The Role of Ethics Audits in Improving Ethical Conduct in Law Firms: An Empirical Examination

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ARTICLE

Susan Saab Fortney

The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms

Abstract. For decades, legal malpractice experts have urged lawyers to implement risk management measures. To assist law firms in doing so, legal malpractice insurers have provided audit services and self-audit materials. Under the Australian regulatory regime, incorporated legal practices are required to complete a self-assessment process and to report on the firm’s compliance with ten objectives of sound law practice. Using management-based principles, this Article discusses steps to take to encourage ethics audits “to merge good ethics and good business” in the U.S.

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INTRODUCTION

On a weekly basis, articles in both legal newspapers and the popular press question the relevance, cost, and application of legal education. This discussion adds another chapter to discourse on the role of law school and legal educators. In the debate on the proper focus of law schools and legal educators, Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit challenged law schools and law firms to examine the “dissjunction” between the legal academy and the legal profession. Judge Edwards questioned the emphasis on abstract theory, arguing that the principal mission of law schools should be to produce “scholarship that judges, legislators, and practitioners can use.” According to Judge Edwards, “practical scholarship . . . is not wholly doctrinal.” Rather he noted that a “practical scholar” gives due weight to cases, statutes, and other authoritative texts, but also employs theory to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in the law or in systems of justice.

At the time that Judge Edwards referred to the “dissjunction,” Judge Edwards may not have been aware of Ted Schneyer’s seminal article,


4. Id. at 35.

5. See id. (noting that a good legal scholarship is not one dimensional); see also Richard A. Danner, Oh, The Treatise!, 111 MICH. L. REV. 821, 822 (2013) (pointing out that in recent years, Chief Justice Roberts and Justice Kennedy have also questioned the value of purely theoretical legal scholarship).
The article critically examined problems facing practitioners and proposed changes to improve the effectiveness of regulation of lawyers. Arguing that the professional regulation should include the discipline of law firms, Professor Schneyer analyzed how limiting discipline to individual lawyers does not address various ethical breaches that arise from inadequate organizational controls and deficiencies in the ethical infrastructure of law firms. Professor Schneyer first used the term “ethical infrastructure” to refer to “a law firm’s organization, policies, and operating procedures . . . that cut[] across particular lawyers and tasks.” Professor Schneyer suggested that “[t]he chief reason to allow disciplinary authorities to proceed directly against law firms is prophylaxis—the promotion of firm practices that prevent wrongdoing by individual lawyers.” As discussed below, Professor Schneyer’s work on the discipline and ethical infrastructure of law firms has influenced lawyers, academics, jurists, and regulators around the world.

Following the publication of Professor Schneyer’s article, the high court in New York revised the state’s professional conduct rules to provide for discipline of law firms as entities. Although few firms have been disciplined, the possibility of entity discipline should motivate firm leaders to devote time and resources to implement policies and procedures to promote ethical conduct.

In focusing attention on the connection between ethical conduct and

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8. Professor Schneyer uses five well-published incidents involving large law firms to illustrate how misconduct may not be attributable to the conduct of individual lawyers. Id. at 4–5.

9. Id. at 10.

10. Id. at 14.


firm systems and controls, Professor Schneyer’s work may have also contributed to regulators’ and jurists’ willingness to rely on the state versions of ABA Model Rule of Professional Conduct 5.1, which requires that a partner in a law firm “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”

Although there are relatively few disciplinary cases citing Rule 5.1(a), opinions increasingly refer to the importance of firm managers making reasonable efforts to ensure that all lawyers in the firm comply with the ethics rules.

In the United States, other scholars relied on Professor Schneyer’s work that called for law firms to focus more on fortifying their ethical infrastructure. Some examined the implementation and impact of ethics systems and controls. A few have called for more research examining the role of ethical infrastructure.

Outside the United States, commentators and bar leaders joined the chorus by seriously considering the role of ethical infrastructure in influencing lawyer conduct. This examination has informed regulatory changes in both the United Kingdom and Australia.

In the United Kingdom, the Solicitors Regulation Authority (SRA) has shifted to outcomes-based regulation that focuses on high-level principles and outcomes that drive the provision of legal services to consumers.

14. MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2013); see Susan Saab Fortney, Am I My Partner’s Keeper? Peer Review in Law Firms, 60 U. COLO. L. REV. 329, 348–58 (1995) (providing a discussion of Model Rule 5.1(a) and a partner’s duty to monitor or supervise other firm lawyers).


16. See Alex B. Long, Whistleblowing Attorneys and Ethical Infrastructures, 68 MD. L. REV. 786, 788–89 (2009) (recommending that firms adopt procedures to promote internal reporting of ethics concerns and providing formal protections against retaliation for reporting).

17. See Susan Saab Fortney & Jett Hanna, Fortifying a Firm’s Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest, 33 ST. MARY’S L.J. 669, 690 (2002) (describing the various systems that firms employ to check the quality of their ethics systems).

18. See Elizabeth Chambliss & David B. Wilkins, Promoting Effective Ethical Infrastructures in Large Law Firms: A Call for Research and Reporting, 30 HOFSTRA L. REV. 691, 693 (2002) (explaining the importance of having a sound ethical infrastructure in place).


The SRA Authorization Rules now require firms to appoint compliance personnel to oversee risk management and governance matters. These compliance officers are responsible for ensuring that their firms implement systems and controls to enable firm members to meet the requirements set forth in the Solicitors Handbook. In describing effective compliance arrangements, the SRA urges solicitors to consider the infrastructure of the firm.

In adopting a form of management-based firm regulation, Australian jurisdictions have taken a somewhat different approach in addressing organizational controls and consumer protection. Legislators in the state of New South Wales (NSW) in Australia first took the pioneering step of integrating the concept of “ethical infrastructure” into the statute, allowing legal practitioners to incorporate their law practices with no restrictions on non-lawyer ownership.
To allay concerns related to non-lawyer ownership and limited liability, the statute imposes a number of management and practice safeguards. First, the incorporated legal practice (ILP) must appoint a legal practitioner director to be “generally responsible for the management of legal services provided” by the ILP. Second, the statute provides that the legal practitioner director must ensure that “appropriate management systems are implemented and maintained to enable the provision of those legal services in accordance with . . . obligations imposed by [law].”

Because the statute did not define “appropriate management systems” (AMS), Steve Mark, the Legal Services Commissioner for NSW, worked with various stakeholders to develop “ten objectives of sound legal practice.” The Office for the Legal Services Commissioner (LSC) also devised an “education toward compliance” approach in which the ILP must complete a self-assessment process (SAP). In this SAP, ILPs complete a Self-Assessment Form (SAF), reporting on their compliance with each of the ten objectives.

Professor Ted Schneyer credits the NSW program with giving content to the term “ethical infrastructure” by “identifying ten types of recurring problems that infrastructure should be designed to prevent or at least mitigate.” Because the “education toward compliance” approach focuses


28. See id. at 686 (explaining the strict compliance regulations to which the practitioner director must adhere).

29. See id. at 689–90 (listing the objectives of the education towards compliance strategy).

30. See id. at 689 (stating that the ILPs must demonstrate that they have a program in place that is congruent with the ten objectives previously described).

31. See id. at 691 (explaining that the SAF requires the legal practitioner director to evaluate firm practices and rate management systems using a template). If the completed form indicates that a firm is non-compliant or partially compliant, a staff member with the LSC provides the ILP written guidance and requests confirmation of steps to achieve compliance. See id. (recognizing that the self-assessment form is a required element of the ILP review program); see also Susan Fortney & Tahlia Gordon, Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation, 10 ST. THOMAS L.J. 152, 152 (2012) (highlighting Tahlia Gordon’s contributions as the Research and Project Manager for the Office of the Legal Services Commissioner for NSW).

on prevention and mitigation, Professor Schneyer describes the NSW program as a prototype for “proactive, management based regulation.”

Unlike reactive regulation that disciplines lawyers for violating particular rules, the management-based objectives address the principles of sound practice. In addition, the SAF provides strategies to address concerns that commonly result in complaints against practitioners.

