

MERIDIUS MATTERS

Risk Management in Review



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On risk management, ethics and professional responsibility trends facing the legal industry — client pressures, conflicts challenges and response strategies.

A blue-tinted background image showing a hand placing a block on a row of standing blocks, symbolizing risk management. The blocks are light blue and arranged in a row on a dark surface. The hand is positioned over the blocks, with one block being placed on top of the others.

Bill, thanks again for taking the time to chat. I'm really excited to catch up with you and talk about risk. You have really illuminated a lot of issues for me over the years and I'm curious to hear what's on your mind as we enter a new year.

But first let me ask you to introduce yourself and share a bit of your personal story for our readers. I think it will be interesting to many to understand not just your qualifications, but the path you took and the hats you've worn in the risk management arena.

Sure. I graduated law school in 1965 and for the next 20 some years had an active trial practice. In 1988, I joined ALAS, a captive insurance company owned by several hundred large law firms, doing loss prevention and risk management. I was there for twelve years, later worked independently as an ethics advisor. Along the way, I did a four year stint doing similar work at Aon, an insurance broker.

When I started to focus on these issues at ALAS, I was working for Bob O'Malley, who was formerly a partner at Covington & Burling. Bob emphasized on day one the importance of the ethics rules in law firm risk management. I started a crash course, immersing myself in the ethics rules including the Model Rules of Professional Conduct and the older ABA Model Code of Professional Responsibility.

And I learned very, very quickly in talking to law firms about their problems how critical an understanding of those ethics rules was. Because if a firm is going to run afoul of a rule, it's almost guaranteed to be an issue in a liability context.

Over my 12 years at ALAS, I talked to many law firms repeatedly about not just avoiding claims and risks, but also just general ethics advice as to how to navigate a variety of situations and scenarios.

Did you observe changes in how firms thought about and responded to risk and professional responsibility issues?

Yes. During that time the larger law firms were developing in-house capabilities to do these analyses themselves, relying on ALAS as a backup. My role was often to review and comment on their own analyses of problems or issues, which meant it was critical I kept up with the developments in the ethics world, including opinions, cases, amendments to the rules and so forth, which I continue to do.

Over the years, my work as an independent consultant and with Aon, including advising many of the largest law firms in the world, have helped me develop significant additional context and perspective.

Bill on FreivogelOnConflicts.com

Well, I worked in a slightly smaller law firm once upon a time, so you and I only really crossed paths when I discovered your website, FreivogelOnConflicts.com, in the mid-2000s.

Yes. I've done a lot of writing on ethics and loss prevention and actually started that site in 2000, originally focused on conflicts of interest. But its scope has grown over the years. I'd estimate there are about 750 pages worth of content now on [Freivogel on Conflicts](http://FreivogelOnConflicts.com), and it keeps growing. I typically update it several times a week.

I also include Canadian cases, and the occasional UK case which helps illustrate the development of the conflicts rules. The conflicts rules really are quite similar across the English speaking world.

Well, I'd be remiss if I didn't take just a moment to thank you for all your work on the site, on behalf of myself and your other readers. You've done truly valuable and unique work surfacing so much rich information over the years.

I just imagine you constantly reading and devouring decisions and updates and all manner of information to be able to produce it all. It really is a tremendous resource for the community.

