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Law Department Management

Hot Button Issues In Outside Counsel Guidelines

BY REES W. MORRISON

All but the smallest law departments have guidelines that they distribute to outside counsel. The guidelines explain how the department wants to govern its relationships with its law firms. Generally these guidelines override retention letters that law firms prepare. (Rees W. Morrison, "Dueling Documents," NYLJ, Sept. 20, 2007.) Large portions of most guidelines are sensible, and law firms neither question them nor object to them. A few controversial topics, however, engender a disproportionate amount of agitation and negotiation.

This article reviews five of those hot buttons: charges related to travel time, conflicts of interest, changes in billing rates, disbursements, and staff restrictions. Additionally, I propose what I believe is a middle-of-the-road position. Law departments with enough leverage can take stronger positions; law firms that are busy or believe strongly in an alternative can seek more moderate outcomes. (Rees W. Morrison, "Hard line or soft pedal: three key elements of outside counsel guidelines," Can. Corp. Counsel Assoc., Fall 2007 at 10.) Regardless, law departments and law firms will be better off if there are some standards that are generally understood and shared.



REES W. MORRISON, *president of Rees Morrison Associates and a lawyer, helps general counsel manage their legal departments. He blogs at www.LawDepartmentManagementblog.com and can be reached at rees@reesmorrison.com.*

- How much will we pay for travel time and upgrades?

Law departments differ on how they handle travel expenses and reimbursements of outside counsel. At one extreme, some outside counsel guidelines prohibit external counsel from charging any time on a matter during travel unless the lawyer is working on the matter. At the other extreme, or where nothing is said about travel-time charges, lawyers may bill from pillow to pillow, from when they shower in the morning until they fall asleep in the hotel.

The fact is, the law department is asking the lawyer to travel on its behalf, and often uncomfortably and outside normal business hours. A fair compromise is to allow counsel to charge any time they actually work on the matter but also take into account the times they are unable to work due to lack of access to the Internet or other conditions. During wheels-up, for instance, it is inadvisable for them to pore over sensitive documents, in hard copy or on a laptop screen. As part of this solution, therefore, lawyers would be paid for the time when they cannot use the Internet. A tougher variant permits billing for only a set amount of hours, such as three hours for any flight over five hours, or imposes a significant discount.

A related issue concerns the right of lawyers at law firms, when flying on client business, to buy a first- or business-class ticket. The fare difference can be dramatic. The preponderant position that I have seen is for law departments to permit lawyers to upgrade only for flights across the Atlantic or Pacific. Some have further restricted this right to partners. Some have permitted upgrades on redeye flights across the United States. Whatever the resolution, it seems equitable to hold

outside counsel to the same class-fare restrictions as internal counsel.

- How scrupulously should we hold firms accountable for conflicts of interest?

When large clients hire large firms, the risks of conflicts of interest abound. Some outside counsel guidelines of Fortune 500 companies purport to require even huge law firms to disclose "any actual or potential business or legal conflict of interest." If the client company is large and has many business involvements under way and contemplated—in other words, virtually every company of much size—no law firm can meet this broad standard. How can they even pretend to divine potential business conflicts? When the business complexities of large clients combine with the beehive of legal services hundreds of lawyers in multiple offices swarm over on behalf of thousands of clients, no law firm can comprehensively spot all legal services that might trigger a conflict of interest.

General counsel and managing partners recognize this practical impossibility and generally come to a more moderate position in the guidelines. A plausible compromise position has three components. One is that the law firm conduct a conflict check at the start of its representation and periodically thereafter. Software databases can do much of this, but humans need to be aware of potential conflicts too. A second component is not to bring any adversarial proceeding against the client. It is an absolute no-no to sue your client or any of its subsidiaries or joint ventures. A third typical obligation requires the law department to identify relevant subsidiaries and potential business initiatives so the firm can get a better handle on conflicts. Most companies can list their corporate entities of substance, and they should

either disclose a significant initiative to primary firms or not hold them accountable for what they cannot know about.

