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## Unintended Consequences (The Essence of Law Firm Management)

*Peter J. Winders*

*"According to the best thinking on law office management, the best thinking hasn't been done yet."*

— *Anonymous*

**M**any of you are familiar with Dr. Lawrence Peter's books on management or corporate governance.<sup>1</sup> His most famous law of management is The Peter Principle, which reads: "In a hierarchy every employee tends to rise to his level of incompetence."

Typical company policy is that the best employees should be rewarded by promotion. Thus, a business promotes its most outstanding salesman to sales manager, which is, of course, a job requiring different and additional skills. The mediocre salesmen remain salesmen. If the new sales manager has only marginal skills as a teacher or counselor, he will not get further promotions, and will remain an incompetent sales manager. If he does have those skills, he may do a wonderful job as sales manager and get a promotion to district manager, where the primary skill set is that of administrator. If he has no administrative skills, he will get no further promotions. The corporation has lost its best salesman and sales manager by promoting him to incompetent district manager. The process continues until it reaches equilibrium, with no person in the position he is best qualified to fill. Incompetence at every level – the unintended consequence of a management idea that a job well done is rewarded best by "promotion" to a supervisory job.

Dr. Peter's point is to examine the management philosophy that promotion to a different position is the proper reward for good work as a salesman, and that sales manager is a "better job". Underlying this examination is the realization that

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there may be unintended consequences to the management philosophy of promotion, that incompetence will be fostered.

In law firms, unintended consequences arise from various management philosophies, including one that maintains that the most productive lawyers have earned the right to run the firm and a corollary philosophy that various compensation incentives work in the best interests of the firm as a whole.

### Unintended Consequences of Law Firm Management Ideas

The unintended consequences that law firms should worry about are those that (1) interfere with a goal to increase the overall quality of the client base or the overall quality of the work performed for clients; (2) interfere with loss prevention goals – for example, policies that might encourage a lawyer to work outside his area of competence, or take a case with borderline confidence in the quality and character of the client; (3) interfere with good management in any aspect; (4) invite competition or power plays between members, rather than decisions made by the firm for the greatest benefit to the firm; (5) work contrary to the core values, expressed, understood or perceived, of the firm; (6) may produce avoidable job dissatisfaction, unnecessary stress, or burnout in valuable members of the team.

I am continuously surprised at primitive, flawed and plainly destructive aspects of systems I see in (other) firms. Less extreme and therefore more dangerous, there are instances in almost every firm where well-meaning plans have gone awry, and in a number of firms a management philosophy that, while well-intentioned and firmly held, creates pressures that have the opposite effects than intended, that punish good behavior and reward bad behavior, and can lead, have led,

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*Unintended Consequences, continued from page 1*

or will lead to the damage or downfall of the firm. Of course, there are many situations less than the extreme, in which law firms do not fully implement stupid ideas, but adopt them only “a little bit” in a spirit of compromise and deference to the idea of the brilliant rainmaker. They may be only a little bit dangerous, but if perceived as more important than intended, they can be more significant worries.

In any event, I think it will be useful to examine the unintended consequences of various management ideas, particularly compensation ideas. I hope that the reader, if any, will not be satisfied with a “we do not do that” reaction. That is beside the point – the point is that a law firm should maintain awareness that doing something approaching or perceived as “doing that” may have adverse or unintended consequences, and what those consequences may be.

### Factors Promoting Unintended Consequences

There are several factors that promote unintended consequences in this arena:

(a) A policy may have been addressed at one aspect of management, but the effects may not have been thought through as to other aspects.<sup>2</sup>

(b) Erroneous assumptions may have been made about the cause of the problem sought to be addressed.

(c) There is considerable validity to the stereotype that lawyers tend to address a specific problem by making a general rule. It is best to address specific problems directly.

Illustrative of all the above, if a firm is concerned because billable hours are down, neither an increase in the billable budget nor a bonus for hours over budget will solve the problem of insufficient business. And if the problem is inefficient allocation of work, such changes will magnify the problem, increasing the temptation to hoard work by those who have it. Nor will such changes address the problem that some of the lawyers are lazy.

