

## Lawyers' Professionalism and Ethics

# The Case for Negotiating OCG Conflict and Indemnity Provisions

By Noah Fiedler and Cassidy Chivers

**D**espite what you might have heard, outside counsel guidelines (OCGs) aren't the end of the world. They have their place in the lawyer-client relationship. Most OCGs provide needed guidance for outside counsel on exactly what their clients want and how to best serve those clients. However, certain OCG provisions attempting to alter the framework of the attorney-client relationship can result in a host of unintended, and potentially damaging, consequences.

Here, I address two of the more popular provisions that can cause unintended problems—indemnification and conflicts. OCG indemnification clauses typically expand the possible bases for outside counsel's liability to the client. The conflicts provisions typically expand the definition of conflict to include parties or situations not defined as conflicts by the law governing lawyers. Depending upon the language used, these provisions can create adverse consequences for both the client and the lawyer, including vitiation of professional liability insurance coverage and the creation, rather than the elimination, of conflicts of interest.

To avoid those consequences, clients and their law firms should work together to create meaningful guidance and a solid framework for the ongoing attorney-client relationship. This approach, of course, isn't revolutionary. But what's in it for the clients? Why would they agree to loosen the strictures of a well-drafted and complete set of OCGs that wraps up lawyers tighter than a swaddled baby?

This short article discusses at least two reasons for clients to work with their lawyers to negotiate reasonable and meaningful OCGs: 1) Accepting standard definitions of conflicts of interest will result in more rapid, efficient, and complete service from outside counsel; and 2) Slight alterations to the indemnification provisions can retain (rather than destroy) the financial protection afforded by lawyers' malpractice insurance.

### Removing or Limiting Expanded Conflicts Definitions Will Permit Lawyers to Provide More Rapid and Knowledgeable Service to Clients

Lawyers' rules of professional conduct prohibit or limit a lawyer's representation where a conflict of interest between clients creates a risk that the lawyer might not provide zealous and competent service. These rules have been fine-tuned over many years and interpreted in countless thousands of court cases.

Not satisfied with the current reach of the law, many OCGs expand the definition of conflicts in order to limit the ability of firms to accept other clients, even in situations where no conflict exists. For instance, many conflict provisions prohibit the representation of economic competitors, which hurts not only the firm, but also the client. By constricting the ability of lawyers to understand industry-wide issues from multiple perspectives, these provisions endanger a lawyers' ability to provide the most informed service to the client.

These provisions also threaten the unbiased advice that clients expect and desire from their lawyers. By excluding a firm's ability to represent competitors in an



industry in which the firm has experience, these provisions (perhaps intentionally) tend to make firms much more dependent upon a single client. Firms that rely primarily on a single client can be tempted to provide advice based not on what is best for the client, but on what is most likely to keep the relationship alive.

Expanded conflicts provisions can also prevent rapid action by the firm. Expanded conflicts create expanded conflicts checking, which takes time—lots of it, depending upon the size of the client. Consider how long it would take a U.S. law firm to obtain consent from local general counsel in dozens of different countries, many of whom having absolutely nothing to do with the matter. In this example (which actually happened) the ability of the firm to take quick action on its client's behalf is completely compromised.

### Careful Construction of Indemnification Provisions Protects Liability Insurance Coverage

Most clients—wisely—want their counsel to be covered by liability insurance. Many require it, along with specific levels of coverage. While lawyers' liability insurance covers negligent acts, certain language in OCG indemnity provisions can nullify that coverage. For instance, lawyers' liability policies uniformly require cooperation with the insurer and provide



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for subrogation. The obligations undertaken in an indemnity clause may require the firm to take steps that impede the firm's, and therefore the insurer's, ability to defend otherwise covered claims. Similarly, an indemnification clause can render meaningless the subrogation clause. Either instance may vitiate coverage.

Indemnification clauses often expand the lawyers' potential liability to include otherwise uncovered acts or situations. While this may appear to provide more protection for the client, the reality is that most firms are organized as limited liability companies, and few have sufficient assets from which to recover a sizable judgment. Even large firms will not have adequate assets to make good an indemnification claim arising from a multi-million (or billion) dollar transaction. Instead, firms rely on professional liability insurance, which uniformly excludes coverage for contractually assumed liabilities. Clients who aggressively attempt to collect on an uncovered indemnity agreement may find themselves doing so in bankruptcy court.

Some firms and their clients have successfully agreed to limit the scope of indemnity provision to losses "to the extent that they are covered by the firm's malpractice insurance policy," or employing language that voids the indemnification agreement if it invalidates the firm's professional liability insurance. However, there is no case law as yet regarding whether such limitation language will be effective if the underlying indemnity provision is in the agreement, so that any such proposed solution is not yet certain to succeed. Remember also that attorneys remain liable for their negligence, even in the absence of an indemnification provision.

### **Common Interest**

Clients and lawyers share a common interest—creating a relationship where each understands what is expected, and that promotes the ability of both parties to function in an effective and stable manner. Small tweaks to these two OCG provisions can provide the benefits clients desire without creating unintended and damaging consequences for both lawyer and client. 