



EMERGING TRENDS TASK FORCE REPORT

Outside Counsel Guidelines Management:
An Information Governance Issue

CONTENTS

1	Background
3	Introduction
3	Business Drivers
4	Beyond Billing Requirements
5	Business Approvers Plan
6	Coordination and Responsibility for OCGs Compliance
7	Sample Workflow Process
8	Technology Support for Adopted OCGs Process
9	Looking Forward and Looking Back
9	Education & Communication Plan
10	Provide Attorneys Information About What is in the OCG
11	Communication Between Attorney and Client – Battle of the Forms
11	Administrative Department Roles in Adhering to OCGs
12	Records and Information Management & Outside Counsel Guidelines
12	Conflicts
13	IT Plan – Security Issues – Client Audits
14	Final Thoughts
16	References

BACKGROUND

The Law Firm Information Governance Symposium was established in 2012 as a platform for the legal industry to create a roadmap for information governance (IG) in the unique setting of law firms. The Symposium offers definitions, processes, and best practices for building law firm IG. Firms can leverage the symposium content to tailor an IG program that works for their culture and goals. In 2013, the Symposium Steering Committee created four task forces to work on specific, current law firm IG topics. This Emerging Trends Task Force report explores outside counsel guideline trends, and makes recommendations for how law firms can manage the approval and execution process, and the internal management of these important agreements between clients and their law firms.

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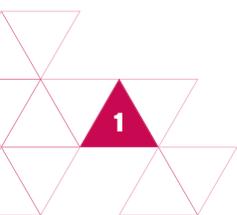
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INTRODUCTION

What started out as a simple list of billing requirements designed to control fees and costs charged by law firms to their corporate clients has evolved into what many believe is an imposing set of standards that many firms, realistically, are not able to easily achieve. Clients demand that law firms protect their interests by holding legal professionals to the same set of regulations to which they themselves must comply. This has become the cost of admission to win, or to keep, the client's business. The message from the client is clear – *give us what we want or we will find someone else who will.*

This paper will explore the various areas where most law firms are under pressure to conform to client requests as laid out in typical outside counsel guidelines (OCGs). To provide an objective basis for our commentary, we surveyed approximately 30 member firm representatives from the Iron Mountain Law Firm Information Governance Symposium in the 2014 Outside Counsel Guidelines Survey.¹ Those results are intertwined throughout our report as we provide discussion on how OCGs are affecting the way business is won in today's increasingly competitive legal environment and how law firms can manage these contractual obligations.

The 2014 OCGs Survey revealed that only 28% of firms today report having formal policies and procedures surrounding OCGs. In addition, the 2014 OCG Survey indicated that 40% are "in development." Clearly this is not a topic that can be ignored.

It is no longer good enough to simply define your policies and procedures surrounding OCGs, you also need to perform a periodic review to assess what is working well to identify those areas in need of further improvement. Candidly, most firms are not there yet, since many are just now developing their initial framework. Nonetheless, this is worth consideration now, and is something to plan for as you evaluate the staffing impact of administering and monitoring the related on-going compliance procedures that OCGs require.

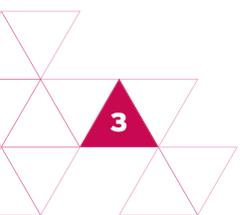
OCGs are not just for billing anymore. They are now much broader and can cover many areas of information governance including data security, privacy, confidentiality and records retention, and disposal – both paper and electronic. They also typically define expectations to adhere to diversity requirements, impose restrictions on press releases and media statements, and define client ownership of attorney work product. Many clients include descriptions about how conflicts of interest searches should be carried out, often with directives to include affiliates of the corporate client.

The Association of Corporate Counsel (ACC) has developed template guidelines that can be utilized by corporations in defining their engagement with their law firms. Law firms need to be prepared to discuss these requirements and determine practical measures to implement these requirements and properly address the client's concerns.

BUSINESS DRIVERS

The relationship between law firms and clients continues to evolve. Some say this evolution is due to economic pressures and the changing regulatory environment affecting corporations. The reasons for the continuing change and the affect upon the clients are not the subject of this task force report. This report will concentrate on the result of this changing relationship and what it means to the law firm. This evolution is particularly evident in the terms of the OCGs clients present to firms today. Law firm management should consider which terms they are willing to accept and more importantly, how they will implement administrative procedures and controls to abide by those accepted terms.

While the origins of OCGs provisions may be based in billing instructions and the use of Uniform Task Based Management System (UTBMS)² codes to track time and cost, they have grown to encompass much more. Some of the more common OCG terms are:



- » **Override Provision:** The agreement has a provision that states that it overrides all other agreements between the company and the law firm unless otherwise stated in writing, even if a law firm provided engagement letter was previously accepted.
- » **Conflicts:** All conflicts and potential conflicts must be disclosed to the company and can only be waived in writing. Additional restrictions on issue and competitor conflicts may be broader than the ethical conflicts rules require.
- » **Affiliate Representation:** The agreement includes representation of all subsidiaries and affiliates of the client, even if they are not involved with the legal representation for which the law firm was retained. For example, acting against any of our affiliates or subsidiaries is tantamount to acting against the parent.
- » **Data Privacy & Management Instructions:** The agreement includes specific requirements regarding how the law firm will handle the company's data. The agreement may require the law firm to abide by the company's data privacy and management guidelines that are a supplement to the OCG. These standards may include International Organization for Standardization (ISO) certification.
- » **Copyright/Ownership of Work Product:** The agreement may include provisions regarding the ownership of the work done by the law firm in representing the company.
- » **Most Favored Nation Provision:** The agreement may require the law firm to provide the company with the lowest rates offered by the law firm to any client for the type of work being done.

