AVOIDING LIABILITY IN LARGE U.S. LAW FIRMS: THE BASICS

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Introduction

My colleague, Doug Richmond, and I have spent a combined 27 years in positions related to the prevention of liability in large law firms. We have seen what good law firms do to minimize risk. These firms do different things in vastly different ways, and that is as it should be. But, every now and then, we see a pattern among well-run law firms that makes perfect sense to us. The purpose of this paper is to identify these patterns of loss prevention activity and relate that activity to claims and malpractice litigation.

A word on traditional malpractice. Large law firms rarely make the kinds of mistakes that small firms and sole practitioners do, such as missing dates or getting the law wrong. Large firms tend to hire the best students, provide the best training, and then insist on a high degree of specialization. While mistakes occur in large firms,[1] we will limit this paper to the far more subtle and nuanced phenomena that are causing large losses in large firms and to their insurance carriers.

What are these phenomena? By far, the biggest problems for large firms arise out of (1) representing crooked or incompetent clients in the business practice; and (2) real or apparent conflicts of interest, *principally* in the business practice.[2] We will discuss these phenomena more fully in the context of specific firm procedures outlined below.

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[1] One area that large law firms need to watch is patent prosecution. We are seeing firms miss filing dates. This does not happen often, but when it does, the matter can be a substantial one.

[2] We say "principally" in the business practice, but a conflict in litigation can occasionally cause a large loss. See, for example, *Breezevale Ltd. v. Dickinson*, 759 A.2d 627 (D.C. 2000), where a large law firm got

Written loss prevention policies. Aon maintains a modest collection of prototype law firm policies relating to loss prevention. (We say "modest," because we do not believe in adopting policies for the sake of adopting policies. Thus, we have developed relatively few.) We published them in the Fall 2003 *Quality Assurance Review*. Where one of those policies relates to a point we make below, we will remind the reader that the policy exists. The reader can then refer to the Fall 2003 *QAR* or request that we send the policy as a Word file.

I. New Matter Intake

Conflicts of interest. All large law firms devote substantial resources to conflicts checking. They all circulate a list of new matters to all firm personnel, at least once a week. Many circulate the list daily and do so electronically, so that even lawyers who are traveling can view the list wherever they have access to E-mail. The best-designed lists identify not only the client and opposing party, but also the nature of the matter and other important participants in the matter.[3] The largest firms also check corporate family databases.[4]

Advance waivers. All authorities examining advance waivers agree that they are not per se unenforceable,[5] although, they must be prepared with care. For example, where the

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caught in the switches because it was representing both a corporate party and an employee in her deposition.

[3] For example, where the client brings a shopping center development project to the firm, the new matter intake form will list lenders, landowners, known tenants, and relevant units of government.

[4] This is expensive and time-consuming, and the commercial databases are frequently incomplete and out-dated. Therefore, many not-so-large firms understandably do not regularly do this. To see cases on the conflict ramifications of corporate relationships, go to http://www.freivogelonconflicts.com. In the Table of Contents, click on "Corporate Families."

[5] For a discussion of these authorities go to http://www.freivogelonconflicts. In the Table of Conflicts click on "Waivers/Consents." On that page click on "Advance Waivers."

potential new matter can be reasonably identified, it should be described. If the firm wants the right to handle litigation against the client, litigation should be specified. If the client is relatively unsophisticated, however, there is a good chance a court will not give effect to an advance waiver. For that reason firms should carefully consider which clients are candidates for advance waivers.