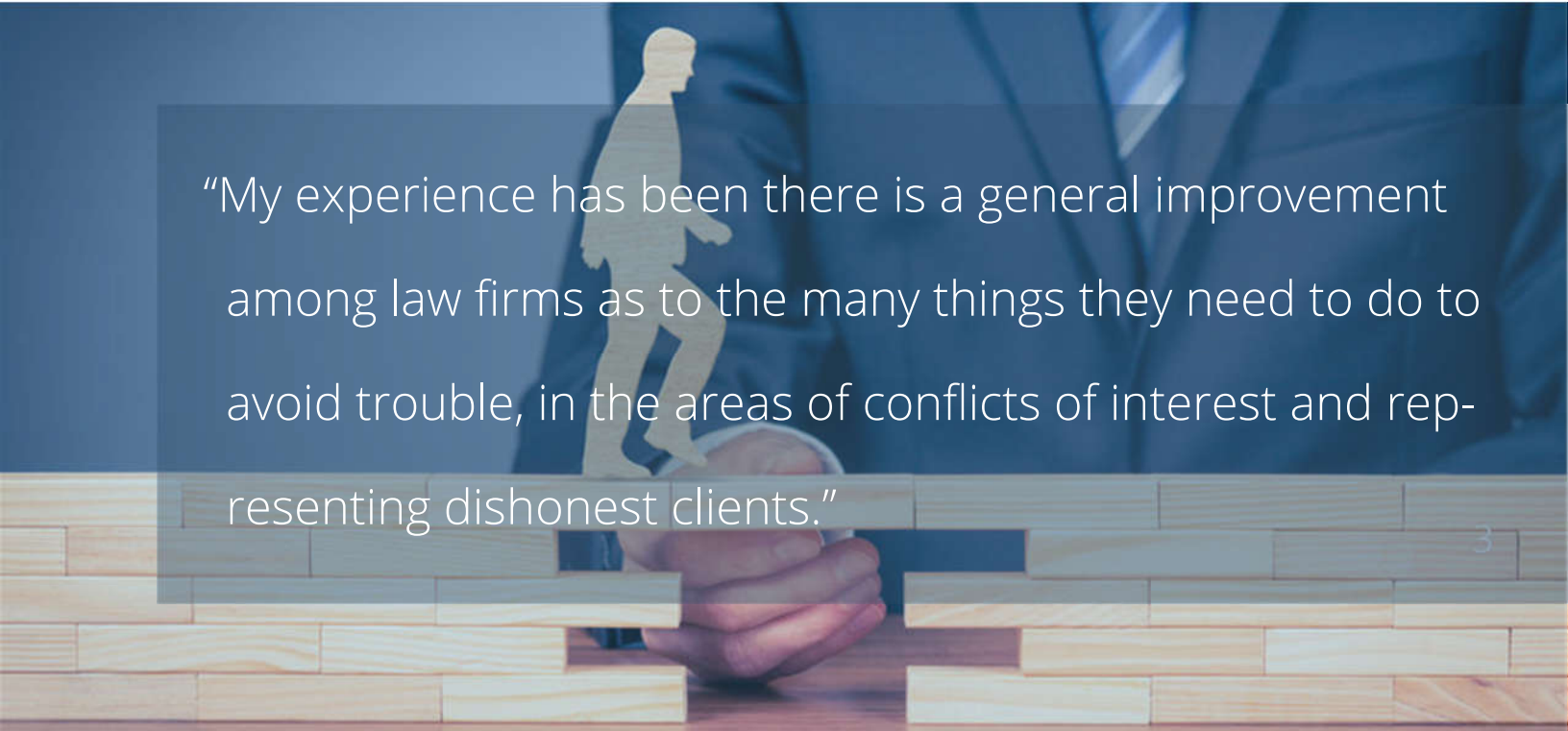
I appreciate that very much. And I confess I do pay attention to my readership statistics, which you may find interesting. Over the course of 2018, my average readership was more than 400 unique daily visitors, accessing about 700 pages of content per day.

It's fascinating to see a little bit behind the curtain. And it makes me feel a little less alone, canvassing your "What's New" page.

The Risk Landscape Today

You mentioned 2018. I want to ask you about your perspective on the major issues, developments of notes across the risk, ethics and loss prevention landscape, looking back over the past year. What are the things that you noted as important — or even perhaps surprising, or not so surprising but expected — over the past year?

Over the past few years, my work has been mostly with large general practice firms with big business practices. What we're seeing, and a lot of it I get from talking to people in my network, is that the very best firms are making more mistakes.



"My experience has been there is a general improvement among law firms as to the many things they need to do to avoid trouble, in the areas of conflicts of interest and representing dishonest clients."

They're under pressure to do more. They're under budgeting pressures. The corporate world is constantly tightening the screws on what the firms can bill for. They put limits on how much you can bill for an associate, for example, or even billing for first-year people. That sort of thing.

At the same time, business has improved since the Great Recession, so there's often actually more work to be done. And all of these factors have added up to seeing a few more mistakes.

