

Legal Expenses are a Controllable Cost of Doing Business – A Toolkit of Cost-control Ideas

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The legal affairs of companies are more complicated than ever. The availability of timely, competent and cost-conscious legal advice is critical to them achieving their business objectives. While the business aspects of transactions and other activities of corporations receive most attention, assuring that those activities are conducted lawfully and in a fashion that does not create legal issues can be a difficult balancing act.

Many companies have in-house legal departments. Those companies have recognized the value of attorneys on staff. Such attorneys are able to acquire knowledge of and familiarity with both the business and the ethos of the company. The law departments are charged with safeguarding the companies' legal interests.

Increasingly, senior management expects those in-house attorneys to control the costs of safeguarding those interests, as well. At one time, many if not most lawyers despaired of controlling the costs of legal service. Litigation was deemed to be subject to forces over which companies had little or no influence and that it would be foolhardy to hamstring your litigation posture by adopting arbitrary or rigid cost expectations.

That attitude is less prevalent than it once was. Further, corporate management is no longer content for general counsel to explain budget overruns with something like "it happens" or "we can't do anything about it."

There is a wide variety of techniques with which legal costs can be controlled or even, in some respects, reduced. Each technique has different strengths, however, and each has some weaknesses. The selection and implementation of the techniques must be undertaken with sensitivity to how they would fit the particular situation and context.

What are those techniques and tools? What are their respective strengths and weaknesses? What factors can impact which ones a particular law department should select and how are they best implemented?

To a large degree, many of these techniques represent the application to legal service of techniques that business has used for years in other contexts. Essentially, this approach consists of applying management techniques to legal affairs. Even when the techniques are well-understood business tools, however, their application to the legal service needed by companies must be done carefully.

Many of the tools also represent an effort to enhance the position of in-house counsel vis-à-vis outside counsel. By assuming greater responsibility for managing the work, in-house counsel can have a greater impact on its cost.

* Mr. Lauer is a consultant in Maplewood, New Jersey, and works with law departments and law firms on strategic cost-control initiatives for legal departments and on relations between corporate clients and law firms on the efficient delivery of legal services to corporate clients. He has over 13 years' experience as an in-house attorney in several organizations. Previously, he spent six years in private practice. He is based in Maplewood, New Jersey. His phone is (973) 763-6340 and he can be reached by e-mail at steven.a.lauer@comcast.net. He is senior partner, PLI/Corpedia Managed Compliance eLearning Service and can be reached at (212) 824-5994 or slauer@corpedia.com. Until recently, he was Deputy Editor and Deputy Publisher of *The Metropolitan Corporate Counsel*, a monthly journal for in-house counsel. This article appeared in *Corporate Counsel's Quarterly* (vol. 16, no. 2, April 2000) and *Law Department Management Adviser* (June 1, 2002), p. 5.

Some companies' cost-control efforts have gained some prominence. Those that have received attention have tended to be the more elaborate (and expensive) ones. There are tools and techniques available to smaller, more cost-conscious law departments as well. Some of those techniques may be the same as ones used by large law departments, but they are or can be implemented on a smaller, less expensive scale.

Technology offers benefits that were unavailable just a few years ago. By selecting and applying appropriate technology tools, a law department will position itself and the outside law firms with which it works to better represent their common clients – the company's business units. Those tools will encompass hardware and software.

There are techniques to managing outside counsel that promote a more effective and efficient delivery of legal service to the clients. Those techniques address various elements of the legal-cost continuum. Not all the techniques may be relevant or necessary for a particular situation. Rather, they constitute a menu of tools from which you can choose one or several.

We can group the tools in some broad categories. Let's describe those broad categories before reviewing specific tools to control costs. Those categories are (1) selection of counsel, (2) management of counsel, and (3) information management.

There is a variety of methods by which to select counsel. Historically, most corporate clients have used different techniques in different contexts. Often, however, those efforts were *ad hoc* rather than systematic and ordered. The importance of the selection of appropriate counsel cannot be overstated. The Greater New York Chapter of the American Corporate Counsel Association (ACCA) stated this point as follows in a 1997 report: "the suitability of a law firm for a particular engagement may have more to do with the ultimate success of that engagement than any other factor over which a corporation has control."