"Smell test." Recall our earlier statement that crooked clients are big problems for large law firms. Typical problem matters are those where the client will be raising money from investors, lenders, business purchasers, and the like. The concern is that such a client will defraud others, and the defrauded parties will sue the law firm for aiding and abetting the fraud, conspiring with the client, and the like.[6] In a significant percentage of these cases a simple background check on the prospective client by the firm would have raised a red flag, enabling the firm either to decline the representation or proceed with caution. Develop a simple background check. The firm's librarian can identify inexpensive databases to enable new matter intake personnel to do such searches.[7]

Multiple representations. Firms should require that someone in the firm who understands the pitfalls of multiple representations check any matter involving more than one client. This person can ensure that untenable multiple representations are not taken, and where the representation is appropriate, that the partner in question documents the representation adequately in an engagement letter. At a minimum, the engagement letter should explain how conflicts could develop, what the firm will do if a conflict develops, and how the firm will deal with client confidences.[8]

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[6] We track all matters in which a law firm endured a verdict or settlement of $20 million or more. There have been 42. Thirty-one of those 42 matters involved a law firm whose own client defrauded others. In almost every one of those 31 the client went to jail.

[7] Both Westlaw and Lexis/Nexis have comprehensive periodical databases; there are others.

[8] The following language is typical of well-drafted letters: "If we learn something from one of you that we think the other(s) should know, we will tell the other(s)." All experts with whom we have discussed such a provision believe this approach is safer than one where the parties agree there will be no disclosure.

Approval of new matters. The firms that do this best have a committee to approve not only each new client, but also each new matter for existing clients.[9] The committee approach is best because committee members develop a talent and "lore" for spotting potential problems. Some partners have proven to have exquisite good judgment on what to bring in; others, quite frankly, are challenged. That is just one factor new business committee members learn to recognize. Second best is to require that the relevant practice group head approve each new matter. We say "second best" because what makes a good practice group head does not necessarily make that person good at smell testing. The worst approach (and a rapidly vanishing one) is to allow each partner to decide what he or she brings in the door.

Dabbling. Dabbling is a vanishing phenomenon, particularly in large law firms. But, we see it. The biggest offenders are business lawyers who think they can bring in a litigation matter for a business client and handle it themselves. Another big one: a non-tax lawyer thinking he can do an estate plan for a client. We recently learned of instances in which transactional lawyers handling deals in which intellectual property was involved attempted to handle those aspects of the deal without consulting with members of the firm's intellectual property department. Well-managed new matter intake systems detect this and are designed to prevent it.

"Off-books" work. Well-run firms do not permit lawyers to handle matters that have not been run through the firm's new matter opening procedures. Examples are estate plans for relatives, house closings for close friends, or small litigated matters for family members or friends.

Engagement letters. Engagement letters are required by the ethics rules in many states. Regardless of whether a state requires engagement letters, they are always advisable. Two principal goals of an engagement letter are to identify with precision who is, and

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[9] Example: defending a client accused of securities fraud is a staple of many fine law firms. Then, opening a new matter wherein the firm will represent that same person in a securities offering is another thing entirely.

who is not, the client, and to define the scope of the work. Also important is setting forth in detail the bases for billing fees and expenses. Aon has a prototype policy on engagement letters ("Engagement Letters").

Declination letters. It is very important that after any communication with a prospective client, where either the potential client or the firm declines the representation, the firm must follow-up with a letter confirming that it will not proceed. It is important that the letter emphasize the running of deadlines. That said, avoid stating specific deadlines; the potential client's recollection of the date of the occurrence may be wrong, or the lawyer in question may not know what the deadlines are in particular kinds of matters. Also, avoid stating the strength, or lack thereof, of the prospective client's matter. For example, where a lawyer tells the prospective client that the firm will not take the case because it lacks merit, the prospective client may lose interest in the matter, only to be told by another lawyer, after the statute of limitations has run, that the case is a good one. Aon has a prototype policy on declination letters ("Matters not Taken").