The proactive approach to regulation has captured the attention of a number of commentators and researchers. Notably, in 2008, Dr. Christine Parker conducted an empirical study assessing the impact of the NSW program on the number of complaints relating to ILPs. The study found that rate of complaints for ILPs went down by two-thirds after the ILP completed its initial self-assessment. Another noteworthy finding was that the rate of complaints for ILPs that completed the SAP was one-third of the number of complaints registered against non-incorporated legal practices. The researchers recommended further investigation utilizing other research methods because the rate of complaints largely reflected consumer service issues and did not address other ethics concerns, such as duties to the court and other ethical issues that are of less concern to clients.

To obtain more data on the impact of the AMS and the SAP and to identify possible measures to improve management-based regulation of firms, I conducted a mixed method study in 2012, combining a survey...
with interviews. Another article analyzes survey findings related to the implementation and development of AMS, as well as the effects of the SAP.41 This Article draws on those findings, focusing on the value of ethics audits in improving ethical conduct by lawyers.

Part I of this Article describes the hypotheses and methodology used in the study. Part II summarizes pertinent survey findings relating to the effects of AMS and the SAP. Part III identifies steps that can be taken to encourage lawyers and their firms to engage in self-assessment. The conclusion explains the foundational role that ethics assessments can play in reducing lawyers’ liability while improving the delivery of legal services.

PART I - RESEARCH QUESTIONS AND METHODOLOGY

For the study, the primary research questions were: (1) what is the relationship between the self-assessment and the ethical norms, systems, conduct, and culture in firms, and (2) how can the SAP be improved? To answer these questions, I conducted a mixed method study in collaboration with the Office of the Legal Services Commissioner for NSW (LSC).

In phase one, I obtained survey data using an online questionnaire.42 The questionnaire sought information on approaches, perspectives, effects, and experiences related to the AMS implementation and the SAP.43 The target group for the survey consisted of 356 ILPs with two or more solicitors.44 A total of 141 directors with ILPs completed the questionnaire, resulting in a response rate of 39.6%.45 The respondents

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42. SUSAN FORTNEY, INCORPORATED LEGAL PRACTICE SURVEY, QUESTIONNAIRE, at 1 (2012) (on file with the St. Mary’s Law Journal); see also Susan Fortney & Tahlia Gordon, Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation, 10 St. Thomas L.J. 152, 168 (2012) (indicating that the questionnaire contained thirty-one multipart items, space for text entries, and a section for additional comments).


44. See Susan Fortney & Tahlia Gordon, Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation, 10 St. Thomas L.J. 152, 168–69 (2012) (specifying that only ILPs that were incorporated between January 1, 2007 and January 1, 2011 were invited to participate in the survey).

45. See id. at 168–70 (discussing the development of the methodology, the response rate, and bias).
represented firms of varying sizes.\textsuperscript{46} 

In the second stage of the study, we interviewed directors from ILPs with two or more solicitors.\textsuperscript{47} Maxine Evers, Senior Lecturer at the University of Technology in Sydney, conducted approximately half of the interviews. We systematically pulled the names of firms and invited designated directors from those firms to participate in interviews.\textsuperscript{48} Interview questions allowed for follow-up on issues covered in the questionnaire. The interviews also provided an opportunity to explore in more detail the directors' experiences with implementing AMS and completing the SAP as well as their opinions on improving the SAP and the regulation of firms.\textsuperscript{49} Respondents were advised that the study was being conducted in cooperation with the LSC and were informed of steps taken to protect the anonymity of their responses.\textsuperscript{50}

\textbf{PART II - SELECT SURVEY FINDINGS}

A number of survey items addressed the following question: What is the relationship between self-assessment and the ethical norms, systems, conduct, and culture in firms?\textsuperscript{51} One question specifically asked respondents to note the steps taken after the firm’s first completion of the SAP. The majority (71\%) indicated that they revised firm systems, policies, and procedures and 47\% reported that they actually adopted new

\textsuperscript{46}. See SUSAN FORTNEY, INCORPORATED LEGAL PRACTICE SURVEY, RESULTS, at Question 1 (2012) (on file with the \textit{St. Mary's Law Journal}) (reporting the following categories for respondent firms by size: 1-2 solicitors (10\%), 3-9 solicitors (78\%), 10-19 solicitors (7\%), and 20 or more solicitors (5\%)). Geographically, the respondents were close to evenly divided between firms with home offices in Sydney and firms with home offices in other communities in NSW.


\textsuperscript{48}. We continued to systematically pull names and invite respondents until we had over forty individuals who agreed to be interviewed.

\textsuperscript{49}. Although each interviewer followed a four-page interview template, the session allowed for follow-up discussion of issues and concerns that arose during the interview.


\textsuperscript{51}. See, e.g., SUSAN FORTNEY, INCORPORATED LEGAL PRACTICE SURVEY, QUESTIONNAIRE, at Question 12–13 (2012) (on file with the \textit{St. Mary's Law Journal}) (asking what steps the interviewer took upon completion of the SAP and whether certain aspects of the firm culture changed as a result).
systems, policies, and procedures. Forty-two percent indicated that they “strengthened firm management” following the completion of the first SAF. For most steps taken by firms in connection with the SAP, there was no significant difference related to firm size and the steps taken. Analyzed together, these results and others suggest that the SAP contributed to firms of all sizes taking steps to fortify the firms’ ethical infrastructures.

Results also indicate that the SAP was an educational experience for the majority of respondents. Sixty-two percent indicated that they agreed or strongly agreed with the following statement: the self-assessment process “was a learning exercise that enabled our firm to improve client service.” Only 15% disagreed or strongly disagreed. These responses and text entries indicate that the education toward compliance approach works in providing firm directors the incentives, tools, and authority to take steps to improve the delivery of legal services. A smaller percentage of respondents noted that the SAP enhanced awareness of ethics issues.

To obtain additional information on the extent of the impact of the SAP, a multi-part inquiry asked respondents to rate impact on the following scale: (1) “no impact,” (2) “some impact,” and (3) “high impact.” For analysis purposes, I grouped the responses in four categories: management, client/professionalism concerns, ethics concerns, and firm dynamics. The following graphic sets forth the average ratings for items in these categories.

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52. Id. at Question 12.
53. Id.
54. See id. at Question 1, 12 (noting that this figure is based on a cross-tabulation of Questions 1 and 12). When it came to implementation of training following the self-assessment process, there was a trend in which larger firms reported that they implemented training more than smaller ones. Id. at Question 12.
56. See SUSAN FORTNEY, INCORPORATED LEGAL PRACTICE SURVEY, RESULTS, at Question 19 (2012) (on file with the St. Mary’s Law Journal) (noting that 55% of respondents checked that they “agree” with the statement and 7% reported that they “strongly agree” with the statement).
57. See id. at Question 19 (reporting that 11% of respondents checked that they “disagree” with the statement and 4% reported that they “strongly disagree” with the statement).
58. See id. at Question 19 (reporting that approximately 45% of respondents “agree” or “strongly agree” that SAP enhanced ethics awareness).
59. Id. at Question 13.
60. See id. (indicating a trend in which directors at smaller firms reported that the self-assessment process impacted supervision at a higher rate than that reported by directors at larger
As indicated by the results summarized in the graphic, the largest percentage of respondents reported that the greatest impact was on matters related to firm management and risk management, followed by impact on client service matters. The respondents’ ratings of the impact on general ethics concerns and firm dynamics were lower. These results can be attributed to the fact that the items covered in the SAF largely deal with practice management issues that commonly result in firm concerns related to client complaints, such as cost disclosure and fee recovery.