Several business factors will influence law firm management in its decision to accept or reject specific OCG provisions. These may include the size or potential for growth of the relationship, the practice group involved, and the law firm's administrative ability to abide by the OCG provisions. An effective information governance program would assist a law firm in determining which provisions are acceptable as well as establishing the processes and controls to insure compliance. This additional benefit highlights another practical use for a solid IG program.

BEYOND BILLING REQUIREMENTS

Coding of time entries using Uniform Task Based Management System (UTBMS), a series of codes used to classify the legal services performed by a law firm in an electronic invoice submission, was introduced in the mid-1990s in a joint effort lead by the American Bar Association, the ACC, and PricewaterhouseCoopers. These efforts were begun at the urging of corporate law departments, that wanted to better understand the services being provided by their law firms. Soon thereafter, submitting bills in a standard electronic format using Legal Electronic Data Exchange Standard (LEDES) became the new normal. The LEDES Oversight Committee (LOC) was established as an international, voluntary, not-for-profit organization comprised of legal industry representatives; it was charged with creating and maintaining open standard formats for the electronic exchange of billing and other information between corporations and law firms. For additional information on UTBMS or the LEDES see UTBMS.com.²

The events described above created an opportunity for corporate clients to define formal billing guidelines for outside legal providers to follow. Initially, corporations that used multiple law firm providers used this as a mechanism to level the playing field. They requested that the law firm define a budget, identify timekeepers, code entries in phases, tasks, activities or a combination of these as part of the services that were provided, and to limit expense reimbursements. They began to impose limits on travel reimbursement, engagement staffing, and demanded most favored nations clauses. They then started refusing to pay for specific types of disbursements such as local travel (i.e., cabs), postage, photocopying, courier, and even external database research for relevant case law.



Compliance with these restrictions was easily controlled with the use of UTBMS and electronic billing software, which utilized the LEDES standard. Corporate clients started rejecting time and cost entries, forcing lawyers to become aware that they would need to be more accountable in their billing practices. Today, many would say the list of eligible expenses is far too stringent, with the pendulum having gone too far the other way, and that a more balanced approach is required.

In the late 1990s, most firms only had a handful of large corporate clients that required e-billing. Today, the typical large law firm has hundreds of such clients and for each there is typically a formal list of billing requirements and/or an accompanying OCG in effect.

As technology continued to evolve and lawyers became accustomed to coding their entries, client demands became more complex. But, no one expected what happened next. Companies began asking firms to comply with standards that were much more difficult to govern and monitor for compliance. These additional standards were less tactical in nature such as green initiatives, treating corporate affiliates the same as the client for conflict clearing purposes, supplying statistics on gender and ethnicity of law firm legal staff, disclosing representation of competitors, and self-reporting for non-compliance with the OCGs.

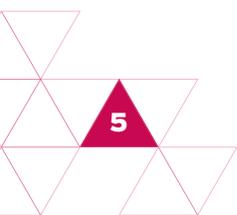
A newly created LEDES subcommittee is developing a UTBMS for Governance Risk & Compliance (GRC) code set in an effort to improve billing and reporting for these types of services. But, this framework is intended to extend beyond the law firm and directly impact other professional services including secretaries, auditors, consultants, and lobbyists. It is anticipated that they too will eventually be required to use e-billing software.

BUSINESS APPROVERS PLAN

Just like any other information governance process, a well-defined OCGs protocol will set the tone from the top and establish the chain of command to be followed for the review and approval of all OCGs. Development of a standardized review process and parameters by which all OCGs can be evaluated will promote a consistent response across the firm's clients. One of the objectives when laying out your program should be creating a trail of supporting approvals that can be referenced in the future to support the decisions made and to identify any terms that were negotiated.

There is no cookie cutter approach that will work at every firm, but most firms will agree that implementing workflow technology will definitely help streamline the process. The success of this technology will hinge upon a set of well-crafted routing (workflow) rules. Knowing who should be involved in the review and approval process is paramount. In most firms it is a cross section of legal and administrative personnel.

