



Inside Corporate Legal (ICL) is a quarterly supplement to Legal Technology Insider aimed at promoting the benefits of technology and business best-practices within corporate legal departments.

Benchmarks

Among the findings of Hildebrandt's 2005 US Law Department Spending Survey was the news that...

- Total legal spending as a percent of US revenues was 0.48 percent
- As a percentage of total legal spending, the median company spends 39% on inside and 61% on outside legal resources
- There are roughly 4.8 lawyers per billion dollars of US revenues

The Hildebrandt survey also highlighted those areas of work where there is a growing demand for legal services. Regulatory (42%) tops this year's list of areas cited by survey participants as most likely to increase in demand during the coming 12 months. Commercial contracts (32%), M&A (32%), international (31%) and licensing (29%) remain on the list as high demand areas. Since last year's survey, there has also been a notable increase in projected demand for services in securities/finance and government contracts work.

Task-based billing - it's all about money and commonsense

by Steven A Lauer

In the early 1990s, a task force of inhouse and outside counsel developed the Uniform Task-Based Management System (UTBMS). That system initially consisted of four sets of codes by which outside lawyers would be able to bill their corporate clients and some guidance on the application of those code sets. In the years since UTBMS appeared, the legal profession has continued to rely to a very great extent on the hourly rate as the basis for most billing by outside lawyers to their corporate clients. Surveys of inhouse attorneys reflect the survival of fees based on the amount of time devoted to an assignment even though those inhouse lawyers voice an interest in fees that more closely reflect the value that the effort reflects for the corporate client.

The question of how outside lawyers' fees compare to the value that inhouse counsel place on their performance has plagued inhouse legal teams for some time, with both sides holding divergent views. For example, in 1997, inhouse counsel graded their outside lawyers at 3.4 (out of a highest possible score of 5) as to whether the charges for legal service were commensurate with the value of those services, while the outside lawyers gave themselves a grade of 4.3. In 1998, inhouse counsel responding to the same survey gave outside counsel a C, while outside lawyers awarded themselves a B+ that same year. The gap between the scores awarded to outside lawyers by inhouse counsel and those that outside lawyers award themselves on that measure persisted in annual surveys by that same organisation.

For some time, many authors have explored the idea of using fee structures to create incentives for outside lawyers to provide legal service more cost effectively and that create greater direct correlation between the fees paid and the value of the legal service that those fees represent. The actual use of alternative fee arrangements (AFAs) however has been much less common than one might expect from the extent of its treatment by consultants and others. Thus, despite the interest of inhouse counsel, the hourly rate persists. *continued on page 2...*



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Task-based billing

continued from front page... The hourly rate rewards those who take longer to complete a task or an assignment unless the work produced is clearly deficient or the amount of time devoted to that work obviously exceeds any reasonable amount of time needed by a competent lawyer. Inhouse attorneys dislike to second guess the amount of time that outside lawyers devote to the representation. During the 1990s, insurance companies and some corporate law departments engaged in 'legal invoice auditing,' usually by engaging the services of a third-party firm that specialised in that activity. Invoices from law firms included codes by which the time entries might be sorted with software. The auditing firms subjected law firms' invoices to detailed review of time entries in an effort to identify excessive time expenditures or inefficient application of resources – such as the attendance by too many lawyers or other personnel at meetings, hearings, etc.

The insurance industry's use of invoice audits led to notable dissatisfaction by many law firms with the status of their relationships with the insurers. An article in the trade press several years ago described how a number of lawyers who had long represented insurers decided to represent plaintiffs against their former client industry. The thrust of the article attributed the trend to the soured relationship between the law firms and the insurers, at least in part due to the auditing of the former's bills by the latter. In the course of the article, the president of an organisation of over 20,000 defence lawyers was quoted as saying "there's been a dramatic drop in constructive dialogue between defence counsel and the insurance industry." Since that time, many members of the insurance industry have demonstrated a more nuanced view of their relationship with outside firms, audits and the use of task-based billing and insurers and their outside lawyers have recognised the need to improve that relationship. ↪

↪ Since the use of codes for the billing is a prerequisite for auditing the invoices, task-based billing might seem like a step down the road that the insurance industry travelled and toward undermining relationships between inhouse and outside counsel, whether in the insurance industry or elsewhere. Task-based billing need not however lead to that outcome.