II. Lateral Hires

Quality. Too frequently lateral hires do not work out because they did not measure up to the new firm's standards for integrity or quality of work. Thus, law firms must work harder than ever to ensure the potential hire does measure up. A number of law firms are doing some or all of the following:

A. Independently checking Bar memberships;
B. Obtaining law school transcripts;
C. Checking Bar disciplinary records (where possible);
D. Checking court files for malpractice litigation;
E. Talking to former colleagues (preferably someone who has recently left candidate's current firm);
F. Running candidate's name through online periodical databases;
G. Obtaining credit reports on candidate;

H. Examining candidate's tax returns;

I. Requesting lists of board, officer, and fiduciary positions and investments in clients;

J. Interviewing judges and checking court files if candidate is a litigator;

K. Interviewing lawyers on other side of deals if candidate is a business lawyer;

L. Interviewing current and former clients.

Possible conflicts of interest. All law firms understand the conflict-of-interest problem created by lateral hires. An important issue is whether a waiver from the "old firm's" client is needed to keep the lateral, who worked on a matter at the old firm, from conflicting out the entire new firm. Most states require a waiver; several states provide that a screen at the new firm will suffice without such a waiver.[10]

Post-hiring. Established partners in the new partner's practice area should monitor the new partner's work for an appropriate period of time. This is especially true for new partners assigned to branch offices.

Malpractice insurance coverage. The hiring firm will need to ascertain the lateral's current insurance coverage and then discuss with firm's insurance broker what coverage options the firm has for the new lawyer.

III. Director, Officer, and Fiduciary Positions

Although lawyers may ethically, and in many cases safely, serve as directors and officers of entities, or in fiduciary positions, these positions can create liability exposures as well as conflict-of-interest problems for the firm.[11] Many firms do not allow such positions

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[10] For a state-by-state survey of this issue, go to http://www.freivogelonconflicts.com. In the Table of Contents click on "Changing Firms – Lawyers and Non-lawyers."

[11] For a detailed description of many, if not all, of the hazards, go to http://www.freivogelonconflicts.com. In the Table of Conflicts click on "Board Positions."

without the consent of the firm's governing body or a special committee. The focus in all such cases should be on the best interests of the firm, not on the best interests of the lawyer wishing to serve. The level of exposure depends upon the nature of the entity (e.g., for-profit or not-for-profit) and depends upon whether or not the entity is a client. Aon maintains a prototype policy on this.

IV. Doing Business with Clients/Stock for Fees

Straying from the pure practice of law can create liability exposure as well as disciplinary exposure.[12] Law firms should control this activity. No lawyer should be allowed to do business with a client without getting permission from an appropriate committee. The committee's focus should be on the firm's best interests, not on the individual lawyer's best interests. It should, among other things, ensure compliance with the relevant state's version of Model Rule 1.8 ("Doing Business with a Client").[13] These rules typically provide that the lawyer make disclosures and/or obtain waivers, with one or both in writing, and advise the client that it would be appropriate for the client to seek advice from another lawyer. Aon has a prototype policy on this.

V. Insider Trading[14]

Lawyers and non-lawyer firm personnel must understand that if they trade securities on the open market based upon material, non-public information, they can be sued, go to jail,

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[12] This is described more fully at http://www.freivogelonconflicts.com. In the Table of Contents click on "Investing in Clients/Stock for Fees."

[13] On the consequences of violating Rule 1.8(a), go to http://www.freivogelonconflicts.com. In the Table of Contents, click on "Investing in Clients/Stock for Fees."

[14] Insider trading procedures are for the protection of firm personnel. Congress passed the Insider Trading and Securities Fraud Enforcement Act in 1988. It was designed, in part, to impose penalties on employers as well as the employees doing the trading. Since that time, we are not aware of a single proceeding against a law firm under that act, although we still see the occasional proceeding against lawyers and other law firm personnel.

and lose their licenses. Firms should periodically circulate to all personnel a document so stating. For smaller firms, or firms with insignificant securities involvement, periodic notices should be adequate. For larger firms, or firms with substantial securities practices, a "restricted-list" procedure may be appropriate. We have prototype policies for both situations.

VI. Partner Peer Review

Different law firms have different appetites for monitoring relevant activities of their partners. We are aware of a variety of ways firms do this. We will mention here only those that we believe make sense. None of these may be appropriate for very collegial firms where all partners are comfortable with what they know about each other. Nevertheless, here are some things good law firms are doing:

A. Asking for proof tax returns have been filed;
B. Confirming Bar membership;
C. Interviewing clients for satisfaction;
D. Following-up on complaints from clients, judges, and other lawyers;
E. Periodically requiring partners to comment confidentially on other partners.