The lead attorney with the primary client relationship is typically the individual that receives the OCGs, but not always. Sometimes, OCGs find their way into the firm via the marketing department as a result of new business pitches or requests for proposal (RFPs). Other times, the OCGs finds its way in through the billing/finance group via the e-billing system itself. Some corporate clients post notices regarding the existence of OCGs by using pop-up windows in the e-billing software. These notices first appear when someone, presumably a biller, logs into the software. These notices may require a checkbox be selected or a button clicked acknowledging agreement to the OCGs. Billers may be prevented from proceeding with their entries until the acknowledgement is given. These systems typically are not built to collect comments or negotiate terms. Since many e-billing systems have pre-set parameters whereby they automatically reject time and cost entries that exceed a certain number of days, time is of the essence, and the firm is not in a position to delay the processing of the bill while the terms are being negotiated. Firms need to raise awareness among those responsible for billing and provide clear instructions about how to proceed when faced with this situation.



COORDINATION AND RESPONSIBILITY FOR OCGs COMPLIANCE

In an ideal world, the General Counsel's office should be where all OCGs are collected, digested, understood, and enforced. There are three stages to the process – *what do we have, what does it mean, and how do we address the gaps*. In the majority of firms surveyed, the lead attorney with primary client contact is the one who negotiates the OCGs terms directly with the client (see results in Table 1). Often, attorneys are not familiar with the administrative business intake functions and need to be educated before responding to the client's request. We will address this further in the Education & Communication Plan section of this report. It is a best practice to divide the review of OCGs terms across the relevant subject matter areas directly responsible for the terms requested. But, historically this was not part of anyone's job responsibility. So, who should be in charge of leading the campaign to collect and summarize the various departmental responses and respond to the client? Clearly, this is an area where the IG professional has the skills to take ownership of the process and add value to the firm. In order to do this efficiently, custom workflow software will be required (more on this later).

WHO NEGOTIATES TERMS DIRECTLY WITH THE CLIENT? (CHECK ALL THAT APPLY)	
AVAILABLE TITLES TO CHOOSE FROM	PERCENTAGE
CHIEF EXECUTIVE OFFICER	12.5%
GENERAL COUNSEL	18.8%
LEAD ATTORNEY WITH PRIMARY CLIENT CONTACT	87.5%
CHIEF OPERATING OFFICER	6.3%
CHIEF INFORMATION OFFICER	6.3%
CHIEF FINANCIAL OFFICER	0.0%
CHIEF MARKETING OFFICER	0.0%
CONFLICTS COUNSEL	18.8%

TABLE 1 – 2014 OCGs SURVEY

Since IG professionals are inherently detail orientated and meticulous record keepers, they are perfectly suited for vetting, compiling, and tracking the individual departmental responses to the OCGs. Additionally, today's IG professional works in tandem with the firm's General Counsel to carry out directives that are reflected in various firm policies. Owning the OCGs process is a natural extension of the services already provided by them. But, since most IG professionals are not partners in the firm, they are not qualified to execute formal legal agreements on behalf of the firm and, therefore, this responsibility should rest with a firm partner (see Table 2).



WHO FORMALLY SIGNS? (CHECK ALL THAT APPLY)

AVAILABLE TITLES TO CHOOSE FROM	PERCENTAGE
A FIRM PARTNER (I.E. GENERAL COUNSEL, CEO OR LEAD ATTORNEY ON MATTER)	94.1%
CHIEF OPERATING OFFICER	17.6%
CHIEF INFORMATION OFFICER	5.9%
CHIEF FINANCIAL OFFICER	0.0%
CHIEF MARKETING OFFICER	0.0%
CONFLICTS COUNSEL	0.0%

TABLE 2 – 2014 OCGs SURVEY

SAMPLE WORKFLOW PROCESS

While no single workflow model will work for every firm every time, one model that should be considered is described below. In Illustration 1, the sample workflow process is specific to OCGs agreements; however variations of it could also be used to monitor engagement letters and other client obligations with binding requirements in areas such as security, risk, retention, etc. Relevant client contractual obligations and engagement letter requirements should be tracked using the same or similar processes as those outlined here for OCGs.

An initial, comprehensive review of the client's terms and conditions is performed by designated individual(s). The objective is to compare the client's request against the firm's own terms of business or engagement letter standards and draft a summary of the variances, then route the same to various departmental reviewers. The qualifications of the reviewer may vary from firm to firm, but ideally this will either be a licensed attorney with a title such as Compliance Counsel, or a non-attorney with a title such as Director of Information Governance with extensive firm experience in the business intake process. Often the compliance counsel and the information governance professional will work together on these initiatives.

The next step is to distribute the comments along with the client's OCGs to the various departmental reviewers. This can be accomplished via workflow technology manually by routing an email message with attachments. It is important for the sender to communicate timeline expectations for the subsequent review and return of additional comments, so a timely response can be provided to the client. During this phase workflow technology will definitely streamline the overall process.

After each department weighs in with their comments and concerns, the Compliance Counsel should summarize the results of these discussions and meet with the General Counsel and Lead Attorney to discuss the firm's strategy in responding to the client. It may also be necessary to include the firm's Chief Operating Officer and/or Chief Executive Officer in this meeting if the client is requesting unusual things that will be difficult or costly to deliver. Examples include: requests for attorneys to be made available for client secondment, requests to carry a certain level of insurance coverage, or that the firm implement certain green initiatives, etc.

