



Reflections on a Few Common Elements of Effective Law Firm Risk Management

by Gilda T. Russell¹

I. Introduction.

United States law firms employ varied approaches to risk management. In terms of structure, many large firms delegate risk management responsibilities to a General Counsel's Office, Legal Department, or some similar type of risk management "team" within the firm. The team in some large firms is comprised of experienced and knowledgeable firm partners and highly trained staff who handle specialized areas of risk management. Such persons may include a General Counsel, an Associate General Counsel, and other partners such as a Loss Prevention Partner, an Ethics Counsel, a Conflicts Partner, or other partners who supervise specific risk management areas, and one or more Administrators or Directors and other staff such as Conflict Analysts.

Other large firms choose to follow a model where there are fewer specialized partners on the risk management team. The partners may only consist of a General Counsel and one or more Associate General Counsel. In such cases, the team will likely also include staff and perhaps "contract" level lawyers who work on discreet areas such as conflicts resolution for new and continuing matters and lateral hires. Such persons may report to the General Counsel or an Associate General Counsel or to a staff level Administrator or Director.

Medium to smaller firms may follow similar models or divide risk management tasks among only a few individual partners, perhaps even a committee, and professional staff.

Each of these approaches can lead to effective risk management, and there may be many reasons why a firm's risk management program is successful. This article does not attempt to designate the best approach or discuss all of the reasons for success. Rather, the analysis below points out a few common elements of effective risk management and, where appropriate, notes how different approaches might fare with regard to these elements.

II. Law Firms Should Clearly Define the Responsibilities of Risk Management Team Members.

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Whatever structure law firms choose for risk management, they should clearly define the responsibilities of those on risk management teams. Such clarity is necessary for effective risk management and also for potential successful application of the attorney-client evidentiary privilege to internal law firm communications concerning risk management matters.

In law firms where the risk management team is comprised of a number of partners and staff, the responsibilities of each may look something like the following. The firm's General Counsel and his or her Associate General Counsel and staff will likely be responsible for handling internal confidential firm inquiries as to risk management issues, working on firm policy matters, handling document retention and electronic discovery issues, dealing with outside vendors, drafting and finalizing contracts with lawyers and professional staff, dealing with the myriad of issues surrounding the hiring of large practice groups or firm mergers, handling departing lawyer matters, and dealing with other types of firm risk management issues.

A firm's Loss Prevention Partner, or a similarly titled partner, will likely have responsibilities that include handling of internal confidential firm inquiries concerning risk management issues, particularly those relating to claims against the firm, or circumstances that may lead to claims against the firm which must be reported to the firm's professional liability insurers. A partner in this role will likely also work with the firm's outside counsel and insurers concerning any litigation that is brought against the firm. The Loss Prevention Partner will also probably be in charge of the firm's professional liability insurance in terms of negotiating coverage and rates, periodically meeting with the firm's brokers and insurers, and reporting back to firm management on such matters. This type of partner will likely have a staff to assist him or her in these aspects of loss prevention.

A firm's Ethics Counsel, Conflicts Partner, or similar partner or partners, will likely handle confidential internal firm inquiries as to ethics, conflicts of interest, and other risk management issues that may arise. Such partners' duties may also include reviewing alternative forms of engagement and related documentation, including client engagement letters, contracts, and outside counsel guidelines, approving alternative billing arrangements, resolving conflicts for new and existing matters as well as lateral lawyer and staff hiring, drafting and updating form documents, drafting and circulating ethics walls, making sure that the firm's website, advertising materials, social media, and individual lawyer blogs comply with professional advertising and solicitation requirements and restrictions, training firm lawyers and staff in ethics and risk management matters, and handling other risk management issues. Partners in this role will also usually have a staff whose responsibilities will involve more "ground level" work including review of conflicts reports, preparing conflicts summaries, assisting in conflicts identification and resolution for new and continuing matters and lateral hires, and the like.



