To protect businesses and ensure compliance with internal budgets, data privacy, security requirements and other legal statutes, corporate legal departments often require outside law firms to agree to stringent outside counsel guidelines. These were originally established to control legal costs and are one of the ways in-house counsel maintain control of outside firms. However, how can corporate counsel be sure that these guidelines are adhered to within a law firm environment? This article will address some of the inherent challenges.

Awareness of the Guidelines

The first step a law firm needs to take to comply with outside counsel guidelines is to become aware that they exist. All too often, the attorney primarily responsible for the relationship with the corporate legal department will agree to the guidelines without first vetting the language with those individuals and departments within the firm that need to establish procedures and technology to comply with them.

Traditionally, larger firms have a documented processes for performing due diligence on potential new business. Intake policies for new clients and matters include an engagement letter, which outlines all of the terms of the representation. The firm’s intake process should include a question inquiring about the existence of outside counsel guidelines. Often the guidelines will contain a provision indicating that they replace all engagement terms previously executed with the law firm.

Establishing a policy to ensure that all outside counsel guidelines are reviewed prior to being executed will go a long way to ensuring attorneys are not putting their law firm at risk. This review should be completed by someone who understands the implications of the terms, such as the law firm’s general counsel. The responsible attorney or practice group leader who has a vested interest in either accepting a new engagement or continuing work for an existing client cannot be given the authority to review or accept outside counsel guidelines on behalf of the firm.

Difficult terms often can be negotiated. The strategy on how to negotiate unacceptable terms will vary by client. The law firm is not obligated to accept all terms at face value.

Controlling Access to Client Information

Much of what is required involves restricting access to client information.
Law firms often implement technology to confine access to matter information only to those individuals working on the matter. Often these programs are intended to work with enterprise document management systems, which are designed to provide a single, organized collaborative repository to manage client matter content. The problem is that, by default, most document management systems are open to anyone within the firm.

Law firm technology resources may be able to restrict access to client matter information that is contained within the document management system; however, many of these same firms also allow attorneys and staff to save confidential client matter information to other unstructured (and open) repositories such as shared network drives or workstation hard drives.

That isn’t the only vulnerability. Often outside counsel guidelines prohibit data related to their representation from being stored on portable media or systems outside of law firm. Yet, attorneys working remotely, out of convenience, often save confidential client information to removable media and cloud-based repositories, such as Dropbox, thereby violating the rules.

Law firms also need to consider how they are handling access to restricted information with support staff resources. Firms may have policies to inform internal support staff of confidentiality requirements; however, many law firms employ an outside company to perform document support functions such as copying, scanning and managing paper records, as well as transporting them (by messenger services, for instance). Outsourced staff may not receive the same training on internal policies and therefore may unknowingly violate outside counsel guidelines related to restricting access. Firms need to have procedures in place to ensure that all support areas, whether outsourced or internal, are managing information in a way that complies with the guidelines. Corporate counsel want assurances that their confidential data is in a secured repository and that access is limited to personnel involved in their matter.

The guidelines may also define the law firm’s obligations regarding retention of client information once representation has concluded. Some retention guidelines may differ from the law firm’s internal information governance and document retention policies. Firms need to be aware of these differences, and if possible incorporate differences in their system for managing retention. Often, the law firm’s records department is unaware of records implications of outside counsel guidelines.

Do the Guidelines Undermine Law Firm Business Goals?

Outside counsel guidelines often have some aspect of loyalty to the client. But a key issue is understanding who the client is. The guidelines may stipulate that the duty of loyalty extends to all subsidiaries and affiliates of the client organization. Yet, an all-encompassing view of the client could limit a law firm’s ability to accept future business.

If a law firm decides to accept a provision that “client” includes subsidiaries and affiliates, there needs to be an understanding as to who is responsible for identifying subsidiaries and affiliates. Will the client regularly update the law firm on new subsidiaries and affiliates? What happens if there is a new subsidiary that conflicts with an existing law firm client?

Law firms must have someone in-house to review terms related to loyalty. Where possible, these loyalty provisions should be revised to ensure that the long-term business goals of the firm are protected.

The Bottom Line

At its core, outside counsel guidelines represent an important component of information governance for both in-house counsel and law firms. With both parties invested in protecting information throughout the entire matter lifecycle, corporate counsel should ensure that law firms are taking every step possible to protect their files. Law firms should develop policies and procedures for reviewing, revising and finalizing outside counsel guidelines terms and conditions as well as communicate the policy and procedures to attorneys, staff and relevant outsourced personnel to ensure compliance. Law firms should communicate that the guidelines and their terms are non-negotiable, and work with attorneys and clients to revise terms where possible. Additionally, in-house counsel should expect law firms to perform their own audit of policies to identify gaps in compliance.

By reviewing that law firms are actively and successfully adhering to guidelines, general and corporate counsel can ensure that not only is their business protected, but also that there is compliance with internal budgets, data privacy, security requirements and other legal statutes.

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