The selection of outside counsel cannot be disengaged from the relationship with counsel that results. The method of selection, the approach to the process and other factors relevant to the selection itself will affect how inside and outside counsel work together later. For that reason, the selection process should be a deliberate one. In-house counsel should approach it seriously and with the goal of reaching a reasoned, objective and clearly supportable result.

The management of outside counsel is an art. There are few hard and fast rules. There are styles that are as different as the law departments that apply them. Nonetheless, there are tools (described below), which can be incorporated into different styles of management, with the implementation of the tools varying because of the management style.

One of the key ingredients to high-quality legal service is the ability to access and apply information. As it is with the substantive legal work, so it is with managing that legal work. The ability to extract data about a particular matter or a particular law firm can be the foundation for a good management system (though it is no guaranty of a good management system). Without that ability, however, good management is virtually impossible. Accordingly, designing a management protocol that places important and useful information within ready reach of those who may need to apply it is a critical aspect of any system of managing legal affairs and controlling the costs of that function.

I. Counsel-selection Tools

A. List of approved counsel

Many, if not most, law departments maintain lists of the outside law firms that work for the company. Often, however, those lists do not specify the type of work for which each firm is qualified other than in a broad sense (*e.g.*, real estate or tax matters). As the New York ACCA chapter noted in the earlier-cited report, however, the "suitability of a law firm for a particular engagement" (emphasis added) is the critical success factor in many instances. As that statement implies, not all firms are equal in their talent or expertise. For example, a local law firm may be an excellent choice to handle the eviction of a tenant in a

commercial office building, but it may not be the best choice to undertake to represent the same client in respect of the refinancing of a large, multi-state portfolio of properties, even though the latter assignment, like the first, can be categorized as real estate work.

Accordingly, the characterization of the types of work for which a firm is an appropriate choice should be by type of work (environmental law or employment law) as well as by the type of engagement for which it is best suited (employment law counseling rather than sex harassment defense litigation). Even the size of the firm may be a factor in its consideration for a particular engagement.

B. Form retention or engagement letter

An important factor in controlling the costs of legal service is the company's success in reaching a common understanding with outside counsel as to the latter's role (as opposed to the role of inside counsel) in servicing the company's legal service needs. A retention or engagement letter from the law department is the appropriate mechanism with which to establish the company's expectations in respect of issues such as billing guidelines, budgeting needs, conflicts of interest and other subjects. Again, the New York chapter of ACCA put it well in that report: "At no time during the engagement is the corporation's bargaining position and ability to mold the legal services greater than at the moment the corporation is about to select outside counsel." Establishing expectations and goals at the very beginning of the relationship (in fact, before the relationship actually commences) is most effective. It enables both parties to avoid later disagreements and disputes that can impede effective representation of the client by the law firm.

C. Guidelines for outside counsel

Every client has its own concerns. While many concerns are common to different clients of each law firm, not all clients share all concerns or share them to the same degree. Some of those concerns may vary from client to client, so it is useful to set those out for the company's outside counsel in a fashion that clarifies the company's expectations as to how counsel will service its needs. These guidelines would elaborate on the issues raised in the retention letter and provide additional detail as to how the client expects the issues identified in that letter to play out in the course of the relationship.

Another benefit of such guidelines is that they enable a law department to lay the groundwork for comparative analysis of cost trends. Many departments have cost information for the legal service for which they are responsible, but that information resides in files that are nearly impenetrable. The bills from different law firms rarely are consistent in format. Further, the data are rarely aggregated in discrete categories of information that might permit analysis of cost trends. If a law department were to determine how the company's costs might best be analyzed, it could instruct the outside firms to present their billing information in such a way as to support that analysis.

4. Selection methods

There is a variety of means by which to select and retain outside counsel. Each of those means is appropriate in certain contexts. Each has strengths and weaknesses. Among the options available to a law department are (i) *ad hoc* identification and selection of counsel using sources such as available lists and directories or referrals by others, (ii) requests for qualifications (RFQs), (iii) requests for proposals (RFPs), (iv) beauty contests and (v) in-person presentations.

