

PRINCIPALS: WHY IT'S SO IMPORTANT TO SET THE RIGHT TONE

By Frances Moffitt



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There is no doubt that when the principal of a law practice shows leadership on compliance issues, it helps to set the tone for the whole practice. Both the management and staff of the law practice should have a clear understanding that compliance is important to the principals and that they are expected to incorporate compliance into their daily operations.

Encouraging appropriate standards of professional behavior is supported by the regulatory requirements ascribed to principals of all law practices under the *Uniform Law*.

Responsibility of each principal

Under section 34 of the *Uniform Law* it is the responsibility of each principal of a law practice to ensure that reasonable steps are taken to ensure that:

- all legal practitioners of the law practice comply with their professional obligations, including their obligations under the *Uniform Law* and
- the *Legal Profession Uniform General Rules ('the Rules')*;
- and the legal services provided by the law practice are provided in accordance with the *Uniform Law* and the *Rules*.

A failure by a principal to uphold that responsibility may amount to unsatisfactory professional conduct or professional misconduct.

Reasonable steps

In terms of section 34 of the *Uniform Law*, the term 'reasonable steps' that a principal is required to take to ensure compliance is not defined. However, when any organisation encourages excellent business practices and has efficient governance arrangements, it is highly likely that it will have built in management systems or tools that are genuinely protective in character.

Similarly, in order to comply with *Uniform Law*, s 34 it is reasonable to expect that principals of law practices will have in place strong compliance

Snapshot

- Encouraging appropriate standards of professional behavior is supported by the regulatory requirements ascribed to principals of all law practices under the *Legal Profession Uniform Law (NSW) ('Uniform Law')*.
- There is no longer a positive obligation placed upon any type of law practice to implement appropriate management systems.
- Section 34 of the *Uniform Law*, however, imposes a positive obligation on all principals of all law practices to ensure that reasonable steps are taken to ensure that all legal practitioners in the practice comply with their obligations under the *Uniform Law*, the *Uniform Rules* and other professional obligations.
- It is suggested that the first reasonable step a principal should take is to set the tone in the practice by introducing compliance management systems.

management systems, guidelines and tools appropriate to their particular practice. However, managing and supervising the delivery of legal services, within a framework of conduct and practice rules and a raft of statutory obligations, has always been an essential part of providing legal services in New South Wales.

Appropriate management systems

In particular, a specific legislative requirement to manage professional and

statutory obligations was introduced under the now repealed *Legal Profession Act 2004 ('LPA')*. Section 140(3) of the *LPA* required each legal practitioner director of an incorporated legal practice to ensure that appropriate management systems were implemented and maintained to enable the provision of legal services by the incorporated legal practice. A contravention of *LPA*, s 140(3) by a legal practitioner director was capable of being professional misconduct (*Council of the Law Society of NSW v Simpson* [2011] NSWADT 242).

Under the *Uniform Law* incorporated legal practices are no longer singled out as a class of law practice that must demonstrate when directed to do so, the implementation of *appropriate management systems*.

Management system direction

The concept of appropriate management systems does still exist however under section 257 of the *Uniform Law*, as 'management system directions'. Section 257 applies to all law practices in general and not just to incorporated legal practices.

Under s 257(1) the Legal Services Commissioner or the Law Society Council may give a management system direction to a law practice requiring the implementation and maintenance of *appropriate management systems* if it is considered reasonable to do so.

Ten objectives identified

The appropriate management systems are based on 10 objectives identified by the Office of the Legal Services Commissioner working collaboratively with the Law Society of NSW, Law Cover and the College of Law.

The 10 objectives are considered fundamental to ensure compliance with the *Uniform Law*, the *Uniform Rules* and other professional obligations.

The 10 objectives are:

- negligence;
- communication;
- delay;
- liens/ file transfers;
- cost disclosure/ billing practices/ termination of retainer;
- conflict of interests;
- records management;
- undertakings;
- supervision of practice and staff; and
- trust account requirements.

Build internal compliance management systems

Notably, these 10 objectives could be used by principals of law practices to build their own internal compliance management systems. Implementing compliance management systems, built around the 10 objectives considered fundamental to ensure compliance, will lay down a solid foundation upon which principals will be better able to discharge their responsibility to take reasonable steps to ensure compliance in terms of *Uniform Law*, s 34.

Caution

A word of caution, though – the mere fact that principals of law practices have a set of compliance management systems in place does not ensure that all legal practitioners in the practice will become instantly compliant with their professional obligations.

This is especially so if the compliance management systems are applied only sometimes and not others; or if they are applied differently by different practitioners at different times; or if all practitioners don't know about the systems, or don't understand the systems; or, worse still, simply don't care.

Management systems are not only a law practice's prescribed guidelines or rules for providing legal services; they are also the unwritten rules for the way things are done, including the office culture, customs and practices that inspire and support practitioners to conduct themselves ethically or conversely that leave them to their own ethical devices; or, worse, actually encourage them to conduct themselves unethically.

Positive obligation

There is no longer a positive obligation placed upon any type of law practice to implement appropriate management systems. However, section 34 of the *Uniform Law* now imposes a positive obligation on all principals of all law practices to ensure that reasonable steps are taken to ensure that all legal practitioners in the practice comply with their obligations under the *Uniform Law*, the *Uniform Rules* and other professional obligations.

In order to address section 34 of the *Uniform Law* it is suggested that the first reasonable step a principal should take is to set the tone in the practice by introducing compliance management systems. The systems should be well understood, routinely applied and frequently monitored to check that the systems are working.

Ideally, the compliance management systems would be built around the set of 10 objectives (as set out above) that cover the areas that are considered to be fundamental to ensure compliance with the *Uniform Law*, the *Uniform Rules* and other professional obligations. **LSJ**

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