Although many of the items covered in the SAF relate to proper conduct under applicable law, the aggregate results suggest that respondents did not perceive that the SAP impacted ethics conduct, leadership, and culture as much as management and client service issues. This conclusion is supported by other responses indicating that a smaller percentage of firms are implementing measures related to general ethics concerns, as opposed to measures and controls that the SAF expressly covers. 61 Similarly, more respondents report that their firms implemented
measures specifically described in the SAF, but a smaller number of respondents used controls not described in the SAF.\textsuperscript{62}

These results point to an overarching question related to the effect of the SAP. Does the process contribute to serious examination of firm practices, policies, and systems, or does the SAP result in firms using the SAF as a checklist, simply implementing the specific practices, policies and procedures described in the SAF? Even worse, does the SAP result in a meaningless box checking exercise in which directors simply go through the SAF checking that their firms are “compliant” without serious examination of firm practices? In the survey, 12% of respondents agreed with the statement that the SAP amounted to meaningless “box ticking.”\textsuperscript{63}

In evaluating survey responses and interview results, directors’ experiences and perspectives appear to fall on a continuum. At one end, a relatively small percentage of respondents may be simply checking boxes and reporting that their firms are compliant without actual review of firm policies.\textsuperscript{64} The mid-continuum point is represented by the large percentage of respondents who report that they used the SAF as a learning process to review and revise existing policies, as well as adopt new ones.\textsuperscript{65} At a minimum, these firm representatives are addressing those matters that are expressly described in the SAF form.\textsuperscript{66} At the far end of the continuum are those firm respondents who have been inspired by the SAF to take management systems to the next level.\textsuperscript{67} These respondents recognize the business imperative in adopting management systems to

\textsuperscript{62}See id. at Question 24 (illustrating the fact that 92% of respondents indicated that their firms had a practice for verifying credentials and certifications of all practitioners, a supervisory control identified in the SAF). On the other hand, only 66% reported that their firms made a regular practice of having a director (not involved in the representation) periodically review all current files. Id.

\textsuperscript{63}See id. at Question 18 (finding that 66% of respondents disagreed that “SAP amounts to meaningless box ticking,” while 22% neither agreed nor disagreed).


\textsuperscript{65}See SUSAN FORTNEY, INCORPORATED LEGAL PRACTICE SURVEY, RESULTS, at Question 18 (2012) (on file with the St. Mary’s Law Journal) (demonstrating that 55% of survey takers believed that the SAP was useful as a learning exercise).

\textsuperscript{66}See id. (noting that 56% of respondents believed that adopting the AMS “reduced the firm’s professional liability of risk”).

\textsuperscript{67}See id. (revealing that 7% of those surveyed strongly agreed that the SAP was a positive learning tool).
make their firms more competitive in attracting and retaining clients.68 A small group of respondents who recognize the value of management systems are going beyond the minimum required by the SAF and seeking a Quality Management Certification under the guidelines adopted by the International Organization for Standards.69 Firms might use such certifications to distinguish themselves for business development purposes.

PART III - INTEGRATING MANAGEMENT-BASED PRINCIPLES

The research findings discussed above indicate that lawyers’ self-assessment makes a real difference in educating lawyers by first evaluating their firm practices, and second, by developing systems. As revealed by respondents’ reports of the impact of the SAP, the greatest impact was on firm management, risk management, and supervision. The survey findings relating to the dramatic decrease in the number of complaints suggest that lawyers can reduce their exposure for liability for disciplinary complaints by evaluating firm practices and improving firm controls.70 These findings may capture the attention of some practitioners, contributing to them going through the SAP.

Although the data is compelling, most practitioners may need additional incentives or a push to get them to devote the time to seriously examining firm processes. In Australia, the regulatory implementation of legislation mandating that incorporated firms implement appropriate management systems requires designated practitioners to complete the SAP.71 Opinions reported in my study revealed that a number of the respondents questioned or even opposed being required to complete an

68. See id. (showing that a total of 62% of respondents believed that the SAP enables their firm to improve client service).


70. See id. at Question 18 (revealing that 40% of respondents agreed or strongly agreed that “AMS reduced the number of client complaints,” versus only 19% disagreeing or strongly disagreeing that client complaints had gone down).

Thirty-three of the 137 responding critics indicated that their opinions changed following completion of the SAP. This experience points to the importance of taking steps to encourage lawyers to examine their practices as part of a risk management and practice improvement program.

The steps taken may depend on a variety of factors, including the state’s disciplinary procedures, bar programs, and insurer support for risk management initiatives. Progressive regulators, insurers, and bar leaders who find data to be persuasive should be more willing to take steps to encourage lawyers to engage in self-examination of firm practices and systems. The following discussion considers specific steps that can be taken to spur lawyers and firms to systematically examine their practices and controls.

A. Regulatory Mandate Related to Alternative Business Structures

Outside of Australia, other jurisdictions are now seriously considering regulatory reforms, including risk-based approaches to regulation. Regulators in a number of Canadian provinces are exploring regulatory reforms and studying the experiences in England and Australia. For example, the Director of Professional Responsibility for the Nova Scotia Barristers’ Society recommends that the Council for the Nova Scotia Barristers’ Society consider the following changes:

[A]dopting a proactive approach with lawyer and law firms through education, engagement, the creation of an appropriate management systems-based approach, and the provision of tools and training to help firms of all sizes practice ethically and competently in the public interest and develop an embedded ethical infrastructure . . . [and] allowing firms the room to establish appropriate management systems that suit the nature of their clientele and to demonstrate their effectiveness, then refocus our attention and resources on supporting sole practitioners and small firms in achieving appropriate management systems and avoiding problems . . .

72. See SUSAN FORTNEY, INCORPORATED LEGAL PRACTICE SURVEY, RESULTS, at Question 22 (2012) (on file with the St. Mary’s Law Journal) (demonstrating the opinions of respondents regarding the required SAP).

73. See id. at Question 9 (soliciting respondents’ opinions on concerns regarding the SAP).

74. See THE LAW SOC’Y OF UPPER CANADA, PROFESSIONAL REGULATION COMMITTEE REPORT, REPORT TO CONVOCATION, at 432–36 (2013), available at http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147495044 (summarizing different approaches used in Australia, the United Kingdom, the United States, and Canada).

This excerpt from the report suggests that regulators in other countries recognize the value of a proactive “education toward compliance” approach that encourages lawyers and their firms to improve their management systems. As these regulators study the possibility of relaxing prohibitions on alternative business structures, management-based principles may be a feature of the new regulatory regime. This is similar to the approach used in Australia where the new regulatory approach and SAP evolved out of the legislation lifting restrictions on non-lawyer ownership of incorporated legal practices.

After other jurisdictions join the United Kingdom and Australia in allowing non-lawyer ownership of law firms, the American Bar Association (“ABA”) and state regulators may revisit modifying disciplinary rules that prohibit non-lawyer ownership of law firms. Any changes in the current rules will need to address the critics who argue that non-lawyer ownership will undermine core values of the legal profession and public protection. Except for the staunchest critics of changing current prohibitions, the reservations of some might be addressed by requiring that safeguards be implemented at firms with non-lawyer owners. These controls could include requiring that the firms appoint a general counsel and demonstrate that the firm has in place proper management systems to give reasonable assurance that firm lawyers act in accordance with their professional obligations.

B. Use of Management-Based Approaches As an Alternative to Discipline

Given the strong opposition to allowing non-lawyer ownership of law firms in the United States, it may be many years until the restrictions on
non-lawyer ownership are changed. Until that time, there are other opportunities for integrating management-based principles into the regulation of lawyers. One avenue that is currently employed in many states is to use diversion programs as an alternative to discipline. After reviewing the genesis of these programs and the approach used in current diversion programs, this section discusses the value of broader use of diversion programs to deal with minor misconduct and practice management concerns.

Over forty years ago, a Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark, issued a report analyzing problems related to disciplinary enforcement (“the Clark Report”). The Clark Report noted that one deficiency was that disciplinary procedures failed to address matters involving minor misconduct.