(d) Erroneous assumptions may have been made about the motivations of the people affected. Again, if hours are down, it may not be because of laziness, but because of lack of business or poor morale. Money may not be the primary motivation of an individual or group – purpose, fairness, respect and recognition are equally important, and may predominate. Further, a manager whose own primary goal is money may tend to operate on the erroneous assumption that everyone is similarly motivated.

(e) Systems may be developed for ease of administration. This is a frequent management mistake. While ease of administration is good, note that the systems that cause the most problems are easy to administer (e.g., theocracies and formula systems of compensation). Since the goal of management is not management itself, but the benefit of the organization, easy administration cannot be an end in itself.

(f) “Accountability” pressures.

Specific to practice group leaders and those in similar positions, “accountability” pressures may create a tendency to understaff. Certainly, the firm does not want anybody to have less work than they need to make a profit. But there is a chicken/egg question. If the firm has quality work, does it promptly and well, and is paid, the firm should be profitable. If the work is delayed, or if the leadership is happy because existing personnel are at full capacity (and therefore not working on developing new business, or not doing other things in the community) there is a substantial risk of stagnation, or of being unable to handle growth available from cross-marketing and other business generation efforts. Are some practice group leaders feeling so much pressure to avoid expenses that they are understaffed, either with lawyers or nonlawyers?

Lawyers are basically amateurs as managers, and, as almost every profession appears easier than one’s own, management is harder work than it may appear.

### Common Troublesome Assumptions

*The “Renaissance Man” model – the assumption that the person who is most valuable to the firm is the person who “touches all the bases.”*

With a little thought, it is apparent that “touching all the bases” as a requirement for success/compensation is inefficient and does not tend to maximize the profit of the firm. Suppose the formation of the A, B & C partnership by three lawyers who agree as a matter of core principles that a lawyer is obligated to serve his profession, his clients, and the community. Suppose A is extremely interested in the organized bar and is talented at both the substantive and leadership roles entailed in bar work. A’s partners agree such work serves the core principles and should be a source of referrals for the firm. Suppose B is the best lawyer of the three, a “lawyer’s lawyer” who likes nothing better than working on a client’s problems, and is very good at it. Finally, suppose that C is well connected in the community, has a history of community leadership, and is good at it. Again, the partners agree C should continue such activities both as an obligation of service and as an important source of business for the firm.

In this hypothetical three-person firm, it would be foolish to require B, the person best at handling the actual practice, to run for Bar president and require the person who is slated to head the Community Chest to spend most of his time in the library. It is a much more efficient means to the ends of the firm – to provide service in the three areas, and to develop business – to put the best person in the job at which he is best, and to think of the firm as a team. If one agrees that this is a sensible approach, then it may not be productive to have a compensation system that says the person who “touches all the bases” – tries to work in all three areas at the same time – is the most valuable, because if

*“[A]ccountability” pressures may create a tendency to understaff.*

each does that, the efficiencies and the profits will suffer. The compensation system should not work at odds with the most efficient and profitable operation of the firm. Certainly given this scenario, it would be silly for A, B and C to sit down, review their individual strengths and how those strengths support their common philosophy, and agree, "Hey, this is great. Between us we can do everything each of us wants to accomplish. Let's form a firm, and pay ourselves the same, so long as each of us touches all the bases."

There are other consequences to the "touch all the bases" approach in the important area of job satisfaction. Johnson O'Connor was a psychologist who was responsible in the 1940s and 1950s for setting up General Electric Company's pioneering and world-recognized personnel system. Dr. O'Connor's thesis, around which the GE system is based, was that a strong talent is like an appetite to a person; that a person must use his talents in his job to be happy; and that a worker so employed is more effective. For that reason, the GE system was changed, so that employees were tested and placed in jobs that would use each employee's strongest talents and aptitudes. The results were an extremely high job satisfaction, significantly less absenteeism, an enviable employee loyalty, and greater efficiency.<sup>3</sup>

This is not to say that everyone should do what he wants if it feels good. The frustrated actors in the firm cannot spend all their time on the Christmas skit. But within the context of firm needs, there should be different paths to success. A solo practitioner *must* cover all positions, because he has no teammates to rely on. A firm may be organized as a team of specialists with a common goal, and it can have the advantage of the most qualified person in each position. The firm should not lose that advantage by forcing its members to continue in a solo practitioner mode.