SAMPLE OCGs WORKFLOW PROCESS

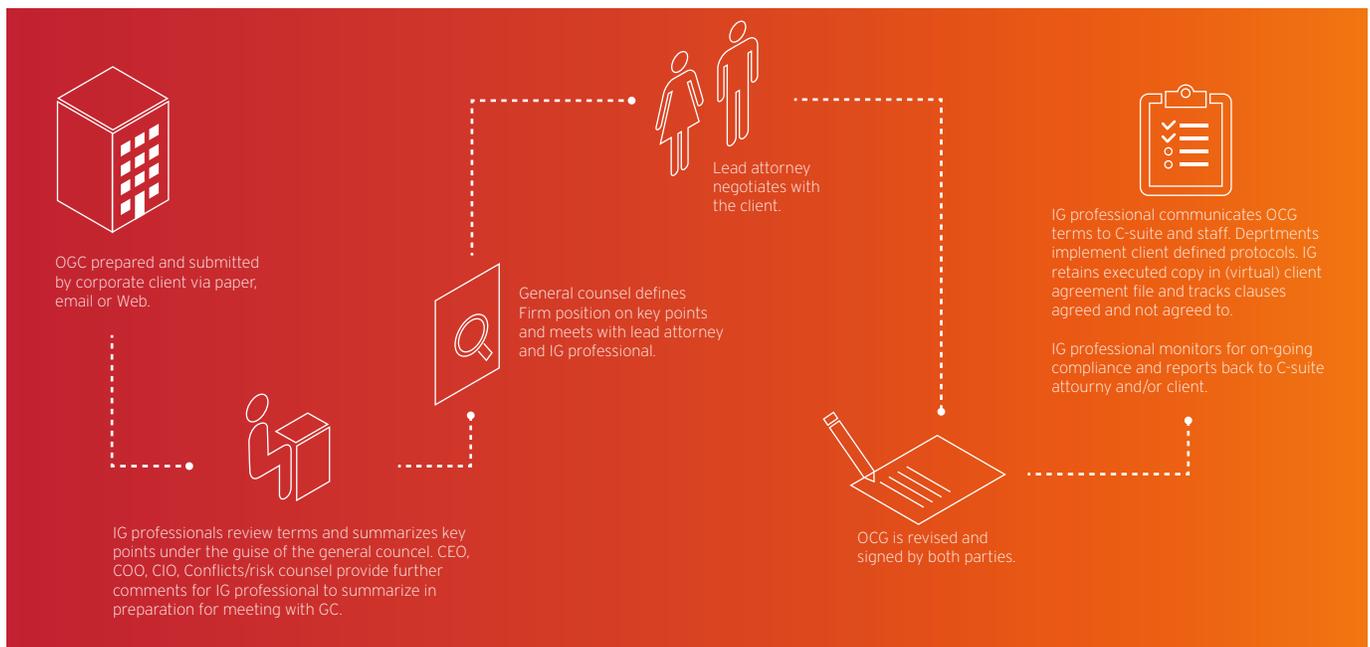


ILLUSTRATION 1

A record of what was and was not agreed to should be tracked in a database for easy reference in future negotiations with other clients. This tracking should be detailed and identify specific terms that were agreed to and those that were not. All of this should be executed on an expedited basis as time is of the essence in attaining the client's confidence and business. Loss of business is not an option and delays should be avoided whenever possible.

TECHNOLOGY SUPPORT FOR ADOPTED OCGs PROCESS

Once your firm commits to defining a OCGs process, you will need to decide to what level your technology will support the underlying process. It is not good enough for the OCGs to be collected and stored centrally in a physical file. They need to be collected and stored in an electronic repository that can be easily searched against and shared amongst all relevant firm personnel. Many firms have elected to store their OCGs on intranet sites or portals while others have created a workspace in their document management system. A more progressive option is to create a secure FTP site in the public cloud. Regardless of the technology selected, it should provide attorneys with one-stop-shopping to locate OCGs for any client they may be dealing with on any given transaction or representation. The files themselves should be stored in a searchable format that allows individuals to easily locate specific terms when needed.

Another consideration is how to identify those clients and matters governed by OCGs terms and conditions. Many firms have added questions to their client matter intake forms asking if the client has established OCGs. Some firms also ask lateral hires if their potential portable clients imposed OCGs at their prior firm. Firms should consider modifying their conflict reports and pre-bills/proformas to flag clients with existing OCGs in place. Another trend we see is sending automated alerts to new timekeepers when they first bill time to a client for which an OCG is in place. This alert includes an attachment to the OCGs and directs them to review and comply with it. There is additional technology available that allows you to track individual acknowledgements to these types of alerts to support overall compliance with the OCGs. Finally, it is deemed a best practice to send periodic reminders to all timekeepers who work on a given client, specifying the OCGs terms and requiring electronic acknowledgement of their acceptance of such.

Do you have formal programs/
methods to educate attorneys and
raise awareness about OCGs?