Twenty years later, the ABA’s Commission on the Evaluation of Disciplinary Enforcement, chaired by Robert McKay (“the McKay Commission”), issued a report that addressed the need for procedures to deal with minor misconduct and the need to provide practice management guidance to lawyers. The McKay Commission recommended the establishment of Law Practice Assistance Committees to consider cases referred to the committees and to aid lawyers voluntarily seeking


83. See id. at 92–95 (examining problems associated with the lack of admonitory procedures to deal with minor misconduct). The Clark Report recommended that disciplinary agencies be authorized to issue “informal admonitions in disposing of complaints involving” minor misconduct. Id.; see also Diane M. Ellis, Is Diversion A Viable Alternative to Traditional Discipline?: An Analysis of the First Ten Years in Arizona, PROF. LAW., Fall 2002, at 1, 4 (discussing the key concerns related to the lack of admonitory procedures).

assistance. The McKay Commission also recommended that “jurisdictions should adopt procedures in lieu of discipline for matters in which a lawyer’s actions constitute minor misconduct, minor incompetence, or minor neglect.” As stated in the recommendation, disciplinary counsel and the respondent lawyer may agree to submit the minor misconduct matter to non-disciplinary proceedings that “may consist of fee arbitration, arbitration, mediation, lawyer practice assistance . . . or any other non-disciplinary proceedings.”

Following the McKay Commission Report, the ABA amended their Model Rules for Lawyer Disciplinary Enforcement to expressly provide for alternatives to discipline. Under the amended rules, alternative discipline is available for instances of “lesser misconduct.” Prior to filing

85. See id. at Recommendation 4 (“The Committee should provide guidance to the lawyer including, when appropriate: (a) review of the lawyer’s office and case management practices and recommendations for improvement; and (b) review of the lawyer’s substantive knowledge of the law and recommendations for further study.”). Comments to the recommendation noted that the Committee could provide direct supervision and guidance or recommend other resources such as office management classes or substance abuse counseling. Id.

86. Id. at Recommendation 9.

87. Id.; see also id. at Recommendation 10 (setting forth expedited procedures for handling instances of minor misconduct); Diane M. Ellis, Is Diversion A Viable Alternative to Traditional Discipline?: An Analysis of the First Ten Years in Arizona, PROF. LAW., Fall 2002, at 1, 4 (explaining that the ABA adopted the McKay Commission recommendations in 1992).


89. Rule 9(2) under the ABA Model Rules for Lawyer Disciplinary Enforcement states that “[l]esser misconduct is conduct that does not warrant a sanction restricting the respondent’s license to practice law.” MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 9(2) (2002), available at http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html. The rule states that conduct shall not be viewed as lesser misconduct if:

1. the misconduct involves the misappropriation of funds;
2. the misconduct results in or is likely to result in substantial prejudice to a client or other person;
3. the respondent has been publically disciplined in the last three years;
4. the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last five years;
5. the misconduct involves dishonesty, deceit, fraud, or misrepresentation by the respondent;
formal charges, Model Rule of Disciplinary Enforcement R.11 empowers
disciplinary counsel to refer matters involving lesser misconduct to the
Alternatives to Discipline Program.  As provided in the rule, alternatives
to discipline may include “fee arbitration, arbitration, mediation, law office
management assistance, lawyer assistance programs, psychological
counseling, continuing legal education programs, ethics school or any
other program authorized by the court.”  The rule sets forth factors for
determining if a referral is appropriate.  It also describes the mechanics
for handling the referral, including notice to complainant and
documentation of the terms of the referral in an agreement between the
respondent lawyer and disciplinary counsel. Once a respondent lawyer
completes the terms of the agreement with disciplinary counsel, the matter
is effectively dismissed.  On the other hand, the matter may proceed
through the normal disciplinary channels when respondents decline to
take part in the diversion program or fail to fulfill the agreement.

A number of states have amended their disciplinary procedures to
provide for alternatives to discipline, including diversion programs. In
these programs, complaints accusing lawyers of minor misconduct are
diverted from the disciplinary process to a program where the lawyers may
obtain guidance, education, and monitoring. Some form of diversion program currently exists in twenty-four states, plus the District of Columbia. Although a jurisdiction may narrow the eligibility for a diversion program to lawyers suffering from some impairment, the vast majority of the jurisdictions allow participation by lawyers suffering from impairment or struggling with practice management problems.

A survey of rules for diversion programs reveals that many share common features. As a starting point, the rules clarify the eligibility for participation in the program. Some states use the term “minor misconduct” to refer to the general category of matters that may be diverted. Other states describe with more specificity the types of misconduct that may result in diversion.

97. See, e.g., Susie Morgan, When Bad Things Happen to Basically Good Lawyers: LSBA Program Offers “Alternative to Discipline” Assistance, 46 LA. B. J. 388, 388 (1999) (describing the features of the Louisiana State Bar Association (LSBA) program). In Louisiana, the Practice Assistance and Improvement Program has two components: the Diversionary Program and the Attorney/Client Assistance Program. The Diversionary Program handles matters after disciplinary counsel has found misconduct and made a referral to the program. If disciplinary counsel screens a complaint and determines that only minor misconduct has been alleged, but that it does not merit a full investigation, disciplinary counsel may refer the matter to the Attorney/Client Assistance Program, where practice assistance counsel will attempt to facilitate a resolution between the complainant and the respondent. Id. at 389–90.


101. FLA. B. REG. R. 3–5.3 (2004), available at https://www.floridabar.org/divexe/rtrhb.nsf/FV/A5ADD0AB6A6DE8EBB2B85256EA7005EB692 (*Disciplinary cases that otherwise would be disposed of by a finding of minor misconduct or by a finding of no probable cause with a letter of
In reviewing a complaint, disciplinary counsel or a disciplinary panel may offer the respondent the opportunity to enter the diversion program if they determine that the matter is one that is eligible for diversion.103 Under state rules, the voluntary nature of participation by the respondent is a key feature of the diversion program.104 The disciplinary counsel and respondent may enter a diversion agreement or contract that specifically sets forth the terms and conditions of the participation.105 The rules describe the effect of a respondent successfully complying with terms of the agreement, as well as the consequences for breaching the agreement.106 Rules vary in the manner in which they deal with costs associated with participating in the program and the confidentiality of participation in the program.107

Although state rules vary in the manner in which they approach diversion, all provide an “intervention” opportunity for lawyers to obtain assistance and deal with issues that may lead to problems in the future.108


103. See, e.g., WASH. CT. R. 6.1 (2014), available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=g&set=ELC&ruleid=gac0606.01 (noting that “disciplinary counsel may refer a respondent lawyer to” the diversion program). In some states, a disciplinary committee or panel can later recommend that a matter be diverted. See N.J. R. GOVERNING THE CTS., 1:20–3 (2013), available at http://www.judiciary.state.nj.us/rules/r1-20.htm (authorizing a disciplinary committee chair to request that the Director of the Office of Attorney Ethics divert a matter and approve an agreement in lieu of disciplinary action).


105. The Utah rule requires that the diversion contract “be supported by the respondent’s or the respondent’s lawyer’s affidavit or declaration” setting forth the purpose for diversion and how the specific terms of the diversion contract will address the allegation raised by the complaint. Id.


107. Many state rules require the respondent to pay for the diversion program. See, e.g., WIS. SUP. CT. R. 22.10 (5) (2013), available at http://www.wicourts.gov/sc/rule/chap22.pdf (“[T]he attorney shall pay all costs incurred in connection with participation in an alternatives to discipline program.”); see also id. R. 22.10(8) (noting that all files and records of diversion are confidential).


If the system could better identify patterns of behavior that warrant intervention before serious misconduct occurs, and offer remedial training to help solve incipient problems, that would significantly benefit lawyers, clients and the profession. To the extent that the
Rather than having to deal with misconduct after it occurs, participation in a diversion program advances public protection by preventing problems. 109

By entering into an individualized diversion agreement, lawyers obtain guidance, support, and tools to meet their particular needs. 110 Because participation is voluntary, lawyers are likely to be open to recommendations on how to improve their practices. 111

Long-term diversion saves time and money if the remedial training helps lawyers avoid future misconduct and complaints. 112 Even in the short term, diversion may cost less than processing a complaint through the formal disciplinary process. 113

Both disciplinary counsel and respondent counsel have commented on the value of diversion program in protecting the public by helping lawyers change how they practice. 114 Bar journal articles have discussed the value of diversion programs as an alternative to discipline. 115

109. See Mark A. Armitage, Regulating Competence, 52 EMORY L.J. 1103, 1107 (2003) (urging “courts, discipline agencies, bar associations, and the academy [to] dedicate the time and resources to refine, enhance, and propagate programs aimed at protecting the public from [disciplinary violations] in the first place”). Mark A. Armitage served as Associate Director of the Attorney Discipline Board of Michigan. Id. at 1103 n.*.

