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Contract Management in Corporate Legal Departments: Opportunities and Pitfalls

Establishing Priorities, Monitoring Risk, Selecting Contracting Software and Outsourcing Vendors

WEDNESDAY, MAY 25, 2016

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Today's faculty features:

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Contract Management in Corporate Law Departments

Strafford Publications CLE Webinar on Wednesday, May 25, 2016

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Today's Agenda

- The in-house attorney's role in contract management
  - The Contracting Process
    - Creating Contracts
    - Reviewing and Negotiating
- How legal departments are using technology to manage contracts
- Use of outsourcing for contract management

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The Role of In-House Counsel

Evolving Expectations for Success

Increased cost sensitivity and risk pressures are altering the role and expectations for success of in-house counsel. Efficiency & Profitability and Business Acumen are becoming increasing important in defining the success of the law department
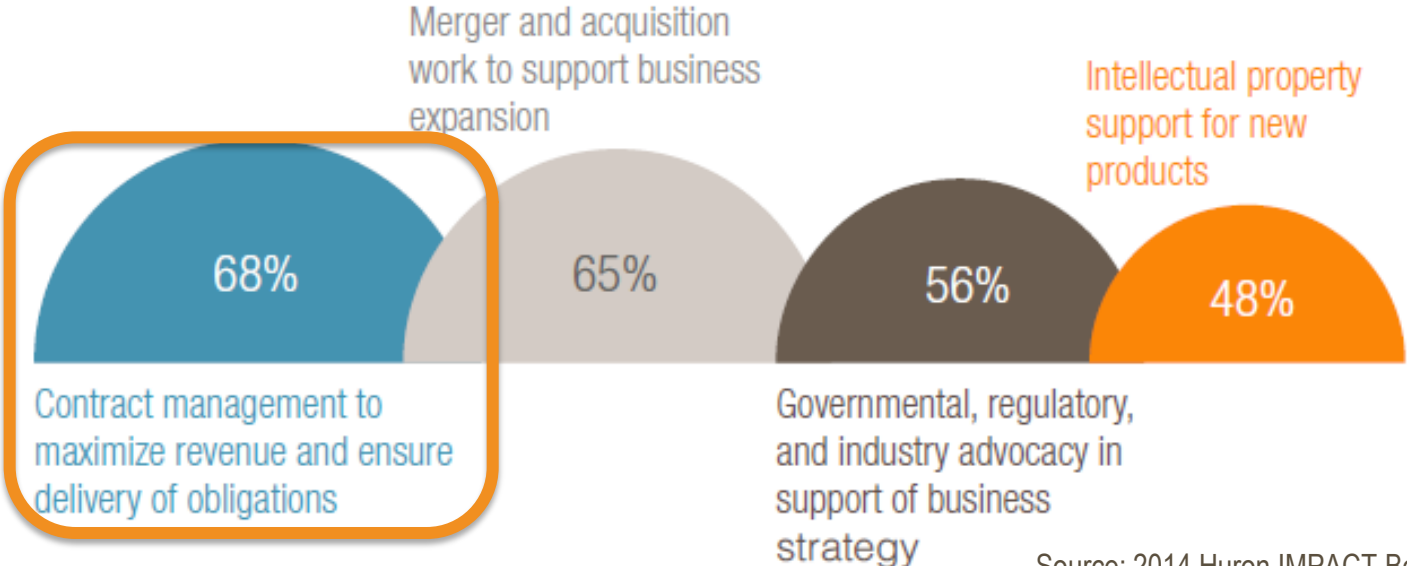
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Determining Legal's Involvement in Contract Management

- Managing Risk and Compliance
  - Legal risk
  - Business risk?
    - Question of ownership
    - Legal may be viewed as "sales hindrance"
  - Who ensures business compliance?

- Managing Contracting Process?
  - People: Where do contract administrators sit?
  - Technology: Who owns the CM system?

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Contract Management as a Growth Driver

Law department's are continuing to evolve to meet more strategically and efficiently the needs of the business. Contract management was cited by 68% of law departments as one of their key contributions to the strategic growth of the business.

Avenues to Promote Strategic Growth of the Business

Merger and acquisition work to support business expansion

Intellectual property support for new products

68%

65%

56%

48%

Contract management to maximize revenue and ensure delivery of obligations

Governmental, regulatory, and industry advocacy in support of business strategy

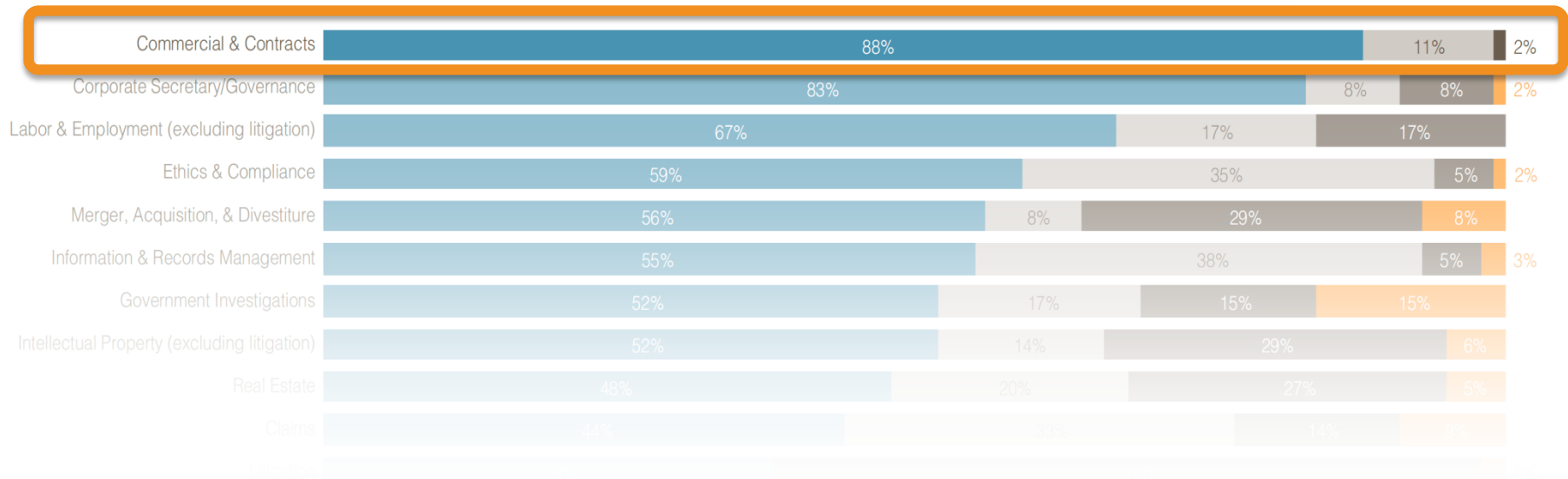Source: 2014 Huron IMPACT Benchmarking Report

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The Role of the Legal Department in Contract Management

88% of companies indicated that Contract functions are primarily staffed within the law department.

Primary Staffing Model by Function

Legend:
- ● Within Law Department
- ○ Outside Law Department
- ● Outside Counsel/Vendor
- ● Not Applicable

Function	Within Law Department	Outside Law Department	Outside Counsel/Vendor	Not Applicable
Commercial & Contracts	88%	11%	2%	
Corporate Secretary/Governance	83%	8%	8%	2%
Labor & Employment (excluding litigation)	67%	17%	17%	
Ethics & Compliance	59%	35%	5%	2%
Merger, Acquisition, & Divestiture	56%	8%	29%	8%
Information & Records Management	55%	38%	5%	3%
Government Investigations	52%	17%	15%	15%
Intellectual Property (excluding litigation)	52%	14%	29%	6%
Real Estate	48%	20%	27%	5%
Claims	44%			

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Relationship Between Legal, Finance, & the Business

Numerous functions need to "own" contract management (or at least contribute) at different points in the lifecycle.

Factors such as company size, diversity of businesses, and growth lifecycle can drive the need for a dedicated Contract Management Group to orchestrate involvement of the other stakeholders to enable contracts that strike the right balance of supporting business relationships and protecting against real risks.

Contract Management Lifecycle

Create/Negotiate	Activate	Perform	Analyze	Renew
Business	Business	Business	Business	Business
Legal	Legal	Legal	Legal	Legal
Finance	Finance	Finance	Finance	Finance

Contract Management Group?

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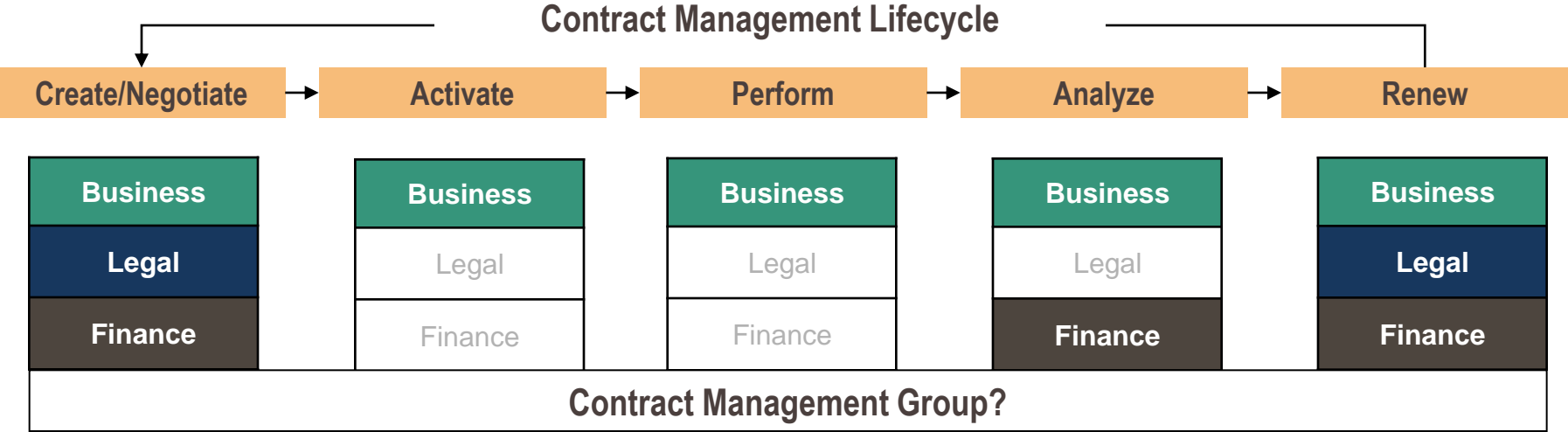
Defining Ownership of Contract Management

