IADC COMMITTEE NEWSLETTER

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

This article focuses on the impact of several critical provisions commonly included in client "outside counsel guidelines" on practitioners in environmental and mass tort law. Indemnification, data protection, and anti-corruption provisions in OCGs in particular may put law firms at serious risk, well beyond their insurance coverage and ordinary legal and ethical obligations. Outside counsel who practice in these areas would do well to review their client OCGs with a view toward negotiating less burdensome obligations.

The Impact of Outside Counsel Guidelines on Environmental and Mass Torts Practice

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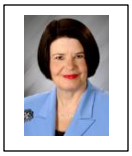
Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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Law firms have been inundated in the last few years with detailed and onerous case management requirements issued by clients, typically identified as "outside counsel guidelines" or "OCGs." These documents today typically run between 10 and 40 pages of dense text, often with multiple attachments that are incorporated into the agreement. And OCGs continue to encompass ever more detailed provisions addressing the matter management and firm-client relationship, the scope of which is limited apparently only by the creativity of the in-house counsel tasked with preparing these documents. Compliance with OCGs also is not voluntary – the firm typically must sign the agreement before it will get the work or receive payment.

Undoubtedly, clients are increasingly utilizing the mechanism of OCGs to provide clear instructions to their law firms as to the rules governing the relationship and expectations for law firm performance. There is something to be said for the clarity the OCGs bring, and they certainly provide clients with much more control over, for instance, the case management, billing, staffing, travel, and similar provisions typically found in OCGs. Some of these provisions are burdensome for law firms, but the firms can usually comply by adjusting the firm's practices to those in the guidelines.

Far more dangerous to the law firms, however, are increasingly common provisions that expand the law firm's compliance obligations with bribery, reporting, and other statutes. Other provisions shift to the law firm the risk and defense/financial obligation of lawsuits against the client arising out of the law firm's engagement. These provisions are a form of contract that could rebound against law firms if their clients are sued for a wide range of things that can go wrong during the course of a litigation representation. This article focuses on those provisions, with special emphasis on their potential applicability in lawsuits involving environmental and other mass torts. I offer some insights and suggestions from my role in reviewing and approving OCG's for my firm over the last several years.

I. The Impact of Outside Counsel Guidelines on Law Firm Practice

Even a decade ago, OCGs were relatively rare. Today, however, they have spread like wildfire through the legal industry and are a regular part of counsel-client interactions for a company of any size. Many law firms have implemented review processes to deal with the increasingly far-reaching provisions. In my firm, as one example, we utilize a review "panel" that encompasses the IT function, our anti-bribery counsel, our HIPAA compliance counsel, the billing and pricing functions, the firm's general counsel function, the conflicts function, and yours truly as a final reviewer of the entire document and arbiter of which provisions we decide to contest or negotiate. The process is cumbersome, slows down the opening of new matters, and can result in

conflict with the matter partner and the client.

Nevertheless, the review is essential given the nature of the provisions that companies are now including. Many of those provisions, sometimes written in incredibly broad language, could potentially extend a law firm's obligations well beyond those covered by the firm's malpractice and other insurance, leaving the firm itself on the hook. Adding to the difficulty for firms, these contracts are not exactly arms-length agreements. In any ordinary contract negotiation, many of the OCG's provisions would require quite a bit of back and forth to hammer out balanced language acceptable to both parties. As only one example, discussed in more detail below, OCGs typically contain one-direction indemnification agreements without the usual counter-indemnification running from the client to the law firm.

But in the heated and sometimes desperate world of law firms seeking business, the leverage is almost entirely with the client. Many of the OCGs are thus written with highly one-sided language that firms often accept, wincingly, to avoid interfering with the opportunity to get the work. OCGs attached to Requests for Proposals are particularly difficult – who wants to be the law firm sending back a stream of rejected OCG terms as part of a pitch for business?

Law firms are left to simply accept the terms as written, as the best means of pleasing a potential client, and hope that nothing bad happens – or in the alternative, to select provisions they simply cannot live with and try to modify them. If the firm chooses the second option, however, the firm will quickly learn that the willingness of in-house counsel to negotiate anything in these agreements is highly variable. Some in-house attorneys, it appears, have been instructed to reject any changes whatsoever – the agreements come in the form of non-modifiable PDFs, and any request for changes is met with the rejoinder "the agreement is not negotiable." Other companies appear to understand that some of their language is onerous and in some cases simply unfair. The firm can in some instances navigate around those provisions by carefully choosing the most critical issues and making reasonable requests.

