

Kiss paper checks goodbye

*You deserve a payment solution that doesn't
leave you waiting and wondering.*

xxxx LawPay



Paper checks are notoriously unreliable. They get lost in the mail, they get tossed in the laundry, and they carry a lot of sensitive information around with them wherever they go.

LawPay changes all of that. Give your firm's clients the flexibility to pay from anywhere, anytime. Most importantly, we ensure your firm stays in compliance with ABA and IOLTA guidelines.



Proud VIP Business Partner

It's easy to get started

866-921-0115 or visit lawpay.com/ala

LAWPAY

AN AFFINIPAY SOLUTION



Navigating the New Compliance and Ethics Landscape

Could internal and external knowledge resources guide your firm to safety?



ERIN BRERETON
Owner, Chicago Journalist Media

Due to globalization, advancements in technology and other factors, attorneys today have arguably more ethics and compliance considerations to consider than in past decades.

Yet law firms' focus on having attorneys obtain and support business can take precedence over keeping up with ethical and regulatory changes, according to Neil Wertlieb, former Chair of the State Bar of California's Ethics Committee and the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee. He currently provides ethics consulting and other services to lawyers and law firms as Principal at Wertlieb Law Corp.

"There's a lot of pressure on attorneys to generate revenue and bill hours," Wertlieb says. "If you're more focused on working on matters, less time is spent thinking about and ensuring compliance with professional responsibilities — there's less time to take CLE courses on ethics and stay abreast of case law developments."

Law firms have good reason, however, to try to ensure attorneys and staff members are prepared to handle any potential ethics and compliance issues that may arise — because,

"I have no doubt there are well-meaning, otherwise ethical and responsible attorneys who don't even have trust accounts because they didn't need them. And now, it's a requirement, and attorneys can be disciplined."

even if accidental, they can put an attorney or firm at risk for professional negligence or malpractice claims, being reprimanded or receiving other sanctions.

COMMON CHALLENGES

While the specific ethics and compliance concerns attorneys encounter can vary depending on the type of practice and work involved, some tend to be more prevalent, such as conflict of interest, according to Wertlieb.

"Issues relating to conflict pop up all the time, no matter how big or small a firm is," he says. "There are potential conflicts that arise from all kinds of things in terms of current or former clients, personal relationships with parties, other connections with people involved in the matter — and sometimes it takes more than just checking a box or running a computer search to figure out whether there's an issue."

Increased job mobility has resulted in a number of attorneys working with more attorneys and clients than their predecessors did, according to Wertlieb.

"It used to be my experience lawyers would tend to stay in firms for years — maybe their entire career," he says. "These days, they change jobs more often, which complicates things in terms of conflict of interest."

Other ethics concerns can revolve around how attorneys promote their services or where they perform work, according to Janis Meyer, a Partner who is part of national law firm Hinshaw & Culbertson's Lawyers for the Profession practice group, which represents and advises lawyers and law firms on legal malpractice, ethics and professional responsibility, and other matters.

"Lawyers are concerned about regulatory requirements — for example, the unauthorized practice of law, the fact you need to be admitted in a state you're practicing in unless you are able to find exception to that rule — or attorney advertising rules," Meyer says. "Particularly smaller firms and firms that are advertising in each state sometimes don't realize there are differences in the rules."

Lawyers can also find themselves in a tricky situation if they take on projects they don't possess the appropriate experience and know-how to handle.

According to research published in the American Bar Association's *Law Practice* magazine, substantive errors comprise more than 46% of reported malpractice claims — with data indicating lawyers acting outside of their usual practice area are much more likely to fail to comprehend or correctly apply the law.

"Like all of us, attorneys don't necessarily know what they don't know. If they're not knowledgeable about a particular subject area, they may not even realize a tax issue arises for a particular transaction," Wertlieb says. "It takes a certain level of self-awareness to recognize perhaps I should take the advice of an expert in the area and maybe try to associate with another attorney who is experienced."

Cybersecurity has become more of a concern for firms. In fact, close to a quarter (23%) of the respondents in ABA's most recent annual technology survey reported their firm had experienced a data breach at some point, an increase from 2017 and 2016. As a result, firms' efforts to protect client and other data has also come into focus.

"In addition to cybersecurity, the rise of technology in general has changed legal practice," Meyer says. "For example, more lawyers are working from home: What are the ethical rules for that? How do you ensure lawyers are not engaging in the unauthorized practice of law? There are also employment law issues related to working remotely."

Local regulations could also come into play in regard to various issues. A recent California State Bar report, for instance, identified misuse of client funds as a component in as many as half of the state's disciplinary cases, according to Wertlieb.

Since November 2018, California attorneys and firms that ask for an upfront retainer to cover legal fees when taking on new business have been required to put the money into

a trust account that's kept separate from the firm's own operating funds, as the retainer is technically money that will be earned in the future.

Wertlieb suspects the regulation could cause confusion for some legal industry members in the state.