VII. Opinions[15]

Many firms have opinion committees. Such a committee may meet periodically to review procedures and developments in opinion practice. Some firms require that each opinion be signed-off by a member of the committee. Other firms require only that a second partner sign off on each opinion. Most procedures are intended to cover not only

[15] Our comments are based in part on a survey conducted by the Committee on Legal Opinions of the ABA Business Law Section, published in the Business Lawyer. Our comments are also based upon our having conducted audits or reviews in approximately 75 large law firms.

third-party opinions ("closing opinions"), but also opinions to clients. Aon maintains a prototype policy on this.

VIII. Audit Responses

For many years law firms have been able to rely upon the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests (1975) ("ABA Statement") for guidance in responding to auditors' requests. A number of large law firms have staffs trained to gather information, review partners' descriptions of pending matters, and assemble the final letter. They are also trained to spot non-traditional descriptions and ensure that the ABA Statement is followed. We are watching this area closely because of § 303 of The Sarbanes-Oxley Act of 2002 and SEC Rule 13b2-2(b), the provisions relating to misleading auditors. These provisions may ultimately lead to lawyers' having to provide information to auditors far beyond that contemplated by the ABA Statement. This raises attorney-client and liability issues that we are unable to predict with any assurance. Aon maintains a prototype policy on audit letter responses.

XIX. Law Firm Networks

Law firms have formed "networks" with other law firms, principally for referring business to one another and to meet periodically to confer on practice issues. Typically, these networks consist of a law firm in each major city, or in each state. Many networks are global. From a liability standpoint, they raise one potentially troublesome issue: to what extent can the conduct of one law firm be imputed to the other members of the network? Among other things, such vicarious liability raises serious coverage issues under some malpractice policies. A law firm wishing to join such a network should check out the network's Web site and promotional literature. These sources should make clear that all members are practicing independently and should not create the impression that any one firm is standing by the work of another.

XX. Ancillary Businesses

Law firms may safely and ethically conduct ancillary businesses.[16] In those states having a version of ABA Model Rule 5.7 the firm should follow the rule. For those states not adopting Rule 5.7 (most states), the rule provides an excellent guide for structuring the ancillary business. Essentially, the rule provides that if there is any ambiguity about the relationship of an ancillary business "customer" to the law firm, the customer will enjoy all of the protections of a client of the law firm. This includes, importantly, the law firm's adherence to conflict-of-interest and confidentiality rules. If, however, the law firm and the ancillary business make clear that the customer of the ancillary business is not a client of the law firm, then the legal ethics rules will most likely not apply to the relationship of the customer to the ancillary business. We say "most likely" because we are not aware of any written decisions applying to these relationships.

XXI. Termination Letters

Theoretically, when the representation of a client ends, the client becomes a "former client." That usually means the law firm no longer has the duty to look out for the former client from a malpractice standpoint. That also means that the law firm can take on matters adverse to the former client provided that the new matter is not substantially related to the former matter.[17] The most effective way to turn a current client into a former client is to write a letter to the client explaining that the matter is concluded, that the firm no longer has responsibility for the matter and that the firm may take on matters adverse the client – subject, of course, to the substantial relationship test. Lawyers, understandably, do not like to write letters like that for a number of reasons, not the least of which is that they want the former client to remain friendly and likely to return with

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[16] We are not aware of a single serious claim against a law firm arising out of an ancillary business.

[17] For a full discussion of former clients and the substantial relationship test go to http://www.freivogelonconflicts.com. In the Table of Contents click on "Former Clients – the Substantial Relationship Test."

new business. Thus, firms, when they write termination letters, are less blunt. The concern is that the softer the letter, the more likely some court will hold that the former client is really a current client, based upon his or her reasonable reliance that an attorney-client relationship exists.[18] Given commercial realities, the risk flowing from a watered-down letter is one some good firms are willing to take.