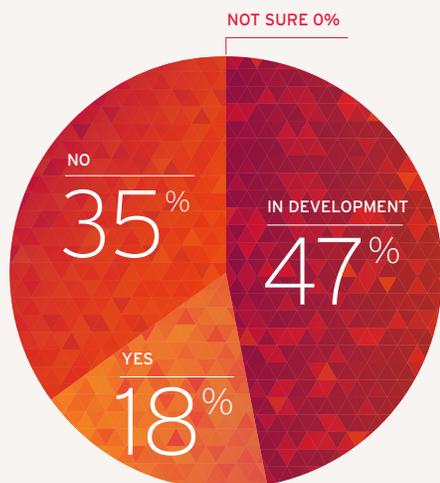


CHART 1 – 2014 OCGs SURVEY

LOOKING FORWARD AND LOOKING BACK

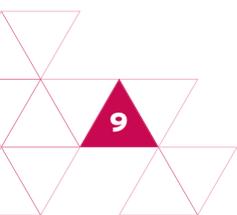
Another challenging item that should be addressed is determining how to implement your OCGs procedures. So far we have focused our discussion on defining strategies going forward, but what about those that already exist? You really should think about the potential landmines. Where might OCGs already exist – in attorney files, billing files, conflict files, marketing files, IT security audit files, or COO files? If they exist, were they formally acknowledged and signed or simply filed away and forgotten about? What should you do if you are not in compliance? Do you have an obligation to notify the client and negotiate more equitable terms at the risk of losing business? These are tough decisions that should be dealt with from an information governance and risk perspective. You will need to involve various stakeholders in this discussion including the General Counsel, Chief Operating Officer, Chief Information Officer and other top-level decision makers.

EDUCATION & COMMUNICATION PLAN

Generally speaking, firms should educate lawyers and staff on the firm's OCGs program and their respective obligations. Most firms responding to the survey question (see Chart 1) either have an education component in development or not at all. According to the 2014 OCGs Survey, two firms have made this education part of professional responsibility training and one firm has held presentations by the General Counsel.

As stated previously, a prospective client's OCGs are usually submitted during the initial stages of an engagement. First and foremost, a firm's OCG procedures should contain provisions on how to address and monitor when OCGs are submitted and how they should be executed. An important part of the internal procedures should focus on how to identify OCGs and the escalation process, so they can be reviewed, negotiated, and approved.

OCGs may be submitted to the firm in a variety of ways and to a variety of people. Marketing departments, specifically, should be educated on potential concerns when responding to RFPs. Often RFPs include OCGs contract language, thus triggering a need for escalation, review, and approval. OCGs might also be sent to the firm along with the signed engagement letter, incorporating the terms by reference. Additionally, OCGs could be sent directly to Finance or another department within the firm after the business has been won. These scenarios show the need for a clear process on how to identify OCGs and non-standard engagement terms, and more importantly, how to escalate those to the proper individuals in the firm. The best practice is for firms to have a central repository and a defined distribution process for all new OCGs. Obviously, time is of the essence in all scenarios because if the firm does not address OCGs or non-standard terms immediately, they may lose the ability to negotiate more favorable terms later. In addition, failure to escalate OCGs as needed could result in the firm failing to comply.



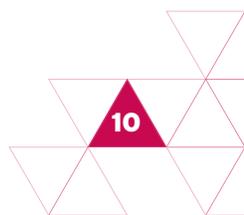
As part of the firm's OCGs education plan, all lawyers and staff who might participate in marketing and business development activities should be trained to identify engagement contract language. It may be helpful to provide sample contract language that may require escalation and review.

It is also critical to educate lawyers that any documents received with, or in response to the engagement letter should be reviewed carefully and escalated for review and approval, since such documentation might contain rules or guidelines that may bind the firm. Similarly, administrative and operational departments should, at minimum, forward any documents they receive directly from the client to the lawyer in charge of the client/matter, or alternately, follow any escalation process the firm has established. The trend is toward developing an automated workflow process to route relevant documents for review and approvals.

PROVIDE ATTORNEYS INFORMATION ABOUT WHAT IS IN THE OCG

By the time the firm has acquired a new client, the review and approval process for the OCGs should have been completed, with the final OCGs in the hands of the firm. The firm's formal procedures should detail how attorneys are informed of the guidelines. The process should also address what should happen as attorneys are brought into a matter, for example triggering alerts when an attorney records time. OCGs provisions can span many topics, including confidentiality, media discussions, restricted access to client documents, competitor provisions, billing restrictions, the client's right to audit firm's security program, litigation support processes, matter staffing, conflict parameters, and records retention requirements for paper and electronic records.

The firm's systems should facilitate management of the requirements such as security, records, billing, and conflict requirements, but these systems alone cannot completely manage all requirements. Additionally, lawyers who will work on a matter must be informed of requirements that will affect how they perform their work, such as specific billing requirements, staffing of legal and non-legal team members, information security requirements, etc. Some OCGs have very clearly defined expectations surrounding how the client's eDiscovery process should be executed. Attorneys should be informed of provisions that are required for each client at the inception of the matter, as they are included on the case or as soon as the firm approves such requirements. The process for communicating requirements to individual lawyers should be defined in the OCG procedures, and should be automated as much as possible.



Does your firm have standard terms and preemptive responses?

