

LEGAL MANAGEMENT

MAY/JUNE 2008

VOLUME 27 | NUMBER 3

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Responsibilities in law firms are changing, so when it comes to client intake, conflicts checks, and records management, whose job is it?

Where do client intake, conflict checks, and records management fall within the law firm? Historically, accounting departments were responsible for these processes, which more specifically fell within the duties of the billing area. In some firms, these functions are handled by the records department.

But where should these processes fall within the firm? Given the complexity of current compliance standards, these functions are shifting to the responsibility of loss prevention teams. In this article, we will dissect this trend and discuss the necessary skill set for the team responsible for client intake, conflicts checks, and records management.

Shifting Roles



RISK ASSESSMENT

All too often, client intake and records management in law firms are considered by attorneys as bureaucratic processes that must be tolerated after a client has agreed to pursue a relationship with the firm. The motivation by attorneys to endure this process is precipitated by an understanding that in the end, they will have a valid client matter number to bill work against.

In many firms, the client intake process falls under the responsibility of the firm's finance and billing department. While some pieces of the client intake process may involve checking the credit worthiness of a client, the most important aspects of this process should be an assessment of any risk issues that may result if the firm accepts new matter representation. These risks necessitate that all potential new legal matters be vetted against a law firm's conflicts of interest system.

CONFLICT OF INTEREST

The conflicts system should be designed to ensure that all client matters opened by the firm can be managed in accordance with a lawyer's professional responsibility duties. The due diligence required to identify potential conflicts needs to be comprehensive enough to make certain that new client representations are not adverse to a firm's duty of loyalty to existing and former clients' interests. Failure to recognize potential conflicts before beginning work on a matter may breach an attorney's fiduciary and ethical responsibilities to clients and lead to costly malpractice claims. Firms that do not have an infrastructure with adequate internal control mechanisms to timely identify and resolve conflicts are putting themselves and their clients at risk.

To minimize risks associated with unidentified conflicts, the firm must dedicate resources to maintain integrity of data in conflicts databases. Firms that maintain clean data in conflicts systems can produce more meaningful conflicts reports because the information reported does not contain significant duplicate and inaccurate information making it easier for attorneys to analyze. Firms that do not have established policies to close inactive or settled matters are stuck managing inactive matter files. Potential conflict hits for former clients are not always analyzed the same as hits for current clients. The amount of data that needs to be reviewed may be significantly decreased with firms that regularly close matters. The resolution process a firm undertakes to resolve potential conflicts should be dictated by the firm's legal department or general counsel.

Business or issue conflicts will vary by firm and can be characterized in numerous ways. These conflicts might arise out of firm policies as to the type of legal matters they want to pursue. For example, if a firm wants to represent companies in employment law matters, that same firm may determine that accepting matter representations involving individual employee

grievance claims against a company poses a business conflict to the firm. If a firm has a substantial banking practice, it most likely will not accept a matter that involves filing suit against a bank. Issue conflicts often arise when there is a possibility that the outcome of one client's matter would adversely affect the interests of another firm client. The intake requirements must provide sufficient information for business and issue conflicts to be recognized by the staff reviewing potential new matters. This assumes that the firm has educated firm lawyers and staff on how to recognize these types of conflicts.

ATTORNEY/CLIENT AGREEMENTS

Some conflicts with clients arise from confusion by the client as to the services to be provided by the attorney and firm. These misunderstandings could be avoided if the firm had policies that required attorneys to document the scope of all new matter engagements with the client in the form of a written engagement letter signed by both the attorney and the client. While some firms require attorneys to send out engagement letters, many of these same firms fall short on policies to provide oversight to review that the signed engagement letter accurately communicates scope of the matter representation. To minimize confusion, there should be procedures to ensure that an engagement letter is acknowledged by the client and then sent back to firm. The engagement letter is a legal document reflecting an agreement between the law firm and the client. A law firm's legal department should work with a firm's records manager to provide oversight and direction to the attorneys as to how and where these records should be managed for future reference and protection.

Records are created for client matter representations from the time a client and attorney discuss a potential new matter. In a law firm, records management may be part of administration, facilities, legal, and occasionally the information technology departments. Regardless of where records fall within a firm's organizational structure, many of the decisions that will need to be made in managing client matter records should be reviewed for legal and risk issues. The firm's legal department and/or general counsel must be available to weigh in on records management decisions that have risk implications for the firm. It is equally important that the applications that are deployed and managed by the firm IT department are used in accordance with an understanding of the firm's risk management and compliance goals for managing client matter records and information.

GROWING FIRMS, GROWING PROBLEMS

Many law firms have grown through merging with other firms and through the recruiting of lateral attorneys. As these firms continue to increase in scope and size, there are greater opportunities for conflicts of interest that will need to be

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resolved. The fiduciary and ethical duties of an attorney can easily be compromised without adequate controls for protecting client confidentiality. Many firms only run conflicts reports for those matters that will be opened by the new firm. Firms will sometimes run conflict checks of a potential lateral's prior work history before making an offer of employment. Once the lateral attorney accepts the offer to join a new firm, only those matters that will become firm clients are maintained in the conflicts database. This is not an acceptable risk as a lateral attorney's prior work history may conflict with new firm clients. While some states allow firms to establish ethical screens to proactively restrict lateral attorneys from accessing client matter information to avoid imputed disqualification of a firm, most states do not accept screening alone as enough of a measure to avoid disqualification. It should be the responsibility of the firm's legal department or general counsel to educate the firm's intake department of their responsibilities for identifying, reporting, and resolving conflicts that often arise as a result of a merger or hiring of a lateral.

Firms often centralize the client intake function within the office that handles other core administrative duties such as billing and human resources. If the client intake function was established in accordance with the professional responsibility guidelines that govern the state in which the client intake department resides, the firm needs to reconsider these processes to reflect the firm's current geographical footprint. Prior to attorneys joining, the firms need to have mechanisms in place to establish screens and notify individuals affected by screens. To be effective, there must be technology in place to automatically enforce ethical screens across applications used by attorneys.

Policies surrounding what records or information lateral attorneys are allowed to bring into and load onto firm systems need to be evaluated in light of risk issues and fiduciary and ethical responsibilities to clients. Firms that allow attorneys to bring in non-client material and load that information onto firm systems are creating an environment that permits attorneys to breach their ethical responsibility for protecting client confidentiality. Firms need to establish policies for accepting and managing information and files that accompany a lateral. These policies need to be communicated to the departments and individuals responsible for managing records and information.

BE PREPARED

Recent headlines have underscored that courts are becoming less lenient with firms that cannot prove that they have policies and procedures to protect client interests and take care in managing their information. Corporate clients are demanding more of their outside firms and as a result will expect the firms that represent them will have an infrastructure in place to perform conflicts due diligence and manage their information. Firms without adequate controls in place to protect client information are at risk for malpractice claims from clients and untold financial losses.

about the author

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