The precise organizational structure of a law firm risk management team and the responsibilities of the supervisory partners and staff on the team should be clearly defined, updated and circulated in the firm manual, directory, periodic firm memoranda and directives, and firm presentations so that the entire firm -- lawyers and staff -- know who to go to for specific risk management issues.

Clarity in designation of who does what is required not only so that risk management can be effective, but also to increase the likelihood that the attorney-client privilege will be found applicable to internal communications between members of the firm and the risk management team. As was noted in ABA Formal Opinion 08-453 (2008), “[t]he desire to ensure that law firm members comply with their ethical obligations has given rise to the designation of ‘ethics counsel’ within law firms to whom the firm and its members may turn for advice on ethics matters.”

However, firms must take care to ensure that when its members do turn to firm counsel for advice, such communications have a good chance of being protected by the attorney-client evidentiary privilege. In order to do so, law firms should *formally establish* the position of “in-house” counsel (e.g., General Counsel, Ethics Counsel, etc.). Recent court decisions have held that such *formal designation is a necessary element* to the attorney-client privilege being found applicable to communications between firm members and in-house firm counsel. *See* Anthony E. Davis and Gilda T. Russell, “Developments Regarding the Attorney-Client Privilege and Law Firm Communications with In-House Counsel,” Paragon Risk Management Services, Newsletter, January 21, 2014 (hereinafter “Davis and Russell, Attorney-Client Privilege and In-House Counsel”), and cases discussed therein.²

Clarity and formal designation may be most apparent on a risk management team where there are a number of partner level supervisors with specifically delineated responsibilities rather than on a team in which the General Counsel and one or more Associate General Counsel handle almost all risk management matters. However, such is not necessarily the case. A firm can have very clearly defined roles for its General Counsel and Associated General Counsel, including designation as “in-house” counsel to whom confidential inquiries can be made by members of the firm for ethics, conflicts, loss prevention, and other risk management issues. Yet, in this type of risk management model, concern can arise if the firm also employs a number of staff and contract lawyers who work directly with firm lawyers on risk

² In addition, such in-house counsel cannot have worked on the underlying matter for which legal advice is sought, in-house counsel’s work should not be billed to a client matter, but rather to a risk management or firm matter billing code, and the communications with in-house counsel should be kept confidential and separate from files in the underlying matter. *See* Davis and Russell, Attorney-Client Privilege and In-House Counsel. In 2013, the ABA adopted Resolution 103, which contained provisions to similar effect.



management matters such as, for example, conflicts identification and resolution. The firm must make it clear who these persons are and what their responsibilities entail. And, for purposes of the attorney-client evidentiary privilege, it must also be apparent that such personnel -- when communicating directly with firm lawyers -- are acting under the authority of formally designated firm in-house counsel.

In a medium or small firm where there are likely even fewer partners on the risk management team, the firm must indicate who the team members are and their responsibilities, and also, for application of the attorney-client privilege, formally designate in-house counsel and those acting under their authority.

It is also important that there be clear and frequent communication among risk management team members themselves about who is doing what with regard to particular matters. It is not uncommon for team members unknowingly to be working on the same issue at the same time. Regular communication among the risk management team as to what is being handled by whom will help alleviate such a problem. In addition, frequent team discussion and reaching group consensus, particularly on difficult issues, will be beneficial.

Thus, whatever organizational structure a law firm chooses for risk management, it is critical that the firm make it clear who the members of the team are, state their respective responsibilities, maintain, update, and regularly circulate such information, and formally designate one or more members of the team as in house counsel. If the organizational structure of the risk management team employs staff or contract lawyers to directly communicate with firm members about risk management issues, it should be made clear that these members of the team are acting under the authority of the firm's in house counsel in order to increase the likelihood that such communications will be protected by the attorney-client privilege. Finally, members of the team itself should regularly communicate with each other about the matters they are handling.

