



805:Outside Counsel Relations: The Basics

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Sr. Vice President, General Counsel & Secretary
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Vice President, General Counsel
RE/MAX Associates

Rob Thomas
Vice President, Strategic Management
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Kent M. Zimmermann
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Faculty Biographies

Eric M. Margolin

Eric M. Margolin is senior vice president, general counsel, and secretary for Advance Auto Parts, Inc. based in Roanoke, Virginia. Advance Auto Parts is a Fortune 500 retailer of automotive parts and accessories with over 2500 stores and 33,000 employees. Mr. Margolin is responsible for all legal affairs of the company which includes commercial matters, corporate governance, employment, government affairs, litigation, mergers/acquisitions, real estate, and trade regulation.

Prior to joining Advance Auto Parts, Mr. Margolin was vice president, general counsel, and secretary for Tire Kingdom, Inc. a large independent tire retailer spun off from the Michelin Tire Corporation. In addition to responsibility for all legal affairs of the company, he was also responsible for the human resources, risk management, customer service, and public relations functions.

He is a member of the board of directors of Mill Mountain Theatre and is a former chair of the civil rights committee and member of the board of directors of the Anti-Defamation League, Palm Beach Region.

Mr. Margolin received a BA from the State University of New York at Buffalo and his JD from the Georgetown University Law Center.

Jacqueline A. Oliver

Jacqueline A. Oliver is vice president and general counsel for RE/MAX Associates in San Diego, the largest privately held real estate company in San Diego County with 14 branch offices and eight satellite offices. Ms. Oliver oversees all outside counsel in addition to her responsibilities for corporate compliance, transactional real estate matters, contract drafting and review, insurance, risk management policy/education, and managing the legal department.

Prior to her appointment as general counsel, Ms. Oliver handled litigation and transactions for business and real estate companies. Ms. Oliver also holds an active California real estate broker's license and is the former broker and owner for RE/MAX Grand Central.

Ms. Oliver is an adjunct professor of law for the California Western School of Law, teaching commercial real estate transactions. She serves as a pro bono certified arbitrator for the Better Business Bureau, hearing a variety of business cases. She is also a concert pianist and a member of the American Federation of Musicians with a number of musical recordings, mostly jazz standards and light rock.

Rob Thomas

Rob Thomas is vice president, strategic development for Serengeti Law, located in Bellavue, Washington. He helped design Serengeti's internet-based e-billing/matter management system, which provides electronic bill processing, online matter management, budget tracking, and

performance reports for over 2,000 in-house counsel and their more than 4,000 law firms worldwide.

Mr. Thomas has more than twenty-five years of diverse experiences as a practicing attorney. His career began with complex litigation and corporate finance transactions for the largest commercial law firm in Seattle, after which he moved to Tokyo to handle international transactions at a Japanese law firm. For twelve years prior to joining Serengeti, he managed complex matters for large business clients of the Seattle law firm of Stokes Lawrence, P.S. He served as managing partner of the firm, and coordinated national projects involving teams of both in-house and outside counsel for corporate clients.

Mr. Thomas created the *ACC/Serengeti Managing Outside Counsel Survey*, and writes the annual survey report which analyzes the techniques used by hundreds of law departments to manage their work with outside counsel. He is a widely published authority and frequent speaker on the use of technology by in-house counsel to efficiently manage their work with outside counsel. His articles have appeared in the ABA's *Law Practice Management*, *ACC Docket*, *Risk Management*, and *LawNet's Peer-to-Peer*.

Mr. Thomas graduated with honors, from Princeton University and Stanford Law School, where he was a member of the *Stanford Law Review*.


Kent M. Zimmermann

Kent M. Zimmermann is vice president and general counsel of Hubbard One, located in Chicago. Hubbard One is a leading provider of specialized technology products and services to the world's largest law firms and corporate legal departments. Mr. Zimmermann is responsible on a number of levels for the growth of Hubbard One, which was recently ranked by *Inc. Magazine* as the 9th fastest growing company in urban America. Mr. Zimmermann serves on Hubbard One's executive committee, works closely with the management team to oversee Hubbard One's performance, is responsible for all aspects of Hubbard's legal, government, industry, and community affairs, and is the company's chief compliance officer. He also oversees media relations and the company's corporate business development affairs, including management of strategic partnerships and Hubbard's network of industry relationships. He regularly publishes and speaks on a national basis on initiatives with which Hubbard is involved.

Prior to joining Hubbard One, Mr. Zimmermann was in private practice in Chicago, concentrating on intellectual property matters and federal trial and appellate litigation. Before that, he worked in television news.

Outside of the office, Mr. Zimmermann is involved in a number of political and charitable initiatives, serves on the board of directors of ACC's Chicago Chapter, and was recently appointed to serve on the board of directors of the American Red Cross of Chicago.

Mr. Zimmermann graduated with honors from Washington University in St. Louis. He earned his JD from the Illinois Institute of Technology's Chicago-Kent College of Law, where he received a CALI award for academic excellence.



Session 805
Outside Counsel Relations

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The in-house bar association.™



I. Identify company objectives

- Transactional – specify type (real estate, contracts, etc.)
- Litigation - Offense/Defense
- Special needs
 - a. Dealing with municipal restrictions
 - b. Intellectual Property
 - c. Worker's compensation
 - d. Corporate compliance

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II. SELECTION OF COUNSEL

B. Who's right for the job?

- 1. Experience
- 2. Track record
- 3. Past performance
- 4. Referral
- 5. Subjective -
 - Will they work well with OUR staff ?

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III. Retainer

- A. Read it!
 - 1. Common Retainer provisions include
 - a. scope of representation
 - b. costs, fees
 - c. notice of malpractice insurance
 - d. dispute resolution

- B. Define the scope of representation – Make sure that the retainer sufficiently defines what it is your company requires. Avoid unnecessary fees associated with work which is beyond the scope of your objectives.

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III. Retainer (cont'd)

- C. Costs – Copies, faxes and all fees incident to the legal work should be tracked accordingly. A document intensive case can result in immense copying fees. If copies can be produced in house by your own staff, you may save significantly. Watch out for the per item cost.

- D. Billing practices: Make sure that you monitor whether the legal task performed reasonably matches the time charged. For example, a “0.2 hr” charge for sending a fax is unreasonable. Does the retainer define the various levels of staff charges, ie. paralegal, secretary, junior associate?



IV. Choice of Counsel

- Choice of counsel – pros & cons
 - ✦ Your role in the supervising the litigation



V. MANAGING OUTSIDE COUNSEL

- A. Billing
 - 1. Analyze every line item in the bill
 - 2. Make sure you know who is actually working on the matter
 - 3. Watch out when two attorneys from the same firm are working on the same matter, yet neither knows the status of the case.
- B. "Using Extranets to Increase Efficiency and Lower Costs: Case Studies."

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THE VALUE OF EXTRANETS

Secure, online collaborative workspaces can allow in-house law departments to receive legal services more efficiently and sometimes at a lower cost.

