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Law Firm Compliance: An Apologia From the Experts

by Kelly L. Faglioni

In Sue Reisinger's recent article, "Looking for Top Law Firms' Compliance Programs," Corporate Counsel questioned whether law firms measure up in terms of compliance programs, a staple of their corporate counterparts. With quotes suggesting that law firms are behind the curve or less formalistic in approach, the article invites law firms to "toot their own horns." Horns aside, many differences in law firms' approach to "compliance" from that of the business world may be more of nomenclature and perspective. Other differences may grow out of the unique resources law firms possess—that is, lawyers—and the challenges they face.

Compliance professionals tout a "code of ethics" as the cornerstone of a robust ethics program. Far from being behind the curve, lawyers train to, test to, and take an oath to uphold the applicable rules of professional responsibility as a condition to licensure and entering practice. Partners, lawyers with comparable managerial authority, and lawyers with direct supervisory authority must make reasonable efforts to assure that lawyers and non-lawyers in the firm conform to the applicable Rules of Professional Conduct. This is true, and well understood, whether or not lawyers call it "compliance."

Law firms do not rest on the professional rules alone. Firms supplement with policies, some that may reflect issues unique to law firms—e.g., changing offices relative to jurisdiction of licensure—and others that reflect issues shared in common with corporate counterparts—e.g., policies against harassment and discrimination or gifts. According to the "2012 Law Firm Risk Survey," produced by the Law Firm Risk Roundtable, 84 percent of responding firms report having risk management policies.

But as the rules require—and as conversations with any number of lawyers practicing in medium to large firms will confirm by complaint of bureaucracy—there also are systems and procedures meant to assure conformance to the "code of ethics" as well as firm policies. Such systems and procedures likely address the following, among others: unauthorized practice of law, business intake, conflicts, accounting, records, docket, document management and records (including transfers, litigation holds, and response to subpoenas), screening (or "firewalls"), marketing, recruiting, investments, human resources issues, and information and physical security.

Training and education come in a variety of forms, often including orientation programs, internal firm publications, and internal and external CLE's. About 78 percent of firms responding to the 2012 Law Firm Risk Survey report having a process to communicate policies to lawyers and staff. One-on-one counseling and education is a vital component as well. This is partly because

of the duty to supervise set out in the professional rules—Rules 5.1 and 5.3—but also because of requests for intervention or assistance on an issue-specific basis (e.g., a “conflicts” partner).

When it comes to enforcement and accountability, law firms parallel their business counterparts with reporting mechanisms, internal investigation procedures, and review processes. But law firms get some added help: Clients, opposing lawyers or adversaries, and courts can all participate in reporting conduct to the governing state bar, which may investigate and take action independent of the law firm. Professional liability carriers have long been active in scrutinizing the practices of lawyers and firms, and clients are increasingly likely to directly dictate their own set of “ethics codes” to their lawyers as they might with other vendors.

But compliance with the rules of professional responsibility present lawyers with unique challenges that defy reduction to policies and procedures. A lawyer is both a fiduciary to a client as well as an officer of the court, giving rise to potentially conflicting responsibilities in any given situation. The preamble to the Model Rules of Professional Responsibility recognizes these potentially competing responsibilities:

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and public citizen having special responsibility for the quality of justice.”

(Comment 1 of Preamble to ABA Model Rules)

“In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.” (Comment 9 of Preamble to ABA Model Rules)

For example, a lawyer’s duty to keep information confidential gives way, in some circumstances, to a lawyer’s duty of honesty and candor to the court and to third parties. This dynamic underscores the importance of ensuring that a law firm ethics program brings a set of relatively independent eyes to the table to sort through application of rules and policies to particular circumstances.

While a “compliance officer” is a critical component to a compliance program, the underlying purpose is to have a point of responsibility and clear visibility about that responsibility. Although titles vary, law firms have become more like their business counterparts in formally recognizing the substantive function, though perhaps styling it general counsel, risk management partner, ethics partner, loss prevention partner, including “compliance officer,” or by a specially designated committee (e.g., investments committee).

Within law firms, there are any number of lawyers with issue-specific knowledge and experience. This may include focus and experience in ethics, conflicts, Sarbanes-Oxley, privilege, privacy, etc. For many reasons, including training and practice, lawyers tend to apply law (ethics codes, standards, policies, procedures, etc.) to facts. As a result, lawyers’ tendency to put the “go to” lawyer or lawyers together with the issue either proactively or when an issue arises may look like a “less formalistic” or “less centralized” approach to outsiders. But putting together the right “team” to fit the issue is how lawyers practice for clients. It should come as no surprise if they then practice in that manner for themselves.

That this looks a little different than more typical corporate compliance programs may be a difference, but not one that reflects a lack of focus on or commitment to creating an ethical culture.

Kelly L. Faglioni is a litigation partner at the law firm of Hunton & Williams, where she also serves as deputy general counsel. In the latter capacity, she participates in various roundtable groups consisting of law firm professionals who focus on law firm ethics and risk management issues. The views reflected herein are her own.