

Your Checklist for Outside Counsel Legal Services Agreements

Keep these 70
points in mind when
reviewing outside
counsel legal
services agreements
for your company.

BY JOHN "JOHNNY" E. MILLER

CONTRACT

This contract is to certify that the aforementioned parties adhere to and comply with all of the terms and conditions laid out in Document 345643.z

As stated by the joint witnesses all standards and processes laid out by the Contracts Commission are to be followed and where possible in all instances agreed upon fully by all of the interested members.

Also as agreed the term of this contract shall not exceed One and Eighty days from the closing of the deal and any extension to this will be subject to an audit to ensure that everything is in place.

Signed.....

Signed.....

Witness.....

Witness.....

Date.....



In your contracts management activities, it's likely that you could be asked by your company to review an outside counsel legal services agreement.

Once it passes through the exclusive domain of in-house attorney review, outside counsel legal services agreements are often additionally reviewed today by a company's contract management personnel in order to potentially surface additional issues that may not have been considered by in-house counsel. Sometimes this additional contract review is requested by your chief financial officer or your procurement management. As with any substantive agreement executed by your company, outside counsel legal services agreements are important contracts that need to be properly reviewed. Companies typically spend more on their outside counsel arrangements than on their own in-house law departments.¹

In my 30-year contracts management career, I have reviewed many legal services engagement agreements with outside counsel. In order to systematically cover the multitude of unique issues in a typical outside counsel agreement review, I have developed a practical Outside Counsel Legal Services Agreement Checklist that I use in reviewing outside counsel legal services agreements.

1 | Consider the use of a multi-year (e.g., three-year) master agreement with separately authorized/signed statements of work for each legal matter. Development of the specific statement of work for each legal matter would address: the effective date of the specific legal services matter; confirmation that any conflicts have been resolved; names and contact information for applicable attorneys for each party; and a clear and complete scope of the legal

services matter, which includes the background, objectives, duties, obligations, requirements, tasks, deliverables, schedule, assumptions, and your company's responsibilities, budget, staffing plan, statement of work pricing type (fixed price, hourly rates, etc.) and so on.

- 2 | Use an ownership/use of legal services/work products provision.
- 3 | Use a SOX 307 reporting requirements provision.
- 4 | Include diversity requirements.
- 5 | Consider including pro bono requirements.
- 6 | Address conflicts (actual, potential, or subject matter) and establish a conflict waivers procedure.
- 7 | Address confidentiality of your company information.
- 8 | Address attorney–client privilege.
- 9 | Address data privacy.
- 10 | Add a Termination for Convenience provision.
- 11 | Address publicity constraints.
- 12 | Add a document retention provision.
- 13 | Address business continuity.
- 14 | State governing law.
- 15 | Consider a convergence on several preferred outside counsel providers that can provide the full range of legal practice areas in return for discounted rates and volume discounts.

- 16 | Consider the use of alternative billing when applicable (discounted rates, volume discounts, cap on annual hourly rate increases, incentive billing, value-based billing, performance billing, firm fixed-fee, blended rates, etc.).
- 17 | Consider risk-sharing provisions.
- 18 | Consider the use of offshore, outside counsel firms by your company and outside counsel.
- 19 | Consider the use of e-billing by outside counsel tied to in-house concurrent of matter management.
- 20 | Use centralization of outside counsel authorizations by only in-house legal, or else resulting invoices will not be valid.
- 21 | Use better outside counsel project management techniques, such as statements of work, periodic progress reports (to include an assessment of the current merits of the matter, range of current liability exposure, estimate of settlement value, and cost of going to trial), engagement plans, and designated engagement and relationship attorneys for both outside counsel and in-house for each matter.
- 22 | Use periodic outside counsel performance assessment/scorecards.
- 23 | Use matter budgets with monthly spend versus budget versus progress analysis.