Sometimes those are just plain missing deadlines, leaving paragraphs out of important deal documents, that sort of thing. But that hadn't been the case for most of the 30-some years I've been doing this work.

The bigger firms were largely clean of simple mistakes, but that's changed a bit. That's the one I'd note as a surprise. But in hindsight, we should have predicted it.

Of course, another trend is tied to bad clients.

I'd throw in with client fraud the tax shelter cases, because there, the client really was the accounting firm that was referring the business to the law firms. Those deals turned out to be fraudulent. The IRS cracked down, and a number of taxpayers have sued their law firms for getting them into fraudulent tax shelters.

The most obvious cases of client fraud were where the law firm represented the issuers of securities and the issuers made misrepresentations in the offering documents and so forth. Those result in securities fraud cases, and the law firms are frequently joined in those cases.

Client fraud has always been big. And in my work in loss prevention and risk management, it's been the hardest thing to deal with.

For years, I could stand in a room full of very competent business lawyers and say: "You'd better watch out what your client is doing because you could get into trouble." They'd look at me like I was crazy.

Well, gradually over the years, and more recently, we're seeing new matter intake evolve, including client background.

Traditionally, as part of new matter intake process firms would look at two things. First, is there a conflict of interest? Second, can this client pay our fees?

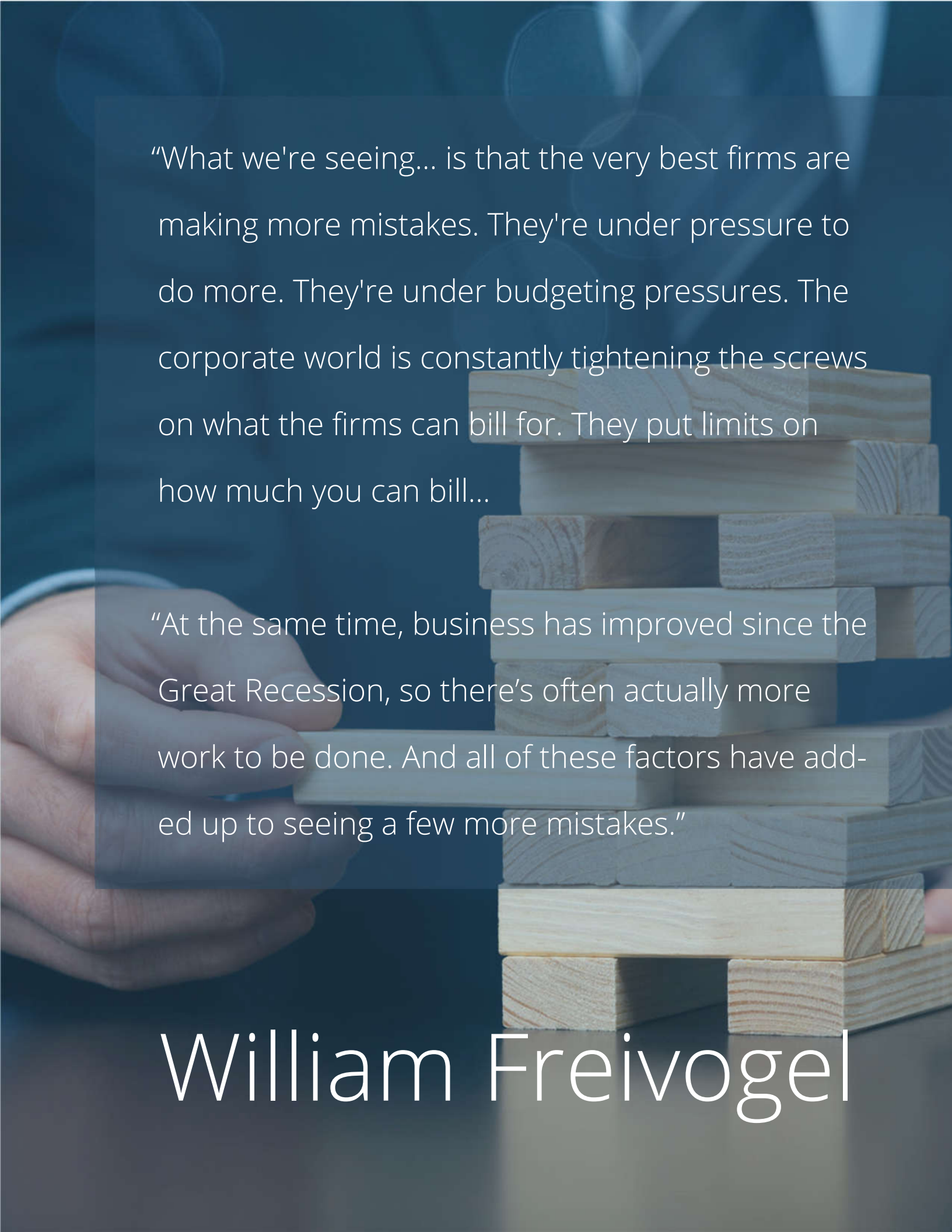
Increasingly now, the new client intake process is expanding. Dan, I think your past work at Intapp would bear this out —increasingly, law firms are now looking at backgrounds of their business clients to see if they're bad people or not.

