

# The Changing Regulatory Landscape And Its Effect on Law Firms

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# Topics Covered Today

- What is lawyer regulation?
- Who is regulating lawyers?
- What trends exist in lawyer regulation?
- What are some “hot” regulatory areas?
- How will law firms respond to greater regulation?
- What is a model for law firm compliance?
- Throughout – What is the impact of lawyer regulation on the Technology Department?

# What Is Lawyer Regulation?

- Lawyer regulation broadly includes all rules that attorneys must follow in the practice of law.
- Lawyer regulation comes from many different places:
  - Ethics rules
  - Statutes and regulations
  - Court and bar rules
  - Contracts

# Who is Seeking to Regulate Lawyers?

- Those seeking to regulate lawyers and the practice of law continues to increase:
  - Lawyers themselves
  - State and federal courts
  - State bar associations
  - State and federal legislatures and agencies
  - Clients

# Why Is There A Trend Toward More Lawyer Regulation?

- Some explanations for increased lawyer regulation include:
  - Inadequacies of lawyer self-regulation
  - Power struggle between state and federal government
  - Current economic conditions
  - View of lawyers as service providers
  - Globalization of legal practice
  - Others

# What Are Some Hot/Emerging Areas in Lawyer Regulation?



- Data Security and Privacy
- Federal and State Ethics Laws
- Client Requirements
- Attorney Advertising
- Social Networking
- Attorney Licensure
- International Issues
- Others

# State Data Security and Privacy Laws



- Lawyers have an ethical duty to protect confidential client data.
- States have taken further steps in efforts to protect personally identifiable information (“PII”):
  - Majority of states now have breach notification laws
  - Some states have gone further to prescribe data security standards

# One New State Data Privacy Law

- Massachusetts Information Security Regulations (201 CMR 17.00) took effect on March 1, 2010.
  - Applies to all entities with personal information of Massachusetts residents
  - Requirements include:
    - A comprehensive written information and security program
    - Specific computer information security requirements

# A Federal Privacy Law Impacting Law Firms



- Health Insurance Portability and Accountability Act (“HIPAA”), as amended by the Health Information Technology for Economic and Clinical Health Act (“HITECH”)
  - Privacy and security regulations regarding protected health information (“PHI”)
  - If business associates to covered entity clients, law firms now are directly subject to certain HIPAA requirements, as well as criminal and civil penalties

# Failed Federal Attempts to Govern Lawyers



- **Graham-Leach-Bliley Act**
  - Contains extensive privacy protection provisions that apply to “financial institutions”
  - FTC’s attempt to extend such requirements directly to practicing lawyers failed (ABA v. FTC, 430 F.3d 457 (D.C. Cir. 2005))

# Failed Federal Attempts to Govern Lawyers



- Red Flags Rule
  - Established by the FTC under the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”)
  - Enforcement delayed several times
  - Will require “creditors” to develop programs identifying, detecting, and responding to the warning signs (i.e. red flags) of identity theft
  - District court has enjoined application of Red Flags Rule to lawyers (ABA v. FTC, 671 F. Supp. 2d 64 (D.D.C. 2009)). FTC has appealed; briefing to conclude this fall.

# Federal and State Ethics Laws

- Honest Leadership and Open Government Act of 2007 (“HLOGA”)
  - Law firms that employ lobbyists must file bi-annual LD-203 reports that:
    - Disclose certain contributions involving federal covered officials
    - Certify that no “gifts” were given to members, employees, or officers of the U.S. Congress
- Gift Laws
  - Limit items of value that can be provided to government officials, even by non-lobbyists

# State Ethics Laws (Pay-to-Play)

- Colorado Amendment 54
  - Sought to limit political contributions by sole source contractors (and their immediate family members)
  - Struck down as unconstitutional (*Dallman v. Ritter*, Case No. 09SA224, (Colo. 2010))
- Illinois Public Act 95-0971
  - Requires state contractors to register with the Illinois State Board of Elections
  - Prohibits certain political contributions; requires notice for permissible contributions

# Client-Driven Issues

- Requests For Proposals, Outside Counsel Guidelines, and Client Engagement Letters often contain unique client-specific requirements attorneys must follow.
- There also are numerous obligations for attorneys who contract to provide legal services to the government:
  - Federal Acquisition Regulations
  - State Procurement Codes

# Attorney Advertising

- Attorney advertising is governed largely by ethics/state bar rules, which vary widely.
- Some states highly regulate attorney advertising. For example, Florida has delayed implementation of online advertising rules that could:
  - Treat lawyer websites as lawyer-solicited communications
  - Require certain disclaimers/pop-up boxes when accessing lawyer websites

# Social Networking

- Lawyers increasingly use social networking tools such as LinkedIn, Facebook, LegalOnRamp, Twitter, blogs, etc.
- Lawyer ethics rules (including attorney advertising, confidentiality requirements, etc.) apply to lawyers' social networking activities.
- Social networking policies can help lawyers and firms avoid ethical violations and other adverse consequences.

# Attorney Licensure

- Attorneys get licensed by respective states (following bar exams, diploma privilege, waiving in, etc.).
- Multi-jurisdictional practice is common. This can create issues for attorneys representing clients in states they are not licensed in.
- States seem to be increasingly focused on unauthorized practice of law issues.

# International Issues

- U.S. Foreign Corrupt Practices Act (“FCPA”)
  - Generally prohibits payments to foreign government officials in order to obtain or keep business
- Specially Designated Nationals (“SDN”) List
  - The U.S. Treasury Department’s Office of Foreign Asset Control (“OFAC”) lists prohibited individuals and entities on the SDN list.
  - Lawyers can accept payment from an SDN only if they first obtain a license from OFAC.

# International Issues

- UK Anti-Money Laundering and Know Your Client Rules
  - Generally apply to UK lawyers assisting clients in certain transactions
  - Require firms to undertake customer due diligence, which includes verifying a client's identity on the basis of documents, etc. from a reliable and independent source

# Other Considerations

- Insider trading lists
- Audit letters
- Opinion practice
- Document holds
- Specific practice-related rules (Sarbanes Oxley, Circular 230, etc.)
- Continuing legal education requirements
- Lobbying reports
- Etc.

# How Will Law Firms Respond To The Regulatory Challenge?



- Firms need to be aware of emerging legal, ethical, and contractual requirements
- Specialized staff to manage and ensure compliance
- Processes and systems to support compliance

# A Proposed Model To Ensure Compliance



- New role – Compliance Counsel – a lawyer who works for the firm
- Helps build compliant processes
  - Consults with stakeholders in the firm about regulatory and other compliance issues
  - Works with Technology Department to identify and deploy technology solutions
- Helps provide training
- Documents the firm's processes and compliance efforts
  - Recordkeeping is critical
  - Be prepared in case of audit

# How Will The Regulatory Environment Affect Firm Technologists?

- Greater need to partner and collaborate with firm loss prevention or compliance department regarding:
  - Data protection
  - Security protocols
  - Systems to aid/support compliance processes

# Questions?

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