Dealing with Client Outside Counsel Guidelines and Other Non-Standard Client Engagement Terms

by Gilda T. Russell[1]

I. Introduction.

In the last decade, law firms have seen a proliferation in numbers and breadth of coverage of client outside counsel guidelines ("OCG") and other non-standard client engagement terms ("client terms"). Such OCG and client terms are now utilized by a wide range of clients, including business and financial institutions, federal, state and local governments and agencies, health care organizations, defense contractors, and even non-profit groups. OCG and client terms cover a large number of subjects and demonstrate attempts by organizational clients and their in-house law departments to maintain control over and loyalty from outside counsel through various restrictions and obligations.

Yet, OCG and client terms can cause enormous problems for law firms -- however large or small the firms -- given the obligations they create, many of which may be adverse to law firm policies, more restrictive than professional ethics rules, designed for other types of businesses than law firms, in conflict with professional liability policies, and/or unduly burdensome. Accepting OCG and client terms without a clear understanding and assessment of the many obligations they impose can result in subsequent breach of contract and malpractice claims, disqualification motions based on conflicts of interest, exposure to potential civil and criminal penalties at least in the government representation context, and loss of client business.

Consequently, firms should develop effective processes for dealing with OCG and client terms. These processes should focus on monitoring the avenues by which OCG and client terms come into firms as well as requiring review and approval of OCG and client terms by designated persons well versed in the subject matter of the provisions and related compliance issues. Given that the subject matter of OCG and client terms is wide ranging and likely beyond the expertise of any one person, a team of persons in any given firm is likely best suited to review OCG and client terms. Once review has taken place, client relationship personnel should, where possible, attempt to negotiate problematic provisions with clients. Firm processes should also allow for affected firm personnel to seek approval from firm Management of provisions which run afoul of firm policies but which provisions clients will not change. Finally, law firms should adopt as policies the processes for dealing with OCG and client terms and publicize and uniformly enforce the same.

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II. Law Firms Should Monitor the Avenues by which OCG and Client Terms Come Into Firms and Require their Review and Approval by Designated Persons.

OCG and client terms come into firms in a variety of ways, each of which should be monitored. Most often, firm personnel receive OCG and client terms, including requests for proposals (RFPs), in the context of potential new and/or continuing representations. Such personnel may be firm partners, associates, counsel, or they may not be lawyers at all but, rather, staff policy advisors, lobbyists or other non-lawyer professionals.

Thus, given that firm personnel receive OCG and client terms in the context of new or continuing representations, firm processes should be designed to require review and approval of provisions by designated persons outside the client relationship chain *before new matters can be opened, ongoing matters continued, or responses to RFPs filed*.

Another way OCG and client terms enter firms is through Accounting Departments. Such entry often bypasses the lawyers and non-lawyer professionals who are responsible for the particular client matters. Clients, or clients in-house billing or legal staffs, may send OCG and client terms directly to firm Accounting Departments with the directives that they must be signed off on, usually electronically, before clients will pay for legal work.

Consequently, as with new and continuing matters, firm processes should require that firm Accounting Departments submit all OCG and client terms to designated persons for review and approval *before they are accepted by Accounting Departments by electronic firm signature or otherwise.*

An additional way in which OCG and client terms come into firms is through the hiring of lateral lawyers and non-lawyer professional staff who may have client engagements being brought to the new firm under OCG and client terms. Thus, firms should utilize due diligence questionnaires and discussions with potential laterals to inquire whether matters proposed to be brought to the firm are subject to OCG or client terms. If so, potential laterals should be asked to submit the OCG and client terms to the hiring firms for review. Should there be issues with the OCG or client terms, hiring firms should request that lateral candidates attempt to negotiate out of the problematic terms. *As a result, laterals should not be allowed to cross the threshold of hiring law firms until all questions concerning OCG and client terms have been resolved.*

Thus, effective law firm processes will monitor the avenues by which OCG and client terms including RFPs find their way into firms, require the review and approval of OCG and client terms by designated persons, prohibit matters from being opened, continued, or accepted under OCG or client terms until they are reviewed and

approved, and not allow lateral candidates to cross firm thresholds until OCG and client terms are fully vetted and accepted.

III. Designated Persons Who Review OCG and Client Terms Should Be Well Versed in Their Subject Matter and Compliance Issues Associated with Potentially Problematic Provisions.

Effective firm processes for dealing with OCG and client terms will require their review and approval by designated persons who are well versed in their subject matter and compliance issues associated with potentially problematic provisions. The myriad of provisions contained in OCG and client terms including RFPs encompass a wide range of subject matter likely beyond the expertise of any one firm lawyer or non-lawyer professional. As such, a team should be assigned who has responsibility for review and analysis of OCG and client terms and possesses the necessary expertise.