The key assumption in the foregoing model is the agreement on the core values and the goals of the *firm*, and the assignment of individuals to work toward the goals consistent with those core values. Compensation (almost) takes care of itself.

***The assumption that the best way to determine a lawyer's value is through assigning compensation credits for clients.***

A compensation system that assigns a client to an individual lawyer and (one way or another) credits him or her with the income earned from that client undoubtedly has as its origin the proposition that the ability to care for the client relationship is important and is something that must be encouraged. That idea is certainly valid. But to measure the value of that job in terms of compensation depending on the client's billings can have undesirable consequences. Because the client means more to the individual lawyer than to the firm as a whole, the consequences may include: (a) insulating the client from review and possible termination by the firm, even though the firm (as opposed to the individual

lawyer) would be better off without the client; and (b) making the individual lawyer more concerned with his "profit center" figures than the overall good of the firm. A compensation system that tends to immunize clients from evaluation, either as unworthy clients, or as unprofitable clients, because of the actual or perceived benefit to an individual within the firm has the unintended consequences of deteriorating or preventing the improvement of the client base, preventing certain steps toward more profitable operations, and straining loss prevention policies. The system has the unintended result of pushing the firm toward a combination of "islands" or "fiefdoms" that as a whole is no greater than the sum (both positive and negative) of its parts.

Consider the following illustration. Nashville partner A generates \$100,000 per year from statewide Bank B. This is an important client to A, and he has done a good job developing the client. However, Bank B will not waive conflicts for unrelated cases against it in Memphis, or the rest of the state where it is represented by other firms.<sup>4</sup> This is a trade-off that should be evaluated on a firm-wide basis. If the firm gets a lot of business from a particular bank, that may be acceptable, but if the firm does not, or if a lot of business in Nashville means a lot of conflicts in the Memphis and Knoxville offices, the trade-off may be a bad one.

In the example, the firm loses an average of \$80,000 per year in conflicts that reasonably should be waived, in addition to legitimate conflicts. Clearly, from the *firm* standpoint, Bank B is not a desirable client. If the firm did not represent it, the firm would be at least as well off, and likely would be better off since it could take adverse matters throughout the state.

But the firm tracks partner billings and client and matter originations as part of the compensation process. So consideration for Partner A prevents the firm from terminating the unprofitable relationship with Bank B because the client is important to A both as client origination and matter origination, and to some extent hours worked. It is "not fair to him" to do what is in the best interest of the firm.

If the use of those tracked statistics prevents the firm from terminating its relationship with Bank B, it is a faulty system. Certainly, Partner A should not be punished if the firm decides to terminate the relationship; certainly he should be recognized for the business development activity he has undertaken; he should be recognized also for giving up the representation of Bank B for the good of the firm, and he should not be rewarded for holding on to it contrary to the good of the firm. To the extent the compensation system rewards a person for his individual statistics, which would be lower if he gave something up for the benefit of the firm, or punishes him for supporting decisions made for the firm's benefit, the system creates an internal conflict of interest, and operates to the detriment of the firm as a whole. To the extent the system is perceived that way, the effect is the same.

***Compensation (almost) takes care of itself.***

It is important to note that in this example, the firm suffers from the compensation system regardless of whether its members are motivated by greed or by respect for each other. A charitable "Well, we cannot terminate Bank B because it is important to my friend Partner A" is just as damaging to the firm as a greedy Partner A, "Terminate Bank B over my dead body. That client is an important part of my book of business."

***The assumption that statistics don't lie.***

The keeping of statistics, while interesting, leads to assumptions and presumptions that may operate unfairly or counterproductively, particularly if the statistic is treated as a revealed truth, a presumption to be overcome, rather than as a number, a piece of evidence.<sup>5</sup> If in the hypothetical three man firm above, A receives a call from Jones Corp. as a result of his activities in the Bar, but the firm can only accept the matter because B specializes in it, and a requirement of the client is the excellent reputation of the firm, in large part due to the efforts of C, then A cannot be said to have originated the business, any more than B or the firm as a whole has. Crediting A alone seems undesirable if a "team" or "whole firm" philosophy is desired and is to be encouraged.