"There was no obligation [to do that] before," he says. "I have no doubt there are well-meaning, otherwise ethical and responsible attorneys who don't even have trust accounts because they didn't need them. And now, it's a requirement, and attorneys can be disciplined."

ETHICAL APPROACHES

Establishing thorough policies — outlining the way new matters should be opened, for example — can help firms identify and avoid ethical problems such as conflicts of interest.

For the practices to be effective, though, firms need to confirm that employees are aware such policies exist and understand them.

"It takes a certain level of self-awareness to recognize perhaps I should take the advice of an expert in the area and maybe try to associate with another attorney who is experienced."

"Law firms need to be sure people are getting proper training and that they know there is someone to come to and ask questions," Meyer says. "In addition to a firm's in-house programs, bar associations and other organizations offer training programs in particular subject areas [and] ethics and professional responsibility, as well as substantive law."

According to Meyer, some insurance carriers also provide access to a hotline where lawyers can get answers to questions or other resources to help them navigate ethical and compliance-related conditions — if, for example, they realize they missed the statute of limitations relating to a matter.

"In some cases, the insurance policy will include a provision for the firm to have an allowance for a risk management program," Meyer says. "I speak at firms on a fairly regular basis on ethics issues, and they get CLE credit for it. [Sometimes], the insurance company will pay for it as part of a policy. Insurers want their lawyers to be acting ethically because it's certainly within their interest."



Given the amount of detail that can be involved in ensuring compliance requirements are met, some firms have established an internal role — potentially a general counsel, risk manager or other position — that's dedicated to oversight and enforcement.

When the Dodd-Frank Wall Street Reform and Consumer Protection Act passed in 2010, vendors that work with banks were required to comply with consumer protection rules and laws. Firm Smith Debnam, which has locations in both Carolinas, knew, according to Managing Partner Jerry T. Myers, that its debt collection practice would need to review some of its practices to ensure they were compliant.

After initially trying to split up the work, the senior team members quickly realized they would benefit from bringing someone on board who was trained in regulatory compliance and auditing. As a result, the firm hired its first chief compliance officer.

"Over the course of probably a year, with a lot of hard work and input from a number of people, she put a good compliance management system in place," Myers says. "She helped us take what we had, make it more comprehensive and put it in an organizational structure so it became part of our institutional approach and part of our culture."

The system, Myers says, has helped the firm not only meet regulatory needs but also enhance how it serves clients.

"Nearly all our clients in the consumer collections practice group audit their files with us on some sort of recurring basis — some yearly, some several times a year," says Myers. "We are constantly having our work reviewed by clients. They're looking for fiscal security, data security, processes we follow, to make sure our communications with their customers meet all regulatory requirements — as well as the institution's own requirements, making sure customers are treated in respectful fashion and we're doing what we can to protect their brand."

“Once we had a compliance officer in place and the system up and running and could talk intelligently about what we were doing, we’ve found other clients were interested in that and looked at us more favorably.”

Some firms may be hesitant to add a similar role because it’ll likely be a nonrevenue-generating expense. But Myers says some could benefit from incorporating the position for more than just debt collection case-related needs.

“Once we had a compliance officer in place and the system up and running and could talk intelligently about what we were doing, we’ve found other clients were interested in that and looked at us more favorably,” he says. “If we were handling cases for them, they wouldn’t have to worry about compliance issues. It can provide a distinguishing feature for marketing and advertising, if you’re talking to clients in regulated industries.”

Meyer says that in the past two decades, the general counsel role at large firms has become a full-time job. However, she’s also seen 20-person firms employ a general counsel who practices but is also the person lawyers can go to with ethical and other questions. At large firms, there can be an office of the general counsel that involves a number of people working internally to handle ethics and risk management issues.

“As firms have gotten bigger, attorneys have realized that even though they are lawyers, they may need someone to advise them in respect to what their ethical responsibilities are,” she says.

If a team or dedicated individual in an oversight role isn’t an option, firms might be able to seek ethics and compliance advice from an external consultant — who, Meyer says, may have experience with the issue and can approach the situation impartially.

“Let’s say it’s a conflict of interest question and the general counsel or risk manager of the firm is being hounded because one partner really wants to take on a particular new matter,” she says. “If the general counsel thinks there’s a conflict, she can go to outside counsel — we don’t have any stake if they take on that business or not. That enables the firm to get objective advice.” ■

ABOUT THE AUTHOR

Erin Brereton is a freelance writer, editor and content strategist who has written about the legal industry, business, technology and other topics for 20 years.

 breretonerin@gmail.com

 twitter.com/erbrer09

 chicagojournalist.com



No-Cost WEBCASTS from the Solutions Series





ALA relies on its business partners to share solutions for pressing issues and hot topics in the legal industry as they work closely with legal management professionals. In these free webcasts — available live and on-demand — they pass along an abundance of knowledge.

Watch now! legalmarketplace.alanet.org/events