OCG Live

ULTIMATE GUIDE:

Managing Outside Counsel Guidelines (OCG)

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OCG is Here to Stay!

What You Resist, Persists

Outside Counsel Guidelines (OCG) have become standard practice in the working relationships between law firms and their corporate clients. These requirements put forth by the client often include specific instructions on how firms should conduct their business - ranging from ethics and conduct to staffing and billing. Given the length and complexity of these agreements, compounded by the fact that they exist in a unique form for each corporate relationship, law firms have their hands full trying to keep it all straight in order to stay in compliance.

THERE'S NO GETTING AROUND IT - MANAGING OCG IS HARD - AND IN SOME WAYS, DOWNRIGHT IMPOSSIBLE.

In today's environment, corporate clients are becoming increasingly strict, implementing new guidelines and scrutinizing each bill in order to identify those that can be rejected. eBilling has made it easy for automated solutions to flag non-compliant bills, thus increasing the rates of rejections, lengthening the billing cycle and putting a strain on the firm-client relationship.

Law firms are scrambling to stay on top of guidelines in order to ensure compliance, while adjusting to the shift in the relationship dynamic between corporate clients and their outside counsel.

Tensions are Brewing

In fact, it's not unfair to say that OCG has become a source of tension between firms and their corporate clients. This issue of OCG creation and enforcement is a reflection of a market shift in corporate legal services, which has gone from a seller's market to a buyer's market.

At a recent panel at the ABA Ethics Conference, Anthony Davis, Partner at Hinshaw & Culbertson LLP, said *"Up until 2008, it was very clear ... that the sale of legal services from law firms to clients, however large, was a seller's market, but at the beginning of the recession, clients woke up to the fact that suddenly it was a buyer's market. And the fact that we're never going back is very clear from everything we read every day in the legal press."*

Some leaders within the legal industry, such as Davis, see OCG as an attempt to micromanage and take issue with client attempts to control which other clients the firm might take on, such as a client's competitor.

Firms React

It's not that rules of engagement are new – it is just that they used to be set by the firm as part of closing the deal as the firm's engagement with the client. As Max Welch pointed out in a recent article in Law Practice Today: *"Historically, if these terms were documented in writing, they could be found in the law firm's own engagement letter, likely drafted with the firm's interests in mind. In part because of what many view as a recent shift in the bargaining power between corporate clients and lawyers, as well as an increased scrutiny within companies of the resources spent on outside counsel, the clients have turned the tables and many law firms are struggling to adapt."*

Contributing to the shift is the inclusion of additional players on the corporate side (beyond general counsel) in the purchasing decision for law firms' contracts, such as the CFO and procurement. These individuals typically work to standardize purchasing agreements and do not view law firms as an exception to this process.

The problem is that the typical response from firms is purely reactionary. As new guidelines and requests are put forth by the client, the firm reacts. Often, the firm's administrators and attorneys are too busy to take a hard look at the problem, so they continue to churn out invoices (after all, everyone needs to get paid) and accept rejections as a cost of doing business - even though it doesn't have to be.

So what can firm's do to be more proactive?

Industry-wide conversations on OCG suggest one of the two options:

#1: PUSH BACK AGAINST OCG.

At the ABA panel, Davis called for an industry-wide resistance: "Davis implored conference attendees to 'collectively push back' against those types of agreements by asking bar regulators to adopt a rule change —an amendment to ABA Model Rule of Professional Conduct 5.6(b)—that could give law firms more leverage in negotiations with clients who demand that OCGs be included in their retention agreements with law firms." However powerful an industry-wide action might be, this is unlikely to proceed given that it would violate ABA's policies against restricting trade.

#2: NEGOTIATE OCG.

This is a viable option, as firms should feel free to assert their boundaries and come to an agreement with their clients that is manageable for both parties. However, simply negotiating an agreement does not address the need to manage the agreed-upon provisions, which is the most challenging aspect of OCG for firms to deal with.

Carl Jung is known for saying "what you resist not only persists but will grow in size." This absolutely applies to managing OCG at your firm. What if, instead of resisting, we embrace OCG? Rather than pushing back, what if we find a way to wrap our collective arms around these guidelines in order to manage them in real-time?