Law firms that simply sign and send the provided forms, without careful review and selected pushback, risk putting themselves in the position of guaranteeing against client lawsuits and harm arising out of the engagement. Several provisions put practitioners of environmental and mass torts at particular risk, as discussed next.

II. Specific Provisions Impacting Environmental and Tort Litigation

To illustrate the problem, I have selected three common provisions found in today's OCGs that raise concerns for those of us who practice in the area of environmental and mass torts. To be clear, though, these and other OCG provisions are not, by their actual language, directed to such work – instead,

these general provisions may well pose particular issues in mass tort cases due to the nature of that brand of litigation. Counsel who practice in this area may want to flag these provisions with their firm's approver of OCGs and work out an acceptable approach to them.

A. Indemnification Clauses

By far the biggest troublemakers in many current OCGs are the one-sided and often amazingly expansive indemnification provisions directed at the law firm. These provisions begin with traditional "indemnify and hold harmless" and duty to defend language. This language is very familiar territory, often seen for instance in settlement agreements. But in the context of a law firm engagement, the "hold harmless" and "duty to defend" provisions likely require the law firm to take on an obligation not covered by its insurance - to wit, the defense obligation of a client caught in a lawsuit.

Further, many, if not most, of the OCG indemnification provisions are written as strict liability language that extends the indemnification obligation to any event that produces a lawsuit or claim against the client, regardless of law firm fault. Specifically, these provisions omit the traditional "arising out of the firm's fault or negligence" language. No contract attorney worth her salt would agree to such a thing, at least without extracting something from the other side. Narrowing the provision to the firm's fault or negligence would at least bring the provision arguably in line with the firm's insurance coverage. In addition, rarely does any OCG contain the traditional counter-indemnification provision running from the client to the firm for any harm the client causes to the firm.

The combination of the no-fault language and the defense obligation could wreak havoc in an environmental or tort case. Imagine, for instance, the result if the firm retains (or instructs the client to retain) an environmental expert and the expert engages in activity (damage to third-party property, injury to an employee, release of a toxic substance) that results in a claim against the client. Even if the firm played no role in causing the trouble, the broad form of OCG indemnification language could require the firm to defend and indemnify the client because the claims "arise out of" the firm's engagement. The firm would have to pursue the retained expert for recovery, with uncertainly in whether such a recovery would even be available.

An additional risk scenario could arise from post-litigation claims of a settlement breach, failure to comply with cleanup or remediation agreements, or similar actions brought against the client. The client might assert the indemnification clause on the ground that the claims arise out of something the law firm negotiated or achieved through litigation. It is not difficult to imagine other situations resulting in claims against the client that then turn

against the law firm, with no actual wrongdoing on the law firm's part.[1]

B. Information Disclosure, HIPAA, and Theft of Data

Many OCGs today include extensive security requirements and other provisions mandating that the firm undertake state of art precautions against hacking and the release of sensitive data provided by the client. For companies that deal in individual health data, these requirements often take the form of Non-Disclosure Agreements or NDAs, with explicit focus on the requirements of the federal HPAA law prohibiting release of individual health data.

These provisions could readily come into play in environmental and mass health claim litigation. Many such lawsuits require the company to turn over its own trade secret or other confidential information relating to products or manufacturing process allegedly contributing to contamination, for instance. That discovery is often the subject of hard-fought protective orders to prevent dissemination to the outside world. What if those protections fail? Defense attorneys are quite familiar with confidential documents in one litigation appearing in another – the fear and perhaps reality is that plaintiffs' counsel sometimes may not honor the protective order provisions. The firm would also face the real possibility that a plaintiff expert would turn sensitive company documents over to the press or an environmental advocacy group.

The OCG's protection of data provisions, coupled with the indemnification provisions above, could encourage a company to bring a claim against the law firm for such an event if the client is faced with a claim or lawsuit (e.g., trade secret theft or patent infringement) as a result of the release. There is also the ever present threat of hacking of the firm's files and databases – a risk not specific to environmental torts, but still hanging over those cases as well.