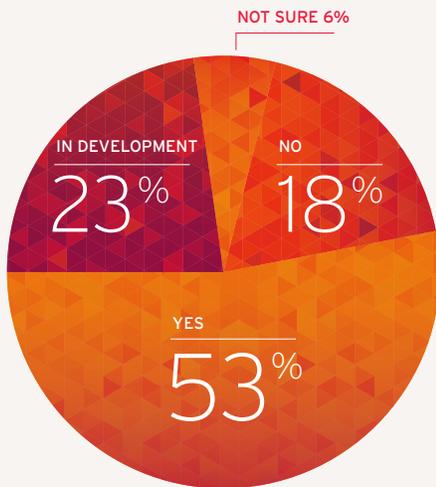


CHART 2 – 2014 OCGs SURVEY

Does your firm have formal policies and procedures surrounding OCGs?

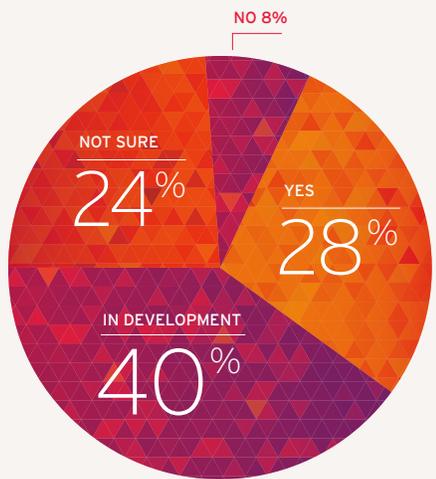


CHART 3 – 2014 OCGs SURVEY

COMMUNICATION BETWEEN ATTORNEY AND CLIENT – BATTLE OF THE FORMS

Many large prestigious firms have already begun to develop preemptive language and a clear position on certain provisions that are routinely encountered in OCGs. Other firms do not always feel they have the leverage and are less willing to push back at the risk of losing the client's business. The firm's position on negotiating various provisions with prospective clients should generally be established in the firm's OCGs procedures, specifically who is authorized to negotiate the terms and who will ultimately sign off.

Based upon our 2014 OCGs Survey results (see Chart 2), standard terms and preemptive language has or is being formalized for a majority of firms. In order to expedite the OCGs review and approval process, it is highly recommended that all firms consider development of standard language that would be helpful when encountering and negotiating similar provisions, and that firms track "hot topics" for future reference. This advance planning can save time and provide firms with counter language to facilitate negotiations. This is outlined in the previous section titled Business Approvers Plan.

ADMINISTRATIVE DEPARTMENT ROLES IN ADHERING TO OCGs

The 2014 OCGs survey asked which firms have policies and procedures in place for OCGs (see Chart 3). The majority of responses indicated that procedures are in development, followed by a number of firms that do have procedures in place.

The policies and procedures should clearly define how administrative departments can assist in meeting the agreed terms. The IT department plays a key role in the implementation and management of security requirements, and those policies and processes should be aligned with the firm's IG requirements. Technology can assist with the implementation of security requirements to affected repositories across the firm. Likewise, the Finance and Marketing departments should apply requirements and utilize technology to manage those requirements affecting them across clients and affected matters. Finally, technology and staff for Conflicts, New Business Intake, and Records should routinely be informed of OCGs requirements that affect them and should utilize systems to track, monitor, and comply with OCGs.

Communication of how administrative departments manage OCGs should be communicated to lawyers and be included in training components for new hires and all lawyers in the firm.

If OCG requires the firm to treat the client and its affiliates the same as the client (i.e. collapse the tree), do you agree to do so?

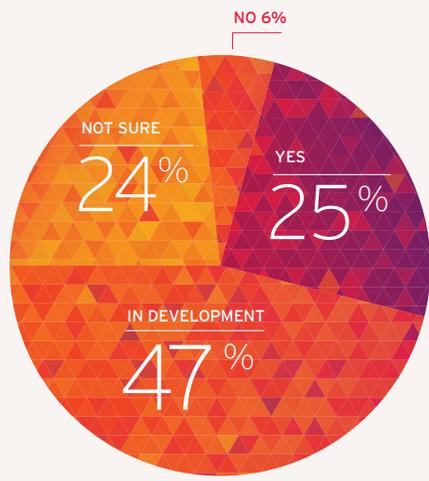


CHART 4 – 2014 OCGs SURVEY

RECORDS AND INFORMATION MANAGEMENT & OUTSIDE COUNSEL GUIDELINES

The 2014 OCGs Survey indicated that OCG provisions related to records retention, return of files, restricted access to files, data security, and data transmission were among the most difficult to successfully implement.

As one can see from the above list, many of the challenges center on security, so IG professionals should be actively involved in addressing these requirements. Most firms have implemented or are re-assessing their security protocol in terms of policies and technology, some looking toward ISO 27001 certification. Whether firms seek certification or not, a comprehensive security policy will alleviate potentially cumbersome efforts to meet OCGs requirements after the fact, and will also reduce the firm's potential exposure to risk in general.