Client Selection Matters

Can you share more about that?

Well, we've always seen cases of larger firms dealing with client fraud. That's always been a big item. It's definitely worth noting.

There aren't a lot of those cases. There have been about 60 cases of \$20 million or more in verdicts and settlements. The biggest cases have gone north of \$100 million to \$200 million. Some 80% of all that was client fraud.

A hand is shown from the left, carefully placing a light-colored wooden block onto a stack of several other similar blocks. The blocks are stacked in a slightly irregular, tower-like structure. The background is a dark, blurred blue, suggesting an office or professional setting. The overall mood is one of precision and pressure.

“What we're seeing... is that the very best firms are making more mistakes. They're under pressure to do more. They're under budgeting pressures. The corporate world is constantly tightening the screws on what the firms can bill for. They put limits on how much you can bill...

“At the same time, business has improved since the Great Recession, so there's often actually more work to be done. And all of these factors have added up to seeing a few more mistakes.”

William Freivogel

Yes, I would definitely agree with that trend. In fact, I'd propose a corollary to the "bad actor" client consideration. And that's the possibility of the client creating reputation risk for the firm, beyond professional liability.

Over the past year I've seen increasing mentions of brand name firms in the general media, associated with controversial representation of business and even state actors. I wonder if that's just for the course or if that's a risk that folks are paying closer attention to.

Well, it's a combination of things. But I think people are really now wising up. For example, Skadden has been in the news extensively for work it did for the government of Ukraine. I believe it just came out that they agreed to pay \$4.6 million as part of a settlement with the Justice Department based on work they did with Paul Manafort.


Is there anything surprising that you read about — either general news or a specific decision — that made you raise an eyebrow in 2018?

Well, I confess that sometimes the fun ones are the conflicts of interest cases that get a lot of publicity where a firm should have known that it was on thin ice, conflicts wise. And then they end up falling through that ice — which means getting disqualified or sued.

Those generate a lot of publicity and multiple court opinions and criticisms by the judges pointing out that that they really should've known better.

They knew darn well that that client was going to be on the other side of something. Maybe they had a weak advance waiver agreement, or a firm drops one client in order to take on a matter adverse to that client — the "hot potato" gambit.

I see those happening quite a bit, and they're always interesting.



"[I]t's critical to ensure the quality of the people charged with things like intake [and] conflicts... Make sure that they're good people. That they're adequately compensated. And that they have and are using all the facilities at their disposal to check backgrounds and financial health of new clients."

Investing in Risk — The ROI

Do you see firms making efforts to try to address all of this better? There's an obvious pain when it happens. They take a PR hit. They may suffer greater scrutiny by their insurers.

Are they trying to do better? And does firm management understand the value of investing in risk management?

My experience has been there is a general improvement among law firms as to the many things they need to do to avoid trouble, in the areas of conflicts of interest and representing dishonest clients.

I think, generally speaking, they're getting better in terms of sniffing out new client backgrounds, for example, that sort of thing.

In terms of avoiding conflicts, the larger firms now have good experienced people who really know the conflicts rules. Increasingly, those people have the attention of the rainmakers in the firm, and command more attention and respect.

Conflicts has become more of a profession now. I know some very fine lawyers who do this for large law firms. And they have large staffs that help them, including other lawyers.