A related concern for those who negotiate outside counsel guidelines has to do with conflicts and proportionality. A large law firm does not want to take on a small matter for a huge client and thereby find itself conflicted from much larger matters for other clients. Essentially, conflicts of interest are business restrictions on law firms, which impinge on profitability. This tension is difficult to resolve, because big clients sometimes legitimately need only relatively small amounts of work. That said, a broad waiver in advance is not the preference of inside counsel. Managers inside companies who are responsible for overseeing the work of outside law firms want some say in whether firms proceed with representations that are or may become contrary to the interests of those managers' companies. But firm partners don't want to be tied down to notification and clearance procedures; selling legal services is hard enough as it is. Both sides clash, and there is no easy answer.

- With what frequency, process, and amount can firms change billing rates?

An aggressive position in-house law departments have taken in issuing outside counsel guidelines is to prohibit increases in billing rates for lawyers working on a matter for the duration of the matter or two years, whichever is shorter. Other law departments insist that they be given written notice of rate changes; some go further and say that they must approve all rate changes for each timekeeper. Another variation is to limit increases in billing rates to some measure, such as the Consumer Price Index (CPI) or a multiple of it. In the end, this disagreement resolves itself according to economic leverage. Powerful clients spending large amounts prevail; specialist partners whose expertise is coveted prevail.

The associated issue that always comes up are promotions of lawyers from associate to partner. My view is that a lawyer's abilities do not jump when they become a partner, so neither should their billing rate for matters they are then handling.

A balanced position would bar rate increases for the shorter of 18 months or the duration of a matter. Beyond that, law firms can submit increases in writing,

law departments can approve or reject them, and the increases can be capped by a third-party standard such as a proportion of the CPI.

- What disbursements will we pay for and for how much?

Disbursement charges by law firms, although they typically make up only 10 percent of the total bill, get disproportionate attention in outside counsel guidelines. Pages and pages detail the quality of hotels that can be used, the scrupulous treatment of airfares and upgrades, limitations on courier services, and prohibitions on charging for air conditioning costs during the summer. It's easier to clamp down on faxes and photocopies, and to have software or bill reviewers fly-speck those expenses, than it is to assess the value created by lawyers drafting documents or giving counsel on a legal question.

A disgruntlement of law departments involves the propensity of lawyers to meet with other lawyers within the law firm and discuss the matter. If everyone attending the intra-firm conferences bills their time for it, costs mount. One intermediate position is to allow the most expensive lawyer to bill the time, but no one else.

The trend may be for law departments to have their primary firms bundle into their billing rates all disbursements except those paid externally. In other words, there should be no charges for photocopying, faxing or internal messengers. Law firms may respond by outsourcing those services. This could be a tricky resolution because there are also payments for online legal research.

Certainly, when external disbursements are billed back to a client, the law firm should not surcharge them and should give the law department the benefit of any discounts the law firm has negotiated. Figuring out "actual costs," however, may sound rigorous and noncontroversial, but it is actually exceedingly slippery. What is the right overhead to allocate for a photocopy machine in Denver? Another approach is to restrict disbursements to a

percentage of the fees billed, but I don't favor that solution.

- How much will we intervene on staffing?

All guidelines for outside counsel emphasize the need for lean staffing. "We will not pay for more than the right amount of time by the right timekeepers on our matters." Rarely do they talk about a list of core team members and state how the time of other timekeepers will be handled. (Rees W. Morrison, "Core Team," NYLJ, July 19, 2007.) Law firms should have a core group of lawyers who work on the company's matters. Then the question is what to do with the other lawyers who from time to time bill on those matters.

My recommendation is that a small core team be identified and expected to bill at least 75 percent of the fees billed on the matter. Other timekeepers will find their time discounted by 20 percent.

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The most strict position law departments take prohibits law firms from billing the time of more than one lawyer at a deposition or a court conference or a meeting. As with nearly every aspect of an outside counsel guideline restriction, the responsible in-house lawyer can waive the restriction.

Conclusion

These five topics crop up all the time with outside counsel guidelines because for law departments they affect the budget; for law firms they concern quality of life, liability, profitability, and management. It would be better for law departments and law firms if there were some consensus on what is a reasonable position to take on each of them.