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Synopsis: In Australia, amendments to the Legal Profession Act require that incorporated legal practices (ILPs) take steps to assure compliance with provisions of the Legal Profession Act 2004. Specifically, the legislation provides that the ILP must appoint a legal practitioner director to be generally responsible for the management of the ILP. The ILP must also implement and maintain “appropriate management systems” to enable the provision of legal services in accordance with the professional obligations of legal practitioners. Because the new law did not define “appropriate management systems” (AMS) the Office of Legal Services Commissioner for New South Wales worked with representatives of other organizations and practitioners to develop guidelines and an approach for evaluating compliance with the statutory requirements. The collaboration resulted in an “education toward compliance” strategy in which a designated director for an ILP completes a self-assessment process (SAP), evaluating the ILP’s compliance

with ten specific objectives of sound legal practice. To evaluate the new regulatory regime, Professor Susan Fortney conducted a mixed method empirical study of incorporated law firms in New South Wales Australia. In Phase One of the study, all incorporated law firms with two or more solicitors were surveyed. In Phase Two, legal services directors were interviewed. This article discusses the survey findings, focusing on the relationship between the self-assessment process and the ethics norms, systems, conduct, and culture in firms.

**Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms*, 4 ST. MARY'S LAW JOURNAL ON LEGAL ETHICS AND MALPRACTICE 112 (2014).**

Synopsis: 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. The ABA Model Rules of Professional Conduct also recognize the importance of policies and procedures as an aspect of a firm's ethical infrastructure. Specifically, Model Rule 5.1 and state versions of Model Rule 5.1 require that firm principals make reasonable efforts to ensure that the firm has in effect measures to ensure that firm lawyers conform to the rules of professional conduct.

In Australia, legislation requires that incorporated law firms appoint a director to be responsible for management of legal services and that the director ensure that "appropriate management systems" be implemented and maintained to enable the provision of legal services in accordance with obligations imposed by law. Under this 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.

Early studies in Australia revealed that management-based regulation of law firms dramatically reduced the number of complaints involving incorporated law firms that completed the self-assessment process. To obtain data on the reasons for the reduction in complaints, as well as other effects of the self-assessment process, Professor Fortney conducted an empirical study, surveying and interviewing practitioners in law firms that completed the self-assessment process. Study results revealed that the self-assessment process first raised lawyers' "ethics awareness" and then contributed to their firms implementing and improving their management systems.

This article discusses study findings and recommendations related to the effects of the self-assessment process. The article examines how features of management-based regulation may be integrated into lawyer regulation in the U.S. and how regulators, insurers, and bar leaders can create incentives encouraging lawyers and firms to examine and improve their management systems and practice controls.

**Susan Saab Fortney, *Promoting Public Protection through an “Attorney Integrity” System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, ABA Center for Professional Responsibility, *The Professional Lawyer*, Vol. 23, No. 1 at \_\_ (2015).**

Synopsis: For decades jurisdictions have regulated lawyers by controlling entry to the profession and thereafter investigating and prosecuting those accused of professional misconduct. This traditional approach is largely “reactive” in that it relies heavily on disciplining lawyers following complaints. With the advent of management-based regulation of lawyers in New South Wales (NSW), Australia, more regulators are exploring proactive approaches designed to help practitioners address concerns and hopefully avoid complaints. This essay provides background information on the NSW legislation that requires that Incorporated Legal Practices implement appropriate management systems and the regulatory regime designed to provide lawyers guidance in the development of management systems. The essay discusses the effects of self-assessment process that the NSW Legal Services Commissioner developed and the impact of the “education toward compliance” program. Drawing from the NSW experience, the essay suggests steps that can be taken to encourage lawyers to engage in self-examination and improve practice management. The essay argues that proactive “attorney integrity” initiatives provide more public protection than relying solely on a reactive disciplinary system that pursues lawyers after misconduct and damage occur.

**Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 *Md. L. Rev.* 786 (2009).**

Synopsis: : In this Article, Professor Long considers what could be done to buttress disciplinary enforcement of Model Rule 8.3, which requires lawyers to report to disciplinary authorities the misconduct of other lawyers that raises a substantial question about those lawyers’ honesty, truthfulness, or fitness to practice. He focuses on Model Rules 5.1(a) and 5.3(a), which require lawyers with managerial authority in a law firm to take steps to ensure that their firm has measures in place to promote compliance with ethical duties. Long observes that these managerial duties are very rarely enforced in the disciplinary process and offers reasons why this is so. He suggests amending the Model Rules to explicitly ban retaliation by management against lawyers in their firms who make Rule 8.3(a) reports. He would also require managers to establish an internal reporting process as part of the firm’s ethical infrastructure. More generally, and of particular interest to those studying the pros and cons of entity regulation, he argues that compliance with MRs 5.1(a) and 5.3(a) themselves could be improved by addressing the rules to law firms as well as lawyers with managerial authority. His argument rests in part on insights in the burgeoning “new governance” literature, especially the work of Professor Orly Lobel, which distinguishes between internal and external (i.e., public) reporting of corporate misconduct and

sees some advantages of relying more heavily on internal reporting up the corporate ladder. Long elaborates on those advantages in promoting ethical compliance in law firms, and suggests that requiring firms to have an internal reporting process could do a more to promote lawyer compliance than relying solely on Rule 8.3 reports to disciplinary bodies, which are all too rare. Finally, Long reports on a 2008 survey of over 150 Tennessee law firms. The study found that nearly two-thirds of the law firms with 25 or more lawyers, but only 15% of those with 10 or fewer lawyers, had designated a lawyer in the firm to have focused responsibility for ethics matters, including the building and maintenance of a sound ethical infrastructure.

**Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 Hofstra L. Rev. 233 (2013).**

Synopsis: With so many changes in law practice today, it is worth considering how our traditional regime for regulating American lawyers can be adapted to new circumstances. In this Article Professor Schneyer considers a case in point. The new circumstance is that law-firm and law-office management in a number of countries is taking on an ethical valence. There is growing recognition in the U.S. and elsewhere that sound law-firm management is vital for promoting ethical lawyering. The question is how best to encourage management to meet this responsibility.

In the U.S., disciplining lawyers for violating rules of legal ethics has long been our chief regulatory tool for promoting ethics compliance. And, ever since 1983, two rules in the ABA's widely adopted Model Rules of Professional Conduct have imposed unprecedentedly broad ethical duties on law-firm management. Rule 5.1(a) requires lawyers with managerial authority to make "reasonable efforts to ensure that the[ir] firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules . . . ." Similarly, Rule 5.3(a) requires lawyers with managerial authority to take measures to ensure that their firm's nonlawyers behave in a manner compatible with the lawyers' duties. So far, however, neither the ABA nor the many state supreme courts that have adopted these rules have established special programs to help managers comply with them. The ABA and the courts may simply presume that these rules can be effectively enforced in the disciplinary process. But no such presumption is warranted. Although the rules were adopted more than 30 years ago, cases disciplining lawyer-managers for violations have been exceedingly rare. In that sense, the rules have been regulatory "dead letters."

What, then, is to be done? Schneyer recommends judicial adoption of what he calls "proactive management-based regulation" (PMBR). In 2004 New South Wales (NSW) became the first jurisdiction to adopt a fully operational PMBR program. Comparable programs now exist elsewhere in Australia and in England and Wales, and are being considered in Canada. Schneyer

claims that adding PMBR to our regulatory mix as a complement to professional discipline can do much more than discipline alone to encourage law-firm managers to build a sound “ethical infrastructures” for their firm – i.e., policies, procedures, and systems designed to prevent common forms of professional misconduct. He points to rigorous empirical evidence that the NSW program has greatly reduced client complaints.

Part II of the Article describes the NSW program in detail and highlights three features. One is a requirement that firms organized as “incorporated legal practices” (ILPs) designate one or more of their solicitors to serve as “Legal Practitioner Directors” (LPDs) The designees are responsible for developing, assessing, and maintaining their firm’s ethical infrastructure. The second is non-adversarial collaboration between the designated solicitors and the Office of the NSW Legal Services Commissioner to help firms develop and maintain “appropriate management systems.” In this respect the Commissioner’s office is akin to a consultant on managing ethical risks. The third and most proactive feature is a self-assessment process whereby LPDs in newly incorporated legal practices report to the Commissioner’s Office on the degree to which their firm’s management systems comply with stated objectives in dealing with ten common problem areas. If an LDP self-assesses her firm’s ethical infrastructure to be “less than compliant” with one or more objectives, the Commissioner Office may work with the LDP to make improvements. The basic idea is to encourage firms to think about their systems and work toward “compliance,” not to use reports of non-compliance as a basis for instituting disciplinary proceedings. Part II also examines two well-designed empirical studies which show, respectively, that PMBR in New South Wales has dramatically reduced complaints alleging lawyer misconduct and has largely gained the acceptance of the LPDs. And it points out that program costs have been modest.

Part III critiques management-based regulation in the U.S. It finds a serious mismatch between the broad duties of law-firm management identified in the Model Rules, on one hand, and expectations that compliance with those rules can be adequately promoted through the disciplinary process. This is so, Schneyer argues, for at least three reasons. First, the disciplinary system is highly reactive, not proactive; it relies chiefly on clients filing ex post complaints against lawyers. Such complaints almost never hint at violations of the management rules. A client who complains that her lawyer has missed several deadlines, for example, is not going to suggest that the lawyer’s firm has an inadequate “tickler” system for meeting deadlines, though that may actually be the case. And in processing such complaints busy disciplinary counsel are unlikely to look into the adequacy of the firm’s calendaring system. Second, accountability under Rules 5.1(a) and 5.3(a) is often too diffuse to single out which lawyer-manager(s) to prosecute. Frequently, no partner will have been designated (like an Australian LPD) to be primarily responsible for deficiencies in a firm’s ethical infrastructure. Third and finally, whether 5.1(a) or 5.3(a) duties have been violated by anyone in management must often turn on the vague issues of

whether reasonable efforts have been made to ensure that a firm had appropriate “measures” in place.

Schneyer concludes that to effectively encourage law-firm management to focus regularly on how to improve a firm’s ethical infrastructure and thereby prevent or detect misconduct, there is much to be said for adopting PMBR programs to complement our traditional reliance on disciplinary enforcement.

**Frederic S. Ury, *Adapt or Perish: The Time Is Now for Non-Lawyer Ownership of Law Firms*, ABA Center for Professional Responsibility, *The Professional Lawyer* Vol. 22, No. 3 (2014).**

Synopsis: Dynamic forces of change, led by globalization and technology, are forcing the legal profession to adapt to a far different future, whether it wants to or not. A bar leader and prominent advocate of thoughtful adaptation to a radically transformed practice landscape urges the profession to start a meaningful dialogue on change now, or risk losing control of the future and the right to self-regulate. For starters, the author urges revisiting the issue of non-lawyer ownership of law firms.