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- 24 | Use monthly skill versus task analysis for each matter.
- 25 | Use contractual prior approval control gates for outside counsel expenses/disbursements.
- 26 | Obtain periodic range of exposure reports from outside counsel for each matter.
- 27 | Consider potential use of contract attorneys by your company and by outside counsel.
- 28 | Consider the use of actual and virtual secondment of outside counsel.
- 29 | Consider the use of virtual outside counsel firms.
- 30 | Require a monthly write-off hours report from outside counsel.
- 31 | Consider adding a provision of free continuing legal education (CLE) for in-house counsel provided by outside counsel.
- 32 | Consider making outside counsel responsible for complying with your company policies and guidelines.
- 33 | Require that the outside counsel be knowledgeable about your company.
- 34 | Require outside counsel (on each invoice) to report monthly professional fees and expenses and disbursements, total year-to-date professional fees, total year-to-date expenses and disbursements, total inception-to-date professional fees, and total inception-to-date expenses and disbursements.
- 35 | Require a negotiated contractual budget with each legal matter.
- 36 | State that in the event of conflicts between the master engagement agreement and the applicable statement of work, the statement of work will prevail.
- 37 | Require that outside counsel discuss potential alternative dispute resolution methods for matters with your company at the outset of a legal matter engagement.
- 38 | Set up a one-outside-counsel-lawyer rule for meetings, negotiations, depositions, and court appearances, unless otherwise agreed to by your company in advance.
- 39 | State that your company does not pay for replacement attorney learning time or other ramp-up learning costs.
- 40 | Prohibit duplication of effort.
- 41 | Require that charges for outside counsel interoffice conferences be minimized unless discussing meaningful direction or strategy.
- 42 | Require run-rate forecasts of anticipated future costs reports on a matter at any time if so required by your company.
- 43 | State that attorney fee rates are firm for one year. Use a percentage cap (e.g., three percent) on annual attorney fee increases.
- 44 | Require additional volume percentage discounts at the end of each year to apply for the next year.
- 45 | Require timely monthly reports of accrued but unbilled (pending) charges if so required by your company.
- 46 | Require compliance with all applicable insider-trading laws, the Foreign Corrupt Practices Act (FCPA), antiboycott laws, and export compliance laws and regulations.
- 47 | Consider the use of a prompt payment discount.
- 48 | Consider reasonable charging limits, such as no more than 10 hours per day for a given attorney (unless approved in advance).
- 49 | Address how travel time will be handled (e.g., no attorney fees for travel time).
- 50 | Consider requiring (1) prior approval on air travel, (2) compliance with your company travel policy, and (3) use of company-approved hotels.
- 51 | Require timely prior written notification to your company if outside counsel becomes aware that the matter budget will be exceeded.
- 52 | Prohibit formula billing (e.g., \$100 for a letter).
- 53 | Require compliance with equal opportunity, antidiscrimination, affirmative action, etc.
- 54 | Consider stating that charges for computer research (Lexis Nexis, WestLaw, etc.) are not billable.
- 55 | Consider stating that photocopy costs in excess of \$X require prior approval from your company. (Perhaps require the use of your company-approved photocopy supplier.)
- 56 | State that nonbillables include office supplies, local telephone charges, per-page fax charges (excluding long distance charges), routine mail, etc.
- 57 | Require the use of your company-approved couriers.
- 58 | State that there is no alcohol reimbursement.
- 59 | State that there is no overtime transportation for outside counsel personnel.
- 60 | Prohibit phone charges at hotel rates.
- 61 | Require the use of good judgment on business meals.
- 62 | Consider the use of videoconference instead of travel, if reasonable.

- 63 | Attach a list of all of your company's affiliated entities that are to be covered by the agreement.
- 64 | Seek most-favored-customer pricing.
- 65 | Use service level agreements (if appropriate).
- 66 | Potentially use an audit rights provision.
- 67 | Consider prohibiting your company's responsibility for third-party invoices.
- 68 | Address how attorney fee disputes will be handled (via arbitration, litigation, etc.).
- 69 | Require that copies of all pleadings, correspondence, and memos be provided to your company.
- 70 | Include a partnering provision to proactively help discover mutually beneficial ways to improve the outside counsel relationship, as well as to discover ways to further enhance

communication, innovation, technology improvements, performance, risk-reduction, continuous improvement, and spend/cost savings with outside counsel.

Conclusion

The goal of an outside counsel legal services engagement agreement is to facilitate a win-win in-house/outside counsel relationship.² This Outside Counsel Legal Services Agreement Checklist is not exhaustive. Every outside counsel engagement arrangement for legal services has some unique aspects that may not be addressed in this checklist.

However, if you routinely use this Outside Counsel Legal Services Agreement Checklist as one of several resources when you review a legal services agreement with outside counsel, you will be pleasantly surprised with the large number of substantive, material, risk-reduction, performance-improvement, and cost-savings issues that will be surfaced for proper resolution. **CM**

ABOUT THE AUTHOR

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Send comments about this article to cm@ncmahq.org.

ENDNOTES

1. 2005 ACCA/Serengeti Managing Outside Counsel Survey: Assessing Key elements of the In-House Counsel/Outside Counsel Relationships, 14.
2. Excerpted from Ronald F. Pol, "Get More Value from Outside Counsel; Show Them the Flipside," ACCA Docket, April 2003. Accessed at www.acca.com/protected/pubs/docket/am03/flipside1.php.

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