Every now and then, some firm will have a new executive committee chair who will want to emphasize money and bringing in more and more revenue. And they get, you could say, frustrated by the people who are always discouraging the firm from taking on risky cases.

But I wouldn't say it's common today for management to want to just push aside any concerns about ethics to get the business in the door.

Evolving Risk Management

I appreciate your optimistic sense of the continuing evolution of the risk profession. And I'm curious about what New Year's resolutions you might suggest for the profession and the industry.

What advice would you give to firms in terms of thinking about and investing in risk, ethics and loss prevention in 2019?

I just think it's critical to ensure the quality of the people charged with things like intake, conflicts checking and analysis. Make sure that they're good people. That they're adequately compensated. And that they have and are using all the facilities at their disposal to check backgrounds and financial health of new clients.

We're seeing more about firms bringing greater centralization to the way they staff and manage intake — not just for new clients but also for new matters.

I've always felt that the conflicts checking must be centralized. There has to be one person under whom all conflicts checking occurs throughout the firm regardless of country, regardless of location of offices. There really is no good reason the firm should not have a centralized conflicts checking system applying to everybody globally in the entire firm. Everything should go through it.

There was a firm that was involved in, I think, a patent infringement case in Delaware. As it turned out, one of its European offices was doing labor work for the company on other side of the patent case.

That caused a big storm, a lot of litigation over whether or not they should be disqualified and so forth. I'm sure that resulted from the non-central nature of the way they were doing their conflicts checking.

Some firms vary their conflicts process and who can clear conflicts based on whether it's an entirely new client or just a new matter. How do you feel about that?

I observed that, but I don't agree with it. I think that new matters for existing clients require almost the same level of scrutiny as when it is a new client. There are all sorts of reasons for that.

Other Trends & Concerns of Note

Is there anything else you'd mention in terms of risk trends and concerns you'd pay special attention to in 2019?

Well, I read a wonderful interview you did with Anthony Davis, a partner at Hinshaw and Culbertson who is really a premier expert in this arena. And I'd share his concern about outside counsel guidelines as a nagging problem.

That's always going to be an issue, and there's no quick fix. There's no magic bullet to dealing with unreasonable demands of corporate clients to enter into agreements, to do things that you really ought

not to be doing. I just won't go any further on that.

Data protection is also huge now, as you well know.

And, of course, artificial intelligence is rearing its head now in many different contexts and raising new questions.

One other trend I'd note is, in the conflicts area, the acceptance of screening in the context of imputation. That is, the battle as to whether or not when a lawyer changes firms he'll contaminate the new firm with what he learned at the old firm.

An increasing number of jurisdictions now allow ethical screens to avoid a conflict. Importantly, California has a new set of ethics rules which came into effect in November 2018, which are now patterned after the AB Model Rules. They adopted a screening rule as part of that, which is a major development.

The other thing I've noticed is in the conflict area is changes regarding what I call "no harm, no foul." Those are cases where there was a conflict, but the court said no one has been harmed. And it would be very expensive to force a client to change lawyers. We are seeing more of that.

I used to have just a small paragraph on this on my website, and it's expanded into a page or two of cases. One might guess that judges might have their own interest in avoiding disqualification, so the case progresses.

I'll try not to make a comment about potential judicial conflicts. I'll wrap up before we get into too much trouble.

Bill, I wanted to thank you again for sharing your story and perspective. It was great to catch up on the record about risk today. It's always interesting to hear from you and to read your work online. I definitely appreciate it.

And, I'd note that I'm not the only one — I see that you were recently honored by the New York State Bar Association.

Yes, they gave me an award last year for my work in legal ethics. It's only one bar association, but it is a big one. So I'm very proud and honored. Plus, it was my first award since I was elected Best Boy Citizen at Danville High School about 60 years ago.

And thank you, Dan. I very much enjoyed the chat. 

Bill accepts a well-deserved award from the New York Bar Association:



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About

Meridius Matters is a publication of Meridius LLC.

Led by seasoned technology and legal industry veteran Dan Bressler, Meridius works with a diverse set of organizations, focusing on helping law firms respond to evolving market pressures to improve the success of their own clients.



Dan Bressler