In fact, task-based billing can permit inhouse and outside counsel to improve their relationship by eliminating some contentious issues from their discussions. Furthermore, task-based billing can empower them to address issues of concern to all of them more objectively. Once everyone has task-based data about the cost of various types of legal work, clients and firms will be able to negotiate fee arrangements based on solid information, rather than strictly on the basis of economic clout or by making hopeful but uneducated guesses.

At present certain large corporate clients, due to their market clout or purchasing power, are able to dictate some of the terms by which law firms are paid, such as demanding a percentage reduction from hourly rates or refusing to pay certain costs, whether right or wrong. Better information about the cost of that legal service should allow everyone to make more informed decisions on fees and some larger corporations have begun to experiment with and implement alternative fee arrangements.

Task-based billing offers considerable benefits when applied in the context of budgeting, especially for litigation. If lawyers can accumulate information as to the effort needed for each aspect of a case – measuring the same aspect in multiple cases so as to identify a norm or average – they will be much more able to estimate the costs of future litigation. They will be able to take into account similarities and differences between cases with greater assurance.

Task-based billing will allow invoices to be added together in such a way that both inhouse and outside counsel can understand the actual costs of a case as compared to the previous estimate in more specific detail.

It should become possible for them both to learn whether budget overruns are in fact due to the excessive discovery demands of your opponent, or whether they result from too much research for a particular case or because of overstaffing or other tactical decisions by the inhouse or outside teams. That distinction might lead to very different decisions upon learning of an overrun, since efforts to control 'defensive' discovery could lead to undesirable impacts on your litigation prospects. ↪

Task-based billing *continued from page 2...*

Whenever discussing billing and fees, you must remain aware of the potential adverse impacts that any decision you make might have on the relationship between the client and outside lawyers. The insurance industry failed to do so during the heyday of legal bill auditing and insurance companies lost credibility with some of their external law firms and ultimately the services of some of those firms. Better data from task-based billing should enable clients to avoid such pitfalls.

An alternative fee arrangement can and should improve the relationship between the law firm and its client. An alternative fee is defined as a fee that is not based on the amount of time devoted to the work and calculated as a multiple of a rate that applies to a unit of time (typically an hour).

The goal of inhouse counsel in their quest for alternative fees is a closer alignment of the interests of corporate clients and their outside lawyers because the hourly rate's inherent incentive is to reward more time devoted to a task regardless of the contribution that such time makes to the success or value of the work.

How does task-based billing accomplish this? When itemising his or her time in an invoice, outside lawyers who use task-based billing must break that time into the specific tasks completed and apply to each entry a code from the UTBMS. By unambiguously identifying how each step in the work performed relates to the activities expected, task-based billing enables the reader of an invoice to more fully understand the relationship between the work and the hoped-for result.

As law departments and law firms work with task-based billing and accumulate data on the legal work done for the former by the latter, they likely will find that they can more effectively discuss and design alternative fee arrangements that take into account the needs of the matter in question, the needs of both the firm and the client and the most effective means of handling the legal needs of the client.

After much discussion and debate, alternative fee arrangements have become somewhat more prominent than they had been even relatively recently. The interest of inhouse counsel in alternatives to the hourly rate seems to have reached a point that law firms, including some prominent firms, have engaged in serious discussions and arrangements that shift some of the process and cost related risk of the matters for which corporations retain them. Since at least some of the willingness to enter ↪

↪ into such arrangements and the likelihood that such an arrangement will be successful depends on the client's and firm's ability to monitor expenses against budget, task-based billing could provide the factual basis on which to move forward.

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- See also *Using the Uniform Task-Based Management System: Survey Results January 1998* published by the Law Firm & Law Department Consulting Group at PriceWaterhouse and the ABA website at www.abanet.org/litigation/utbms/home.html

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From the market...

Succeeding with vendors

by Jeff Hodge

Following on from defining the problem to be solved, the next most pressing issue facing legal department project managers faced with implementing legal technology is selecting the vendors who will help you solve those problems you identified.

Selecting a vendor or vendors to tackle your project seems a simple enough task. You look for an application that appeals to your eye, produced by a vendor with whom you have established an amicable relationship and whose product fits your price range. Of course the offering should have the functional capability to solve your problems as well but that is where it all starts to get tricky.

In the last issue we briefly explore a few of the pitfalls of vendor selection and how to avoid them. The key point to remember is that you are being sold to by your vendor. They are not trying to do you a favour and they are not your friend when it comes to solving your company's problems. They are merely a source of possible help and it is your responsibility to separate the wheat from the chaff and serve your user's interests – nothing more.