***The assumption that business generation requirements or the amount of business generated should be used as a factor in compensation.***

A review of the claims against lawyers that have produced large settlements or large verdicts or other consequences (e.g., fee forfeitures) reveals that all involve management matters that created pressures that can reasonably be construed as having overcome good judgment that would have avoided the problem. The big cases are not simply the result of errors, but of bad judgment arguably motivated by individual financial concerns. In one, a lateral lawyer brought with him four clients who did indeed produce the volume of business he had promised for his first two years. But then his two largest clients went bankrupt, and the economy hit his specialty hard. He was given an ultimatum to restore his business generation or leave the firm. At this time, a high living con man approached the firm for legal help. The distressed lawyer was, of course, overjoyed to help first with the purchase of a multi-million dollar house, then with the Lear jet, and then with the private placement of European financial institution investment notes that promised 35% in 45 days. Red flags were ignored, and the lawyer was working not in his field (real estate) but securities. Thus the pressure to produce at least arguably (plaintiff argued it) negated basic loss prevention rules about investigating the new client who is in a high exposure business and avoiding dabbling in areas outside a lawyer's practice area. Further, the "my client" – "his client" attitude (as opposed to a team approach to firm clients) prevented at least one lawyer in the firm from reporting or following up a rumor she heard about the new client, which should clearly have been investigated. The

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eight-figure settlement of a suit for aiding and abetting the client's fraud on the investors was the unintended consequence. A reading of the plaintiff's mediation brief showed the unquestionable importance of the financial pressure placed by management decisions on the individual who ignored the red flags, went overboard in efforts to help the client, and helped convince the insurer and the firm that there was a real danger that an aiding and abetting verdict would result from trial.

***The assumption that the use of billable hours is the best way to determine a lawyer's value to the firm.***

Pressure to produce billable hours has many of the same consequences as pressure to produce business. If the hourly budget is high and failure to reach it has individual consequences, there is a tendency for individuals to:

a. *Hoard work* - If Associate A has 200 hours of work to do at the first of March, but expects a lull in April, and another 50 hours comes in that he cannot get to for a month, he will be tempted to save it until the lull in April.

The firm would benefit if instead, A delegated those 50 hours to B, who is experiencing a lull in March. An extra 50 hours would be billed in March, and by the end of March, the firm would be 50 hours ahead in billing. Delegation would benefit the firm; hoarding would benefit the individual to the detriment of the firm.

Note, as discussed elsewhere, if the associate is not being fully utilized, the problem is the lack of work, and putting the burden on the associate to assure that he meets budget may present unintended consequences. Ideally, the associate should seek work because she is expected to, not because she will be punished for failure to find it.

b. *Undertake work outside their specialties* - If Partner C works in the mortgage financing area, and the economy is such that work in mortgage financing is down, he will be tempted to handle a matter outside his expertise rather than delegate. Otherwise, his hours will be down. He will also be tempted to take whatever new client he can get, without worrying too much about the quality, to plug the short-term hole in his compensation formula.

The firm risks underestimated fees, mistakes, and corrective work, write-offs for the learning curve, and client dissatisfaction. The firm also risks the bad client, because the mortgage finance or M&A lawyer might not recognize the signs of the dishonest client operating in the securities area.

c. *Sidestep loss prevention safeguards* - Even if the firm has adopted procedures and requirements designed to prevent dabbling in areas outside one's expertise and to identify the bad client in the preceding example, the compensation system can reward successful efforts to get around those safeguards. An overall system in which loss prevention and compensation do not create a series of contests, but rather a common goal of firm profitability, would be better.

d. *Pad time* - If there is not enough current work, there is a temptation to overwork a file or pad time. While I do not assume actual dishonesty, which will happen only very rarely, still the work will tend to expand to fill the time there is to do it.

The *firm* risks write-offs, client dissatisfaction, and loss of reputation.

e. *Pay insufficient attention to other aspects of the practice* - Since hours are a basic requirement the lawyer may neglect marketing, firm matters, etc., particularly if excess hours are specifically rewarded or there is a penalty for failure to meet hours.

If major marketing efforts detract from hours in one period, they are designed to benefit the firm in a future period and they should be encouraged, not penalized because of lack of hours. If the lawyer is a talented marketer, it may be that assigning others to help with the work while he is encouraged to market and otherwise think toward the future will benefit the firm as a whole.

f. *Become complacent if they are able to easily meet the hourly requirement* - Some assignments make hours easy. A lawyer working on a single big case for a big client will have 10-hour days between 8 and 6, while an equally hard-working lawyer juggling a dozen files may record 6 hours. With equal "spare time" the first lawyer may be tempted to decline opportunities for other firm service.

g. *"Step-child" management or similar work* - Assume that revisions of the firm's loss prevention systems - conflicts, business intake, lateral hires, for example - and other procedures are needed. These are significant matters that can have a substantial impact on profitability. Unless the time is taken to fix them, they remain a danger to the profits of the firm. If they can be done only in "spare time," or if that is the perception, they will take years, rather than months, to accomplish and implement. To the extent billable hour requirements prevent the accomplishment of needed management or loss-prevention duties on the part of every lawyer, they prolong exposure of the firm to certain dangers.

The pressure to produce billable hours may also prevent wise management changes. It may be a very good idea to convert to a new system of corporate governance, such as a CEO who devotes himself full time to management. A compensation system that institutionalizes an assumption that billable hours is the most valuable work that can be done for the firm is an impediment to such a change. If the firm can find within its members someone who has the (entirely different) set of talents that make a good manager, the net effect on profits of changing from a bunch of part time managers to one executive will usually be positive.

#### **SUGGESTIONS:**

1. The firm should agree on core values. The core values

of the firm must be truly held, not just the beauty pageant answers about children and world peace. If the members want only to make money, say so. If the members want to serve the profession and the community as well as serving clients, say so.

2. Make the compensation system depend on contribution to core values, and if the core values include matters other than revenue, be sure compensation consideration is given for the accomplishment of those values as well.

3. Make certain that decisions are firm decisions, consistent with core values, and that the firm shares the consequences of the decisions. If a lawyer has an opportunity to serve as president of a civic organization, which will necessarily be time consuming but which might provide a benefit to the firm as a source of business, then so long as the firm analyzes and approves the decision, the time deficit should not be a penalty to the individual lawyer, nor should the enhancement of firm business, if it occurs, be entirely "his." Similarly with contingent fees, pro bono commitments, bar leadership roles, and management positions, the decisions must be decisions of the firm, and the rewards of those decisions as well as the mistakes must be shared. This should be an underlying principle of all decisions.

4. Assure that the compensation system is truly subjective, though based on as complete information as possible. Make sure that the collection of information upon which the subjective evaluation is made is

complete and that, if "objective" "statistics" are used, they are not overemphasized to the extent they create an impression that there is a formulaic system despite statements to the contrary. The perception that a formulaic system or component exists will preserve the problems and pressures described above most associated with a formulaic system. Be sure that the statistics do not create a presumption to be overcome, and that those affected know that. Be sure that instances of individual recognition of the team philosophy are collected and recognized.

5. Avoid rewarding conduct that is not in the best interest of the firm; reward conduct that is in the best interest of the firm. Examples - Giving up a client to improve the overall client base is a good thing. Refusing to request a conflict waiver from "my" client for fear of offending should not be rewarded, even though that may produce greater individual "numbers." Passing along work to the appropriate person - even at the expense of "my" hours should be rewarded. Passing along client responsibility when reasonable to do so - at the expense of "my" book of business should be rewarded. Statistics that fail to recognize these considerations should not predominate, and they should not be perceived as doing so. In other words, if desirable conduct is punished because an individual's "numbers" necessarily change, and the numbers are a presumption to be overcome, there should be changes.