WE CAN, AND YOU CAN TOO. THAT'S WHY WE WROTE THIS GUIDE.

Dissecting Billing Guidelines and Compliance

What is Compliance?

Before we can talk about a plan to better manage OCG, we have to establish an understanding of what it means to be in compliance. OCG typically addresses several different aspects of the firm-client relationship, including ethics, conduct, staffing and, of course, billing.

Broadly speaking, compliance means doing all of the things that the client asks. However, these guidelines can be better understood based on belonging to one of these two types of guidelines:

SUBJECTIVE GUIDELINES:
Compliance with these guidelines is primarily determined by opinions or perspective. Guidelines that address attorney ethics or behavior, such as how to conduct themselves in court, best practices for depositions, code of conduct, payment/appeal time frames, etc. are considered to be subjective. Technology cannot (yet!) enforce and automate this type of rule.

OBJECTIVE GUIDELINES:
Compliance with these guidelines is determined by fact. Therefore it is easy to set rules and understand compliance or non-compliance at face value, such as billing for fees and expenses or adhering to cybersecurity guidelines.

It's All About the Objective

While subjective guidelines can be vague, they are not typically the source of concern or push-back when it comes to OCG. After all, most attorneys conduct themselves in a way that is satisfactory to the client's wishes.

It is the objective guidelines, on the other hand, that are the source of OCG stress between the client and the firm. Too often, bills are submitted that are not compliant with guidelines for charging fees and expenses. For the client, they are looking to prevent overpayment. For the firm, they often face rejections or delayed billing cycles as a result of being overwhelmed by unique billing guidelines across various client accounts.

One alarming trend in OCG is the inability to appeal if a bill or an entry is rejected. For firms, this is even more reason to get it right the first time, if they want to get paid. To think that firms must "get it right the first time," or forfeit their right to get paid should have everyone on their toes.

Avoid Disaster Through Better Compliance

Other objective guidelines that should be of considerable concern are those relating to the handling of the firm's data or other cybersecurity measures intended to prevent data loss. Losing a client's data could be disastrous for the firm.

Therefore, it is in the areas of billing and cybersecurity that firms must attend to if they wish to get a strong grasp on compliance, as it is in these key areas that most costs relating to OCG non-compliance are incurred.

BILLING COMPLIANCE:

Get it Right the First Time

The Heart of OCG

Billing compliance is a cornerstone of managing OCG. This is the section of the guidelines that outlines rules of engagement for the financial transactions that take place as part of the relationship. For the firm, failure to comply could mean decreases in collection realization in the form of delayed payment or inability to collect payment for hours worked or expenses incurred. This is also the area of OCG where most firms see the most violations taking place.

The reason for this is that manually managing the compliance of billing guidelines is an overwhelming task. Billing professionals are tasked with memorizing specific and unique guidelines for every client and are required to flag non-compliant items. Human error is central to this process. Therefore, it is no surprise that non-compliant bills often slip through the cracks.

The good news, however, is that there is a solution for this. However, before we discuss how to ensure that compliant bills are being sent to the client, we must first understand the types of billing rules that exist with OCGs.

Understanding Billing Compliance

When it comes to managing billing guidelines, there are two types of rules that address how to bill for fees and expenses:

EXPLICIT RULES:

These are finite and defined rules, such as "no payments for travel time" or "If you go to trial, you can only bill for one partner and one associate." This is the type of rule that technology can enforce and automate.

HIDDEN RULES:

These rules provide a general and broad idea of what the client is looking to enforce, therefore they are very subjective and can mean different things. For example, a line item should not use vague language, or a line item should not charge for excessive work. These guidelines offer little help to attorneys and firms to improve compliance, resulting in rejections from the client side.

Real-Time Budgeting

Another area related to compliance is budgeting. Most clients want to know a budget when the agreement is set, and lawyers will work with their clients to provide an estimate. Although attorneys will establish a budget with the client at the beginning of an engagement, it is seldom checked in real time against actual hours spent. If the budget is not monitored daily, it is almost certain that the budget will be exceeded. If your firm goes over a budget that was previously agreed upon with the client, it has to eat the cost.