Pitfall #1 – Mass appeal

Most application providers do one or two things well. This is particularly true of smaller applications vendors as they only have the resources to focus in one or two key areas. Moreover, smaller vendors are typically more customer focused developers, which equates to solving customers' core problems. This naturally translates into the development of select functional areas in which they have been encouraged to focus. Conversely, features addressing many disparate functional areas may show well but are likely to perform poorly.

In reality application providers who attempt to focus in many areas, trying to appeal to a broader market, typically do none or few of them well. One solution cannot be all things to all customers. So, while purchasers of systems from small vendors that have wide ranging functionality may get a lot of functional spin for their money, the functionality they get is not always worth the money they spend. Vendors who focus their businesses and software on specific areas will almost always be more competent in those areas and their client base will reflect it. ↪

↪ These are precisely the reasons that niche and emerging markets tend to spawn competition from vendors who appear but then quickly disappear.

Legal is one of those markets. Eager to gain clients and grow, smaller vendors develop 'showy' functionality rapidly (particularly in today's world of rapid development tools) hoping to use quick hit sales to fund further development of their software. In essence they are 'robbing Peter' to pay for real development of the features they showed and sold but which were only barely real. This is the nature of most start-up software developers and it is of greatest risk to buyers at the mercy of their sales people.

Admittedly this is the way most non-dotcom era vendors build up their market share but the risks to the market, to buyers and to the unwary project manager can be crippling. The most sensible way to mitigate this risk is to look for successful vendors. The longer the period of success, particularly with companies like your own, the more likely that your implementation will be a success as well. Nothing breeds success like success.

Pitfall #2 – Too good to be true

Many of us receive offers in the mail for free products or services and simply toss them into the bin. When a telemarketer calls our natural response is a polite 'no!' or to hang up the receiver. When we are told that we will get not one but three-for-the-price-of-one we instantly sense we are about to be had. Yet all too frequently managers fall into this same trap and find themselves two years into an implementation project and feeling like they want to sell their legal technology kit at the next car-boot sale.

The first thing to remember here is that no legal technology is ever free; someone always pays. It may be your department, your law firms, or your company but the vendor will always get paid. This is a fundamental of business – a vendor must get paid for their products or services. ↪

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continued from page 4... If law firms pay for your technology, you should remember that they too are in business to make money. Unless there is a fair return on the firm's investment in helping pay for your technology, it is likely that somewhere deep inside some yet-to-be delivered invoice will be some part of the price they had to pay to help you. This is not law firm treachery, this is sound business. You pay for value received and charge for value given.

Wrapped into this too good to be true analogy is that every vendor has skeletons in their applications closet. The nicely choreographed product demonstration you see is never the entire story. In fact here I offer *Hodge's First Law of Application Selection* namely: the usefulness and viability of any legal vendor or any legal application is directly proportional to the number of clients and users of that technology. In other words, an application is only as good as the number of customers that have already bought it and the number of users that run it. In this sense, customers always get what they pay for with legal technology. Or, as the commercial once said: 'you can pay me now, or pay me later.' There are no free lunches, only unwary project managers to be taken to lunch.

Pitfall #3 – Buyer's remorse

Bundling of wide ranging functionality for mass appeal is problematic for the marketplace in another respect as well. Once bundled, unwanted or irrelevant features are not easy, or worse yet, impossible, to unbundle. Many vendors of bundled functionality do not or will not allow for other best-of-breed functionality to be integrated. So, once a company has deeply vested – and invested – in these applications, they may find it difficult or impossible to adapt to new business scenarios. Re-energizing their benefactors or corporate sponsors to take on the task of once again evaluating, paying for, and re-implementing a new application to replace the weak or failed one is any project manager's worst nightmare. Moreover, having lost credibility in the benefactors' eyes for having delivered less than adequate functionality, project managers often find it difficult to get buy-in for another bite of the cherry.

This situation leaves users dissatisfied and project managers with a serious problem. The typical response in such situations is to continue to ask for improvements and fixes. However once a vendor has received payment and moved on to another project, regaining their attention to focus on your problems is a rare. More money, time and effort at this point seldom produces the desired result. The opportunity to define and achieve success has passed. ↪

↪ Pitfall #4 – Experts in wolves clothing

This final pitfall is deceptively dangerous and must be guarded against at all cost. The danger to watch for here is the large number of legal application and implementation experts who will emerge during your project definition and vendor selection stage. These are most frequently users and each will have their own ideas about how best to solve their problems and which products are best equipped to meet their needs.

