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A Modest Proposal?



**Should NOBC Members Use
Rule 5.1 More Proactively?**
National Association of Bar Counsel
New York, August 9, 2008
Professor Laurel S. Terry
LTerry@psu.edu

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Panel Overview



- **Professor Judith Maute:** the UK’s 10-2007 dramatic restructuring of lawyer regulation (and its causes)
- **Bill Smith:** Could restructuring happen in the U.S.?
- **Steve Mark:** New South Wales’ implementation of the “appropriate management systems” requirement
- **Audience discussion:**
 - Could Rule 5.1 serve a similar role as the NSW legislation?
 - Would it be a good idea to do so?

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ABA Model Rule 5.1

Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers

- (a) A **partner** in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall **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.**

State Adoption: http://www.abanet.org/cpr/jclr/5_1.pdf

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October 2007 UK Developments

Legal Services Act 2007 - Ministry of Justice

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Legal Services Act 2007

The Legal Services Act reforms the way legal services in England and Wales are regulated and puts the consumer interest at the heart of the regulatory framework. It received Royal Assent on 30 October 2007.

The Legal Services Act sets out the framework for reform, which include setting up a Legal Services Board and an Office for Legal Complaints and enabling legal services to be provided under new business structures.

Legal Services Act 2007

The Bill, supporting documents and progress through parliament are published on the UK Parliament website.

Regulatory impact assessment: 29 November 2006 [PDF 441kb, 86 pages]

Supplement to the regulatory impact assessment: June 2007 [PDF 129kb, 10 pages]

<http://www.justice.gov.uk/publications/legalservicesbill.htm>

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New South Wales' Legislation

(3) Each legal practitioner director of an incorporated legal practice must ensure that **appropriate management systems are implemented and maintained** to enable the provision of legal services by the incorporated legal practice:



http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s140.html

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NSW's "Ten Areas to Address"

1. Negligence
2. Communication
3. Delay
4. Liens/file transfers
5. Cost disclosure/ billing practices/ and termination of retainer
6. Conflict of interests
7. Records management
8. Undertakings (timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, costs assessors)
9. Supervision of practice and staff
10. Trust account regulations

http://www.lawlink.nsw.gov.au/lawlink/olsc/l_olsc.nsf/pages/OLSC_tenobjectives

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NSW's Self-Assessment Document

... While the legislation does not define “appropriate management systems”, OLSC, working collaboratively with LSC, LawCover and the College of Law, has adopted an “education towards compliance” strategy to assist [Incorporated Legal Practices] ILPs. This document deals with the ten areas (reflected in the Objectives column in this document) that OLSC suggests should be addressed in considering “appropriate management systems”.

... **All examples provided in this document are suggestions only** because ILPs vary in terms of size, work practices and nature of operations and thus no “one size fits all”. Legal practitioner directors are encouraged to contact the OLSC or the Law Society of NSW for any clarification needed or additional examples. Ratings are Non-Compliant, Partially Compliant, Compliant, Fully Compliant, Fully Compliant Plus

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Please consider each key concept and rate yourself as either Non-Compliant (NC), Partially Compliant (PC), Compliant, Fully Compliant, or Fully Compliant Plus. If you rate yourself NC or PC please outline the action you will take to comply. If you use an alternate system to those described in this form as most likely to lead to compliance, please describe it. If you believe any of the key concepts are not applicable, please note them as being inapplicable and provide reasons.

Objective	Key concepts to consider when addressing the Objective	Examples of possible evidence or systems most likely to lead to compliance	Action to be taken by ILP (if needed)
Competent work practices to avoid NEGLIGENCE	Fee earners practise only in areas where they have appropriate competence and expertise.	A written statement setting out the types of matters in which the practice will accept instructions and that instructions will not be accepted in any other types of matters.	
	All fee earners have a good grasp of issues involved in running a practice and serving clients.	Written records of attendance at CLE programs indicating some attendance at programs concerning practice management, staff management and risk management.	

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Audience Discussion

- Could your Supreme Court implement this idea by simply adding two questions to each lawyer's bar dues statement?
 - Are you subject to Rule 5.1?
 - If so, have you considered whether you are in compliance with Rule 5.1. this year? (See Bar Counsel's self assessment form for guidance about the types of questions to ask)
- If so, would it be a good idea to do so?
- What issues would you place on your "Ten Commandments" list of areas for self-assessment?



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To Read More About It...



- UK's Legal Services Act:
<http://www.justice.gov.uk/publications/legalservicesbill.htm>
- New South Wales OLC Incorporated Legal Practices Homepage:
http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_ilp
 - Includes links to legislation, ten areas, and assessment form
- Additional Information about the New South Wales System:
http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches
- ABA Canons articles by Judith Maute and Laurel Terry,
<http://www.abanet.org/cpr/centennial.html>
- For more info about the advantage of "systems," see Elizabeth Chambliss & David B. Wilkins, A New Framework for Law Firm Discipline, 16 GEO. J. LEGAL ETHICS 335 (2002)

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