

Hard line or soft pedal?

Three key elements of outside counsel guidelines.

Many law departments send their law firms a set of guidelines. Those guidelines typically cover general points about the relationship between the law department and the law firm in such areas as billing, expenses, staffing, publicity and others. Three particular choices regarding guidelines are the topic for this month's column.

1. Hard-wired positions or situational contingency.

One choice a general counsel makes about outside counsel guidelines is whether to bake into them specific requirements and terms, or whether to leave many decisions to the lead inside lawyer who is responsible for the matter.

For example, a guideline might mandate that all law firms will provide a 5% discount off their standard hourly rates. Or it might say that no more than three people may be assigned to a matter without prior approval of the lead lawyer. Both of those provisions set out hard and fast rules applicable in all situations.

The opposite position sets out general principles that the lead lawyer can apply as appropriate. To return to our examples, the guideline might say that "we expect discounts from our law firms, but recognize that the level of discount varies from matter to matter and firm to firm under the circumstances." As to staffing requirements, the guidelines might merely say that the law firm and the lead lawyer will decide on the appropriate staffing for the matter.

In general, I favour the stronger and more specific positions, because otherwise, the law department might not achieve its objectives, given that each inside lawyer

who manages outside counsel might strike a different balance.

2. Enforced guidelines or laissez-faire guidelines.

Some general counsel take a hard line and insist that the managing partner of the law firm sign the guidelines, to indicate that the firm will comply with them. Others insist that the guidelines be circulated among the partners in the law firm who work on matters for that company. Another form of enforcement is to build into the guidelines punishments for non-compliance — for instance, if the law firm does not submit its bills in a timely fashion and in the required format, the law department will take a percent or two off of the bill.

A contrary view is held by those who see the guidelines as precatory. They are meant generally to shape the relationship, stimulate discussion if necessary, and push in the direction of a progressive and well-managed relationship. It is outside-counsel management with a light touch.

As to these positions, I favour the more heavy-handed approach. If a law department does not insist on compliance and accountability, why bother to draft and disseminate outside counsel guidelines? Change at law firms will not happen quickly enough without discipline and enforcement.

3. Detailed rules or broad understandings.

The third axis for thinking about outside counsel might be characterized as the "constitutional" school of thought compared to the "regulatory interpretation" school of thought. By this I mean that the guidelines might set out a few general principles for how the law department wants to work



with its outside firms, but leaves the implementation details to be fashioned by the lead lawyer. It doesn't dive into the details and spell out every alternative; rather, it states the basic operating premises.

Other law departments have created detailed compendia, as many as 25 pages, in which they specify in detail the treatment of every kind of disbursement. Or they lay out all sorts of rules and guidelines for when and how a law firm can address media inquiries. Some of these detailed guidelines, which remind me of lengthy, interpretive regulations, explain step-by-step how and when and with what content law firms should submit revised budgets.

This final spectrum of decisions is a hard one to come down on either side inclusively. In general, my personal preference is for guidelines to be constitutional, but there are sound arguments in favour of spelling out what is meant by the guidelines, giving examples, and guiding law firms with specificity as to how they should perform. ■



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