- Litigation: automate discovery process
- M&A: move toward virtual deal rooms
- Employment: monitor handling of EEOC matters
- IP: monitor trademark and patent portfolios

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HOW EXTRANETS WORK

- In-house and outside counsel collaborate in secure online workspace regardless of geography and time of day
- Log in with unique user ID and password; users see only information that they are given rights to access
- Share/search documents, view calendars and matter history, and communicate with others
- Hosted offering allows for low or no IT staff involvement

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KEY EXTRANET COMPONENTS

Here are things you should expect from outside firms:

- Launch of a new extranet in minutes upon your request for as little as \$500/month, often paid by the firm.
- Extremely useable and intuitive interfaces
- Robust, feature-level security
- Integration with existing systems (such as billing)

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EXTRANETS IN ACTION

Key Challenge

- Key client was on the verge of making a major acquisition and asked the firm to use an extranet to speed the pace and lower the cost of due diligence.

Solution

- The firm used an extranet as a virtual deal room
- More than 400 current users accessed the system to review due diligence remotely
- This was followed by innovative uses of extranet systems in other practice areas as well



Results

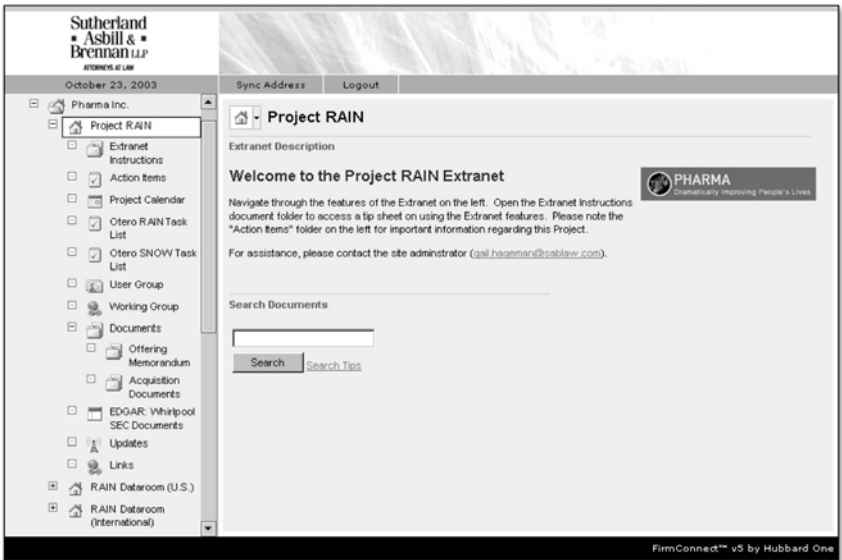
- Now, the firm is using over 100 active extranets across practice groups and offices to serve its in-house clients

“The fact that the firm uses extranets has positively influenced our decision to work more closely with Sutherland.”
— GC of Sutherland client

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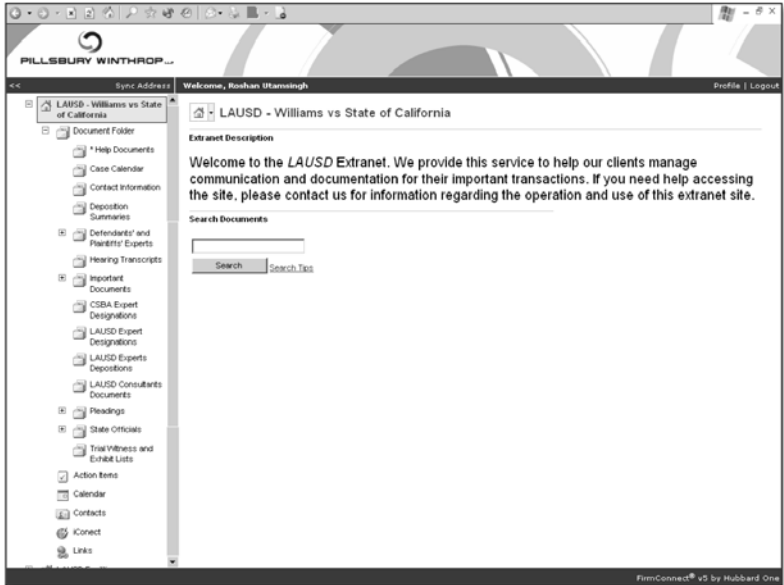



EXTRANETS IN ACTION

- Key Challenge—LAUSD wishes to increase efficiency
 - Pays 29 firms \$28 million in outside counsel fees
 - Complex process with vast numbers of people, documentation and correspondence involved
 - Multiple offices and parties led to poor document organization and a frequent rebuilding of the wheel at LAUSD's expense
- Solution—One Source
 - Eliminate replicating archived files
 - One location to get thousands of documents
 - Accessed by in-house team 24x7 without incurring hourly rate
- Results—
 - "We have one source to go to get literally thousands and thousands of documents. It is a very efficient system."
--Harold Kwalwasser, former GC, LA Unified School District

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VI. Electronic Billing FAQs

- What is it? How common is it?
- Why do in-house counsel want it?
- What's in it for law firms?
- What are potential problem areas?
- How does e-billing fit with matter management?

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VII. What is E-billing? How common is it?

- Wide variety: bare bones email bill delivery vs. Web-based systems connecting clients/firms
- Electronic images of bills (e.g., .pdf file) vs. LEDES invoices (electronic invoice standard)
- Less than 10% of law departments
- Poised for growth--28% of law departments considering
- Thousands of law firms (U.S. and foreign) currently submitting e-bills

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VIII. Why do in-house counsel want it?

- Faster, better bill review
- Electronic audits enforce billing guidelines
- Automated tracking of spending vs. budgets
- Instant access to accurate financial reports
- Eliminate paper, data entry
- Average savings: 17% of outside legal spending

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IX. What's in it for law firms?

- Faster bill transmission
- Online access to bill status, revisions, comments
- Potential for quicker payment
- Fewer client requests for budget comparisons, financial reports

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X. What are potential problem areas?

- Less than 100% of law firms connected—requires wasteful paper system/data entry for some law firms
- Variable fees (e.g., based upon percentage of spending) vs. certainty of fixed pricing
- Fees charged to law firms (which firms recover directly or indirectly from the client) vs. no fees to law firms
- System deployment time (years vs. several months)
- User training time (days vs. one hour)
- Onerous firm requirements: non-standard LEDES, UTBMS, etc.

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X. Potential Problem Areas (cont'd.)

- Inconvenient bill submission process/error resolution
- Bill audit false positives, handling adjustments/comments
- International capabilities: non-LEDES billing option, currency conversions, VAT tracking
- Ability to export data to spreadsheets, databases
- Separate system required for matter management: multiple vendors, limited functions of “integrated” systems
- Frequency of upgrades to reflect best practices

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XI. How does e-billing fit with matter management?

- Feeding e-billing into separate matter management system vs. one system that tracks bills and status, documents, calendars, contacts, results, etc.
- Advantages of single system
 - One system to learn and use
 - One system to connect with law firms
 - One vendor, no “finger pointing”
 - Client requirements of budgets, status reports, etc. enforced by tying to bill acceptance
 - Reports include not only spending, but also performance (status, lessons learned, and results)

805 OUTSIDE COUNSEL RELATIONS: The Basics

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SESSION 805 OUTLINE**I. IDENTIFY COMPANY OBJECTIVES****A. Transactional**

1. Do you require a generalist or a specialist?
2. If a specialist is required, what do you expect of outside counsel? Eg. Analyze and/or prepare provisions, documents, applications, etc. in land use, commercial lease provisions, mergers/acquisitions and the like?
3. How much of the legal work on a particular project will be handled by outside counsel? The entire matter or only one component?

B. Litigation - Offense/Defense

1. Analyze whether your company requires an opinion on whether to take an offensive action or whether the company requires immediate litigation to ensue.
2. Where defense counsel is required, are they clear on your company's position? Does your company have specific objectives/needs, which must be preserved, protected, analyzed which would require protective orders or other action? (eg. Trade secrets, practices, etc.)

C. Special needs

1. Identify the specific objective. If, for example, your company needs outside counsel to file a petition with a government agency, recognize the possibility of particular nuances affecting that petition---is it a planning issue, a permit issue, a land use issue? Isolate the issue. If necessary, hire outside counsel to analyze the issue before engaging counsel.
2. Intellectual Property –Recognize that there are numerous aspects to intellectual property law including copyright, trademark

and patent. Make sure you identify the correct discipline to support the objectives.

3. Worker's compensation – Does the objective involve coverage issues, new policy applications or interpretations? Are you defending a claim? Is there a question of employment practices affecting your worker's compensation coverage?

D. Corporate compliance – Recognize the difference between compliance and incorporation. Are you forming a new corporation, limited liability company or partnership, a new business relationship or the like? Are you simply looking for assistance in maintaining corporate records?

II. MAKING AN APPROPRIATE SELECTION (Who's right for the job?)

A. Experience – How long has the firm been around? Is this a well established local firm? A national firm but new to the area? If so, will that affect their ability to handle the matter? Refer back to your objectives to answer this.

B. Track record – Even if the firm or individual attorney is well established, a mediocre track record may be an indication of the probable outcome. Ask how many times the attorney has handled a similar matter, what result and whether they are familiar with the practices as well as the legal issues.

C. Past performance – If you have used a firm in the past and the result was poor, consider a new firm but realize that a poor result is not always the fault of the outside counsel. Failure to return calls, file timely responses, keep you informed in writing and to provide adequate, competent advice is enough reason to shop for a new outside firm.

If you used the firm in the past, are you assured of getting the same attorney or will they pass it to a new, inexperienced attorney?

D. Referral – Consider the source of the referral. Make sure that the referring source used the outside counsel for the same general objective your company has; otherwise, the referral may not have much value and may waste valuable time.

E. Subjective - Will they work well with OUR staff?
Personal skills are important.

III. RETAINER

A. Read it!

1. Common Retainer provisions include

- a. scope of representation
- b. costs, fees

- c. notice of malpractice insurance
- d. dispute resolution

2. Do not hesitate to request edits to the retainer

B. Define the scope of representation – Make sure that the retainer sufficiently defines what it is your company requires. Avoid unnecessary fees associated with work which is beyond the scope of your objectives.

C. Costs – Copies, faxes and all fees incident to the legal work should be tracked accordingly. A document intensive case can result in immense copying fees. If copies can be produced in house by your own staff, you may save significantly. Watch out for the per item cost.

D. Billing practices: Make sure that you monitor whether the legal task performed reasonably matches the time charged. For example, a “0.2 hr” charge for sending a fax is unreasonable. Does the retainer define the various levels of staff charges, ie. paralegal, secretary, junior associate?

IV. COUNSEL PROVIDED BY INSURANCE CARRIERS

- A. Choice of counsel – pros & cons
- B. Your role in the supervising the litigation

V. MANAGING OUTSIDE COUNSEL

A. "Using Extranets to Increase Efficiency and Lower Costs: Case Studies."

B. Billing

1. Analyze every line item in the bill for proper allocation at the corporate level. For example, if you have numerous branches, you will want to allocate legal expenses to the proper branch for an accurate reflection of your financial data. If the law firm bill is incorrect, your allocation will be incorrect and may affect the financial reports, which will, in turn, effect company strategic planning.

2. Who is actually working on the matter? Make sure you are receiving timely status reports. How is the communication between associates, paralegals, staff?

3. Make sure that you are not paying for two attorneys who are collectively producing the work of one attorney. For example, in most cases it is not necessary to pay for two attorneys to attend a deposition, hearing or meeting, which could be handled by one attorney. Naturally, if there are special circumstances, you may

desire two attorneys. However, watch out for the firm charging a low hourly fee but sending two attorneys.

VI. ELECTRONIC BILLING

A. ELECTRONIC BILLING FAQs

1. What is it?
2. How common is it?
3. Why do in-house counsel want it?
4. What's in it for law firms?
5. What are potential problem areas?
6. How does e-billing fit with matter management?

B. WHAT IS E-BILLING? HOW COMMON IS IT?

1. Wide variety: bare bones email bill delivery vs. Web-based systems connecting clients/firms
2. Electronic images of bills (e.g., .pdf file) vs. LEDES invoices (electronic invoice standard)
3. Less than 10% of law departments
4. Poised for growth--28% of law departments considering
5. Thousands of law firms (U.S. and foreign) currently submitting e-bills

C. WHY DO IN-HOUSE COUNSEL WANT E-BILLING?

1. Faster, better bill review
2. Electronic audits enforce billing guidelines
3. Automated tracking of spending vs. budgets
4. Instant access to accurate financial reports
5. Eliminate paper, data entry
6. Average savings: 17% of outside legal spending

D. WHAT'S IN IT FOR LAW FIRMS?

1. Faster bill transmission
2. Online access to bill status, revisions, comments
3. Potential for quicker payment
4. Fewer client requests for budget comparisons, financial reports

E. WHAT ARE THE POTENTIAL PROBLEM AREAS?

1. Less than 100% of law firms connected—requires wasteful paper system/data entry for some law firms
2. Variable fees (e.g., based upon percentage of spending) vs. certainty of fixed pricing
3. Fees charged to law firms (which firms recover directly or indirectly from the client) vs. no fees to law firms
4. System deployment time (years vs. several months)

5. User training time (days vs. one hour)
6. Onerous firm requirements: non-standard LEDES, UTBMS, etc.
7. Inconvenient bill submission process/error resolution
8. Bill audit false positives, handling adjustments/comments
9. International capabilities: non-LEDES billing option, currency conversions, VAT tracking
10. Ability to export data to spreadsheets, databases
11. Separate system required for matter management: multiple vendors, limited functions of "integrated" systems
12. Frequency of upgrades to reflect best practices

F. HOW DOES E-BILLING FIT WITH MATTER MANAGEMENT?

1. Feeding e-billing into separate matter management system vs. one system that tracks bills and status, documents, calendars, contacts, results, etc.
2. Advantages of single system
 - One system to learn and use
 - One system to connect with law firms
 - One vendor, no "finger pointing"
 - Client requirements of budgets, status reports, etc. enforced by tying to bill acceptance
 - Reports include not only spending, but also performance (status, lessons learned, and results)

VII. ADDITIONAL READING

A. E-Billing

1. "Managing Outside Counsel," Legal Times
2. "E-Billing Without the Pain," Legal Times

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3. "Web-Based Matter Management Systems"

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B. Managing Outside Counsel

1. "Using Extranets to Increase Efficiency and Lower Costs: Case Studies."

LegalTimes

WEEK OF NOVEMBER 17, 2003 • VOL. XXVI, NO. 46

IN-HOUSE COUNSEL

Managing Outside Counsel

New survey reveals clients are imposing more constraints on their law firms. **BY ROB THOMAS**

A difficult economic environment is changing the ways that in-house counsel manage legal work, according to a report recently released by the Association of Corporate Counsel and Serengeti Law. In-house counsel are caught between a heavier workload and their companies' need to hold the line on legal spending.

This year's report describes how legal departments are meeting this challenge, and what these changes mean for their law firms. More than 250 law departments contributed their experiences to the third annual "ACCA/Serengeti Managing Outside Counsel Survey Report."

After two years of no change, legal spending as a percentage of company revenue jumped from a median of 0.51 percent to 0.57 percent this past year. Legal costs have the biggest impact on small companies (with less than \$100 million in annual revenues), which on average spent 2.2 percent of their revenue on legal expenses, compared with 0.32 percent at large companies (with more than \$1 billion in annual revenues). Since most companies spend significantly more on outside counsel than on their legal departments, it is not surprising that the top concern of most in-house counsel (currently 82 percent) is getting control over outside legal spending.

Dissatisfaction with outside legal costs is leading companies to impose more constraints on their law firms, and to send less work to them. As a result, law firms have had to slow the increases in their hourly rates in each of the past three years (from 9.3 percent to 6.3 percent to 5.4 percent). In-house counsel are expecting further slowing of rate increases during the coming year. Respondents also estimated that spending on outside counsel next year will be flat, which—assuming a small increase in hourly rates—means that corporate law firms may get even less work in the coming year.

What are the specific controls being placed on outside counsel? Gaining widespread acceptance is requiring outside counsel to live within a budget. The "do whatever is necessary" approach is increasingly being reserved for the most critical matters.

Budgets jumped from fifth to second place (after monthly or periodic bills) on the list of the most common retention terms required by law departments. Both the number of in-house counsel requiring budgets (83 percent) and the average percentage of matters in which they require budgets (41 percent) are up significantly from last year, with litigation identified as the area where budgets are most often required.

Budgets not only clarify expectations on both sides about appropriate levels of law firm activity, but also set clear benchmarks against which ongoing performance is monitored. An increasing number of in-house counsel are also requiring electronic billing, which gives them direct access to financial data for each matter and permits them to use automated systems to audit bills and compare actual spending with budgets.

WHAT CLIENTS WANT

Other controls on outside counsel identified in this year's report include:

- Requesting that law firms share their work product not only with in-house counsel but also with other firms representing the client on similar matters, to permit reuse of work product;
- Requiring firms to agree to specific retention terms before they start work, including no change of attorneys or rates without approval, end-of-matter assessments, compliance with ADR policies, and use of vendors specified by the client;
- Requiring more types of conflicts checks than the minimum required by ethical rules (e.g., past representation of adverse parties in unrelated matters, potential issues conflicts), and less willingness to grant blanket waivers of potential future conflicts;
- Requesting discounts for early payment of bills; and
- Requiring that associates handling their matters have minimum levels of experience.

More law departments report that they are terminating relationships with law firms that are not responsive or too costly.

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Convergence continues, with more work going to smaller firms, which are perceived to have better rates and service.

Companies that are serious about implementing cost controls with outside counsel are finding that these techniques are having an impact. Savings are reported to be at least 10 percent of annual outside legal spending.

On the flip side, techniques explored by in-house counsel that do not seem to be gaining traction include:

- Competitive bidding or RFPs, which on average receive less than two law firm responses.
- UTBMS bill coding, now required by only about 4 percent of companies, one-fourth of which admit that they do not use the coding provided by their firms.

ADDING TECHNOLOGY, NOT STAFF

After two years of outside legal spending that was double the amount of internal spending, the ratio dropped to 1.6 this year, indicating that more work is being retained by the law department. Yet on average, in-house counsel are projecting no change in the number of staff lawyers and paralegals. As a result, the second-most-pressing concern for in-house counsel this year is “too much work for too little resources/legal budget issues.”

With increasing pressure to send less work to outside counsel and to spend more time managing the work of outside counsel, in-house counsel are feeling pressed to accomplish more without adding personnel. And it's clear that more in-house counsel are turning to technology to increase productivity in order to handle more work with current resources: The concern that increased the most this year was having “technology to improve the efficiency of the law department and work with outside counsel.”

In-house counsel are starting to close the technology gap with their colleagues at law firms. Unlike last year, in-house counsel are generally planning to increase spending on various new technologies during the coming year. In general, as Internet-based systems such as extranets and e-billing have matured and gained mainstream acceptance, they have moved up in the list of technology priorities that law departments are considering. E-billing is at the top by a wide margin, with more than 28 percent of law departments currently considering implementing it with their law firms.

EXTERNAL, INTERNAL TOOLS

The smorgasbord of other technology to help law departments manage their legal work breaks down roughly into two categories: external tools (that include their law firms), and internal tools (used only by the law department). Among external technologies, law department extranets, currently used by about 20 percent of law departments, continue to grow in popularity as a way to share information.

For the first time, more law departments are considering extranets than are considering new internal software to help manage outside counsel. And law departments that are creating

extranets are increasing at a faster rate than are those whose law firms are providing extranets, perhaps reflecting the corporate client's frustration at having to go to multiple law firm extranets to access their data. Law departments' use of application service providers (extranets hosted by third parties) has doubled (to 22 percent in two years), making ASPs a serious alternative for law departments seeking quick setup and convenient access for exchanging bills, documents, and other information in a single site.

On the internal side, spreadsheet, database, and calendaring software are still used more often than formal matter-management software packages to track work with outside counsel, although the differences are narrowing. The use of electronic document repositories (for managing large volumes of litigation or transactional documents) also grew significantly during the past year (from 13 percent to 19 percent). On the other hand, law department intranet use seems to be leveling off, showing a slight drop from last year.

Law departments are also showing increasing independence in analyzing the performance of their outside counsel. For the first time, reports generated by internal matter-management systems were more commonly used than reports provided by law firms. While in-house review of paper bills is still the most frequent source of information regarding law firm performance, electronic billing data is starting to make significant inroads, growing by more than 40 percent over last year. The vast majority of law departments perform this analysis in-house, rather than using outside consultants.

In-house counsel report that law firms are not cooperating when it comes to controlling legal costs. Each of the past three years, outside counsel have been rated lowest in performance on cost consciousness and predictive accuracy. In fact, the top suggestion for outside counsel is to be more concerned with costs. These sentiments are supported by reports of law firm resistance to alternative fees, failure to respond to requests for bids, and reluctance to accept other changes sought by in-house counsel.

This strong level of dissatisfaction among corporate clients presents a clear opportunity for those law firms that are willing to work with their clients to improve efficiency and predictability. Rather than waiting for their clients to impose new constraints, outside counsel can gain a competitive advantage by identifying and proposing practical solutions that will meet the needs of both sides of the relationship.

Rob Thomas is vice president, strategic development, at Serengeti Law, whose Web-based technology is used by more than 1,800 in-house counsel to manage work with their outside firms. He may be reached at rob.thomas@serengetilaw.com. Information about the 170-page “2003 ACCA/Serengeti Managing Outside Counsel Survey Report” (which includes trending analysis from the past three years) is available at www.serengetilaw.com/survey.

LegalTimes

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TECHNOLOGY A Special Report

E-Billing Without the Pain

Get involved in the selection process to find a system everyone likes.



BY HOWARD JANIS

You may not know it, but your firm is probably sending electronic bills to some corporate clients, whose systems audit, analyze, revise, and report on every charge.

Like many others, our firm has multiple clients who have asked us to use several different e-billing systems. This year's annual Association of Corporate Counsel/Serengeti Law survey of several hundred law departments found that while use of electronic billing is still low (roughly 6 percent of law departments), it has tripled since last year. And, with more than 28 percent of law departments currently considering e-billing, this exponential growth is likely to continue.

Why should law firms get involved in selecting e-billing systems with their clients, rather than waiting to see what their clients pick for them? What should firms and clients look for in an e-billing system?

LawNet, the leading organization of legal technology professionals, conducted a survey of law firms last year that uncovered a broad base of negative opinions about e-billing. Dissatisfaction stemmed from two main areas: cost and difficulty of use.

The vast majority of law firms felt that the fees charged by e-billing vendors were unreasonable. "We have been billed by the client for the privilege to bill them," one firm complained.

"It is unfair for a law firm to have to pay to participate in a third-party e-billing program which was at the client's request," groused another.

Although there are some vendors that do not charge law firms to submit e-bills, most charge annual fees (\$1,000 to \$2,000 per client), or a percentage of the bills sent through the system (about 2 percent). The bottom line is that most law firms do not believe that the benefits to them justify the costs.

Law firms have also found that e-billing vendors often require time-consuming implementation, a real burden for smaller law firms without strong IT support. In the LawNet survey, law firms specifically reported that many vendors require additional work such as coding for time entries and modification of industry data standards.

One respondent complained that rather than sticking to the standardized format, "each company has taken it upon themselves to customize it, greatly complicating matters for firms with limited IT resources."

Another reported that the system foisted on the firm was "absolutely impossible to integrate into our billing practices. I think they expect an attorney to sit down and make corrections to task codes, etc. which will never happen in the real world."

Many law firms have therefore found that initiating e-billing can be frustrating and costly. The good news is that there is a wide variation in vendor practices, with some systems that are relatively easy for law firms to begin using.

Rather than sit back and see what systems their clients chose for them, firms should let their clients know that they would like to be involved in the selection of an e-billing system. Many law firms have used multiple e-billing vendors, and can provide practical knowledge to clients about the differences among such systems.

OPPORTUNITY KNOCKS

Given the large percentage of companies currently considering e-billing, law firms have an opportunity to enhance their role as a trusted adviser while helping their clients select a system that works well for everyone. It's simply a matter of contacting key corporate clients, letting them know about your firm's experience with e-billing, and offering to provide useful input if they are considering an e-billing system.

Factors to consider include:

Cost. Costs to law firms should be taken into account by the client when evaluating the overall cost of the system. Because e-billing is used only by certain clients, most law firms are probably recovering e-billing charges from those clients, either directly or indirectly.

Charges to law firms vary widely, from no charge (Serengeti Law) to annual fees/client (DataCert), to a percentage of the fees billed (Tymetrix). Law firm charges can be a significant factor for companies setting up e-billing with a large number of law firms.

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Data Standards. The Legal Electronic Data Exchange Standard (LEDES) was adopted by a consortium of law firms, corporate clients, and vendors in 1998. Essentially, it permits law firms to generate a uniform set of billing data no matter what their time and billing system.

To output LEDES data, law firms generally purchase a module from their software vendor. The problem is that many e-billing vendors require modifications to the standard LEDES output, negating the purpose of having a standard. It is therefore important to ask any vendor whether they require LEDES and, if they do, whether they require any modifications to the standard output. Obviously, the more modifications necessary, the more problems for law firms coming onto the system.

Most clients prefer LEDES bills because they come through in a single format that can be analyzed by their e-billing system. However, clients that work with a significant number of smaller law firms or foreign law firms may need a system that can also accept non-LEDES formats (Word, Acrobat, etc.) in order to get all of their firms onto a single system. Therefore, in addition to finding out about LEDES invoices, you may want to ask whether the system will also accept non-LEDES bills from law firm systems that cannot generate LEDES.

Billing Codes. Some e-billing systems also require Uniform Task-Based Management System (UTBMS) task and activity codes for every time entry in the bill. As noted above, this can cause significant problems for lawyers not used to entering codes when recording their time and for billing clerks who generally have a hard time coding time entries recorded by lawyers.

The UTBMS codes were released years ago by the American Bar Association and the American Corporate Counsel Association with much fanfare about how they would permit clients to compare the costs of performing legal work across multiple firms. In practice, many law firms and clients have found them difficult to use and of questionable benefit.

The annual ACC/Serengeti Law survey found that only 4 percent of companies currently require such coding from any of their firms, down from 7 percent the year before. And about one-fourth of these companies admitted that they don't use the coded data they receive.

As a result, you may want to check to see whether an e-billing system requires that all time entries be coded with UTBMS task and activity codes, and discuss with your client whether this is worth the effort involved.

Ongoing Ease of Use. You may want to ask vendors how long it takes to implement their system with all of a company's law firms, and whether they have had any incomplete implementations where not all firms could get on the system. These questions will provide valuable information regarding the relative ease or difficulty of getting started.

Once an e-billing system is set up, it is also important to consider the ease of submitting bills and dealing with the inevitable errors that result. It is worth taking the time to go through the bill submission process step by step, and to find out if the process differs for LEDES and non-LEDES bills. You may also want to find out how budgets, expense receipts, and other bill-

related information are submitted. Finally, you should check to see what types of errors are caught during the invoice submissions process, how the firm is notified, and what information is given to the firm so that errors can be quickly corrected.

International Capabilities. Many companies now are working with law firms that bill in international currencies, which can present a problem for e-billing systems that can process only a single currency. Most clients want to have all their law firms on a single e-billing system, so that their spending reports are complete. If a client has international legal work, you may want to help them find a system that can handle international currency bills, currency conversions, value-added taxes, and other information unique to foreign bills.

Client Features. It is probably safe to assume that the client will carefully evaluate the bill processing, auditing, and reporting capabilities on their side of the e-billing system. However, law firms may want to specifically check on how bill revisions are handled, whether law firms receive clear and timely explanations of why bills are revised, and how law firms will know which bills have been approved for payment. Some systems now permit clients to make line-item electronic comments to bills, which are conveyed to law firms with the approved bill. Such features can streamline the process for resolving billing questions through e-billing.

Law firms can increase their chances of having their bills paid on time and without revision if they can also find out what electronic audits are being performed on their e-bills. It is not uncommon for such systems to flag violations of client expense reimbursement guidelines, changes in hourly rates, etc. By understanding what audits the system runs, law firms can make life easier for everyone by catching such problems before the bills are sent.

Exchanging Other Information. Once you have the e-billing connection established, it may make sense to use the connection to send budgets, status reports, calendars, contact information, documents, and other information into the organized online files kept for e-bills. Find out if the vendor provides matter management features, in addition to the e-billing.

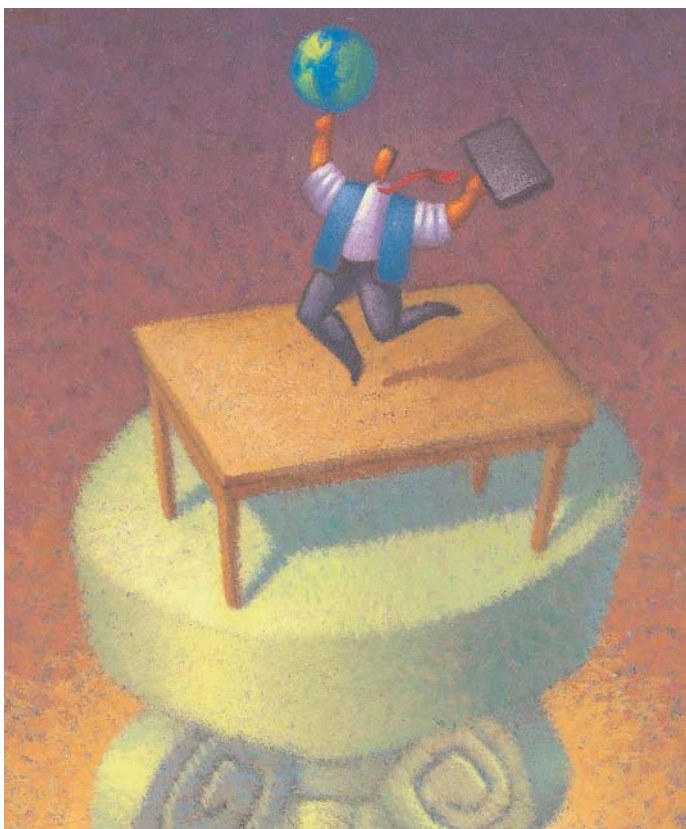
System Growth. No system is perfect, so when selecting one, it's important to consider how it has grown and will grow in the future. You should ask how many users are now on the system, talk with some of them, and find out how system upgrades are handled (including costs). The vendor should be able to provide a history of releases, as well as plans for the future. You may also want to find out what advance notice and training are available for releases that involve significant changes.

The bottom line is that those law firms that take a proactive role in helping their clients select an e-billing system can strengthen their relationships with their clients and end up with a system that is the best match for both parties. Rather than waiting for your clients to decide, it's worth opening a dialogue about this new technology, which appears to be here to stay.

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Web-Based Matter Management Systems:

Reality Trounces Old Conventional Wisdom Once Again



A few years ago, as the Internet was becoming widely accepted in the legal profession, law departments and law firms began considering ways to use this new technology to work together. Large firms, generally the leaders in adopting new technology for the profession, began developing extranets to give corporate clients instant access to their information. Standards were put in place to enable electronic legal bill processing, including billing codes that would enable clients to weed out inefficiencies. Matter management systems being used internally at law departments began to add Internet connections that would bring in information from sources outside the law department, including law firms.

by Rob Thomas of Serengeti Law

Did these nascent trends end up where we thought they would? Of course not! As with most things in life, unanticipated twists and turns led us to face challenges we never anticipated. With new technology came a quantum change in users and expectations. In addition, law departments took a much more active role in requiring that new technologies meet their actual needs rather than those originally perceived by their law firms.

So, much of what we believed “back then”—the Old Conventional Wisdom—has evolved as we experienced the new reality brought to us by the Internet. This article examines several of the major ways in which reality has prevailed over what used to pass for conventional wisdom.

The Amazon.com Phenomenon: So Simple, Even Lawyers Will Use It

Old Conventional Wisdom: Current matter management systems will simply be extended to provide Web access and will continue to be used primarily by law department staff. Information from law firms will come in primarily as paper, with key spending results and other data manually entered into the matter management system.

Today's Reality: In-house lawyers expect a matter management system they can use with their law firms from anywhere via Internet access. Lawyers, not just staff, use the system, which requires little or no training. Information from law firms is uploaded directly into a shared system from which in-house counsel can perform all essential management functions.

Before the Internet, matter management systems were strictly internal law department systems, with no connections to law firms. These systems were used primarily by administrative staff and paralegals, due to their complexity and the fact that most lawyers would not take the time for training. In order to navigate the system, users had to learn the meaning of icons and esoteric commands. Report creation was complex, often requiring special support from the vendor. Paper bills, budgets, status updates and other documents from law firms were manually processed and digested, with important information having to be keyed in. As a result, there were often issues regarding whether the data was current and the reports accurate. Also, internal IT support, not always easy to come by, was necessary to install, maintain and upgrade the system. If things did not work as expected, there was often finger pointing between the law department's IT staff and the vendor.

It is not surprising that as the Internet gained broader acceptance in the legal profession, most in-house counsel assumed that existing systems would simply add Internet connections. However, as vendors attempted to Web-enable such systems, significant issues arose. Performance was slowed by the large amounts of code and data needed to run the application on a remote computer. Security issues arose when law firms were given the same access as law department users (they were now able to see matters that were being handled by other firms). And company firewalls interfered with the transmission of data over the Internet.

Most matter management system vendors tried to patch these and other problems with varying degrees of success. Some just gave up. Hummingbird created shock waves that shook many law departments when it decided to withdraw LawPack, which had the largest slice of the matter management system market at 25 percent, including most of the large law departments and large government agencies. Even with such a substantial user base, Hummingbird decided that the cost of creating the Web version their clients wanted was not worth the risk and that there was no point in continuing to support the existing software without a Web version*.

Meanwhile, there was a big change in the users of matter management systems and their expectations, due in part to the explosive growth of Internet use throughout the business world. Lawyers who seldom used their computers, or who used them only for basic e-mail and word processing applications, realized that they were falling behind if they were not using the new tools provided by the Internet. *Business Week* recently reported that the Brookings Institution estimated a couple of years ago that productivity gains from e-commerce would pump up to \$250 billion a year into the economy by 2005—a figure that turned out to be grossly below the current estimate of \$450 billion**. Similarly, the starry-eyed projections made by Forrester Research in 1999 that e-commerce among U.S. businesses would reach a “staggering” \$1.3 trillion by 2003 was well short of the \$2.4 trillion in current transactions, due to the unanticipated adoption of the Internet**.

Much of this unprecedented growth in the use of the Internet has been by large numbers of users who are not computer- and software-savvy but who have been drawn to the Web by new, easy-to-use sites. “Spoiled” by sites like Amazon.com, users routinely expect computer interfaces to be clean and require no training to use. They want systems designed to mirror how people think and work.

The latest generation of matter management systems is not just an extension of the old systems as was expected, but

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rather a quantum leap to satisfy this whole new range of users and expectations. Such systems are not Web-enabled—they are Web-native and built from scratch. They don’t have the major firewall and compatibility problems encountered with Web-enabling older systems, since users share a single Web-based system. There is no hardware or software to install and no IT support necessary—all users need is a computer with an Internet connection and browser software.

Information that is already in electronic form at law firms and law departments (bills, budgets, documents, etc.) can be conveniently uploaded for accessibility by all team members. This direct exchange of electronic data eliminates the delays and errors inherent in the delivery, processing and manual entry of paper information. All data transmitted to and from the shared environment is encrypted. System security is also built in at the matter level so that teams working on one matter do not have access to other matters.

To meet the new expectations of Internet users, today’s generation of matter management systems have a look and feel similar to retail Internet sites. Information mirrors what users are familiar with in the paper world. Commands are not hidden in icons; they appear clearly on each screen where they can be activated with a mouse click. Data can be retrieved and reports created by clicking on the categories of information that the user wants to see. Training is unnecessary, but for those who want a personal guided tour, very little time is required. In fact, anyone in the legal profession who can buy a book on Amazon.com can use a well-designed current generation matter management system.

Many law departments have found that the new Web-native systems provide universal accessibility to key data and processes, even for the computer-challenged. Such technology leads to significant efficiencies for the law department and better control over outside legal spending and activities, through practical access to the electronic data provided by law firms through the shared system.

UTBMS and Other Billing Standards: Silver Bullets Miss the Target

Old Conventional Wisdom: Standard billing codes and electronic billing will enable clients to compare the

performance of outside counsel to determine who is not being efficient.

Today's Reality: Most companies have stopped requiring billing codes from their law firms. The results are not worth the effort, and there are better ways to stimulate law firm efficiency.

In 1995, the first code set for the Uniform Task-Based Management System (UTBMS) was released, with glowing predictions about evaluating law firm performance and creating realistic legal spending forecasts. The goal was to have each activity on a legal bill designated with two codes, a task code and an activity code. This coding could be used to analyze the time and spending on each task and activity throughout the life of a matter.

As electronic billing came onto the scene, many e-billing systems began to require that law firm bills be coded with UTBMS codes in order to be transmitted. But, despite the initial enthusiasm about UTBMS codes, actual use has been low and is declining. In 2001, only seven percent of the law departments required UTBMS codes from any of their law firms, dropping to under four percent in 2002***.

Why has this standard not been more widely adopted? LawNet's June 2002 e-billing survey contains some good clues in the law firm comments:

"Absolutely impossible to integrate into our billing practices. I think they expect an attorney to sit down and make corrections to task codes, etc. which will never happen in the real world."

"It is my experience that clients will request e-billing and rarely use this data for analyzing the cost of the legal work."

These comments indicate that law firms have found it is unrealistic to expect lawyers to code each and every time entry with two codes. In many cases, the attorneys leave the coding up to secretaries and billing clerks, who either find it impossible to break out specific activities and times from the lawyers' narrative time entries or who do not understand the coding categories. As a result, the data is often not correctly coded, leading to the classic problem of garbage in, garbage out.

The comments also suggest that clients are not using the data as expected, making it difficult for the firms to get motivated to improve their input effort. Clients can see that time entries are miscoded. They are also frustrated that it takes a

significant amount of time to analyze coded data and that there is no uniform way to distinguish among different types of matters or degrees of complexity of matters. As a result, analyzing coded data across multiple matters is often like comparing apples to oranges, leading to meaningless conclusions.

For example, suppose that after combing through the coded billing data a client finds that a law firm spent more time than the average for depositions in a specific case. When confronted with this finding, the law firm can be expected to provide an explanation related to the unique aspects of that case, such as more witnesses, more documents, more issues, etc. This attempt to micromanage outside counsel probably does not result in a change of law firm conduct, and it sends an implicit message to the law firm that the client does not trust the firm's judgment on the most basic level. Thus, most clients and law firms have found that there is not enough to be gained from this process to justify the time and expense of entering and analyzing the UTBMS billing data.

Law departments have also found that there are better alternatives that motivate their law firms to be more efficient and to resolve matters earlier. For instance, phase-based litigation budgets help clients and firms map out a series of exit points in litigation, along with corresponding costs, so that intelligent decisions can be made about the investment of additional time and money in continuing litigation. Also, alternative fees provide monetary incentives to provide greater compensation to those law firms who can position matters for faster, more efficient resolution. Most law departments, therefore, have concluded that UTBMS coding creates extra burdens for their legal teams without adding significant value. Law departments considering electronic billing systems should make sure that such systems do not require UTBMS codes but have the capability to accept them if the company and firms decide they are appropriate for certain groups of matters.

The Legal Electronic Data Exchange Standard (LEDES)—another silver bullet that has not met expectations—was initially promulgated in 1998 as a uniform data output from law firm time and billing systems that e-billing vendors could use to deliver electronic bills to law departments. The idea was that law firms could generate one uniform set of data, no matter what their time and billing system or what e-billing vendor was processing the data.

Like UTBMS codes, the good intentions associated with the LEDES standard proved better in theory than in practice. LawNet's 2002 e-billing survey indicates widespread law firm discontent with the fact that many of the e-billing vendors require their own unique modifications to the LEDES standard

output, negating many of the positive benefits of having a standard (“My biggest concern is that there is no uniformity; every e-billing service requires different changes to the standard LEDES output.”). In addition, companies that do business with foreign law firms find that such firms often cannot generate LEDES, which is primarily a standard adopted by U.S. time and billing vendors.

Law departments evaluating e-billing systems should therefore be careful to select a system that will ensure the broadest possible acceptance by law firms so that the client doesn't have to maintain a separate paper bill processing system. Law departments should check to see that e-billing vendors do not require unique modifications to the LEDES standard that can create problems for their law firms (and make sure that systems do not require UTBMS codes as indicated above).

In addition, the e-billing system should have a way to accept bills electronically through the system in non-LEDES formats from foreign law firms and small U.S. law firms that cannot generate LEDES data, such as documents in Word, Acrobat or other common formats. With non-LEDES bills, the system should require the firm to submit an electronic copy of the bill, and provide summary data regarding fees, expenses, time period covered, etc. so that the client does not need to re-enter any data for its own databases and reports. By understanding these standards, and the difficulties inherent in their implementation, law departments can maximize their chances of having a system that can be used by all of their law firms, so that they do not need to continue to maintain a separate paper bill processing system.

Law Firm Extranets Encounter Limitations

Old Conventional Wisdom: Law firm extranets will satisfy the need of corporate clients for immediate and convenient access to information and documents provided by each of their law firms.

Today's Reality: Corporate clients prefer an independent Internet-accessible site for sharing key information in one place with all of their law firms that includes functionality geared to in-house counsel.

As the Internet gained acceptance in the legal profession, many large law firms saw extranets as a way to differentiate themselves by giving clients direct access to their information and documents without having to request access from the law firm. Extranets were customized to meet the needs of individual clients, and much of the cost was usually passed along to such clients. In early 2000, Niku Corp. paid \$10 million for Legal Anywhere, one of the leaders in the custom development of law firm extranets, placing a bet on the growth of this technology.

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Although clients generally reacted positively to early efforts by law firms to share information through extranets, they quickly began to experience the limitations of this law firm-centric model. In-house counsel found that they had to go to too many different law firm extranets, each with its own unique features, to access their information. Law firms were generally not eager to allow access to other law firms or to include many of the features most needed by in-house counsel, including access to bills, budgets, status updates, and other key information that they needed on a regular basis. As a result, the growth of law firm extranets foundered, as reflected by the demise of Niku's legal extranet business in April 2001, just one year after its purchase.

At the same time, the client-centric Internet-based services that share information between law firms and in-house counsel experienced dramatic growth, nearly doubling last year to use by more than one-fifth of law departments***. Internet-based matter management systems have grown dramatically, because they give both sides of the relationship a single place and way to share the information that they need to work together and to meet the needs of the clients who are requiring access to information. Such systems also generally provide broader functionality at a lower cost than the one-off extranets developed by a single law firm or company.

Therefore, in-house counsel are driving the trend toward Internet-based shared systems and away from individual law firm extranets. Law firms are contributing to this trend due to the time and costs involved in building and maintaining extranets for individual clients.

Revenge of the Client: Law Departments Call the Technology Shots

Old Conventional Wisdom: Law firms have the latest technology, leading the way for their corporate clients, and they will recover the costs of such new technology from their general client base through hourly billing rate increases.

Today's Reality: Corporate clients are setting the technology requirements for their law firms to control essential functions, quality and compatibility. Law departments are often bearing the cost of technology dedicated specifically to their legal teams.

The newest gadgets have generally shown up in the offices of outside counsel ahead of their clients. Although that still may be the case with individual practice technologies, law departments are starting to call the shots for technology that impacts the collaboration of their legal teams. As many law departments engage in a process of convergence and reduce the number of law firms that they work with on a regular basis, minimum technology requirements are often expected for law firms wanting to continue to represent such clients.

This trend started to manifest itself years ago when law departments were predominantly using Word while law firms were using WordPerfect, before there was compatibility between the two. Gradually, law firms were required to provide documents in Word to certain clients. Then specific case management systems, billing formats and other technology requirements followed suit. As convergence has taken hold and competition among law firms has increased, law departments have dictated more of the technology requirements. This is particularly true with regard to technology that facilitates the exchange of work product with the law department and with their other law firms.

Because the costs of such technology can be significant, new issues arise as to who pays for it. In the case of technologies like case management and word processing that arguably benefit most of a firm's clients, the firm is generally expected to absorb the cost, which is recovered along with other overhead in the firm's hourly rates to all clients. However, law firms are beginning to bridle at paying for new technologies such as electronic billing and Internet-based matter management, which is required by a specific client—particularly when there is little perceived benefit to the law firm. As one law firm said in LawNet's recent e-billing survey, "This is simply a way for clients to refuse to pay bills. We have also been billed by the client for the privilege to bill them."

As a result, many law departments are paying for such dedicated technologies directly, so that they can control the total system cost. When a law department pays for the use of such systems, it does not have to be concerned about its firms passing through such costs at a markup through higher future legal bills. This also makes for more realistic decisions about whether system cost is justified by the benefits to the law department requiring it, and eases implementation of a new

system that law firms perceive to be for the benefit of a single client. Law departments are recognizing there is no free lunch; it is generally better to take direct financial responsibility for dedicated technology, rather than to have their law firms pay and recover such costs indirectly.

These issues will become more common as law departments begin to adopt Internet-based technologies for matter management and e-billing. Only 20 percent of law departments currently have any matter management system, and most of these are old internal systems, not shared with law firms over the Internet. But over 33 percent have homegrown databases and 25 percent have their own spreadsheets to keep track of outside legal work***. Only two percent have electronic billing, which generally is part of an Internet-based matter management system***. These numbers should grow dramatically, as reflected by the doubling of the use of Internet-based systems in the past year, and nearly a quarter of law departments planning on moving to e-billing***.

However, judging from the law firm responses to the LawNet survey on e-billing, law departments need to be more selective in choosing systems that their law firms can support, rather than forcing them to adapt to systems that are difficult to use. Law departments should look for systems that can implement all of their law firms based upon strict adherence to standards such as LEDES (without vendor modifications), and the flexibility to accept UTBMS codes without requiring them. Law departments should also look for systems that let the law department pay for the system, rather than requiring that all law firms pay for use of a system dedicated to that specific client. With the opportunity to dictate the matter management and e-billing system that will be used by its law firms, law departments should bear the responsibility for choosing a system that is practical for its law firms to use and that does not require payment in excess of the perceived benefit.

Conclusion

The Internet has provided a wealth of new opportunities for law departments to work more efficiently with their outside counsel. As they consider specific applications, it is important to continuously assess the benefits for each of the disparate players brought together by the system, as well as the costs in both time and money, to ensure the successful long-term use of each new platform. The key words are "continuously assess"—because just as yesterday's conventional wisdom evolved into today's realities, who knows what tomorrow will bring?

Endnotes

- * "LawPack Packs It In," *Corporate Counsel*, September 2002
- ** "The E-Biz Surprise," *Business Week*, May 12, 2003
- *** 2002 ACCA/Serengeti Managing Outside Counsel Survey Report