

PROACTIVELY MANAGE THE FINANCIAL RISKS OF ETHICS VIOLATIONS

Karen A. Hammer, Esq., LL.M. (Hammer-Law)¹

Many business people say, “if you can’t work harder, then work smarter.” They focus on increasing profitability by either increasing revenue (while holding down costs) or decreasing costs (even when revenues are level). Even if you cannot increase your gross revenue, you can most likely decrease costs by proactively managing foreseeable risks.

OARC’s Lawyer Self-Assessment Program provides tools to help lawyers work smarter by anticipating and managing risk.

WHY I’M A FAN OF SELF-ASSESSMENT

When fielding calls for the Colorado Bar Association’s Ethics Hotline, I talk to some lawyers who don’t know *how* to evaluate and manage ethics risks. Attendees at ethics CLE I teach sometimes incorrectly assume ethics rules are merely “aspirational.” Those lawyers who treat ethics rules as “aspirational” still face ethics risks, but are blind to opportunities to manage those risks.

These misunderstandings exist among all experience levels and across practice areas.

That’s why I enthusiastically answered Attorney Regulation Counsel Jim Coyle’s request to join a Supreme Court subcommittee on *proactively* managing ethics risks. In late October 2017, Colorado’s OARC rolled out the first-in-the-nation ethics self-assessment program for lawyers to voluntarily and confidentially evaluate risks.

UNDERSTANDING RISK

Transactional lawyers often help clients manage risk - parties voluntarily apportion certain risks contractually. Litigators routinely help their clients influence who bears the cost when the risk of harm has “blossomed” into actual or perceived damage to private or public interests protected by law.

Lawyers traditionally consider themselves the ones who *give* advice, but maybe we could learn from the impact on our clients – and on our colleagues - of inadequate risk management.

WHAT IS RISK MANAGEMENT?

Some learned as youngsters to look both ways before crossing the street so that we don’t walk into oncoming traffic. That may have been our first risk management lesson.

OARC SELF-ASSESSMENT PROGRAM

The self-assessment tool identifies ten select areas where lawyers can manage the risks of the substantive and *practical* aspects of the *business* of law:

1. Developing competent practices
2. Communicating in an effective, timely, professional manner
3. Ensuring the confidentiality requirements are met
4. Avoiding conflicts of interest
5. File management, security, and retention
6. Managing the law firm/legal entity and staff appropriately
7. Charging appropriate fees and making appropriate disbursements
8. Ensuring that reliable trust account practices are in use
9. Access to justice and client development
10. Wellness and inclusivity

Each module includes thought-provoking questions and resources to help us work smarter. After completion of each online module, the lawyer can receive an analytical report.

CONFIDENTIALITY

OARC actively designed the tool so that lawyers can *honestly* participate in self-assessments without revealing to others weak spots in their practice or ethics compliance. More information is available online.

LIABILITY INSURANCE IS NOT THE ONLY RISK MANAGEMENT TOOL

Violations of the external standards imposed on us as lawyers and as civilians can be expensive and cause reputational damage. To manage that risk, many lawyers purchase liability insurance.

If you have professional liability coverage, check your policy to determine the size of your deductible for your defense. Now make a list of the things you could spend your deductible amount on that would be more rewarding, interesting, or satisfying than defending against risks that could have been proactively managed and/or mitigated.

Read your policy thoroughly to determine other essential terms. For example, your policy may not cover illegal acts.

Lawyers should know better than anyone how much time goes into defense against claims - that time could be used for more productive or enjoyable purposes. Ultimately, wouldn't you rather make *proactive* decisions about where you spend your time and money?

ONE EXAMPLE

Here's a specific self-assessment example from the Competent Practice Working Group (Cori Peterson (Office of the Presiding Disciplinary Judge), David Wollins (David H. Wollins, P.C.) and me).

Many competence questions help lawyers identify weaknesses and strengths in our own substantive areas of practice. But the self-assessment also prompts lawyers to

identify circumstances we might not otherwise anticipate that could undermine competence.

Competence Objective 1 is “Ensure you have the legal knowledge and education to handle all new matters.” That seems straightforward at first blush.

Then the tool provides a series of best practices for you to consider, including Best Practice 1.3: “Assess whether you are familiar with the *factual context* and subject matter of cases you take” (*emphasis added*).

After each objective, the online tool refers to some relevant Colorado Rules of Professional Conduct. For competence Objective 1, the tool also cites to “*In re Shipley*, 135 S. Ct. 1589-90 (2015) (a lawyer cannot delegate the duty of competence to a client).”

Going deeper, Objective 3 assesses whether you have the necessary *resources* to competently handle matters. Best Practice 3.5 prompts you to “Ensure your fees are adequate to support developing both the factual bases and the legal aspects of the matters you undertake.” You are then referred to “C.R.C.P. 11 (‘the signature of an attorney constitutes a certificate that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, is well-grounded in fact’).”

Rule 11 violations create financial risks; but, even without Rule 11 sanctions, ethics rules make false Rule 11 certifications potential discipline risks. Similarly, transactional lawyers also face external standards of care, such as securities laws governing legal opinions lawyers provide to investors and financial rating agencies to evaluate a potential investment. Insufficient due diligence creates direct financial risk under securities laws, and indirect financial risks from the professional disciplinary process.

OARC investigations can be triggered by request. Investigations can be uncomfortable, time-consuming, and potentially expensive, regardless of whether discipline follows.

Unlikely? Remember Boulder’s 1,000-year rain? In retrospect, well-maintained sump pumps weren’t “aspirational.”

YOUR ANNUAL CHECK-UP

OARC’s self-assessment is like your annual physical to gauge your medical condition or the financial snapshot your annual taxes provide. Why not click on the self-assessment link while renewing your annual attorney registration?

<http://coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp>

UPCOMING CLE

On March 8, 2018, the Boulder County Bar Association will host its first CLE on OARC’s Lawyer Self-Assessment Program, “Sharpen Up: The Lawyer Self-Assessment.” For more information, go to <http://www.boulder-bar.org/event-2830940>.ⁱⁱ

THE AUTHOR

Karen Hammer is the principal of Hammer-Law. Hammer has handled over two billion dollars of complex financial transactions involving businesses, government agencies, and quasi-governmental entities. She also does related types of litigation. A member of the CBA's Professionalism Coordinating Council, Hammer is also co-Secretary of the CBA's Ethics Committee. Hammer is a Hearing Panel board member for attorney discipline cases. She was Chair of the D.C. Bar's Real Estate, Housing, and Land Use Section and an appointee to the White House and Congressional Commission on Character Building in Education. Hammer can be reached at hammer@hammer-law.com.

DISCLAIMER

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