XXII. Litigation Practice

Compared with various business practice arias (corporate, securities, banking, bankruptcy, etc.), litigation in large law firms has not been particularly dangerous. Firms should, however, ensure that only litigators are handling litigation. Some firms also require that the head of litigation be consulted whenever a member of the department is the subject of a motion for sanctions or desires to bring such a motion. Other firms have special requirements for bringing RICO actions or actions against law firms. Almost all firms have requirements for contingent fee cases, or other cases with fee arrangements other than straight hourly fees. Some firms control disqualification proceedings, motions to disqualify judges, motions seeking or opposing sanctions, and so on. Aon maintains a prototype policy on this. ("Policy on Sensitive Litigation Matters")

XXIII. Trust and Estate Practice

The trust and estate practice in large law firms can involve huge sums of money. Those lawyers who do this work must be very skillful tax lawyers. Firms should take steps to ensure that only specialists are doing this work.

XXIV. Business Practice (Corporate, Securities, Banking, Bankruptcy, Etc.)

[18] See Restatement (Third) the Law Governing Lawyers §14, cmt. b (2000), and Reporters Note to §14.

In business practice areas the two biggest causes of loss are the representation of dishonest clients and conflicts of interest.

Dishonest clients. This is by far the biggest problem for large, sophisticated law firms. We attempt to track all claims or suits against law firms that are resolved for $20 million or more. There are forty-two such matters, of which we are aware. (We know there have been a few privately resolved matters of which we are not aware, but we believe our data are adequate to make our points.) Of those, fully thirty-one involved a well-known law firm allegedly in bed with a dishonest client. Currently, the largest such matter is the pending Jenkens & Gilchrist settlement of $108 million, arising out of its allegedly abusive tax shelter work. The more typical claim involves a law firm helping a client raise money by issuing securities, borrowing from lenders, selling assets, and the like. The client defrauds the investors or lenders or purchasers, and the defrauded persons sue the client and the law firm. Typically the defrauded third parties allege that the law firm was a primary violator of SEC Rule 10b-5, aided and abetted the client's fraud, aided and abetted the breach by an agent of the client of his or her fiduciary duty to the employer/client, or conspired with the client. There are other theories of liability to third parties, but these are the most common.

There are several things law firms can do to prevent these claims, the first being education. That a dishonest client can be extremely dangerous is not intuitive to most good business lawyers. They need to be shown how these cases arise. As discussed under Section I above, a client background check can frequently provide the firm with a heads-up that a prospective new client has caused others problems. While that should not necessarily cause the firm to reject the new client, it does put the firm in the position of monitoring such clients more closely than it normally would. Second, the firm's business lawyers should understand that even historically good clients can, under financial stress, make bad choices. When this happens, there may be telltale signs that the client is cutting corners, enabling the firm to take remedial action before the client causes damage.

Aon maintains a policy on client misconduct designed to deal with these issues. Essentially it provides that anyone who suspects a client, or an agent of a client, of committing fraud or other misconduct, that person must report to someone in the firm, who has the tools to analyze the situation objectively in light of the many ethics rules, regulations, and laws on client misconduct. Section 307 of the Sarbanes-Oxley Act of 2002 and the SEC rule promulgated under §307, 17 CFR Part 205, have caused most large firms to adopt policies specifically related to misconduct of agents of public-company clients. While we applaud these policies, we believe a broader policy designed to deal with non-public companies and other client entities to be preferred. The Aon policy on client misconduct is designed to serve this broader purpose.