110. See Jennifer Gerarda Brown & Liana G.T. Wolf, The Paradox and Promise of Restorative Attorney Discipline, 12 NEV. L.J. 253, 271 (2012) (“An enormous benefit of such programs is that the diversion contract can be specifically tailored to the respondent’s shortcomings to help prevent similar violation in the future.”).

111. See id. (suggesting that respondents are more “likely to be agreeable and open to recommendations on how to improve” their practices because they must consent to the diversion agreement).

112. See id. at 273 (“Diversion programs using mediation do facilitate communication between the respondent and the complainant, and the mediation may lead to a resolution more quickly than formal disciplinary proceedings.”).

113. See id. at 271 (“Diversion programs are often cheaper and faster than formal grievance hearings.”).

114. See, e.g., Linda Acevedo, Grievance Referral Program, How the Texas Disciplinary Counsel’s Office Is Helping Lawyers Help Themselves, TEX. B.J., June 2013, at 521, 521 (noting that in six years, the Texas diversion program has “become an integral part of the Texas attorney discipline system” with more than 230 attorneys completing the program and thirty participating in the program at the time the article was written). Mark Harrison, an experienced respondent counsel, noted that 70% of informal charges could be diverted, rather than formally prosecuted. Diane M. Ellis, A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers, 52 EMORY L.J., 1221, 1230 (2003).

115. See Linda Acevedo, Grievance Referral Program, How the Texas Disciplinary Counsel’s Office Is Helping Lawyers Help Themselves, TEX. B.J., June 2013, at 521, 521–22 (outlining the benefits of
One empirical study reported on the impact of the Arizona alternative discipline system.\textsuperscript{116} Using data from a ten-year period, the researchers analyzed the frequency and severity of disciplinary charges filed against lawyers after they successfully completed the diversion program.\textsuperscript{117} To objectively measure the effectiveness of the diversion program, the study compared the frequency and severity of disciplinary “charges filed against lawyers who successfully completed a diversion program, as compared to” the charges against lawyers who declined to participate in a diversion program.\textsuperscript{118} Based on the analysis of the data, the study report concluded that there was “a statistically significant difference in the number and severity of subsequent disciplinary charges between lawyers who [had] completed a . . . diversion program and those who [had] not.”\textsuperscript{119}

Although these findings can be used by proponents who advocate wider use of diversion programs, the study relied only on available records.\textsuperscript{120} This data set may not have reflected the actual number of attorneys who were diverted and had their records expunged because they had not been subject to new complaints for a three-year period following their completion of a diversion program.\textsuperscript{121}
In order to better assess recidivism by lawyers who complete a diversion program, administrators of these programs should maintain records for a longer period of time, or at least maintain them for statistical purposes.\textsuperscript{122} Such statistical information provides a more complete picture for research, and helps us understand the extent to which diversion experiences impact the manner in which lawyers practice and discharge their responsibilities.

As disciplinary authorities evaluate their current diversion programs or consider establishing new diversion programs, they can take steps to address other public protection issues related to diversion. One such concern relates to whether diversion programs improperly shield lawyers by allowing them to escape formal discipline and a record that would later be an aggravating factor if the lawyer is faced with disciplinary charges.\textsuperscript{123} To deal with this criticism, diversion rules can provide that records related to diversion agreements “remain confidential and not available to the public . . . [but that] the information may be considered in any future disciplinary matters” evaluated by disciplinary authorities.\textsuperscript{124}

Another consumer concern relates to the treatment of persons whose filed complaints are referred to diversion programs. In discussing the virtues of restorative justice, one commentator explained that diversion programs’ emphasis on the rehabilitation and the future may ignore the affected the disciplinary counsel’s evaluation of subsequent complaints. See id. (noting the relevance because expunging the records may contribute to disciplinary counsel assuming that the respondent lawyer had a “clean” record). If lawyers with expunged records receive leniency because disciplinary counsel believe that the lawyers had not previously engaged in questionable conduct, this could skew the numbers related to the impact of diversion is preventing future misconduct. Id.

122. To monitor the recidivism rate of lawyers who successfully complete diversion, Kansas maintains annual statistical records of the number of complaints assigned to the Attorney Diversion Program. See KAN. SUP. CT. R. 203(d)(3)(i) (2010), available at http://www.kscourts.org/rules/rule-list.asp?r1=Rules+Relating+to+Discipline+of+Attorneys (specifying that the information should include “the final disposition[] the number of diversion agreements reached, the number of complaints returned to the traditional disciplinary process, and the success or failure of respondents in completing their diversion” programs).


124. Kansas uses such an approach, noting that successful completion of a diversion program is “reported back to the Review Committee” and will result in the dismissal of the complaint, but in future disciplinary matter the Disciplinary Administrator may consider the information as “prior discipline.” KAN. SUP. CT. R. 203(d)(2)(vi) (2010), available at http://www.kscourts.org/rules/rule-list.asp?r1=Rules+Relating+to+Discipline+of+Attorneys (specifying that the information should include “the final disposition[] the number of diversion agreements reached, the number of complaints returned to the traditional disciplinary process, and the success or failure of respondents in completing their diversion” programs).
past and complainants’ desire to tell their stories.\textsuperscript{125} Failure to provide complainants with information on diversion can heighten their frustration and disappointment first with their treatment by their lawyers, and then their treatment in the disciplinary system.\textsuperscript{126} To avoid this risk, some diversion rules require that complainants be provided notice of the diversion decision and an opportunity to comment.\textsuperscript{127}

States that do not have diversion programs should seriously consider adopting rules that allow for diversion for practice management concerns. New rules and programs can be designed to address the criticism of aspects of current approaches. For example, the disciplinary procedure rules can provide for more communication with complainants so that they better appreciate the value of diversion in preventing future misconduct.\textsuperscript{128} More communication on the alternatives to discipline can also help shape perspectives so that lawyers better understand the educational role of disciplinary authorities.\textsuperscript{129}

For new diversion programs, as well as existing ones, audits or self-assessments can play an important role in helping lawyers systematically evaluate how they can improve and manage their law practices. As indicated by the research on the new regulatory regime in Australia, there was a significant reduction in complaints for firms that completed the SAP.\textsuperscript{130} My own research revealed that the majority of respondents took

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\textsuperscript{125} Jennifer Gerarda Brown & Liana G.T. Wolf, \textit{The Paradox and Promise of Restorative Attorney Discipline}, 12 \textit{NEV. L.J.} 253, 271 (2012) (pointing out that the diversion process leaves out the complainant and other stakeholders).

\textsuperscript{126} See \textit{id.} (stating that because the specific dispute that led to the complaint might never be resolved, diversion is likely to increase “public dissatisfaction with the legal profession”).

\textsuperscript{127} For example, the Wyoming Rule states:

The complainant, if any, shall be notified of the proposed decision to refer the respondent to diversion. The complainant shall have fifteen (15) days from the date of notice to submit to Bar Counsel a written comment thereon. The complainant also shall be notified when a complaint or formal charge is diverted. Decisions to divert are not appealable.

\textsuperscript{128} See Norman E. Veasey, \textit{Transcript from Professionalism Conference}, 54 S.C. L. REV. 897, 930 (2003) (suggesting that alternatives to discipline should be communicated more among state bar members).