It is critical to have actionable records, an information policy and retention schedule, along with procedures for consistent implementation, and compliance monitoring. This will facilitate a firm's assessment and review of OCGs. Certain OCGs provisions that are too restrictive and that conflict with the firm's own retention requirements should be negotiated before taking on the business.

The records and information policy should include both hardcopy and electronic records, and should identify official repositories for all information (paper and electronic) so that compliance with OCGs can be implemented and monitored easily. Any exceptions to the firm's retention schedule should be documented in writing, or in accordance with the firm's OCGs policy and procedures. While not feasible for every type of OCG provision, firms should attempt to manage and automate requirements with technology in order to avoid intense manual tracking and the potential for human error.

CONFLICTS & OUTSIDE COUNSEL GUIDELINES

PARENTS AND SUBSIDIARIES

OCGs often seek to extend representation to all subsidiaries. If this provision is in an OCG, firms may ask the prospective client to provide a list of subsidiaries; other firms use external databases to make the assessment. Extending the representation to subsidiaries can have a deep impact on firms and can potentially limit their ability to obtain other work. This is often a point of negotiation between the firm and the prospective client, and may result in the firm deciding not to take on the client if the impact would be too severe. Ultimately, this comes down to negotiation and the relative importance of the client for current and future business. Most firms that responded to this question in the 2014 OCGs Survey (see Chart 4) stated that this type of OCG provision is decided on a case-by-case basis. The ABA Formal Opinion 95-390 lays out guidelines to evaluate whether a conflict exists, by using percent ownership and other such criteria. To avoid having to go through this process, create meaningful agreements.

If the firm does accept OCGs that extend representation to all client subsidiaries, the conflicts database should be used to track any potential issues and should require review by appropriate lawyers if a hit occurs on any subsidiaries. Ongoing and update tracking of subsidiaries and affiliates in the conflict system also poses a unique challenge to the firm, as frequently commercially available information sources may not have current information. Asking the client to provide periodic updates on their corporate family tree as part of the OCGs is becoming an accepted method of dealing with this issue.

ADDITIONAL CONSIDERATIONS

As the blanket subsidiary and affiliate conflict clearance requirement may well lie outside a law firm's ethical obligations, prospective clients may also attempt to extend the definition of conflicts in other ways beyond the firm's regular practices and its ethical requirements. This again is a point that may be negotiated by the lawyer bringing in the business, management, and others who have been identified as part of the decision-making team. If so, any requirements that differ from the regular conflict practices of the firm must be communicated to the conflict team and implemented as an exception for the particular client. This exception could impact the conflict process, as well as the new business intake workflow.

Some OCGs have also tried to limit the firm's ability to do business with competitors, sometimes extending beyond the ethical obligations of the law firm. The 2014 OCGs Survey asked firms what provisions were most difficult to implement with this having the highest response rate. When this provision is part of an OCG, firms are many times asking the client to provide a list of companies they consider to be competitors (and why), and to provide periodic updates. If decision-makers at the firm accept this provision in an OCG, the conflict department will need to determine the best way to track these entities so they can be addressed as new business is considered.

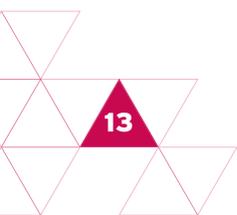
WAIVERS

Language regarding waiver provisions is less common but does make an appearance in some OCGs. When it does, it typically includes requirements that the client be notified of all potential conflicts. It may list names or titles of those authorized to approve waivers on behalf of client and it may state that waivers need to be in writing and it may contain sample letters with required language.

IT PLAN – SECURITY ISSUES – CLIENT AUDITS

One provision that is appearing more often in OCGs terms is the ability for the client to conduct security audits of the firm's information systems. This has created a situation where many firms are considering ISO 27001 certification. ISO 27001 has earned the reputation of being the "gold standard" of data security. It is believed that being able to attest to a standard such as ISO 27001 makes responding to a client's security audit, OCGs demands, or RFPs easier. However, the 2013 International Legal Technology Association (ILTA) Survey³ revealed that only 2% of firms surveyed rely on ISO 27001 certification as a security measure. So why hasn't the legal profession embraced ISO 27001?

Certification under ISO 27001 requires a substantial investment of resources by the firm to review, analyze, upgrade, and monitor all areas of the IT infrastructure. Up until now, there was no compelling reason to comply since most law firms are privately owned and not subject to any formal regulatory body. It should be noted that the ISO 27001 certification is a measure of the firm's compliance with its own stated standards and practices in the firm's specified information operations. As such, the firm's standards may not be aligned with the client's security standards or scope as defined by their own ISO 27001 certification. An ISO 27001 certification can initially be narrowly scoped and then expanded to provide continuous improvement and expansion to other systems, but the client may have valid concerns if the law firm's initial scope is not in alignment with that of the client.



Does your firm believe that having ISO 27001 certification will help streamline the OCG response.