6. Obtain agreement to the principles of compensation

*The pressure to produce billable hours may also prevent wise management changes.*

[in writing, at least for lateral hires]. Agreement that compensation is subjective; clients are clients of the firm; hoarding of work and of clients and 'profit-center thinking' are discouraged. If a lateral does not buy in to the philosophy, he or she should not be hired regardless of his "numbers". In ALAS experience, and in the malpractice insurance industry in general, lateral hires who are not speedily integrated into the firm or who do not "buy in" to the firm's core values are a disproportionate source of large claims. The primary problem is the lateral who carries over from his prior firm's compensation system that emphasizes his "book of business" or his "profit center" or his "individual profitability" or the like. A lateral who considers himself and "his clients" portable, is subject to all the above pressures, or analogous ones, to place his or her own performance ahead of firm welfare, and if he or she remains insecure in the new position, there is a temptation to preserve the "portability"- to stay packed.

7. Compensation share [for owners of the firm at least] should be set in advance, not after the fact.<sup>6</sup> A lawyer will gain from another lawyer's increased billings, and will lose from inefficiency of the firm as a whole. Further efforts should be made to see that each partner realizes this and is motivated to avoid hoarding work, dabbling, etc., and to be aware of specific sorts of conduct that increase firm profitability despite the effect on his individual "numbers." At the same time, those undesirable activities should not be seen as a way to increase an individual's "points" for next year. Similarly, the associate compensation system should be examined for ways that it can be changed to reward actions in the overall benefit of the firm. There are reports that associate compensation is market-driven (meaning that law students who are basically clueless dictate law firm management). To the extent that is a factor, education is desirable. If an associate compensation system overemphasizes hours, as discussed above, it may have adverse consequences. To a great extent, this may depend on the role of the associate in the particular firm, i.e., as man or machine. Associate relations committee views should be solicited.

8. Take steps to reduce the temptation to measure success by comparison to other lawyers in the firm. If my goal is the meeting of budget, generating of sufficient business and touching the other bases, rather than the building of the firm, the firm loses. If I look at my hours as needing to come up to the level my peers are working, rather than the possible positioning of the firm so that new work is created for additional associates, the focus is too selfish on the one hand and too short sighted on the other.

To discourage the attitude that firm lawyers are competing with each other rather than competing with other firms, one 90 year-old 275 lawyer ALAS firm has the following system, according to its Loss Prevention Partner: A two-

person elected compensation committee makes all compensation decisions, none of which is published. No other person has access to the figures of any other person. All partners agree to keep their compensation confidential, and no one other than the compensation committee knows what any other lawyer makes. This is quite a different approach than one where lawyers are encouraged to compare where they stand versus the others in the firm. The idea is, I should not be satisfied just because I make more than my partner. I should be satisfied because clients prefer our firm to the other lawyers available to them because of superior efforts, and I am making a good living. Obviously such a system requires a complete confidence in the compensation committee, and it is hard to imagine compensation secrets not leaking, but the idea is a good one.

9. To the extent possible, assign persons to positions in which they are talented. Avoid the common Peter Principle trap experienced in most law firms of mistaking a business generation talent for management or leadership skills, or alternatively of granting demands for leadership based on performance in non-leadership areas. These are unrelated talents, and although the views of the firm members should be solicited and considered — the right of a stockholder or partner or member of the team to be heard — the implementation duties should not be treated as an honor but as a job for those with the talent for it. A management position should not be a "reward" for important contributions to the firm.

10. Test assumptions underlying decisions, and avoid using a change in a system to "send a message" or solve a specific problem. A problem with an impaired lawyer should be dealt with as such, not by adopting a retirement policy crediting a year's alcoholism as 50 years service. Increasing a billable budget as a means of getting more billable hours assumes that lawyers are not willing to work hard enough to get the job done. If a lawyer is identified as lazy, deal with him directly. If instead, the problem is an uneven distribution of work, or a lack of business, address that problem directly, not by increasing already unattained goals, thus magnifying the problems, not solving them.

11. Avoid single paths to success or compensation. Recognize and take advantage of different talents. Recognize that a team approach may be better than expecting a particular mold to be filled, or everyone to play both offense and defense, have a team of quarterbacks, etc. Look to the benefit to the firm as a whole, not to the value of the individual parts. Avoid a situation where an individual lawyer is desperate and solely responsible to meet a specific dollar figure in business generation or a specific number of hours, when the problem is one for the firm to address. Look at overall contributions to the firm as a test, not the meeting of arbitrary goals. And make sure the firm membership's perception accords with the true intent of the firm.

