners' written work, much less of their oral advice to clients.

### **Controls Over Expenses And Billing**

Law firms have been far more willing to implement accounting systems to deter and detect misconduct relating to expense accounts and disbursements. One large corporate firm requires that all associate expenses be reviewed by the billing partner and a managing partner before a client is billed. That firm also requires that any lawyer seeking expense reimbursement from the firm submit original documentation (e.g., credit card receipts, etc.). Expense reports and supporting documentation are reviewed by the firm's accounting department.

A larger problem lies in supervising law firm billing. Most law firms still look to the billing partner for each client to assure the accuracy of bills sent to the client. But as the ethics partner in one firm acknowledged, "Bill padding is hard to detect." One firm has hired a billing coordinator and implemented a billing system staffed by non-lawyers. No lawyer has access to the system and all changes to bills must be approved by the billing coordinator, who is an accountant, not a lawyer. At some firms the billing departments analyze associate billing patterns, but this is primarily to assure that work assignments are fairly distributed and that associates are meeting the firm's expectations, not to detect billing fraud. There is little review or oversight of partner billing patterns, except to insure adequate compensation. For the most part, law firms continue to rely on the integrity of their partners, as well as review by clients, which is not always adequate to signal problems.

### **Caseload Management**

Caseload management is computerized in most law firms today. Nearly all large law firms maintain a computerized master calendar for all litigated matters. Lawyers and support staff are responsible for advising the calendar clerk of filing dates and deadlines, as well as the status of all court proceedings. The calendar clerk (often assisted by other clerks) monitors the courts in which the firm's cases are pending. One large firm acknowledged, however, that matters litigated outside New York are not as effectively monitored as are the firm's New York cases. Each lawyer is left to calendar his or her own out-of-town matters and this system is not always an effective prevention mechanism.

Monitoring the status of non-litigated matters is more difficult, although it can be just as essential. Regulatory and transactional work can be time-sensitive and often urgent. Most law firms depend on the billing partner to supervise these and keep in touch with the client. In most cases, few problems arise. Unfortunately, even an occasional "oversight" can be financially devastating for a firm and its partners. An effective peer review system would significantly lower a law firm's risk in these matters.

### **Other Risk Reduction Techniques**

Law firms can and do reduce their exposure in other ways as well. The training of associates (and retraining of partners) is essential. With mandatory continuing legal education already here for new

lawyers and just around the corner for all lawyers, more large firms are likely to apply to qualify as CLE providers and may devote even more time to training their lawyers in office management skills and to sensitizing them to existing and new ethical obligations. Many large firms currently invest considerable time in training new associates in the importance of maintaining client confidentiality, and many firms regularly brief partners and associates on developments in expanding civil and criminal liability for lawyers who improperly disclose client information. Many firms have formed in-house ethics committees and some retain outside ethics counsel who are available to lawyers in the firm on a regular basis. One large New York City firm has an “ombudsman” system, which enables any lawyer in the firm to talk to a designated lawyer on a confidential basis about personal or professional problems. Another firm has recently taken steps to sensitize partners to the warning signs when lawyers and support staff take to alcohol or drugs or suffer from stress or personal problems.

## **Conclusion**

Lawyers can no longer think only about their own clients and their clients’ problems. They must also focus on their partners and associates and install mechanisms to prevent problems that can disrupt their practices, interfere with their livelihood and damage their reputations.