

MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents

Legal Considerations When Outsourcing

Coffee Talk: A Miller Thomson
Health Industry Seminar Series



February 8, 2007
Karima Kanani

This Presentation is provided as an information service to our clients and is a summary of current legal issues. The Presentation is not meant as legal opinions and readers are cautioned not to act on information provided in this document without seeking specific legal advice with respect to their unique circumstances.

MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents



Agenda

1. What is Outsourcing?
2. Identifying an Outsourcing Supplier
3. Preliminary Legal Issues to Consider
4. Key Parts of an Outsourcing Contract



What is Outsourcing?

Involves a healthcare facility entering into a long-term service contract with a supplier for the provision of a service that would otherwise be provided by the healthcare facility internally

E.g. Food Services
 Housekeeping
 Security
 Purchasing & Materials Management
 Clinical Services
 Administrative back office
 Technology

MILLER THOMSON LLP

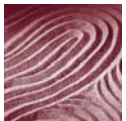
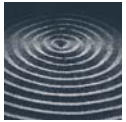
Barristers & Solicitors, Patent & Trade-Mark Agents



Identifying an Outsourcing Supplier

- Supplier of choice may be identified through the development and circulation of a Request for Proposal (“RFP”)
- The RFP and the chosen supplier’s response are key in setting the terms and conditions of the legal relationship
- Outsourcing agreement may even be attached as a schedule to the RFP

Preliminary Legal Issues to Consider



- Employees
- Assets
- Space



Preliminary Legal Issues Employees

- Are the affected employees unionized or non-unionized?
- Impact of existing collective agreements
- Will employees of the healthcare facility be moved within the facility? Seconded to the service provider? Transferred to the service provider?



Preliminary Legal Issues Assets

- Will any assets be purchased, leased or licenced?
- Determine whether relevant assets are currently owned, leased or licensed and whether leases/licenses may be assigned



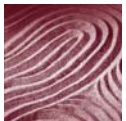
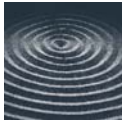
Preliminary Legal Issues Space

- From which premises will the outsourced services be provided?
- Consider areas of exclusive use and non-exclusive use
- Specify terms and conditions of use in contract



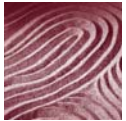
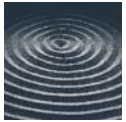
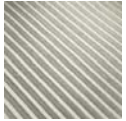
Key Parts of an Outsourcing Contract

- Scope and Level of Services
- License to Occupy and Use Premises
- Term and Termination
- Representations and Warranties
- Payment and Pricing
- Employees
- Compliance with Laws
- Confidentiality and Privacy
- Indemnity and Insurance
- Trademarks
- Force Majeure
- Dispute Resolution
- General Provisions



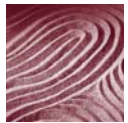
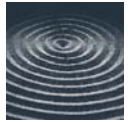
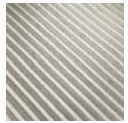
Scope and Level of Services

- Clear and specific description of services to be outsourced
- Definitions of expected levels of performance of each service
- Stated in detail in schedules attached to the contract
- Ensure scalability and flexibility to address evolving needs



Term and Termination

- State the duration of the contract and options for renewal (typically long-term)
- Define transition period
- Provide for exit mechanisms (i.e. circumstances allowing for voluntary and automatic termination of the contractual relationship)
- Address how matters such as employees, assets and information will be dealt with upon termination

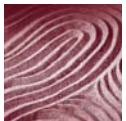
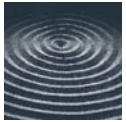


Representations, Warranties and Covenants

- Corporate and General Matters
- Transactional Matters
- Intellectual Property Matters

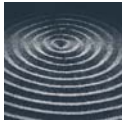
MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents



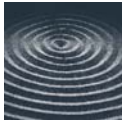
Payment and Pricing

- Price may address up-front capital costs of the service provider
- Structure of pricing and payment may vary depending on the objective of the outsourcing
- Monetary penalties and incentives may be tied to satisfaction of objectives
- May build in mechanisms for “benchmarking” (i.e. industry comparisons by an independent third party to ensure the agreement remains competitive over time)



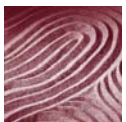
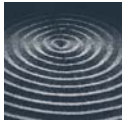
Compliance with Laws

- Ensure the ability to change the outsourcing relationship/contract in response to legislative/regulatory changes
- Require service provider compliance with applicable law and healthcare facility by-laws, rules, regulations and policies



Confidentiality and Privacy

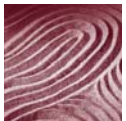
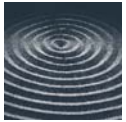
- Of each other's information
- Of patient information
- In compliance with regulatory requirements



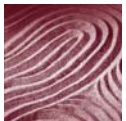
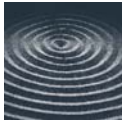
Indemnity and Insurance

- Indemnity is:
 - an obligation to make another party whole for third party claims resulting from the first party's negligence, breach of contract or statutory violation
 - “hold harmless” means the first party will take over the defence
- Insurance is:
 - evidence that a party will have the financial means to satisfy its indemnity obligations
- Indemnities and Insurance may be given a monetary limit under the contract

Trademarks

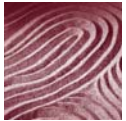
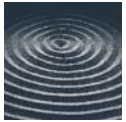
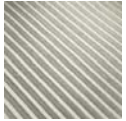


- Acknowledgements of trademark ownership
- Covenants not to use trademarks without express consent



Force Majeure

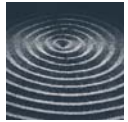
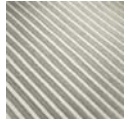
- Events beyond control (e.g. fire, flood, explosion, riot)
- Consider which events should and should not constitute force majeure (e.g. strikes and lockouts)
- Identify contingency plans for continuing the services in case of emergency



Dispute Resolution

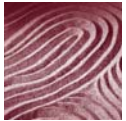
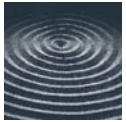
- Problem solving during the outsourcing relationship is an important consideration
- Contractual dispute resolution provisions provide mechanisms for dealing with disputes between the parties before they go to court
- May involve discussion between senior management, mediation, arbitration

General Provisions



- Independent Contractor
- Assignment
- Amendment

- Governing Law
- Notice
- Counterparts



Karima Kanani

T: 416.595.7908

F: 416.595.8695

kkanani@millerthomson.com

Karima Kanani is dedicated corporate counsel
in the Health Industry Practice Group at Miller
Thomson LLP, Toronto, Ontario

MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents