

## **CLLAS**

### **Practice Note Respecting Outside Counsel Guidelines**

Over the past several years, there has been a significant increase in the number of clients that require law firms to adhere to their terms of engagement or “Outside Counsel Guidelines” (“OCGs”). They often contain onerous provisions relating to – among other things - conflicts of interest, matter budgeting, limitations on disbursements, prohibitions on rate increases and restrictions and/or requirements regarding technology and staffing. The purpose of this practice note is to raise awareness about certain risks associated with some of the terms and conditions that can be found in OCGs. Some terms and conditions may create potential liabilities under contract that are not insured by LawPro or CLLAS, while others may increase the cost or complexity of defending an insured claim.

1. CLLAS members should consider having a procedure in place so that OCGs are reviewed not only by the client relationship manager, but also centrally by a person or persons familiar with the terms OCGs frequently contain and the risks they could present. For instance, OCGs could be reviewed by the General Counsel or other risk management personnel (from a risk management perspective), and the Director, Finance or other accounting department personnel (to ensure compliance with the financial provisions), before agreeing to their terms.
2. CLLAS members should consider taking steps to ensure that lawyers and others working on matters for clients who have provided OCGs are aware of the content of the OCGs and are complying with them.
3. CLLAS members should be aware that some of the more onerous OCGs contain provisions that raise serious risk management issues, including:
  - (a) demands that the firm indemnify the client or third parties;
  - (b) demands that the firm monitor “business” and “issue” conflicts of interest and/or the application of the conflicts provisions to all affiliates of the client anywhere, which may expose the law firm to unknown and undiscoverable conflict of interest claims;
  - (c) statements that the client owns all intellectual property in the work product, which fail to recognize the role of precedents in legal practice;
  - (d) requests that the firm provide copies of CLLAS policies and procedures or disclosure concerning the operations of CLLAS itself;
  - (e) designation of the governing law or forum as a jurisdiction other than the province in which the firm is located, or the retainer being subject to binding (often foreign) arbitration; and

- (f) demands that the firm perform criminal background checks on lawyers, law clerks, legal assistants or other employees, which may raise privacy concerns.
4. Similarly, CLLAS firms should note some of the more onerous technology requirements contained in OCGs, including:
- (a) demands that clients be permitted to conduct invasive technology audits;
  - (b) requirements that documents be accessible on a “need to know” only basis (i.e. all of the client’s matters will have to be behind ethical walls with limits on staffing and knowledge sharing);
  - (c) prohibitions or restrictions on the use of the cloud, mobile apps, USB keys, other unencrypted portable devices and/or publicly accessible wifi;
  - (d) the completion of detailed technology security questionnaires and confirmation that certain security systems are in place (i.e. complex passwords, short timeouts, two factor authentication, remote access protocols, encrypted emails, servers and wifi, etc.);
  - (e) disclosure of details of attempted (and successful) electronic security breaches and obligations to notify the client within very short time frames and prior to engaging forensic specialists;
  - (f) disclosure of details of vulnerability assessments;
  - (g) disclosure of details of business continuity and disaster recovery plans, including security breach (i.e. hacking) response plans; and
  - (h) confirmation of sufficient cyber insurance.