A rogue in your midst (Pt 1)

Frank Maher commences a series of articles on rogue partners & employees

© iStockphoto/mediaphotos

This is the first of three articles on practical problems caused by rogue partners and employees. This will look at what we mean by rogues. The second will look at how we find them. The final one will look at practical steps you need to take if you have the misfortune to find one, and some which you may usefully consider before you have such misfortune.

Cognitive bias

It is easy to think it does not apply to you—you trust your people and someone stealing from client or office account is not going to happen. Cognitive bias makes people believe it will happen only to others and not to themselves.

However, there are two answers to this. First, we are not only looking at people who steal money, but anyone whose failure to comply with your standards and rules may threaten the fabric of the firm. Second, whether you take the narrow (theft from client or office account) definition of a rogue, or the wider one, most large firms, and very many small ones, have had one. Some appear in the judgments of the Solicitors Disciplinary Tribunal, many more do not.

Rogue behaviour

Examples from the writer's experience of advising law firms include nearly all of the following, some many times over:

- Overcharging clients by significant amounts.
- Involvement in tax schemes which are found to be unlawful (or worse).
- Taking on high-value, high-risk work, such as overseas investments, outside the other partners' risk appetite.
- Acting where there is an own interest conflict, such as buying property from a client.
- Acting where there is a client conflict of interests which is more than technical or trivial.
- Insider dealing.
- Turning a blind eye to clients who suppress documents in litigation.
- Failing to account to the firm for money received from clients for work done.
- Failing to use the firm's standard terms which limit liability, exposing the firm to substantial liability.
- Fiddling expense.
- Creating fake documents—letters, e-mails and even court documents;
- Discovering that "facts" placed before the court are no longer true, and failing to correct them.
- Poor practice on volume work giving rise to multiple claims which are subject to the aggregation clause in the firm's insurance, under which only one (inadequate) policy limit may apply.
- Turning a blind eye to clients who are misleading their lenders.
- Bullies and people who harass colleagues and staff.

The list is not finite.

Under pressure

Most of these involve people who have set out on a deliberate course of action, but that is not so in every case. An unusual, and rather sad case in which the writer acted for a firm's insurers involved a solicitor who was highly regarded as a commercial litigator. She found herself under pressure of work, forged a claim form and sent a copy to her client saying she had commenced proceedings. She then told the client that she had obtained judgment and the defendant would be paying by instalments. The first instalment she sent to the client comprised money from her own savings. By the time all this was discovered, it was too late to commence proceedings and there was a substantial claim against the firm.

A report from a clinical psychologist established that she had been functioning above her natural ability and had finally succumbed to the pressure. On the face of it, even though she had made no gain, indeed the contrary was the case, her deception was dishonest, but whether her actions satisfied the two stage test in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 All ER 377 was never put to the test: the Law Society (pre-Solicitors Regulation Authority) agreed to allow her to remove her name voluntarily from the Roll.

Conflict of interests

American Professor Mitt Regan examined the case of John Gellene, a high-earning partner in a leading Wall Street firm specialising in big-ticket corporate insolvency work (*Eat What You Kill: The Fall of a Wall Street Lawyer* (University of Michigan Press, 2016)). Gellene breached a requirement to disclose to the bankruptcy court in an affidavit when applying for an insolvency appointment that his firm was acting for the principal secured creditor and had a conflict of interests. He was convicted of perjury and sentenced to 15 months imprisonment.

It is inconceivable that Gellene would ever have stolen client money, yet Professor Regan's analysis showed that despite his success, Gellene had been under pressure to meet billing targets. It is also interesting to note that he was known for non-compliance, and was nearly always badly behind with his time recording.

Gellene, according to Professor Regan, was a person who was reluctant to share responsibility and had difficulty in seeking help from others. He was also prone to engaging in petty transgressions which, as his moral compass began to lose direction, led incrementally to more serious breaches. Each small step took him closer to his final crime, of dishonesty.

Professor Regan queried whether the firm's financial targets were unrealistic, having greater influence on behaviour than any code of ethics.

These examples show that significant harm can occur in even the largest firms and without involving theft of client money. **NLJ**

Frank Maher is a practising solicitor and partner in Legal Risk LLP, specialising in advising law firms, insurers and regulators on professional indemnity and compliance.