Root Cause: The Role of Time Entry in Compliance

We cannot continue to discuss compliance without recognizing the role of time entry in achieving compliance. Time entry is where billing compliance begins. It is impossible to achieve true compliance, without sound time entry practices. After all, bills (whether compliant or not) are generated from timecards. Contemporaneous timekeeping is the only way to create accurate time cards.

When timekeeping habits are antiquated or not up to par and attorneys practice reconstructive time entry, not only do they leave money on the table, but it is impossible to get a real-time understanding of budget, and other details relating to how time is spent on the matter become fuzzy and fade away. If your firm is truly focused on improving OCG compliance, accuracy and contemporaneous time entry must be embraced.

Cybersecurity Compliance: Do It Before You Lose It

We all know that cybersecurity is a serious concern for all organizations. Afterall, cybercrime is happening every instant. According to Teramind, over 200,000 records are stolen every hour. Law firms are especially susceptible to a cyberattack, given the lucrative data on its clients that it has within its networks.

Of course you remember when law firm Mossack Fonseca was breached in the infamous Panama Papers incident in 2016. While that breach dominated headlines, it turned out that 40% of firms surveyed had been breached and didn't know it that same year.

Understanding both the demand for and vulnerability of their sensitive data, corporations are increasingly including a cybersecurity clause in OCG, such as the following example.

Creating A Cybersecurity Clause

EXAMPLE OF A CYBERSECURITY CLAUSE:

The responsible attorney must immediately notify ABC company in the event of data loss on a laptop, thumb drive, or mobile device. Ex. security test ex. Not use wifi in public. This goes to our proposition of no data on devices.

As Max Welch pointed out in Law Practice Today *"A notable development in OCGs is driven by concerns regarding the security of data. While clients in certain industries–finance, healthcare, and retail, for example–long have required assurances from their outside lawyers regarding adherence to principles of data security, clients no longer accept mere promises. In many OCGs, corporations are laying out specific measures and policies that they expect law firms to have in place or adopt in order to retain the client's business. In addition, clients are following up on OCG terms with extensive written assessments and on-site, multi-office audits."*

In fact, this is something that firms should expect to see more of. Currently, over 50% of the guidelines do not have any language on cybersecurity - this is alarming. Both firms and their clients should seek to have an explicit agreement as to how data is handled and protected. After all, everyone loses if a breach takes place.

How to Manage OCG

Now that you have an understanding of the types of rules and guidelines that exist in a typical OCG document, you may be asking - how do we actually manage these guidelines?

Step One: Get to Know the Guidelines

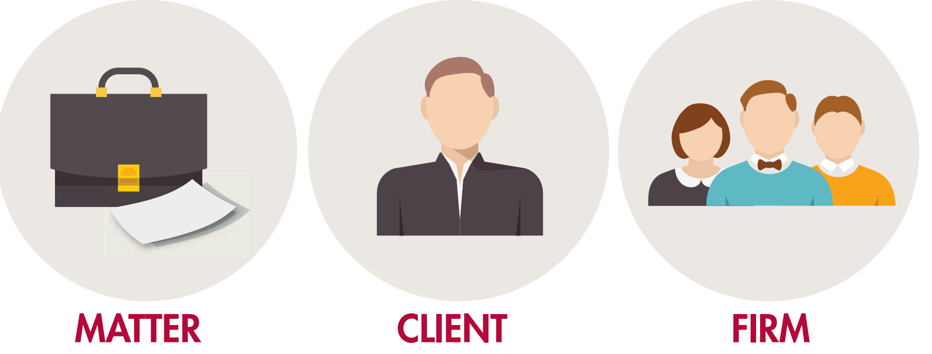
OCGs are typically presented in the form of a manual - which is exactly as it is implied - lengthy and overwhelming. In order to achieve compliance, you must first know and understand the guidelines put forth by the client. Given the typical format, it is hard for timekeepers and administrators to get a handle on the guidelines, let alone refer to them later.

ACTION ITEM:

The first thing that you need to do is to review the guidelines as they are presented in the original format and transfer them to a summary document in order to create a quick view of what timekeepers need to know. A timekeeper should be able to understand the guidelines at a quick glance in order to become familiar with or be reminded of client expectations. This summary document should also exist in a central location that is accessible to attorneys at all times.