Conflicts of Interest. Historically, conflicts of interest were something litigators worried about, the principal concern being the firm's or individual lawyer's disqualification in cases. While litigators still have those concerns, the focus has shifted to the business practice. Of the thirty-two large claims mentioned above, five involved serious allegations of conflict of interest, four of them in the business practice. For a discussion of how conflicts of business lawyers can cause their law firms serious damage, go to the "Malpractice Liability/Fee Forfeitures" page of Freivogel on Conflicts.[19] The largest jury verdict against a law firm involving a conflict was $59 million.[20] Many of these problems can be avoided if closer attention is paid to documenting carefully multiple representations and by ensuring that all parties to a transaction know who is, and who is not, the client.

"*I am not your lawyer*." A frequently recurring problem in the conflicts area occurs in the business start-up situation. The client, a wealthy individual, shows up at an early meeting with one or more strangers to the law firm who will have a role in the new business. The planning proceeds, an entity is formed, and the law firm begins to represent the new entity. Later a dispute arises between the original client and one of the

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[19] Go to http://www.freivogelonconflicts.com. In the Table of Contents click on "Malpractice Liability/Fee Forfeitures."

[20] The firm settled for what is believed to be its insurance policy limit of $20 million.

strangers. Either the stranger is badly harmed during the dispute and sues the law firm for not protecting him, or, in litigation between the stranger and the client, the stranger moves to disqualify the law firm for having a conflict of interest. The law firm's position is that it owed no duty to the stranger, because the stranger was not a client. The stranger will argue that he was a client. Absent a clear showing that the stranger was not a client, the court will submit the issue of whether or not there was an attorney-client relationship to the jury.[21] This is not a hypothetical problem; we see these cases all the time. It is, therefore, appropriate in these types of situations to write a letter to these "non-clients" early in the representation to the effect that they are not clients of the law firm.

XXV. Information Technology

Word processing and related software. Word processing documents, spreadsheets, and presentation files may contain invisible data, which the receiver of the document can open. Some of this is called "metadata." Whatever it is called, this information may reveal who worked on the document, when changes were made, and even what changes were made. This, of course, can have devastating consequences, in some cases if the client sees the data, and in other cases if an adversary sees the data. There is "scrubbing" software designed to eliminate or at least mitigate this problem, which will certainly involve the firm's information technology ("IT") staff. Firm management should ensure that the firm has this software and that firm personnel know how to use it.

Disposing of hardware. Most IT professionals know this: before hardware is disposed of or rented equipment is returned, all hard drives should be "scrubbed" of all data. Law firm management should confirm with IT personnel that they are doing this.

E-mail and other electronic documents. Who can forget the role E-mails played in the demise of Arthur Andersen and in the antitrust trial of Microsoft? There is a widespread

[21] Comment b to §14 of the Restatement (Third) of the Law Governing Lawyers says that the relationship exists when the client "reasonably relies" upon it. See also the Reporters Note to §14.

belief that E-mail can be controlled. It cannot. It is located on myriad firm computers and servers, and it is probably backed up. We are told that software is available to ensure that all E-mails within the firm of a certain age can be located and deleted, even from folders on personnel desktops and laptops, but we question its practical application. What lawyer will be comfortable with a procedure where the firm's IT staff periodically purges all E-mail of a certain aged including E-mails saved in folders on file servers or on the lawyer's own hard drive? That probably explains why we are not aware of any law firm that resorts to this Draconian measure. Then, when one considers E-mails that are sent outside the law firm and all the hard drives outside the firm that the E-mails reside on, it is clear that no one can predict how and when those messages will surface.

Litigators are becoming increasingly sophisticated at discovering E-mails and other electronic documents. In corporate fraud cases there almost certainly will not be attorney-client privilege protection for the law firm's E-mails and other electronic documents. How can the privilege be lost? Here are just five of many:[22]

A. A tribunal can make a crime/fraud finding.[23]
B. A corporate client may waive the privilege as a public relations gesture.[24]
C. A bankruptcy trustee or examiner may waive the privilege for an insolvent client.[25]
D. Prosecutors may require a waiver as part of a pleas agreement with an entity client.[26]

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[22] There are more ways to lose the privilege than those listed here; a comprehensive monograph on the privilege and work-product doctrine was sent to Aon law firm clients during the fall of 2004.