The first task, however, is to identify attorneys who are appropriate candidates for consideration as a company's retained outside counsel. Whether by means of telephone recommendations from members of ACCA or from acquaintances or some other method, a law department should strive to make its selection from multiple candidates who are all qualified substantively to perform the work. There are now tools available, such as online directories and law firms' websites and even websites that aggregate comparative data from law firms' sites, that enable a law department to make a more systematic and effective search for qualified counsel without regard to travel, budget or jurisdictional limits (subject, of course, to the needs of

the particular matter and applicable professional rules). The choices are now far more numerous and better than they were even ten years ago.

The *ad hoc* method of selection is the simplest and the least structured. In fact, it is entirely free form. Sources of names of candidate firms, means of evaluating candidate firms and other elements of the process are fully unformed.

An RFQ is a process by which a law department seeks counsel through a consistent approach to its needs for legal service. Typically, the process includes a standardized series of questions by which the in-house attorneys plan to identify outside firms that have capabilities that closely match the company's needs for legal counsel. By incorporating in the process a fixed set of criteria by which counsel are measured for purposes of selection, a department enables itself to evaluate the successful firms' actual performance by the same criteria.

An RFP is a process by which to identify appropriate outside counsel that is more formal than an RFQ. The RFP requires the most from both the law department and the law firms in terms of the information necessary and the amount of effort required. It typically includes considerable dialogue between the law department attorneys and their outside counterparts as the process unfolds, but the commitment of resources may be greater than is appropriate for many legal assignments.

The beauty contest is a less-than-complete presentation by one or more law firms that forms the basis for a selection. This method focuses on the interpersonal elements of the relationship – how comfortable the in-house and outside attorneys would be were the organizations to establish an attorney/client relationship. It provides the inside counsel an opportunity to “size up” the law firm representatives. In-person presentations can be incorporated into some of the other selection methods, however, since the subjective, personal interaction is an important element of a successful relationship.

II. Counsel-management Tools

A. Legal-invoice review

Every client reviews legal invoices, at least in order to pay them. Very few clients use the invoices as a tool by which to manage outside counsel. This is due, in large part, to the fact that the information contained in most legal invoices is not intended to assist clients in managing the work. Those invoices are intended merely to provide a mechanism by which the law firm is to be paid.

Data can be presented in an invoice in such a manner as to explain the work and provide a means to understand how each element of the work relates to the remainder of the work as well as providing the cost of that work. With the information so displayed, a client could review the bill and understand better what actions were taken on its behalf and why they were taken. Further, if the billing data are presented in such a way as to tie into a budget for the legal work, a review of each bill could lead to a review of the status of the matter simultaneously.

Invoice review can be used in two ways. The first, which is more common and more often applied, is that which supports legal fee auditing. In essence, invoices are reviewed in an effort to identify instances in which the invoices violate established billing guidelines. A law department can accomplish this type of analysis internally, with its own personnel, or through the use of third party firms that conduct this analysis on a contract basis. As an after-the-fact review of completed bills, however, it is not a tool by which to manage the work. Rather, it is a tool by which to ensure compliance with standards previously enunciated.

Moreover, unless the invoices contain considerable detail, a reviewer might reach inaccurate conclusions as to guideline compliance. For example, similar task descriptions might mask the fact that the work of multiple individuals required varying levels of experience or expertise and, therefore, result in different costs.

The second form of invoice review is quite different. In this method, someone who is familiar with the substance of the matter reviews the billing data. The information allows that person to monitor the status of the matter by means of the cost information. With a budget for the matter in place, the reviewer is able to use that budget as a mechanism to keep on top of the various, often numerous, efforts that often comprise a legal assignment. This type of invoice review is thus supportive of a real time management of the legal service.

B. Invoice-review software

If invoices are formatted to permit the type of analysis described above (which is called task-based billing), it's important to recognize that manual review of the invoices will have limited utility. That billing format requires that time entries be broken down into smaller units. This results in more entries than would have been the case under the more traditional style of invoice format (called "block billing"). With the greater number of distinct time entries, a bill reviewer can be overwhelmed by the sheer number of time entries that appear in a bill of any significant length. The review of such a bill will not be as effective as it could be if invoice-review software is utilized. The software not only accelerates the physical process of reviewing bills, but it permits types of analysis that are virtually impossible otherwise.