*Look at overall contributions to the firm as a test, not the meeting of arbitrary goals.*

12. Consider full time management jobs - CEO, for example, and Loss Prevention/Claims. The right persons performing such functions can accomplish the above, and much more, and free the producers to produce. The role of the Loss Prevention Partner in some firms is that of the police. In other firms, the Loss Prevention Partner is counsel. By and large, the role depends on the management systems and whether or not they reward individual lawyers for breaking the loss prevention rules. Where development of a client has important compensation consequences, the LPP might act as cop to enforce rules requiring terminating the relationship with an unworthy client. In a different system, the partner in charge of the client might be just as interested in getting rid of the unworthy client because it benefits the firm. The policeman role seems a patching of a faulty system. It is better to work to create a system where crime does not pay, and loss prevention is part of the team effort.

Remember that most of the large settlements by law firms and their insurers have been avoidable, and have involved errors in judgment arguably induced by compensation or analogous pressures. While we can guard against ill effects with certain loss prevention policies, the margin of safety will increase if the policies of the firm and the interests of the individual members are seen as being consistent with the loss prevention goals, rather than seeing loss prevention as frustrating individual advancement. Loss Prevention as a resource, not as law enforcement.

#### Endnotes

1. When it comes to attribution, this article is written in a modified Navajo style. Generally, Navajo philosophy dictates that when one hears a new idea, he should think about it. If it is a good idea in his view, he adopts it as his own. If it is not a good idea, he does not. It makes little difference where the idea originated. This is in contrast to those who believe the strength of an idea depends on who is said to have said it. Modifying this philosophy for this article, if I remember where I learned something, I will attribute it. I am not going to look it up. I cannot testify authoritatively whether this is Navajo philosophy or just a good idea because I can't remember where I got the idea.
2. While not foolproof in a busy law firm, solicitation of views about unintended results throughout the firm is a good idea, not only because some such results may be identified, but because people who have input into a program will accept it more readily, even if their views do not prevail.

3. The nationwide non-profit Johnson O'Connor Foundation carries on in that tradition, developing new and better aptitude and related testing.
4. Big banks are notorious for spreading legal work around their community, with the result that none of the better lawyers in town can sue them.
5. As an anecdote, the first written statement of my own firm's compensation system, had as an element to be considered, "The lawyer's unverified representation as to business generated through his efforts." I thought this was funny at the time; I now think it borders on genius. It is inherently inaccurate to assign credit in most instances, and certainly it is not less accurate to have 200% allocation than 100%. In the immediately preceding hypothetical, if at year end both A and B claim credit for the Jones Corp matter, they are both right. If there is an allocation system, and A fills out the new matter forms as client originating 50/50, the result might be the same, but many lawyers in A's position claim 100%. While everybody knows who they are, all the statistics are presented as if the numbers had validity and thereby may create a practical presumption that must be overcome.
6. A particularly interesting system that evokes various unintended consequences is the "eat what you kill" formula for lawyer compensation. Every lawyer is credited for half the fees for clients he originates and half the fees for the work he does. Everybody must contribute \$X to the general overhead, but they take home the rest. The object is to give credit where credit is due — there will be no income if business is not originated. There will be no income if the work is not done — "that's the name of the game." The formula may do that, but what else does it do? It assures that nobody is minding the store. Who is administering the firm? Who is administering the conflicts inquiries? Who is deciding them? Okay, let's require everybody put in 20 hours of service to the firm. That assures that somebody is deciding such issues, but also that they are being decided inconsistently by persons who do it only as a sideline. What else will happen? For one thing, everybody will be judging his own conflicts, maybe rationalizing the close calls in favor of keeping the new client, when an objective view might indicate otherwise. The same is true of the unworthy client. I will take the case, and if I can't stand the client, I will give him to an associate (in my department, so I can share the credit for the work). What else? It will tend to make the partners insular — concerned with their own practices, and not alert to problems undertaken by others. If my partner messes up and loses a client, what does that matter to me? My compensation will not be affected. 🙄

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