[23] Restatement (Third) of the Law Governing Lawyers §81 (as to privilege) & § 93 (as to work product).

[24] Several law firms representing Enron saw their communications with and about Enron made public. Testimony of Stephen Hall before the Senate Committee on Commerce, Science, and Transportation, May 15, 2002, *available at* htttp://commerce.senate.gov/hearings/051502hall.pdf (last visited June 10, 2004).

[25] *See, e.g., FDIC v. Cherry, Bekaert & Holland*, 131 F.R.D. 202, 205 (M.D. Fla. 1990); *Odmark v. Westside Bancorp.*, 636 F. Supp. 552, 554-56 (W.D. Wash. 1986). As to the Examiner in the Enron bankruptcy waiving Enron's privilege, see *In re Enron Corp*., Order Pursuant to 11 U.S.C. §§ 1104(c) and 1106(b) Directing Appointment of Enron Corp. Examiner, No. 01-16034 (AJG) (S.D.N.Y. Apr. 8, 2002).

E. Sharing documents with regulators (even with a confidentiality agreement) may cause a waiver in class action litigation.[27]

What all this means is that where a law firm has been involved with a client engaged in a fraud, every E-mail and every draft of every document ever created relating to the matter are vulnerable to being produced to plaintiffs' lawyers, law enforcement agencies, prosecutors and regulators. *Therefore, training in the law firm is essential*. No one should write an E-mail or other electronic document that he or she would not be willing to read to a jury, and explain to the jury, while sitting in a witness box. Ways to avoid this problem? If you need to discuss possible partner or client misconduct, walk down the hall or pick up the phone.

XXVI. Firm Policy Manual

In the many years we have been observing how large law firms conduct loss prevention we have been surprised at how disorganized some firms are in documenting their policies. Many are the occasions this happened in one of our interviews with firm lawyers:

> Partner A: "We have a policy on that."
> Partner B: "No, we don't."
> Partner A: "Yes, I am almost positive the Management Committee adopted it three years ago."
> Partner B: "Well then, where is it?"
> Partner A: "It should have been attached to the Executive Committee minutes."
> Partner B: "Who keeps those?"

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[26] For a good overview of how the DOJ uses this technique, see John Gibeaut, *Junior G-Men*, A.B.A. J., June 2003, at 46.

[27] *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302-04 (6th Cir. 2002).

All firms should gather all policies relating to loss prevention and put them in one place. Increasingly, firms are putting such policies on their Intranets, which is one good way of collecting and centralizing important information. If a firm does this, it should periodically circulate a list of policies and remind lawyers and staff where to find them. If the firm relies on hard copy, the firm should appoint a staff person to distribute to all personnel a loose-leaf binder with all current policies. On an ongoing basis, that person should also see that all new policies are inserted in the binders and old policies removed.

Are policies dangerous? As we stated earlier, we do not favor adoption of policies for the sake of adopting policies. However, *where a firm perceives the need for a policy* and is willing to enforce it, it should not hesitate to adopt one, particularly on subjects dealt with in the Aon prototype policies. In the 27 aggregate years we have been doing loss prevention and studying claims we have not become aware of a single matter where the fact that a lawyer violated a firm policy was a factor in a trial or affected the size of settlement.

XXVII. Important Loss Prevention Literature

Loss prevention personnel in large law firms should have access to the publications and materials identified below. We described them in the Spring 2004 Aon Quality Assurance Review. If you cannot find that issue or want information about how to obtain one of the following, let us know.

A. *Restatement (Third) of the Law Governing Lawyers* (2000).
B. ABA/BNA *Lawyers Manual on Professional Conduct*.
B. American Bar Association, *Annotated Model Rules of Professional Conduct.*
C. *Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering*.
D. Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyers Desk Book on Professional Responsibility.*
E. Web links to state ethics resources: www.legalethics.com; www.hricik.com.

F. *Freivogel on Conflicts*, www.freivogelonconflicts.com.

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