\textsuperscript{129} See \textit{id.} (urging more publicity of the alternatives to discipline in which the bar and disciplinary authorities provide education and support).

steps to revise their policies, procedures, and systems following self-
assessment and close to fifty percent adopted new policies, procedures, and
systems.131 These results should help directors of diversion programs
recognize the value of conducting ethics audits and developing self-
assessment tools.

Diversion programs enable lawyers to keep their records clean by taking
steps to evaluate and improve their practice management. For those
lawyers, disciplinary complaints serve as a wake-up call, motivating them
to examine how they practice and handle client business.132 Lawyers who
are not facing grievances should be able to obtain guidance and resources
from personnel with diversion and law practice management programs.133

In an effort to be proactive in educating lawyers and avoiding complaints,
bar associations should devote more resources to offices and programs that
assist lawyers with law practice management. Bar groups could follow the
lead of the Canadian Bar Association in developing an online tool for
lawyers to voluntarily examine their practices and systems.134 Rather than
relying on voluntary self-assessment, progressive jurists who embrace the
concept of proactive regulation might establish a NSW-style program as a
complement to discipline.135

131. See Susan Saab Fortney, Am I My Partner’s Keeper? Peer Review in Law Firms, 66 U.
be used by practitioners).

list.asp?r1=Rules+Relating+to+Discipline+of+Attorneys (portraying how a diversion rule could allow
a respondent to request that a complaint be referred to diversion).

133. As explained by Professor Ted Schneyer, Law Office Management Programs generally
serve two functions: (1) a reactive one of handling a matter referred by disciplinary counsel, and (2) a
proactive one in “advising lawyers who voluntarily seek their assistance on matters such as' office
management. Ted Schneyer, The Case for Proactive Management Based Regulation to Improve

134. CBA Ethical Practice Self-Evaluation Tool, THE CAN. BAR. ASS’N., available at
online tool sets forth ten objectives under the following general categories: (1) Relationship to
Clients; (2) Relationship to Students, Employees, and Others; and (3) Relationship to Regulator,
Third Parties, and the Public Generally. Id. The introduction to the tool explains that the
Professional Responsibility Committee prepared the “Ethical Practices Self-Evaluation Tool to assist
Canadian law firms and lawyers to systematically examine the ethical infrastructure that supports
their legal practices . . . [t]he goal of the Self-Evaluation Tool is not to be prescriptive but rather to
encourage exploration and discussion of firm practices.” Id. For each objective, the tool outlines
“possible questions to ask in assessing compliance with” the objective and “potential systems and
practices to ensure that the objective is met.” Id. In addition, the tool links available online resources
that lawyers may consult for additional guidance. Id.

135. See Ted Schneyer, The Case for Proactive Management Based Regulation to Improve
Professional Self-Regulation for U.S. Lawyers, 42 HOFSTRA L. REV. 233, 264 (2013) (suggesting that
courts establish proactive NSW-style programs as a complement to reactive discipline). Professor
Short of imposing some type of self-assessment, courts, legislators, regulators, bar leaders, and insurers should take other steps to create incentives for lawyers to devote time and resources to serious examination of their practices. The following section discusses the role of insurance carriers in encouraging lawyers to examine and improve their management controls and systems.

C. Insurers' Role in Promoting Self-Assessment and Development of Systems

For decades, legal malpractice insurers have played an important role in encouraging ethical conduct by lawyers. Some commentators have examined the impact of insurers, examining how insurers have emerged as informal regulators of lawyer conduct. When it comes to risk management, the insurers’ influence takes different forms.

Insurers’ influence on the conduct of lawyers starts with the application for insurance that lawyers must complete to obtain insurance. The policy application asks a number of questions, seeking information to enable the insurer to evaluate whether the insurer will assume the risk of writing a policy, and if so, the price and terms of the coverage. In addition to asking general information about the prospective insured, policy applications request information relating to firm practices, policies, and systems. Common questions require applicants to describe their conflict of interest and docket control systems. Insurance underwriters

Schneyer further claims that a NSW-style program could be expected to cut down substantially on complaints for unprofessional conduct by “encouraging and helping firms to adhere to policies, procedures, and systems designed to forestall acts and omissions that generate those complaints.”

136. See Anthony E. Davis, Professional Liability Insurers as Regulators of Law Practice, 65 FORDHAM L. REV. 209, 224 (1996) (suggesting that insurers have had an impact on attorney ethical conduct for years).

137. Compare id. at 216 (arguing that insurance companies seek to “discourage, i.e., to regulate, conduct which the ethics codes and the ethics committees” deem to be risky by providing “express notice to insureds that they are on their own when it comes to liability for claims arising from such relationships”), with Charles Silver, Professional Liability Insurance As Insurance and As Lawyer Regulation: Response to Davis, 65 FORDHAM L. REV. 233, 234 (1996) (“I find Davis’s proposed explanation unpersuasive. Insurers do not usually cite a desire to discourage risky conduct when justifying exclusions. They argue for exclusions on straightforward grounds having to do with their own interests.”).


139. See id. (explaining that insurers use the information disclosed on the application to evaluate risk exposure based on underwriting guidelines, rules, and practices).

140. See id. § 6:2, § 6:14 (suggesting that most insurance applications require information regarding how a firm controls its calendar system and screens for conflicts or interests).
seek this information because they recognize that the “better the procedures, the more acceptable the risk.” These application questions require that lawyers examine their firm’s management systems and describe them on policy applications.

As a condition of obtaining insurance or a lower premium, an insurer may require that applicant-firms complete an audit or practice review. Such a review will help the firm determine issues to be addressed and inform the insurer’s underwriting decisions.

Once insured, carriers assist insured firms with risk management. For example, the Attorneys’ Liability Assurance Society (Bermuda) Ltd. (ALAS Ltd.), a mutual insurance company owned entirely by its insured member firms, claims to have the most comprehensive loss-prevention program for lawyers. Through the program, member firms can obtain educational material and a range of services, including consultations with loss prevention counsel.

Depending on the circumstances, an insurer may provide a premium discount for particular conduct that the insurer wants to encourage. For example, an insurer may provide a premium credit for lawyers completing particular training or continuing legal education programs. Using a similar approach to promoting conduct that educates lawyers and lowers liability risk, insurers should provide a premium discount for lawyers who systematically examine their firm policies, procedures, and systems. As indicated by the first Australian study, a self-examination process can help address issues that lead to complaints. My own study revealed that the

141. See id. § 6:14 (“Today, a law firm without a conflict of interest screening system and a calendaring system is not likely to be an acceptable risk.”).
142. See id. (“Most applications request information regarding the ‘housekeeping’ maintained by the applicant.”).
143. If a firm’s insurance needs are complex or unique, Jody A. Harris, Senior Vice President and Managing Director of Gallagher Lawyer Professional Risk Services, recommends that the applicant meet with the underwriting agency. She suggests that during the meeting, the attorney emphasize the proactive steps the firm takes to avoid claims. Jody A. Harris, Purchasing Lawyers Professional Liability Insurance through an Independent Broker Specialist, in LEGAL MALPRACTICE: LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE, § 4, § 4:7 (Ronald E. Mallen ed., 2012).
144. See id. § 7:3 (referring to great variance between insurers and the free services that they offer).
146. Id.
147. See id. (noting that insurers often provide special workshops and seminars regarding loss prevention).
148. See Susan Fortney & Tahlia Gordon, Adopting Law Firm Management Systems to Survive
self-assessment process contributed to 71% of firms revising their systems, policies, and controls and 47% adopting new systems, policies, and procedures. A large percentage (42%) indicated that they strengthened firm management following the SAP. These study results should persuade insurers to take steps to encourage lawyers to examine their firms’ policies, practices, and systems as the first step in fortifying the firms’ ethical infrastructure. As noted by a veteran loss-prevention expert, insurers already understand data. Therefore, insurers should take note of research findings related to the value of self-assessments. These studies provide support for insurers providing premium discounts for lawyers who systematically examine firm policies, procedures, controls, and systems.