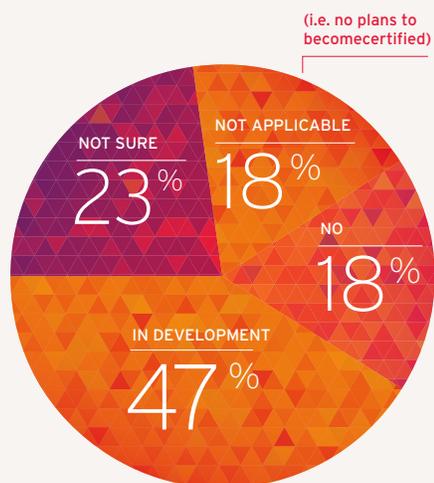


CHART 5 – 2014 OCGs SURVEY

The question, from the 2014 OCGs Survey, (see Chart 5) posed to our representative sampling of Iron Mountain Law Firm Information Governance Symposium firms asked if having ISO 27001 certification will help streamline the OCG process, and 41% responded “yes.” We can only assume that those firms responding to our survey are assuming that if they had already pursued and obtained ISO certification, then the OCGs response to many of the common questions would simply cite the ISO certification itself. This will eliminate the need to require a much longer detailed explanation of the actual IT policy and/or procedure.

As stated previously, achieving an ISO certification comes with a substantial cost and can be a financial burden to the firm, but there is another option. Many firms are now considering pursuing the Information Technology Infrastructure Library (ITIL) designation as an alternative to ISO 27001. ITIL is a globally recognized collection of best practices for IT services. ITIL is easier to implement and a more cost-effective methodology for streamlining processes and improving productivity within the IT arena. ITIL strives to provide uninterrupted IT service in a secure environment. The common denominator with both ISO 27001 and ITIL is that they strive to ensure that information receives the appropriate level of security and protection within the organization and with external users of that information, although the scope of ITIL can be much broader than that of ISO 27001.

Only time will tell if ITIL is good enough to meet the demanding standards of clients given their extremely strict data security and leakage provisions. We do not know if ITIL will provide the same level of comfort while ensuring compliance with existing regulations already established by ISO 27001. Regardless of whether any formal certification or designation is achieved, your IT department will need to win the client’s confidence by demonstrating that you have implemented and followed a regimented IT security protocol on a consistent basis. Some firms are addressing this concern by hiring independent security experts to perform in-depth security audits on themselves. This typically results in a scorecard that rates how your firm compares to its competitors in the marketplace. Another deliverable typically provided is a list of recommendations for improvement along a risk rating for each, which will help identify those areas that are most vulnerable and in need of immediate improvement. Firms may choose to share this scorecard with their clients as a means to demonstrate their commitment to enhancing their security protocol.

FINAL THOUGHTS

Clients are paying close attention to how the legal profession responds to their OCGs requests. Honoring “in the breach” is no longer considered an option as more and more clients are asking for some level of assurance that their requests are being followed. In addition, the FBI has specifically identified law firms as targets for hackers given the breadth and scope of client information possessed by firms. Clients may ask that the law firm provide annual certification or an affidavit and to self-report any

Do you have defined procedures to monitor on-going compliance with OCG terms?

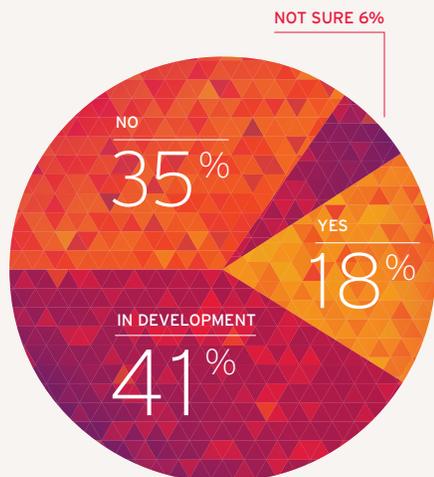
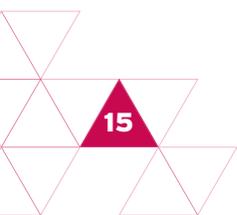


CHART 6 – 2014 OCGs SURVEY

breaches that occurred. Other clients may request that the law firm permit an independent third-party to come on-site and conduct a compliance audit. Regardless of the method, the message from the client is clear – *give us what we want or we will find someone else who will.*

This is driving many firms to consider implementing their own internal audit departments to monitor adherence to the various OCGs provisions. Forty-one percent of firms from the 2014 OCGs Survey (see Chart 6) say that they are in the process of developing on-going compliance procedures. Firms are investing heavily in technology and security and adjusting their budgets to allow for necessary improvements. Firms are also finding it necessary to increase staff to administer and monitor compliance, and this in turn is driving up overhead costs within the organization. Law firms are listening to their clients and trying to foster and maintain long-term business relationships by investing in initiatives that are important to the client (as well as the law firm).



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ABOUT IRON MOUNTAIN

Iron Mountain Incorporated (NYSE: IRM) provides information management services that help organizations lower the costs, risks and inefficiencies of managing their physical and digital data. Founded in 1951, Iron Mountain manages billions of information assets, including backup and archival data, electronic records, document imaging, business records, secure shredding, and more, for organizations around the world. Visit the company website at www.ironmountain.com for more information.

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