	Business	Legal	Finance
Pros	↑ Has to "live" with the contract ↑ Best knows the value drivers ↑ Understand market and competitive landscape ↑ Negotiates the deal terms	↑ Central function with broad corporate view to increase consistency ↑ Focus on regulatory/legal compliance ↑ Encourages Legal's earlier involvement in direction and potential solutions ↑ Can look around the corner	↑ Greater focus on maximizing total contract value – not just initial $$$ ↑ Focus on process and escalation criteria ↑ Best Deal Structure
Cons	↓ Less "checks and balances" on high risk deals ↓ Often higher turnover in sales ↓ Less process oriented ↓ Speed ↓ Short term view	↓ Can view mission as removing "all" risk – limiting business flexibility ↓ Cost center at risk of staffing cuts ↓ Limited understanding of business risk and value drivers	↓ Less knowledge of business to identify delivery risks ↓ Cost center at risk of staffing cuts

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Aligning Legal's Involvement with the Risk, Complexity, & Value

SAMPLE CRITERIA FOR LEGAL INVOLVEMENT	RESPONSE		NEXT STEP
1. **Value:** Is the contract value greater than $X?	No ↓ #2	Yes ➔	**Involve Legal**
2. **Duration:** Is the contract duration longer than X months?	No ↓ #3	Yes ➔	**Involve Legal**
3. **Customer/Vendor**: Is this a new relationship?	No ↓ #4	Yes ➔	**Involve Legal**
4. **International:** Is this a new geography?	No ↓ #5	Yes ➔	**Involve Legal**
5. **Legal Terms**: Have high risk legal terms been revised?	No ↓ #6	Yes ➔	**Involve Legal**
6. **Potential Liability:** Is it higher than normal?	No ↓ #7	Yes ➔	**Involve Legal**
7. **Overall Risk to Company:** Is it outside normal parameters?	No ↓ #8	Yes ➔	**Involve Legal**
8. **Other:** Exclusivity, IP licensing, Food, Joint development	No	Yes ➔	**Involve Legal**

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Supporting Coordination Amongst Contract Management Owners

What needs to be in place for "peace among warring tribes"?

- Corporate-wide perspective on risk tolerance

- Recognized value of each Department/Function

- Use of "plain English" templates with alternative language

- Defined approval process and escalation criteria

- Required training for sales/Procurement that includes content on importance of compliance from a statutory and revenue perspective

- Detailed process training with roles and responsibilities of each function

- Use of metrics to monitor cycle times and compliance with process

- Enterprise-wide systems designed to support entire CM lifecycle

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THE CONTRACTING PROCESS

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Initial Questions

Vary by Contract Type ?????:

Creation

- What types of contracts do we have?

- Is it a collaborative process?

- What templates are used? (Self Service?)

- Is input required from another function (e.g., Finance, Tax, HR, etc.)

Negotiation

- Who manages the interaction with the third party?

- Does this change depending on contract risk?

Approval/Execution

- Is the approval process consistent?

- How are approvals obtained and documented?

- Is legal a final approver/gatekeeper or just notified of approval and execution?

Obligations Management

- Who owns the tracking of obligations and follow up? (e.g. renewals, termination, penalties and disputes)

- Where are the contracts stored?

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Contract Creation

- Avoid a bespoke drafting process
- Determine who will provide the initial draft
- Define who in legal will review and approve the draft
- Provide a source library for drafting
- Who will own/draft the commercial terms – scope of services, SOW

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Contract Creation: The Use of Templates

- Create a governance document with contracting roles and policies
- Identify all contract types and create templates for each type
  — Geography
  — Type and risk
- Create a "core terms and clause" library
  — Include approved "fall back" provisions
- Utilize a "Contracts Repository"
  — Centralize management of templates
  — Keep templates updated/use version control
- Train personnel on drafting and reviewing consistent with the governance documentation

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Contract Creation: The Use of Templates

Advantages

- Improved compliance
- Increased transparency
- Reduced risk ("cowboy contracts")
- Speed
- More control
- Ability to delegate

Risks

- Use of unauthorized templates
- Template library is not maintained
- Failure to train and re-train
- Lack of communication regarding updates
- Copy and Paste errors and mistakes
- Perception that process is "slow"

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The Contracting Process: Reviewing and Negotiating Contracts

Contract Review

Who and What Should Legal Review?