Individual health data is also a peculiar risk for health-related tort claims, which often involve the medical records of individual plaintiffs or others not involved in the lawsuit. A discovery request, for instance, seeking the companies' workers compensation claims history related to a particular substance or work practice (e.g., asbestos exposure) may force the company to turn over individual employee health data for persons not involved in the lawsuit. The firm would need to consider its obligations under the OCG provisions relating to HIPAA and medical data. It is not hard to imagine a scenario in which some of those individuals sue the client, despite the law firm's best efforts to protect against release of individual identifiers. Similar trouble could arise in OSHA lawsuits, lawsuits by former

[1] An aggressive client might construe the indemnification provision to apply to further claims and lawsuits arising out of nothing more than the firm losing the initial case. This seems a stretch, however, and without explicit language including such a result one would think a court would not extend the language so far.

employees alleging workplace harm such as noise-induced hearing loss, litigation involving alleged "clusters" of health effects, or even plaintiffs' own medical data if the court orders protection of that data against outside disclosure.[2]

C. Bribery and Anti-Foreign Corrupt Practices Provisions

The U.S. continues to be a worldwide magnet for tort and environmental litigation brought by persons who are not resident in the U.S. Such cases frequently require discovery, at a minimum, in foreign countries, or even active litigation in those countries. The highly publicized Chevron Ecuador litigation, for instance, involved extensive proceedings and a massive judgment against Chevron by an Ecuadorian court, later reversed by a U.S. court due to fraud in the Ecuadorian court proceedings.

Counsel defending environmental or mass tort cases in foreign countries may run a significant risk of falling under U.S. anti-bribery and foreign corruption laws. These laws are complex and have spurred an entire practice area devoted to keeping companies out of trouble. Law firms and outside lawyers must comply with certain provisions of those laws regardless of OCGs. But the rub is that many clients often include even broader language or wording that could require the firms to go beyond their ordinary statutory obligations. Other OCGs incorporate by reference, and require law firm compliance with, the company's own internal practices and procedures (the "Code of Conduct") for its own employees, usually attached or referenced as an exhibit. The Codes of Conduct have extensive requirements targeted at company employees. Firms engaged in such a matter will need to review carefully these OCG provisions and potentially push back with a more limited agreement that the firm will comply to the extent of its legal obligations.

D. Other Challenging Provisions

Other provisions in OCGs present particular difficulties for law firms, but the challenges tend to be more general and not specific to environmental or mass tort cases. The audit provisions, for instance, often subject the firm to "immediate" and highly intrusive reviews by the client or its retained auditing company covering not just the firm's work on the matter and billing practices, but also the firm's compliance with all of the OCG provisions. The OCGs conflicts provision may well include an obligation to report or avoid "loyalty" or "business" conflicts outside the scope of the ethical obligations that attach to firms under their respective rules of professional responsibility. Firms who represent a wide array of corporate defendants in different litigation (e.g., asbestos clients or co-defendants in environmental cases) could easily run afoul of these provisions.

[2] Presumably, a plaintiffs' own medical data necessary to litigation the lawsuit would not fall under HIPAA protections since the plaintiff has made the data at issue by filing the lawsuit.

Perhaps those of us who write articles like this are merely worrywarts who should get over our nervousness and just proceed as if clients will never enforce or act on the provisions above. And yet one such lawsuit already exists. *See Sephora USA, Inc. v. Palmer, Reifler & Associates, P.A.*, Order, 15-cv-05750-JCS (N.D. Cal. May 13, 2016) (law firm motion to dismiss claim under OCG indemnification provision denied). Loyal clients no doubt would engage in less forceful means than breach of contract lawsuits or assertion of the indemnification clause if something goes wrong – we try to work these things out with our clients. But a serious data breach or significant lawsuit against a client may require the client to act under its stockholder obligations or board member direction to pursue available contractual rights against the law firm. It seems far better to deal with the most obvious risks up front.

If the legal market moves away from the buyers' market that exists today, OCGs may move more toward reasonable language that does not threaten the law firms' rights or finances. In the interim, and the interim may last a good long time, firms practicing in environmental and mass torts would do well to develop a careful OCG review process and negotiate necessary modifications from companies before taking on the proffered work.

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