C. Guidelines for inside counsel on how to manage outside counsel

Law departments by definition have multiple in-house attorneys. In most law departments today, the management of outside counsel is often a very individualized approach. Rather than a consistent approach within a department, outside firms often experience varying styles within each department. Each in-house attorney might use his/her own style of working with outside firms. Some manage their matters very closely while others allow much more latitude to the outside attorneys with whom they work. One attorney might even use different styles with different law firms. While a single style may be correct in a particular situation, different styles co-existing within one company's outside legal work might be counterproductive. Much as inconsistent billing formats might prevent a department from analyzing the legal work in meaningful ways (see §II.A above), inconsistent management styles might lead to confusion among law firms. By developing a consistent approach to the management of outside firms, a law department will also establish a more consistent approach to the work itself because that process forces it to consider and think through how it works with outside counsel and the implications of that for the client and the work.

D. Improved communications with outside counsel

As events accelerate, the ability to communicate more quickly becomes more than a competitive edge. It becomes a necessity for survival. Even more valuable than simple e-mail connections are communication links that enable inside and outside counsel to make sure that they "speak the same language."

A better understanding of each other's needs and expectations can be valuable in several respects. It can lead to an improved relationship between a law department and outside law firms. It can result in more consistent expectations vis-à-vis things such as staffing approaches, discovery burdens and other topics that are so critical to the day-to-day functioning of a law department and its outside firms. The communication can be enhanced by regular meetings between inside and outside counsel that are devoted to improving the exchange of ideas between them (rather than focusing solely on substantive matters).

The inside and outside attorneys can share data directly, which permits even better coordination and collaboration between them. Shared databases, extranets and other technology-based tools can be very helpful in this regard.

E. Regular, consistent evaluations of outside counsel

Too often, the performance of outside counsel is measured formally by inside counsel only infrequently. Moreover, the evaluations that are performed are not consistently completed and they do not

provide a basis for intelligent dialogue with the lawyers evaluated because they are often very subjective and the criteria that underlie them are less-than-completely formulated. If counsel selection were more consistently effected (see §I above), later evaluations would be related to the bases on which counsel were selected. This would result in evaluations that would support the selection and management of outside counsel. It would also benefit outside counsel by providing a more reliable basis for the measurement of their performance.

F. Alternative fee arrangements

The hourly rate is the basis for the vast majority of fee arrangements in place between corporate clients and law firms. The hourly rate, however, is not designed to reward efficiency. In fact, on its face it rewards inefficiency. Despite widespread disenchantment with fees based on the amount of time spent on an assignment, clients and their counsel have been slow to adopt alternative arrangements.

The use of incentives by which law firms are rewarded for work that achieves goals such as early resolution of disputes and lower effective hourly rates can be effective as a cost-control device. While the widespread use of alternative fee arrangements is likely to take some time, it's possible to begin to use such alternatives quickly if appropriate safeguards are taken. By reorienting the law firms so that they work toward goals of the corporation additional to the production of high-quality legal work, law departments can improve their companies' bottom lines.

G. Use of third-party vendors of certain services

Legal service relies on talents besides legal reasoning and counseling. For example, in complicated, multi-party litigation, thousands or millions of pages of documents may be produced and exchanged in the course of discovery, in multiple copies. The management of documents by means of photocopying, collating, stapling and binding is not an expertise of law firms, yet they have provided that service in the course of representing their clients in such matters. And they often have done so at a cost that exceeds what a company that specializes in managing documents would charge.

By identifying services that might not be most effectively provided by law firms, but which often are provided by law firms as part of their one-stop legal service, companies might be able to effect significant savings in the expenses they bear as part of their legal costs. By negotiating directly with third-party providers of those services, law departments might even secure advantageous financial and service benefits.

H. Litigation audits

Many companies that experience defeat at trial of litigation in which they are involved must consider whether to appeal those adverse decisions. Typically, they ask their trial counsel whether and how to seek appellate review.

An effective mechanism to identify those situations in which an appeal is not the wisest course is a litigation audit. In essence, a law department seeks an objective second opinion, from a law firm that was not involved in the trial of the case, as to the wisdom of appealing the result. The independence of the second firm allows it to review in full the performance of the client and its counsel at the trial in an effort to determine whether an appeal has sufficient likelihood of success to warrant the effort. Sometimes the more cost-effective decision is to avoid "throwing good money after bad."