III. Risk Management Teams Should Consist of Members With a High Level of Expertise

To ensure effective risk management, risk management teams should consist of members who have a high level of expertise in the areas of their individual responsibility. In firms that utilize a number of partners on the risk management team such as a General Counsel, an Associate General Counsel, a Loss Prevention Partner, an Ethics Counsel, a Conflicts Partner, or other such partners, there is a strong likelihood that such individuals will have significant expertise in their subject areas.

Partner members of risk management teams are most often chosen for their positions based on their specific knowledge, training, and background, whether they are appointed from within the firm or hired from outside of the firm. And, the

longer such partners serve in their positions, the greater likelihood that their knowledge will increase in the areas of their responsibility. In addition, at least historically, partners in such positions may be more likely to stay with their firms longer than staff or contract lawyers, thus enhancing expertise that comes with long-term “on the job” experience. Indeed, ABA Formal Opinion 08-453 (2008) cites scholarly commentary on the recent trend of “career in-house counsel” who are more and more occupying the role of firm counsel. *See*, Elizabeth Chambliss, “The Professionalization of Law Firm In-House Counsel,” 84 N.C. L. REV. 1515 (2006). Also, partners may be more inclined to participate in bar, continuing legal education, and panel presentations in specific areas of risk management than staff or contract attorneys, and, as such, are more likely to broaden their knowledge base.

On the other hand, firms -- whether large, medium, or small -- that utilize a General Counsel and Associate General Counsel risk management model, or a similar model with only a small number of partners or even a small committee constituting the team, may find that such personnel can become burdened with too much responsibility for too many different subject areas. As a result, this type of risk management model may result in the very limited number of team members not having as much expertise, at least in some subject areas, as a larger team would have.

However, in firms that utilize such an approach, the General Counsel and Associate General Counsel, or other involved partners can become quite adept in many areas of risk management; and, in addition, there may be staff or contract lawyers at these firms with significant expertise in specific areas. Also, it is not necessarily the case that staff or contract lawyers’ tenure will be more abbreviated due to their status as non-partners. And, there is not an impediment to such persons participating in continuing legal education risk management programs to enhance their knowledge. Indeed, firms that use staff or contract lawyers as part of their risk management teams should support and help fund their continuing legal education in the areas of their responsibility as part of the firms’ ethics obligations. *See* ABA Model Rules of Professional Conduct 5.1 (a) and 5.3 (a).

In sum, a critical element to effective risk management is that members of risk management teams should have a high level of expertise in their respective areas of responsibility.

IV. Risk Management Teams Should Operate in a Manner that Engenders Firm Support.

Whatever the organizational structure, it is extremely important for effective risk management that risk management teams operate in a manner that engenders firm support. How is this accomplished?

Probably the most important element in this regard is the involvement of firm management with risk management. The management of most law firms will have been involved, if not initially, at least in the recent evolution of the structure and operation of the risk management team within the firm. This is a good thing. The more firm management is involved, knows the risk management personnel, and understands how the team functions, the more likely it is that management will lend its support to the decisions made by risk management team members.

Many law firms significantly involve firm management in at least some aspects of their risk management programs. For example, management of some firms fully participate in negotiations with the firms' professional liability insurance brokers and/or insurers regarding coverage and rates, and, as well, in decision-making with respect to malpractice litigation in which the firms are involved. One of the results of such participation will likely be a greater appreciation by firm management of the mission of their risk management teams.

Inevitably, of course, firm management will likely become involved in certain other risk management decisions such as when challenging conflict issues arise concerning important clients or significant hires. The risk management team should consider such involvement to be positive and not an infringement on its territory. The more firm management is involved in such decisions, understands the often complex issues that occur, and is exposed to the expertise and analysis of the risk management team members, the more likely it will support the recommendations of risk management.

It is, of course, also important that the risk management team operate in a way so as to garner support from the rest of the firm.³ Perhaps the best way to attain such support is for members of the risk management team to be available and responsive. Firm lawyers⁴ who need risk management assistance must be able to get it quickly. This means that risk management team members must be accessible. They should return telephone calls and emails in as timely a fashion as possible. This does not mean that risk management personnel must immediately answer

³ This is one area in which the risk management team model that utilizes contract lawyers rather than partners may be at a disadvantage in interacting with firm members, particularly in the area of conflicts identification and resolution. To the extent that such lawyers are not members of the firm, but, rather, contract employees with likely not much history with the firm, firm members may not be as accepting of their assessments as they would be of the conclusions drawn by known partner members of a risk management team. However, to the extent that such contract lawyers are supervised by a General Counsel or an Associate General Counsel, or other firm partner, and the ultimate recommendations as to conflicts resolution come from such partners and not directly from the contract lawyers, the concern may be alleviated.

⁴For purposes of the discussion in this section, use of the terms "firm lawyers" is meant to also include other firm professionals such as Lobbyists, Senior Professionals, Of Counsel, etc.



questions posed within moments of their being asked; however, it does mean that they should acknowledge as quickly as possible the inquiries that are made. Team members should promptly obtain relevant facts from inquiring firm lawyers and ask questions of them and others to collect any additional relevant information. In addition, risk management team personnel should always give those making inquiries a reasonable time framework within which to expect at least a preliminary answer to the questions posed.

Also, in order to have firm support, the risk management team should have an approach in place for those times when firm lawyers do not agree with the assessment of a team member. If, after reasoned explanation of why the team member has reached a contrary conclusion, firm lawyers still disagree, there should be a process for further consideration by a supervising member of the team, such as, for example, the General Counsel. If, after consideration by the “higher authority,” there still is disagreement, firm lawyers should have the ability to consult with firm management. The point is that firm lawyers should not be made to feel that they are either not being listened to by those in risk management or have no recourse as to decisions with which they disagree. Rather, the opposite should be the case. Firm lawyers should feel that, even though they may not ultimately prevail on a risk management issue, they have an opportunity to be heard and reheard before a final decision is reached on an important matter affecting their practice.

In addition, when firm lawyers are concerned that they may not be able to adequately explain risk management decisions to their clients, the risk management team should be more than willing to assist in discussing such matters directly with clients. Such assistance is often a great relief to firm lawyers and will likely have a beneficial impact not only on their view of risk management, but also on the clients’ views of the firm.

Finally, it is also useful for members of the risk management team to be receptive to working through issues with the personnel of other firm departments. For example, certain risk management issues may involve interaction with those working in new matter intake, firm marketing, IT, human resources, or other areas of the firm. The best approach risk management team members can take with regard to such interaction is one of helpful collaboration. In this regard, no risk management team should consider itself an island.

In sum, risk management teams that welcome involvement by firm management, are responsive to inquiries from firm lawyers, fully explain the reasons for contrary assessments and give firm lawyers the opportunity to have their opinions heard and reassessed, assist firm lawyers in talking with clients about risk management decisions, and collaborate with other departments will more readily garner firm support, a critical element for risk management efficacy.

VI. Conclusion.

There are many approaches that law firms can adopt with regard to risk management. There is no right or wrong model. Indeed, the precise risk management structure law firms choose depends on several factors, including firm size, history, available resources, and culture. While effective risk management may have many reasons for success, there are at least a few common elements to any approach that is taken:

- Firms should make it very clear who the members of the risk management team are and what their respective responsibilities entail and should regularly circulate and update such information;
- Firms should formally designate one or more members of the risk management team as in-house counsel and clearly indicate the team members acting under the authority of in-house counsel;
- Risk management team members should communicate regularly among themselves as to matters they are handling;
- Risk management team members should have a high degree of expertise in the specific subject areas of their responsibility; and
- Risk management team members should operate in a way that engenders firm support through involving firm management, being available and responsive to firm lawyers, giving firm lawyers the opportunity to be heard and reheard on risk management decisions with which they disagree, assisting firm lawyers in communicating risk management decisions to their clients, and collaborating with other departments of the firm.