There are several types of reoccurring potentially problematic provisions in OCG and client terms, the majority of which can be generally categorized as Client Identification, Client Loyalty, Housekeeping, and Government Obligation provisions, which require expert analysis and raise compliance issues. These provisions and the compliance issues they raise are discussed below.

A. Client Identification Provisions.

Client Identification provisions define the client for purposes of law firm representations. An organizational client may be defined as the specific entity alone or the entity together with some or all of its affiliates. In the context of government agency representations, the client may be identified as the government agency alone or the larger government body (e.g., the Federal Government, a State, or local Municipality). However, firm policy, in line with professional ethics rules, may envision a much more limited concept of the "client". For example, firm policy may provide that, when a firm represents an organizational client, it represents only that entity and not the entity's affiliates. In the government context, firm policy, also in line with ethics rules, may provide that when a firm represents a governmental agency, it represents that agency alone and not the entire governmental body. A very broad definition of an organizational client can create significant conflicts of interest problems for law firms, particularly for large clients with numerous corporate family members. Agreeing to treat affiliates as "clients" of the firm cannot only foreclose future representations adverse to these "clients" that professional ethics rules would otherwise allow, but can also create disqualifying conflicts in existing representations that may not be identified as part of the intake process. Thus, careful attention to Client Identification provisions is essential. Lawyers in firm Legal Departments or General Counsel offices are likely to have the expertise required to effectively analyze Client Identification provisions in light of the compliance issues they raise.

B. Client Loyalty Provisions.

Client Loyalty provisions most often include requirements dealing with Exclusive Representation and Competitors, Conflicts of Interest, and Confidentiality. Exclusive Representation and Competitors provisions may prohibit firms from representing clients' competitors and/or contain obligations to exclusively represent clients (and not their competitors). Such prohibitions and obligations may be directly adverse to firm policies. In addition, such provisions may not actually identify client competitors and leave it up to firms to determine who the competitors are, making it extremely difficult for firms to adhere to such provisions. In the face of Client Loyalty provisions, firms may try to negotiate the provisions so that they end up being of more limited scope. For example, firms may be able to negotiate with clients less restrictive Competitors provisions that prohibit the representation of clients' competitors only in the practice area(s) in which the firm represents the client. Where the competitive significance of information disclosed to the firm (e.g., the Coca-Cola formula) creates such a high risk of harm to the client if the information is used for the benefit of a competitor, the client may not be able to accept the firm's representation of competitors even with the protection of ethical obligations of confidentiality, prohibitions of in-firm disclosure of information through ethics walls, etc.

Confidentiality provisions also may be more restrictive than both firm policy and applicable ethics rules. And, in the context of certain types of industry representations such as that of health care organizations, Confidentiality provisions will contain very strict mandates required by federal or state law, such as HIPPA, that imposes strict confidentiality standards. Firms may have difficulty in accepting restrictive Confidentiality requirements because of the extra burdens they impose and difficulties of enforcement. This is particularly true as to Confidentiality provisions prohibiting use of client names without client consent. In large law firms, it may be hard to police whether individual lawyers or staff professionals have obtained client consent before using client names in marketing materials such as in responses to RFPs.

Conflicts of Interest provisions may define conflicts in much broader terms than provided under applicable ethics rules and may also include positional conflicts in such expansive definitions thereby unduly restricting the firms' lawyers' rights to practice. And, with regard to positional conflicts, large firms may have no means to identify whether lawyers or non-lawyer professionals may be taking positions in the representation of other clients which may be adverse to positions held by the clients who have included positional conflicts provisions in their OCG or client terms.

Lawyers in law firm Management as well as firm Legal Departments and General Counsel offices are likely best suited to analyze Client Loyalty provisions. And, in

specialized practice areas, such as representation of health care organizations, lawyers with particular expertise in such areas should be consulted with regard to any heightened requirements.

C. Insurance and Indemnification.

Another category of commonly reoccurring provisions that raise compliance issues is that of Insurance which often includes not only Insurance requirements but also Indemnification provisions. It is difficult to understand why these provisions, particularly those that are very expansive and cover numerous types of insurances and high coverage amounts, are included in OCG and client terms regarding legal representations. Indeed, such provisions seem more applicable to contractors and vendors whose activities in construction and product design and development could lead to potential significant liability claims against clients. Nonetheless, Insurance and Indemnification provisions have found their way into OCG and client terms required of law firms.

Insurance provisions create many issues for firms. Such provisions are likely to include General Liability and Professional Liability Insurance requirements, as well as other requirements (e.g., Automobile Liability Insurance, Workers Compensation, Employers Liability, Modification and Cancellation, and Subrogation). Insurance provisions often must be reviewed by persons both inside and outside law firms who are familiar with the firms' General and Professional Liability policies and who have the requisite expertise or are able to develop it over time, to assess whether firms can comply with Insurance provisions.