- Use of Purchase Orders, Work Orders and SOWs

- Use of Fixed Pricing Agreements

- Use of thresholds and other risk guidelines to minimize the number of contracts sent to Legal for review

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Contract Negotiation - Preparation

1. Understand your role – active negotiator or scrivener?

2. Understand the deal and the value drivers for the company

3. Understand who has the leverage – history of the vendor relationship

4. Review any vendor redlines and any past agreements with the vendor

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Contract Negotiation - Preparation

5.   Benchmark against similar deals with other vendors

6.   Understand the big picture

7.   Ensure contractual commitments will not conflict with other contractual commitments

8.   Prepare a list of the key issues and prioritize (approved fall back positions)

Contract Negotiation - Preparation

7. Identify the deal breakers and potential workarounds, and guard rails

8. Ensure Internal Alignment

9. Obtain required Input : Risk, Litigation, Compliance, VP approvals

10. Google as needed

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Contract Negotiation – Contract Terms

1.   Essential Terms (i.e. service level requirements)

2.   Minimize gaps and inconsistencies in the commercial terms

3.   Force Clarity and Simplification

4.   Termination/Escape clauses

Contract Negotiation – Contract Terms

5.   Avoid onerous/burdensome terms (i.e. non-solicitation)

6.   Compliance with Corporate Policies and Requirements

7.   Escalation where required

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Contract Negotiation – Other Duties

1. Reviewing and revising drafts – document/version control

2. Creativity – out – of – the box thinking

3. Counseling on practical implications of contract terms

4. Collaboration with Other Professionals

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Contract Negotiation – Other Duties

1. Confirm/coordinate required approvals

2. Electronic filing of drafts and emails

3. Finalization/Execution of Final Document

4. Keep an eye on the big PICTURE

Contract Management: Use of Legal Technology

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An Integrated View of Legal Systems Related to Contracts

Knowledge Management & Management Reporting
- Collaboration – Legal Portal - Standard Operating Procedures - KPIs – Dashboards - Reports

Matter Management
- Matter Administration
- Calendar/Docketing
- Budgeting
- Notifications
- Automated Workflow

Records Management
- Records Repository
- Retention
  Scheduling
- Litigation Readiness

Contract Management
- Contract Drafting
- Contract Workflow
- Contract Approval
- Contract Repository

Document Management
- Document Repository
- Document Searching
- Legal Contract Archival

eBilling
- Invoice Processing (Submission, Routing and Approval)
- Fee Bill Analytics

Discovery
- Legal Hold
- ESI Mapping
- Case Management

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Technology Enabled Contract Management Best Practices

1. Initiate/ Request	– Contract initiation follows a prescribed workflow. – Functional areas request contracts through a "single doorway". – Standardized contractual terms are incorporated into the contracting process. – Requestors are provided with visibility on the progress of the request.
2. Create/ Draft	– Standard clause and contract template libraries are used. – Draft contracts are automatically generated. – Applicable stakeholders from relevant departments are involved. – "Self-service" contract assembly is enabled where appropriate.
3. Collaborate/ Negotiate	– Central tracking of draft agreements for reference and audit purposes. – Revision history, document comparison, version control and redline capabilities. – Approvals are routed and tracked using pre-established criteria.
4. Approve & Sign	– Signature process is documented and followed. – Electronic signatures and mobile approvals are used to streamline process. – Compliance with policy and regulatory requirements.
5. Manage & Admin.	– Contract metadata, amendments, and history of changes are maintained in a central repository. – Alerts based on expirations/renewals are setup and tracked. – Fulfillment of performance obligations proactively managed. – Analytics and reporting used for strategic decision making.

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Benefits of Streamlining Legal Processes through Technology

The right technology when paired with policies and processes can help achieve the following:

- Ensure that the Legal Department **business processes** are cohesive

- Reduce **manual effort for individual staff** and increase **access to important information**

- Ensure **knowledge capital is captured and leveraged** internally and with outside counsel

- Improve **operational and financial management** of the Legal Department; **reduce spend and effort duplication** through proactive management

- Increase **efficiency** through collaboration across practice groups, geographies, companies and law firms

- Support development of the appropriate **metrics and measurements** to drive behavior

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Prevalence of Legal Technology

55% of law departments reported the use of contract management technology while an additional 32% don't currently use the technology but would like to be better equipped to do so.

Legal Technology

Legend: ● Currently use it   ● Don't use it but would like to be better equipped to do so   ● No interest in using

Matter Management: 59% Currently use it, 30% Don't use it but would like to, 11% No interest

Contract Management: 55% Currently use it, 32% Don't use it but would like to, 13% No interest

E-Billing: 54% Currently use it, 21% Don't use it but would like to, 25% No interest

Document Management: 51% Currently use it, 39% Don't use it but would like to, 10% No interest

Claims Management: 48% Currently use it, 16% Don't use it but would like to, 36% No interest

Intellectual Property Management: 45% Currently use it, 19% Don't use it but would like to, 35% No interest

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Differentiating Systems that Support Contract Management

There are systems that specifically support and automate the entire contract management process; while there are other systems that can be adapted to meet client's contract management objectives.

Type of System	Contract Lifecycle					Sample Vendors
	Initiate	Create	Negotiate	Approve & Sign	Manage & Admin	
Contract Management	●	●	●	●	●	• Apttus CM, Selectica CM, SciQuest CD
Supply Chain Mgmt.	●	●	○	○	●	• SAP Ariba, SAP CLM, IBM Emptoris
Document Management	○	○	○	○	●	• OpenText DM, HP Automony, EMC Documentum
Matter Management	○	○	○	○	●	• Mitratech TeamConnect, Bridgeway eCounsel, Wolters Kluwer
Document Assembly	○	●	○	○	●	• Business Integrity Contract Express
Workflow	●		○	●	●	• Onit App builder
Electronic Signature				●		• DocuSign, Adobe Echosign
Discovery & Abstraction						• Seal, Brightleaf, Selectica

● System supports contract functionality	○ System partially supports contract functionality or requires integration

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Differentiating Systems that Support Contract Management (Cont.)

Matter Management

Captures key data related to the matter, such as:

- Matter name
- Categorization
- Description
- Date Opened
- Narratives
- Status or Phase
- Disposition
- Date Closed

Document Management

Where users work and collaborate:

- Document Collaboration
- Versioning
- Secure document access
- Workspace (Matter) Centric organization
- Metadata Inheritance
- Record/Retention Identification
- Document Classification/Record Identification

Records Management

Official system of record, both electronic & physical

- Record Retention
- Legal Holds
- E-Discovery
- Retention
- Destruction

Contract Management

Facilitates contract lifecycle workflows:

- Requests / Approvals
- Standard Language
- Contract Assembly
- Versioning
- Electronic Signature
- Expiration / Renewal
- Compliance
- Fulfillment of Obligations

Source: 2014 Huron IMPACT Benchmarking Report

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Matter Management

The term "matter management" refers to the business processes and software that support the administration of law department work.

- Matter management **"processes"** refer to the practices and procedures within the law department by which matter related data is recognized, gathered, collected, reported and utilized for decision making.

- Matter management **"software"** is the tool or repository of information designed specifically for the purpose of tracking matter management data which may include:

Matters:	People:	Calendaring:
- Case notes/Status reports	- Staff	- Deadlines
- Negotiations	- Witnesses	- To do lists
- Judgments/Settlements	- Experts	- Events
- Contract Management	- Parties	- Court/review board dates
- Fees and Costs	- Outside attorneys	- Ticklers/Workflow
- Budgeting	- Board members	- Trial/Hearing Dates
- Resource Management		
Organizations:	**Reports:**	**Financials:**
- Law firms including performance	- Management reports	- Budgets
- Vendors	- Performance metrics	- Invoices (from eBilling)
- Other service providers	- Client communications	- Phase/Task costing
- Business units/departments	- Case assessment	
- Customers		
- Business partners		

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Document & Records Management

Documents

"Documents consist of information or data that can be structured or unstructured and accessed by people in an organization. Common access to the documents is enabled by existence of a library and/or a repository within the system."

Records

"Records provide evidence of the activities of a given organization's functioning and policies. Records often have strict compliance requirements regarding their retention, access and destruction."

Document Management

"Electronic document repositories provide for the checking-in and out of documents that can be revised and unlocked for future revision, with version tracking and histories."

Records Management

"Records management needs to place records in their proper context so that generally they are kept in series, or in indexes determined not by internal, enterprise-dictated rules, but by external rules."

Source: CMS Wire

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Contract Management

1. Initiate/Request
1. Single electronic request "doorway"
2. Route for approvals
3. Provide visibility to requestors

2. Create/Draft
1. Utilize standard language library
2. Enable "self-service" via assembly of contracts
3. Approvals prior to negotiations

3. Negotiate
1. Track "redlines" and compare versions
2. Capture changes in terms
3. Secure online negotiations

4. Approve & Sign
1. Audit trail for all approvals
2. Comply with all policy requirements
3. Mobile approvals
4. Electronic signatures

5. Manage & Admin.
1. Track contract expiration and renewals
2. Manage compliance
3. Manage fulfillment of performance obligations
4. Develop analytics

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Defining Your Implementation Approach

Best practice framework for developing an information management program begins with **_Governance_**, which builds the foundation for accountability with program strategy, oversight, roles and responsibilities, policies, and compliance.

The solution is implemented through information management **_Processes,_** which are guided by corporate policies and procedures.

Technology facilitates the information management processes.

Governance

Process

Technology

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Defining Your Implementation Approach (Cont.)

Project Management

| 1.Requirements | 2. Analysis | 3.Design | 4. Develop | 7. Test | 8. Deployment |

1.Requirements
- Identify business requirements
- Define business problem
- Validate & Prioritize Requirements

2. Analysis
- Assess the current processes
- Assess system usage
- Identify Gaps and opportunities
- Refine requirements
- Determine alternatives / solution
- RFI / RFP

3.Design
- Conduct Practice Group workshops
- Design and map new processes
- Design application interface
- Design system workflow
- Design integration functionality
- Design security model
- Prepare functional specifications

4. Develop
- Build approved design
- Configure security requirements
- Prepare appropriate training and other documentation

5. Integration
- Build or install systems integration components
- Test system integrations

6. Conversion
- Analyze legacy data
- Scrub data, as needed
- Develop conversion approach
- Map data conversion
- Build conversion scripts
- Test and reconcile data
- Finalize testing

8. Deployment
- Deliver training
- Production Cut-over
- Post Project review

Change Management

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Acknowledging Your Current State

Understanding current pain points will help the law department define it's optimal state contact management processes and key requirement gathering areas.

Frequent Contract Management Pain Points

People
- Resource constraints
- Lack of know-how and training
- Lack of clarity in roles

Process

- Rogue contracts
- Delays in processing contracts
- Lack of visibility into contracts
- Inability to ensure compliance
- Use of non-standard language or unapproved language
- Lack of awareness of consequences
- Lack of formal approval processes
- Payments and revenue are reconciled against contracts

Technology
- Lack of centralized storage
- Invoices cannot be matched to contracts
- Data integrity issues

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Prioritizing Requirements & Setting Business Objectives

Business Objective	Pre-Execution	Repository	Post-execution
1. Measure the cost to deliver services to better manage client and contract profitability	●	○	●
2. Reduce revenue leakage through increased monitoring and application of contractual terms and scope		○	●
3. Improve under-contract revenue forecasting		○	●
4. Reduce cycle time from client acceptance to execution of the contract	●		
5. Transition from reliance on individual knowledge and contribution to standardized, enforced contracting processes and templates	●	○	
6. Contracts accurately reflect the company's ability to deliver	●	○	●
7. Align with clients' growing expectation for cross-business, consistent contracts	●		
8. Instill more rigorous contract compliance	●	○	●
9. Embed risk identification and management, including regulatory, provider, contractor arrangement and operational risks, throughout the contract lifecycle	●	○	●

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System Selection Vendor Landscape

Gardner's 2015 Magic Quadrant for Strategic Sourcing Applications

System Selection Evaluation Criteria

Vendor / Product Evaluation Criteria	- Vendor viability - Ownership stability - Management and oversight - Financial stability - Implementation capabilities - Resources to configure and deliver the product - Strong partner network to support implementation aspects, such as process design, application design, user acceptance testing, process training, post-production support - Functionality - Fit to business goals and user requirements "Out of the box" features - Fit to short and long term department goals - Usability and adoption - Appealing and intuitive user interface - Help features - User adoption feedback from the market

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System Selection Evaluation Criteria (Cont.)

Technical Evaluation Criteria	• Compliance to technical corporate standards and direction
	• Application architecture
	   – Hosting
	      o Internal vs externally hosted
	      o SAAS
	   – Security
	   – Integration with other applications
	• Maintenance and support
	   – Managing changes and bugs

Pricing Evaluation Criteria	• Licensing model
	   – Perpetual, subscription, or hybrid
	   – Capital investment vs. firm subsidized
	• Annual increases
	• Discount opportunities
	• Bundled vs unbundled approach
	• Base vs add-on module pricing differences
	• Maintenance and support package level
	• 3-5 year total cost of ownership

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Best Practice Training Considerations & Key Components

- **Change Management & Communications Plan:** Identification of key stakeholders and target user groups to ensure comprehensive training and user adoption across the department

- **Designated Subject Matter Experts**: A defined core group within the legal department who understand and own use the system to provide support to other end-users and act as change champions

- **Process and Policy Guide:** Defined and documented policies and procedures detailing system integration with key business processes and the supporting governance structure

- **Naming Convention / Data Quality Guide:** Defined and documented methodologies for enforcing consistency in data quality within the system (e.g. document or matter naming conventions, task code definitions, etc.)

- **Technical How-To Guide:** Technical guide for end users to assist in day-to-day work within the system

- **Use of Multiple Learning Methods**:
  - One-on-one
  - Classroom with system access / tutorials
  - On-line learning
  - Webex
  - Re-enforcement through management reporting / follow-up
  - System built-in "help"/fly over

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Outsourcing

Types of Outsourcing

Broadly defined, outsourcing is the reassignment of work from in-house resources to any other service provider. Several models that could loosely be considered outsourcing are defined below.

Outside Counsel
- Traditional usage of outside law firms to handle overflow work, provide advice and counsel, or contribute expertise not found in-house. ($$$$)

Contract Attorneys
- Resources that can be engaged on a one-time /one-off basis to handle overflow work. These solo attorneys charge lower rates than traditional outside counsel firms. ($$$)

LPO / LSO (Legal Outsourcing Vendors)
- Specialty firms providing specific services in areas including but not limited to commercial contracts, patent support, compliance review, discovery review, legal research and drafting. Note: many of these firms are offshore. ($$)

Technology
- (Emerging option) Sophisticated subscription based technology that routinizes and simplifies complex work traditionally performed by outside counsel, and/or work requiring significant in-house time. ($$)

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Reasons to Outsource

Though cost-savings is often the primary reason companies choose to outsource, other factors may also play a role. Outsourcing may allow in-house resources to:
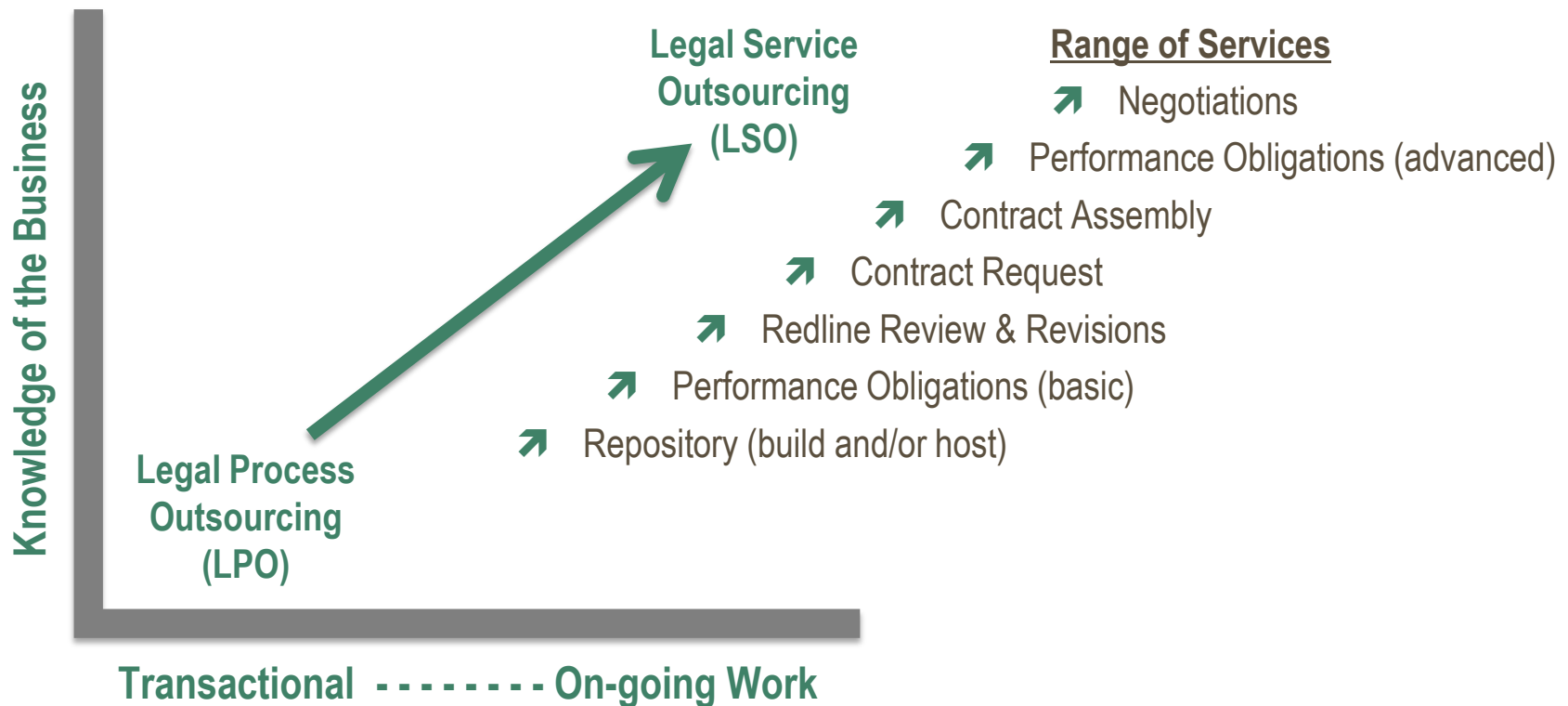
- Focus on the business' core concerns/issues/strategy.

- Improve service and accuracy in areas of work that are low-risk/low-value and time consuming to the company, but required nonetheless.

- Take advantage of advances in technology without the accompanying overhead investment and maintenance costs.

- Better manage peaks and valleys in workload by supplementing capacity during high volume work periods.

- Make improvements in attorney satisfaction and retention (through outsourcing mundane tasks or non client-facing work).

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Outsourcing Considerations

Volume	What is the volume of work – is there a critical mass?
Consistency	Does the work occur in consistent, predictable patterns or does it ebb and flow?
Commonality	Is the work repeatable?
Autonomy	How much discretion and oversight is needed to do the work?
Knowledge of Business	Is knowledge of company practices, culture, policies required?
Individual Provider	Are highly specialized resources needed?
Required Investment	Are technology and processes needed to make change efficient and sustainable?
Escalation Criteria	Does the work have a clear cutoff for escalation back to company Group?
Objective Evaluation	Can the quality of work be objectively evaluated?

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Trends In Contract Management Outsourcing

TREND: Moving from outsourcing transactional, specialty projects to include on-going work that requires increasing knowledge of the business

Knowledge of the Business (vertical axis)

Legal Service Outsourcing (LSO)

Range of Services
- ↗ Negotiations
- ↗ Performance Obligations (advanced)
- ↗ Contract Assembly
- ↗ Contract Request
- ↗ Redline Review & Revisions
- ↗ Performance Obligations (basic)
- ↗ Repository (build and/or host)

Legal Process Outsourcing (LPO)

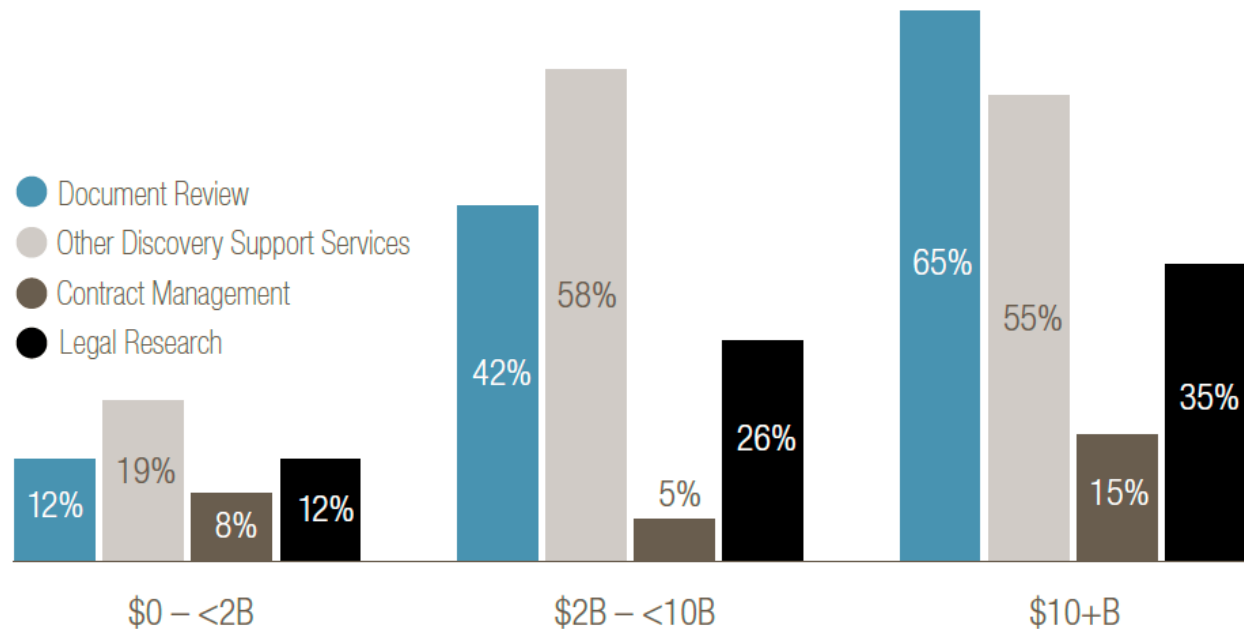**Transactional** - - - - - - - - **On-going Work**

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Industry Usage of Alternative Service Providers

15% of companies with over $10 billion in revenue reported sourcing contract management to alternative service providers.
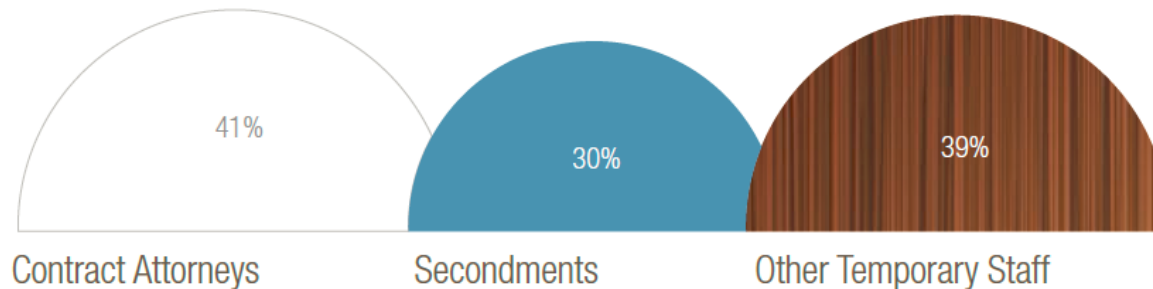
Alternative Service Provider Usage

by Revenue Segment

Legend:
- Document Review
- Other Discovery Support Services
- Contract Management
- Legal Research

$0 – <2B
- Document Review: 12%
- Other Discovery Support Services: 19%
- Contract Management: 8%
- Legal Research: 12%

$2B – <10B
- Document Review: 42%
- Other Discovery Support Services: 58%
- Contract Management: 5%
- Legal Research: 26%

$10+B
- Document Review: 65%
- Other Discovery Support Services: 55%
- Contract Management: 15%
- Legal Research: 35%

Source: 2014 Huron IMPACT Benchmarking Report

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Industry Usage of Staff Augmentation Resources

41% of law departments noted using contract attorneys as additional resources to manage the law department's workload.

Additional Resources to Manage Workload

Contract Attorneys	Secondments	Other Temporary Staff
41%	30%	39%

Source: 2014 Huron IMPACT Benchmarking Report

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