These are usually well-intentioned people with a genuine desire to help. Sometimes they will have been pre-sold by one of your friendly vendors and be absolutely convinced that a single product is the only one that can solve their problems. Just as you would not pretend to practice law or manage the books for your company it should be just as obvious that you have responsibility for your project and are best equipped to make these decisions on the legal department's behalf. If you are in doubt about the logic of this point please consider that regardless of whether you or your users drive product selection only you will be held responsible. These decisions are yours and must be owned by you as ultimate responsibility for success or failure will fall on your shoulders.

Unless you have tied yourself to the track by signing a contract there is always time to step out of the way. There will always be other trains to catch and other vendors to help you. So given these potential pitfalls, how do project managers and buyers avoid them? Here are some suggestions...

- Define your needs in detail. In doing so, companies can at least understand during their research which vendors say they can meet the requirements. Realistically evaluate the needs of the users and only seriously consider products that can be reasonably expected to meet those needs.
- Do not compromise on your needs. You will have defined user and system requirements for *continued on page 6...*

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continued from page 5... good reasons. Users will be the most focused on having their needs met and will not be as forgiving as your peers. At least one vendor in your short list will have experience with similar needs, if not direct experience. As with buying a new car, once you have it home it is too late, and selecting the wrong base functionality or options will not be forgotten by your users.

- Value experience and past success over flash and unlikely promises. Look for reputable vendors with a long track record of success with companies and needs like yours. Once you have verified that a number of available solutions could meet your needs, evaluate each on its individual merits. If your problems are new or if the vendors addressing like needs are all new and the market is evolving, you may have to choose a vendor with limited experience with your exact requirements. However do not select an untried or untested vendor. Select a vendor with at least similar experience. Having selected an experienced vendor (one with more than a hand full of implementations) you at least mitigate this risk.
- Ask to visit companies where the vendor's technology is installed and has been running. Simply because a vendor says they can meet a need, demonstrate that functionality in a demo, and show you the documentation does not mean the capability is real. Seeing the vendor's product in action at a client site similar to your own is the only way to gain the confidence that you will not be a beta site or application development test bed for the vendor you select. More customers fall prey to invisible functionality than any other buyer issue because they fail to look beyond the sales pitch to real world implementations.
- Expect to pay for what you get and get what you pay for. Reputable companies and good products come with a cost that reasonably allows them to continue to grow their products (which is good for you) and expand their ability to support you. Over priced and over hyped products are not difficult to spot as most competitors will have very similar pricing. Simply look for deviations from the norm. If the offering comes with minimal cost or is free, expect that your actual costs will be in excess of any amount budgeted. If the price seems unreasonable but the product meets your needs then you have a negotiation problem to be solved by your legal team. Your mission is to find and implement the proper solution.
- Where integrated solutions are required to meet your needs, look first for vendors who have worked successfully together before. There is absolutely no replacement for ↪

↪ 'been there, done that' when it comes to integrating technologies, regardless of how easy it sounds or how confident the vendor insists they are. Be wary of vendors who over simplify your need to have an integrated solution, as well as those who cannot specifically articulate their approach to accommodating such needs. Ask to visit an existing client site where the integration is working, talk to that project manager and see the integration in action. Integrating products is only a risk if it has not been done before.

- Contractually bind vendors to their promises. Vendor's memories are short; particularly inexperienced and untested vendors. Once in writing, hold vendors accountable not only to the letter of the contract but its spirit as well. Incorporate the promises vendors have made and expectations they have set. It is meagre protection from a bad vendor but it is better than falling mercy to a small, under resourced and inexperienced vendor who holds your project in their hands. Finally, set project milestones and tie payment and project continuation to vendor success.

Conclusion

You might consider the above mentioned advice as employment insurance of a kind. Legal technology projects, like all software implementation projects, are a difficult business. Project managers are assigned high expectations by both their bosses and their users and then instantly find themselves deluged by vendor promises and offers of expert advice from every corner. The only insurance against bad vendors and poor advice is to (i) embrace the responsibility you are assigned, (ii) demand control over the project that you will be held accountable for, (iii) do your homework, and (iv) make final decisions only based on facts. To do otherwise will assure only one thing: that you will be the scapegoat should the project fail.

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