I. Jury consultants

In appropriate cases, a company would find it helpful to deploy jury consultants in its litigation. The cost of such an effort is probably beyond the scope of much litigation. Securing the views of a group of individuals as to the acceptability (to a potential jury) of the company's legal position may provide extremely valuable insight. Such insights might lead to more successful settlement discussions or a more

effective trial strategy. With those insights, inside counsel may be able to more effectively deploy the outside legal talent representing the company.

It might be possible to gain some of the advantages of jury research at a lower cost than traditional jury research entails. Internet-based jury research may offer such savings, as well as other advantages.

III. Information management

A. Development of internal policies

To the extent a company's internal policies are understood by all who must apply or abide by them, the more effective those procedures can be. This is true even for policies on subjects such as authority to settle litigation and how to conduct appropriate investigations in response to discovery demands as a defendant. Otherwise, redundant work and omitted work are very possible, each of which can be costly (albeit in different ways).

A law department should develop consistent policies on such topics (and others). Once such policies are in place, of course, they must be accessible to those who must apply them. Whether by means of circulated hard copies of such policies or by means of electronic distribution of such policies via an intranet or extranet (see §III.D below), a law department must assure itself that the information is in the correct hands at the time that it is most useful or necessary.

B. Matter-management systems

Keeping track of the status of the hundreds or thousands of individual projects or matters for which a law department is responsible is a critical task. After all, if you can't keep track of the work, you can't control its cost. Accordingly, careful attention is due to the decision as to how to do so. There is a wide range of software available for that purpose, some of which is more specifically focused than other examples. What is appropriate for a particular company will depend on that company's particular needs. Rarely will an answer for one company easily fit the situation of another. Sometimes, a proprietary, specifically designed system is appropriate, though the continued proliferation of powerful off-the-shelf products makes that increasingly unlikely.

C. Internal training

Managing legal service is an unusual responsibility. There are few sources of information as to how to do it (as opposed to how to perform the legal service itself). Moreover, the management of legal service will vary from law department to law department. For those reasons, a law department should decide whether it should develop materials with which to train its staff or, perhaps, seek outside assistance toward that end. Well-managed legal service is almost undoubtedly more cost effective than legal service that's out of control.

D. Information distribution

Even when companies and law departments have developed policies, procedures and other information that is relevant to the completion and management of legal service, they often have not distributed that information effectively. Policy manuals, pertinent guidance on litigation-related topics and other information have been distributed by means of photocopied materials. Effective distribution should be achieved electronically. Whether the information is generated internally on a computer network or it resides in older memoranda and notices, it can be available to all members of the legal team (inside and outside the law department organization) by means of linked computers. With available indexing and accessing software, that information can be immediately available to those who need it most. Anything less can be an unacceptable trade-off.

E. Maintenance of a precedent file

As time passes, a company purchases a considerable amount of information regarding its legal affairs (memoranda on points of law pertinent to its operations, pleadings prepared for litigation, papers prepared for presentation to other parties in transactions, etc.). For many companies, however, that information is used only for the immediate purpose for which it was compiled. Even if the information and legal research might be of great value later (either in whole or in part), in-house lawyers often have had very limited means of recalling that information in other contexts (different transactions, later litigation). Unless individual in-house attorneys remember earlier material, it often slumbers in long-forgotten files, gathering dust, while other research may be conducted at great expense (often on the same or very similar questions).

With recent developments in software, however, that no longer need be the case. Indexing software can provide easy access to valuable information that can be reused very profitably. While the discipline to capture all the potentially useful information (and being able to recognize what is potentially useful and what is not) may be a talent that has not been cultivated, that talent is one that will be increasingly important to well-functioning law departments as time passes.

That information should not be available to the in-house attorneys only, of course. Its value is directly proportional to the extent to which it is applied and reapplied in transactions and litigation by a company's outside counsel. Securing the active participation of outside counsel in the recycling of such information is dependent on more than the technology available, since that technology is merely a facilitating tool. The management skills of in-house counsel are important in this effort. That effort is well worth making, whoever.

IV. Conclusion

This overview of techniques is just that – a source of ideas for law departments that want to control their companies' cost of legal service. The selection of tools to implement for a particular company will depend on numerous factors and criteria. As stated above, however, the size of a company or of the law department should not be a determinant of whether such tools can be applied, though it might impact how they are applied.