To assist firms in examining their practices, insurers could also develop SAFs designed for firms of varying sizes. An online self-assessment tool could then link other materials, such as forms, articles, and guidelines that could assist lawyers in developing and revising their own policies, procedures, and guidance. Developing an effective self-assessment tool with supporting material involves a great investment of time and resources. Some insurers, such as companies that are members of the National Bar Related Insurance Companies, could join forces and

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149. See SUSAN FORTNEY, INCORPORATED LEGAL PRACTICE SURVEY, RESULTS, at Question 12 (2012) (on file with the St. Mary’s Law Journal) (showing that 42% of firms “[s]trengthened firm management [upon] completion of the Self Assessment Process”).

150. Id.

151. Interview with Robert Creamer, former loss prevention counsel with ALAS, in Charleston, S.C. (Nov. 14, 2013) (expressing the view that insurers regularly make decisions based on data).

152. SUSAN FORTNEY, INCORPORATED LEGAL PRACTICE SURVEY, RESULTS, at Question 22 (2012) (on file with the St. Mary’s Law Journal) (revealing that many respondents from small firms believed that the self-assessment instrument should be revised for more applicability to small and solo practices).


154. See generally ANTHONY E. DAVIS & PETER R. JARVIS, RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS (2d ed. 2007) (providing an example of two legal malpractice experts who have devoted countless hours to developing checklists included in a risk management book for lawyers).
collaborate on developing both self-assessment tools and related educational material. Insurers who currently provide audit services or self-assessment tools may have encountered some resistance from lawyers who expressed concern about the discovery of the results. To address this concern, interested parties should support the recognition of a self-evaluation privilege, discussed in the next section.

D. The Role of Privileges

Results from my empirical study on law firm peer review reflected the concern that lawyers may be reluctant to engage in an SAP if they believe that the information developed in the process could later be discoverable and used against them in a legal malpractice case. The survey instrument asked respondents to register their opinions relating to willingness to conduct peer review and perspectives on risks associated with third parties obtaining peer review results. In the survey of managing partners of Texas firms with ten or more lawyers, “7% [of the respondents indicated that their firms did] not engage in formal peer review because the results might be discoverable.” “[Thirty-six percent of the respondents reported that] their firms would be more likely to institute peer review measures if peer review communications were protected from discovery.” A large percentage of respondents (86%) concurred that “peer review should be afforded confidentiality so that third parties cannot discover the results of peer review.”

157. See Susan Fortney, INCORPORATED LEGAL PRACTICE SURVEY, RESULTS, at Question 12 (2012) (on file with the St. Mary’s Law Journal) (indicating that approximately 84% of respondents claimed to review their policies and procedures after completing the SAP); see also Susan Saab Fortney, Are Law Firm Partners Islands Unto Themselves? An Empirical Study on Law Firm Peer Review and Culture, 10 GEO. J. LEGAL ETHICS 271, 296–97 (1996) (explaining the results of the empirical study related to law firm peer review).
159. Id. at 297.
160. Id.
161. Id.
firms from conducting formal self-assessments, especially ones with documentation.

To provide protection for material and information developed in a practice review, firms or their insurers may retain the services of an outside lawyer to audit the practice and provide an opinion letter on findings and possible steps to improve their policies, procedures, and systems. Assuming that the opinion letter and related reports qualify as communications to facilitate the rendition of legal services, the firm could assert that the attorney-client privilege shields communications between the outside attorney and the client—the law firm.

A firm might use a different tack, relying on the firm’s in-house general counsel or ethics advisor to conduct the self-assessment. The ability of a firm to successfully rely on attorney-client privilege to protect any report or material developed by the in-house counsel turns on various factors, including whether the self-assessment would be treated as an internal investigation that created a conflict between the interests of the firm and current client. For many years, courts rejected firms’ claims that the attorney-client privilege protected such in-firm communications. Although recent court opinions have been more willing to extend protection to in-firm communications, the law is in flux. Even if courts extend protection to internal investigations conducted by in-house counsel (to facilitate the rendition of legal services), courts could reject a

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162. See Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 2.5 (2013 ed.) (noting that “the use of outside counsel can provide protection of the attorney-client privilege, which may not be available [if] inside counsel” at the firm handles risk management matters).


165. Anthony E. Davis, Attorney-Client Privilege Within Firms and Law Departments, N.Y. L.J., 2 (2013) (examining “cases that have significantly expanded the ability of firms to rely on a privilege between firm lawyers and the designated firm general counsel”).
claim that the attorney-client privilege extends to routine self-examinations or audits of firm practices, procedures, and systems.

Rather than relying on attorney-client privilege, a firm might claim that a self-critical analysis privilege shields information developed in a firm audit or SAP. A few U.S. courts have “recognized a privilege from discovery in litigation for some information produced as a result of an organization’s own internal evaluation of its operation.”166 The policy justification for extending protection to information developed in internal investigations is to encourage firms to critically examine their practices, without fear that negative information would later be used against them in litigation.167 Courts have applied the privilege in different contexts, including cases involving medical peer review, securities violations, train cases, and some employment discrimination cases.168 Opinions that have applied the self-evaluation privilege have identified the following prerequisites:

1. The critical self-analysis must have been undertaken by the parties seeking protection;
2. The public must possess a strong interest in preserving the free flow of the type of information sought;
3. The information must be of the type that its free flow would be curtailed if discovery were allowed; and
4. Any document produced must have been prepared with the expectation of confidentiality and the confidentiality must, in fact, have been maintained.169


A firm that conducts an internal review should be able to satisfy each of these prerequisites. First, the firm conducts the self-assessment or audit to systematically evaluate and improve practices within the organization.  

Second, the public possesses a strong interest in encouraging parties to undertake critical evaluations that promise to improve the delivery of legal services and ethical conduct within law firms.  

Third, it is likely that the possibility of discovery of unfavorable information would curtail risk-averse lawyers from critically examining firm practices, procedures, and policies. Fourth, lawyers who conduct the examination should be prepared to demonstrate that they did so with the expectation of confidentiality and that they maintained the confidentiality.  

Lawyers may be able to improve the likelihood of a court recognizing the self-critical analysis privilege by taking the following steps:  

(1) maintaining the confidentiality of the audit process;  
(2) writing the audit report in a general and evaluative manner; and  
(3) minimizing specific factual data in the report.  

Although these actions might put a firm in a better position to assert the self-critical analysis privilege, there is no guarantee that a court will shield information developed in the self-examination. Therefore, lawyers and their firms should approach the process recognizing that there is a risk of discoverability.  

To eliminate the uncertainty related to the discoverability of self-evaluation information, lawyers could follow the lead of the medical profession by maintaining confidentiality and minimizing specific factual data in the audit report.  


173. See Dowling, 971 F. 2d at 426 (discussing the importance of the expectation of privacy). To satisfy the last prerequisite, the firm should not share the results of the self-assessment with third persons, such as insurers, if doing so would jeopardize the protection of the self-critical assessment privilege.  

profession and seek statutory protection, similar to that afforded to medical peer-review communications. All states now recognize a medical peer-review privilege to varying degrees. 175 “Peer review is the process by which healthcare providers evaluate and assess deficiencies in the quality of physician services provided in the healthcare setting.” 176 Peer-review information is protected to encourage healthcare providers to critically and candidly evaluate deficiencies in the quality of medical services, without the concern that information could later be used “in a medical malpractice case.” 177 Although some might question whether the peer-review privilege fosters a “conspiracy of silence” among doctors, physicians maintain that protection is necessary to maximize the quality of care that patients receive. 178

Similarly, a statutory self-evaluation privilege for lawyers could serve the public interest by creating a comfort zone so that lawyers can critically examine and improve their practices without the fear of discovery. Recognizing the value of such a project, a group of risk management experts proposed a privilege for risk audits of law firms. 179 “[The] proposal was created by a now defunct organization, The Lawyer Risk Management Association.” 180 “The principal drafters were Margaret Hepper and James C. Belding, now at Aon Affinity Insurance Services . . . and Anthony E. Davis, now a partner in the Lawyers for the Profession.”

175. See Ann B. Clairbone et al., Legal Impediments to Implementing Value-Based Purchasing in Healthcare, 35 AM. J. L. & MED. 442, 470 (2009) (examining the impact peer review has had on the medical field); see also J. Matthew Anderson, The Medical Peer Review Privilege: Illustrative Cases of the Public Policy Supporting the Privilege and a Practical Approach to Presenting the Case for Protection, 46 TORT TRIAL & INS. PRAC. L.J. 95, 97–99 (2010) (discussing the scope and application of the privilege).


177. See id. (“It serves to assure physicians that the peer review committee’s analysis of physician performance will not be used against such physicians in a medical malpractice case.”).


179. See Email from Anthony C. Davis to Susan Fortney (Nov. 8, 2013, 10:15 A.M.) (on file with the St. Mary’s Law Journal) (stating that the proposed privilege for risk audits was drafted in 1997 by a now disbanded organization).

180. Id.; Email from James C. Belding to Anthony C. Davis, (Nov. 8, 2013, 10:21 A.M.) (on file with the St. Mary’s Law Journal).
practice group of Hinshaw & Culbertson LLP."

As stated in the proposal’s Preamble, communications relating to “voluntary internal risk management audits” are “privilege[d] from discovery or use as evidence in any civil proceedings” so that lawyers are encouraged “to undergo voluntary internal risk management audits of their management policies.”

After defining terms, the proposal sets forth the privilege as follows: “Any privileged information prepared in connection with or which directly relates to a risk management audit conducted in accordance with [the definitions] is not subject to discovery or admissible in evidence in any civil proceeding.”

This proposal can serve as a model when advocating for an expanded self-critical analysis privilege to cover information developed in law firm audits and self-assessments.

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181 Email from Anthony C. Davis to Susan Fortney, (Nov. 8, 2013, 10:15 A.M.) (on file with the St. Mary’s Law Journal); Email from James C. Belding to Anthony C. Davis, (Nov. 8, 2013, 10:21 A.M.) (on file with the St. Mary’s Law Journal).

182 Risk Management Audits for Lawyers and Law Firms; Privilege From Discovery and Use in Civil Proceedings, THE LAWYER RISK MANAGEMENT ASSOCIATION, Draft (1997) (on file with the St. Mary’s Law Journal) (“This privilege does not exist with respect to lawyer discipline proceedings.”).

183 See id. at Section 2 (clarifying that the privilege does not extend to firms’ records “not prepared as part of or in connection with the risk management audit”).

184 The following is the text of the proposed privilege:

Section 1. Definitions:

(a) “Risk management audit” means a voluntary, internal assessment, evaluation or review that is performed by a lawyer or by a partner or shareholder of a law firm, an employee of the lawyer or law firm, or by a third party person or entity who conducts such audit or assists the law firm in the implementation of any finding or recommendation made in connection with such audit, and initiated by the principal, a partner or shareholder of the law firm for the purpose (i) of determining whether the systems, policies and procedures for the management of the law firm are adequate or appropriate to the needs of the law firm and meet requirements of professional responsibility or (ii) of implementing any finding or recommendation made in connection with such audit.

(b) “Risk management audit report” means any report, whether written or oral, prepared or communicated as a result of or in response to a risk management audit. A risk management audit report may include the following supporting information, if prepared or developed for the primary purpose and in the course of an audit: notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, computer-generated or electronically recorded information, and surveys.

(c) “Privileged information” means a risk management audit report and any information, opinion, communication, report or record, whether written or oral, to which the evidentiary privilege attaches pursuant to Section 2 (a) of this Act.

(d) “Civil proceeding” and “civil action” mean any civil litigation, including but not limited to any alternative dispute resolution procedure. “Civil proceeding” and “civil action” does not mean lawyer professional discipline proceedings, with respect to which the privilege established by Section 2 (a) of this Act shall not apply.
CONCLUSION: BUILDING PARTNERSHIPS AMONG PRACTITIONERS, REGULATORS AND INSURERS

Regulators, bar leaders, and legal ethics experts around the world are monitoring the Australian experience with management-based regulation of lawyers. The Australian statute allowing non-lawyer ownership of law firms effectively pushed incorporated firms to develop their ethical infrastructures. First, the law requires that the firms appoint a legal practitioner director to be responsible for ethical conduct within the organization. Second, it requires that incorporated firms implement and

Section 2. Privilege In Civil Proceedings

(a) Any privileged information prepared in connection with or which directly relates to a risk management audit conducted in accordance with Section 1 of this Act is not subject to discovery or admissible in evidence in any civil proceeding. Information, documents or other records otherwise existing and available as part of the records of the law firm and not prepared as part of or in connection with a risk management audit are not privileged in a civil proceeding merely because such information, documents or records were presented or considered in connection with a risk management audit.

(b) No person shall be required to disclose by way of testimony or otherwise or to produce under subpoena or otherwise any protected information, and no such privileged information may be used in connection with any civil action or proceeding, or in any discovery procedure in any civil action or proceeding.

Section 3. Exception: Waiver

(a) The privilege established by Section 2 of this Act does not apply to the extent the privilege is expressly waived by any person with authority to do so on behalf of the law firm that ordered the risk management audit report or caused the risk management audit to be conducted.

(b) Disclosure of any privileged information does not waive the privilege established by Section 2 of this Act if the disclosure is made:

(i) to a person to whom the audit results are disclosed and who is either the principal, a partner, shareholder or the employee of a law firm in connection with whose professional practice the risk management audit was conducted;

(ii) to a legal representative of a person included within paragraph (1) hereinabove;

(iii) to an employee of a person or entity that receives any privileged information, in the ordinary course of business and who or which is engaged in the business of obtaining or placing professional liability insurance coverage or which is engaged in the business of insuring, underwriting, or indemnifying attorneys; or

(iv) subject to the terms of a confidentiality agreement between the lawyer or the law firm which ordered the risk management audit or caused the risk management audit to be conducted and a third party where such disclosure is made to such third party for the purpose of obtaining advice or assistance from such third party in the implementation of any finding or recommendation made in connection with a risk management audit report.

_id. at Section 1 to Section 3._
maintain AMS. Because the statute does not define the systems or manner for determining compliance, the regulator worked with interested parties, including practitioners and legal malpractice insurers, to develop a regulatory regime. In collaboration, stakeholders developed ten objectives of good practice as well as an SAP for incorporated firms to evaluate and rate their compliance with the objectives. This process enables lawyers to systematically learn about management controls and obtain guidance from the regulators.

Early studies evaluating the “education toward compliance” approach revealed a relationship between firms’ completion of the self-assessment process and a significant reduction of the number of complaints filed against lawyers in the firm. To obtain more data on the effects of the self-assessment process, I conducted a two-phase study. As discussed above, the study revealed that the self-assessment process contributed to development of management systems within firms. The greatest reported impact was on firm management and risk management. Taken together, results from these studies make a compelling case for implementing proactive approaches to regulation.

Implementation of management-based principles can help transform a lawyer disciplinary system from a reactive one to a proactive one that educates and assists lawyers in conducting their practices ethically and efficiently. To start the process of integrating management-based approaches, regulators and insurers can encourage self-assessment and educational initiatives to assist lawyers in improving their management practices, avoiding complaints, and lowering malpractice exposure. They should create programs and incentives for lawyers to examine their firms’ practices and controls. At the same time, they should seek to address disincentives, such as the risk of discoverability from results of the self-examination or audit.

The steps outlined in Part III of this Article can help regulators and insurers reshape their relationships with lawyers and the public. Through educational programs, insurers and regulators work with lawyers—not against them. They effectively partner with lawyers in assisting them to develop management systems and practice controls. This approach promises to protect the public more than the current disciplinary system in which aggrieved persons obtain limited assistance and redress. Rather than relying on a reactive system that processes complaints after misconduct occurs, clients and the public will fare much better if regulators and insurers work with firm and bar leaders to create programs that help lawyers improve their practices by avoiding problems before they happen.