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Law Department Management

DUELING DOCUMENTS

*Law-firm retention letters
versus law department
outside-counsel guidelines*

BY REES W. MORRISON

DUELING may be outlawed, but at the start of an engagement law departments and their law firms sometimes walk back 10 paces, turn and fire. In this country, law departments blast away with their outside-counsel guidelines; law firms return fire with their retention letters. Neither document will disappear, but the two sides can take a shot at improving the exchange. This article starts with a bit of history on both documents and then considers both sides of the shootout.

For many years, law firms

undertook matters for companies after routinely sending a letter of retention, which the in-house lawyer or client dutifully signed. Even now, the typical retention letter from a law firm explains how it will bill for its work on the matter, including expenses; limits the enforceability of its representations regarding budgets and outcomes; details how it figures its bills and its right to be paid and to hold attorneys' liens; narrows any interpretations of conflicts of interest; and covers assorted points in its favor that the law firm thought important to explain. Often, state ethics rules require a firm to include certain terms. A retention letter strongly favors its drafter, the law firm.

Rees W. Morrison, co-head of law-department management consulting for Hildebrandt International, hosts the blog www.LawDepartmentManagement.typepad.com. He can be reached at rwmorrison@hildebrandt.com.



Enter Guidelines

As for law departments, before they armed for the duel, most contented themselves with meek transmittal letters to law firms wherein they confirmed the engagement of the firm and sent along what documents were available. This complacent exchange began to come apart in the past 10 or 15 years as law departments took more active control over management of their outside counsel.

Law departments recognized that they need to set some of their own rules and expectations, so they began to create guidelines for outside counsel. These guidelines covered all matters sent to external counsel, unlike law-firm retention letters which govern a single matter. Occasionally a law department has a set of guidelines specifically for litigated matters. In general, guidelines swing to the opposite side from law-firm retention letters: The buyer asserts its dominance.

The guidelines specify how the law firm will bill—such as monthly and in detail with supporting documentation; what disbursements can be charged to the client and on what cost basis; limitations on changes of law firm personnel; and how the law department's responsible attorney is the key decision-maker. Guidelines for outside counsel are now commonplace; compilations of them have been published and many law departments have gone through several iterations.

Some retention letters run to three or four pages, even with attachments. Outside-counsel guidelines typically are more like five to six pages, but some that seek

even more specificity and control run to 20 pages or longer. They cover situations such as when journalists call, the necessity for electronic bills, the importance of timely billing, preferences for certain vendors of services, and much more.

No metrics have come to my attention about the frequency with which law firms send engagement letters; my estimate, having consulted to law departments for 20 years, is that more than three-quarters of all U.S. law departments with more than 10 attorneys have by now promulgated some form of outside-counsel guidelines.

Document Clash

What has developed in recent years has been a volley between the law firm's retention letter and the law department's outside-counsel guidelines. The two documents clash in almost every important respect because they seek opposite ends. The partner wants freedom of action, financial protection, and little accountability. The general counsel wants control, cost consciousness, and disciplined representation.

One response by law departments has been to negotiate or strike out the most egregious provisions of the law firm's letter. That effort takes time and can irritate both sides to the engagement, sides that have to work amicably together thereafter. It's as awkward as haggling through a prenuptial agreement.

Another response in the "battle of the forms" is that the law department signs the retention letter of the law firm but sends the department's own guidelines and states that where there are any conflicts, the guidelines take precedence.

A third choice is for law departments simply to refuse to sign law-firm engagement letters. The law department is the buyer, and it sets the terms of the engagement. If a law firm finds something objectionable in the client's guidelines, it is the firm's responsibility to ask for a modification.

Who signs what is not the only bump in the road. Consider also the proliferation of forms and the different degrees by which

law departments try to assure compliance with their guidelines.

What worsens the situation is the lack of consistency among outside-counsel guidelines—a consequence of how the guidelines sprang up. Unlike the uniform, task-based management system codes (UTBMS) and the LEDES 1998b billing format, both of which started out as standardized tools, outside-counsel guidelines never started out from a common set of wording or structure. Each law department that has adopted such guidelines takes the only respectable lawyerly route: "Let's write one from scratch using precedent documents." After years of this, many variants exist. As a result of the profusion of guidelines, large law firms face dozens of variations on what their clients want.

Practice and Enforcement

On top of the multitude of versions, the practices of law departments in regard to their guidelines differ substantially. Some law departments send each of the law firms they retain their guidelines and do nothing thereafter for each individual matter. They may never refer to them again. Other law departments insist on having the guidelines sent with each matter. Some law departments go so far as to insist that the responsible partner sign and return the guidelines, while others seek even more accountability and insist that the managing partner sign them and circulate them to everybody in the law firm.

Enforcement of the rules in guidelines, such as there is, usually occurs through the use of electronic billing software. That software encodes various staffing and disbursement rules and combs through invoices for any instances of non-compliance. Otherwise, much of the language in outside-counsel guidelines is precatory and may never be invoked. Even so, if a client is not happy with the work of a law firm, it does not need an outside-counsel guideline to give it grounds to terminate the relationship.

The efficacy of guidelines in terms of

controlling outside counsel costs, however, has yet to be measured, let alone proven. Guidelines serve the purpose of putting law firms on notice that costs and performance matter, but in the end I am dubious that all the time and energy expended on them have made much difference. The problems of warring documents, confusing variations everywhere, and dissimilar enforcement could be ameliorated.

What we need as an industry is something akin to the common application for college. We need a set of baseline guidelines for outside counsel that law departments can start from uniformly and incorporate by reference. Such a taxonomy of concepts and positions, in a commonly recognized order, would make it easier for law departments to think about what they want to emphasize, rather than to struggle with drafting. If a department feels obliged to modify portions or add other provisions, at least there would be a framework for consistency and law firms would be more appreciative.

The benefit for law firms from a common set of terms is that they too could spend less time on this aspect of representation, accept industry standards, and only discuss the few provisions that seem inappropriate.