Step Two: Translate the Document to Actionable Rules

Once you know the guidelines, translate the document into rules for fees and expenses, to the extent that it is possible. You should consider three levels of rules: matter, client and firm. Before you even get started with technology, you have to understand the guidelines in order to create the rules.



Step Three: Set up Your Compliance Infrastructure

For any given rule, you can set up rule-specific alerts to advise the timekeeper on how to proceed, such as a "warning," that informs the timekeeper of something important or "stop," which requires the timekeeper to fix an error in order to continue.

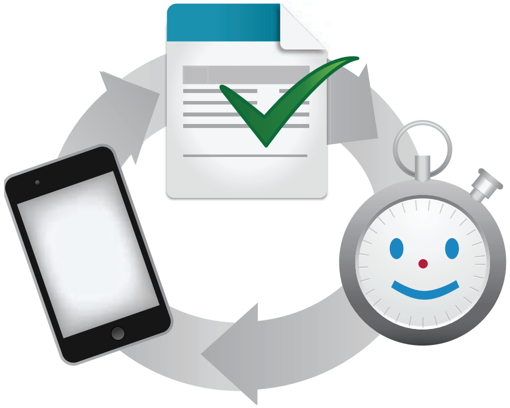
Different types of actions may be required, depending on the nature of the error. It could require the attorney to fix the issue in real time or might be deferred to the billing department, such as in the event that a discount may need to be applied.

Step Four: Educate Your Attorneys

Although it is too much to ask for an attorney that he/she remembers every single guideline for every client he/she works for, it is important that the firm sets standards and educates attorneys on what is important and critical in order to have a successful relationship with the client.

ACTION ITEM:

Build summaries that are specific to attorneys for each of your client guidelines. Keep them simple so they can be read and followed. Make your attorneys acknowledge that they have read the summaries provided. Don't overcomplicate it.



Step Five: Practice as You Go

Real-time compliance (RTC) is essential to managing OCG guidelines. This means that as time cards are entered, you are notified of any issues that would result in a non-compliant time entry and given the opportunity to fix it on the spot.

The Far-Reaching Benefits of Billing Compliance

What's Wrong with the Status Quo?

After reading the previous section, you might be asking yourself whether OCG is worth the effort. After all, it is a fact of life, a cost of doing business, if you will. Is it really worth the effort and the technology investment needed to address it?

Here are a few reasons why we feel that maintaining the status quo is not an option for today's law firms hoping to remain competitive.

Collection Realization

The trend in corporate counsels scrutinizing bills for compliance, thus increasing the number of rejections and appeals is not going away. In fact, it has become standard practice. Therefore, continuing to submit inaccurate and non-compliant bills should no longer be an option for your firm, as it leads to unnecessary write-offs and delays in payment. You can improve collection realization by improving the accuracy of time entries and getting a handle on billing rules so that invoices are compliant at the initial submission.

Business Continuity

What happens when a billing associate leaves the firm? The firm loses knowledge. The reason for this is that the hidden rules, which we discussed earlier in this guide, are stored in the heads of each of your billers. It means that when someone chooses to transition out of their role at your firm, the person replacing them has to learn each of these hidden rules as they go, which can take months or years. Addressing these hidden rules through technology can prevent your firm from losing money when a staff transition is taking place.

Competitiveness

Your corporate clients are not limiting their analysis of your invoices to billing guidelines, they are also looking to understand which of their law firm contractors are getting the job done in the most efficient and cost-effective way. Managing billing compliance and focusing on timekeeping accuracy are two ways that you can ensure that you are giving your best to your clients and protecting your firm from being outpaced by the competition.

CONCLUSION:

Firms that Excel at Managing OCG Win

Tomorrow's Top Firms are Managing OCG Today.

For today's firms, managing OCG isn't an option. It will be the difference between the ability to retain happy clients and getting fired and going without payment for services rendered. While the nature of these guidelines can seem to put a firm at odds with their clients, managing and adhering to OCG is a win-win for both the firm and its clients.

Firms that successfully manage OCG experience the following benefits:

- Fewer errors
- Fewer human resources
- Fewer rejections
- Faster billing cycles
- Faster collections
- Business continuity
- Manage their risk

In some ways, you could argue that effective OCG management is the best thing that has happened to the firm in quite some time, as the benefits of adhering to the guidelines improve the overall financial health of the firm.

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