Indemnification provisions create issues as to whether firms' professional liability insurance will cover promises to indemnify even if the clients and law firms share responsibility for any resulting injuries or damages or, in some cases, indemnification even if responsibility for injury or damages is solely that of the clients or third persons. Most professional liability insurance policies will not cover Indemnification agreements where the acts do not constitute the practice of law or where firms have no responsibility for the injuries or damages in question. Effective review of Indemnification provisions requires particular knowledge of firms' professional liability insurance policies including exclusions. Thus, Insurance lawyers in law firms, lawyers in firm Legal Departments and General Counsel offices, as well as other internal and external professional staff versed in firms' professional liability policies are the persons best suited to analyze Indemnification provisions.

D. Housekeeping Provisions.

Housekeeping provisions usually encompass Accounting, Audit, Billing, Costs, and Reimbursements, Staffing and Travel, Document Retention and Destruction, Information Security, and Work Product provisions, among others. Accounting, Audit, Billing, Costs, Reimbursements, Staffing and Travel requirements may not

comply with law firm policies and procedures regarding these subjects. Document Retention and Destruction and Information Security provisions may place overly burdensome obligations on law firms in excess of the requirements of firm policies as well as applicable ethics rules. Work Product provisions that too broadly dictate that only the client owns and can use the any "work product" resulting from representations, restrict law firms' ability to apply the expertise they develop in a particular practice area on behalf of other clients so as to grow the practice. Lawyers in firms Legal Departments and General Counsel offices, staff professionals in the Accounting, Billing, and Document areas, and lawyers and non-lawyer professionals in charge of the financial aspects of the representations in question are those persons who are most likely to have the expertise necessary for review of Housekeeping provisions.

E. Government Obligation Provisions.

Government Obligation provisions commonly appear in Government OCG and client terms as well as in law firms' subcontracts with defense contractors. These provisions, and the laws upon which they are based, often require adherence to federal, state, and local statutory and administrative law, the violation of which can lead to civil and criminal penalties against firms and/or firm lawyers. (e.g., Anti-Discrimination, Affirmative Action, Anti-Terrorist, Pay to Play laws.) Thus, Government Obligation provisions should be carefully reviewed by law firm personnel who have the expertise necessary to understand the full import of the obligations imposed. Lawyers in firms' Government Contracts practice areas and Legal Departments or General Counsel offices are most likely best suited to review Government Obligation provisions.

F. Other Provisions.

There are, of course, many other reoccurring provisions in OCG and client terms that can raise compliance issues such as Media Contact, Management of Litigation and Non-Litigation, Termination and Withdrawal, Dispute Resolution, and Jurisdictional Provisions. Members of firm Legal Departments and General Counsel Offices are those most likely to have the expertise to be able to review such provisions.

IV. Negotiation and Approval of Provisions.

Once review of OCG and client terms has taken place, firm processes should provide for the client relationship partners or non-lawyer professionals to attempt to negotiate problematic provisions with clients. On occasion, client relationship personnel will prefer the persons in the firm who reviewed the provisions to take the lead on negotiating the resolution of these issues with clients.

Of course, in some instances firms will not be able to comply with provisions that conflict with firm policy, professional liability insurance policies or other insurance

policies, or applicable ethics rules. Theoretically, clients can be made to understand such situations and will not require compliance. As to "problematic" provisions that can be negotiated, to the extent that firms can show some flexibility in negotiations, there is more likelihood of a give and take with clients. Even if clients hold steadfast to certain provisions, most clients will appreciate that firms took the time to discuss problematic provisions rather than simply rejecting the OCG or client terms all together. An all or nothing approach by firms is likely to result in the loss of the clients.

Firm processes should also provide a means by which client relationship personnel can seek approval from firm Management of provisions that clients will not change but which run afoul of firm policies.

V. Firms Should Formally Adopt as Firm Policies the Processes for Dealing with OCG and Client Terms, Publicize and Uniformly Enforce the Same.

Finally, firms should adopt as firm policies the processes for dealing with OCG and client terms, publicize and uniformly enforce the same. It is important that firm Management take a formal stand in this critical area of risk management and publicize such policies so that firm lawyers and staff are aware of them. Awareness can be achieved through electronic and written memorialization of the policies and also through education of firm personnel. It is also helpful if firm members "buy into" the ethos behind firm policies concerning OCG and client terms and understand that, while these policies can create obstacles to undertaking individual representations, the interests of firms as a whole are protected by such policies.

VI. Conclusion.

OCG and client terms pose significant business as well as risk management issues for law firms. Establishing effective processes and policies for dealing with OCG and client terms, which embody the criteria discussed above, should enable firms to have organized, efficient, and well-reasoned approaches to this challenging aspect of modern day practice.