

Role of In-House Counsel in Contract Management: Opportunities and Pitfalls

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

THURSDAY, FEBRUARY 26, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Kenneth A. Adams, Garden City, N.Y.

Bret Baccus, Senior Director, **Huron Legal**, Houston

Geri L. Williams, Senior Corporate Counsel, **The Home Depot**, Atlanta

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-961-8499** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the SEND button beside the box

If you have purchased Strafford CLE processing services, you must confirm your participation by completing and submitting an Official Record of Attendance (CLE Form).

You may obtain your CLE form by going to the program page and selecting the appropriate form in the PROGRAM MATERIALS box at the top right corner.

If you'd like to purchase CLE credit processing, it is available for a fee. For additional information about CLE credit processing, go to our website or call us at 1-800-926-7926 ext. 35.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Role of In-House Counsel in Contract Management

Strafford Publications CLE Webinar on Thursday, February 26, 2015

Kenneth A. Adams

kadams@adamsdrafting.com

Bret Baccus

bbaccus@huronconsultinggroup.com

Geri L. Williams

geri_williams@homedepot.com

Today's Agenda

- The Role of In-House Counsel
- Contract Process
 - Creating contracts (including technology)
 - Reviewing and negotiating contracts
 - Tracking information after signing (including technology)
- Outsourcing

The Role of In-House Counsel

Determining Legal's Involvement in Contracts

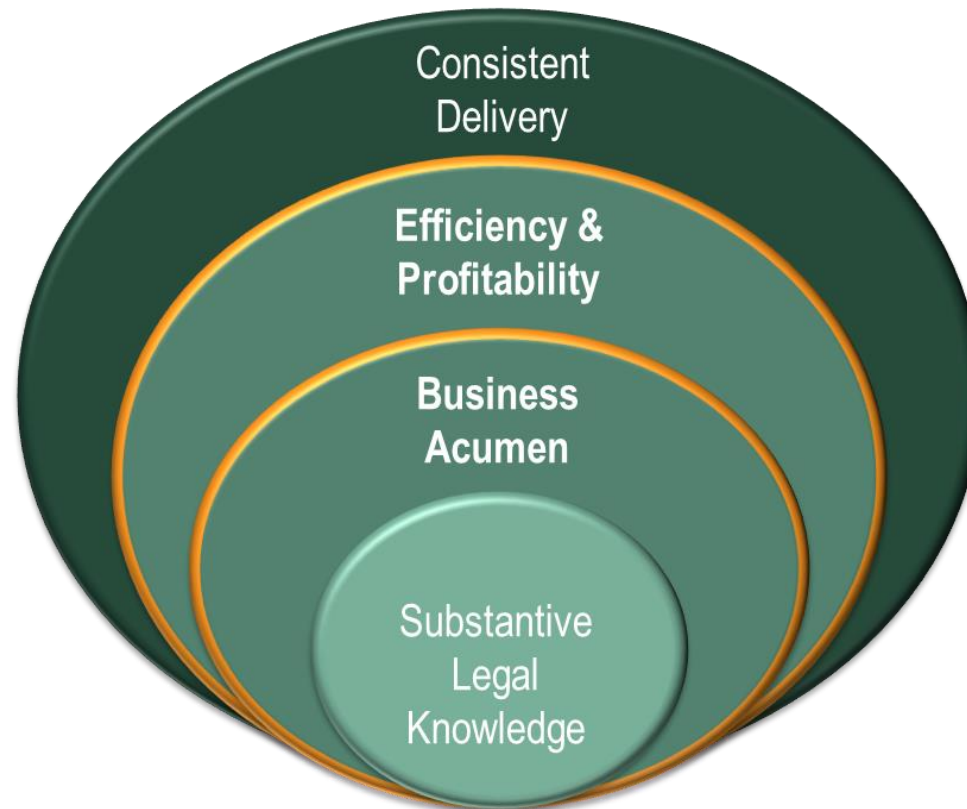
- What part of contracts is “the legal bit”?
 - Legal framework
 - What makes a contract?
 - What are the default rules?
 - What violates the law?
 - Management of disputes
- Who handles what?
 - Commonplace for lawyers to handle everything
 - Cooperation

Resource:

<http://www.adamsdrafting.com/what-part-of-the-contract-process-if-any-requires-a-lawyer/>

Evolving Expectations for Success

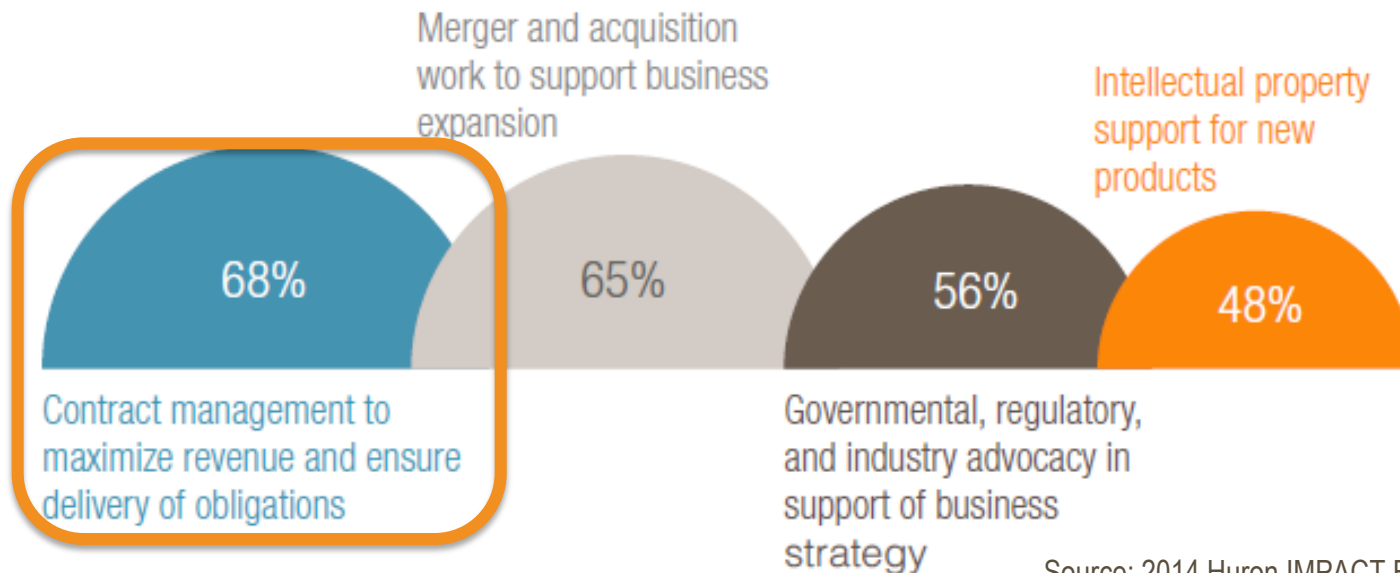
Increased cost sensitivity and risk pressures are altering the role and expectations for success of in-house counsel. Efficiency & Profitability and Business Acumen are becoming increasingly important in defining the success of the law department



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



Source: 2014 Huron IMPACT Benchmarking Report

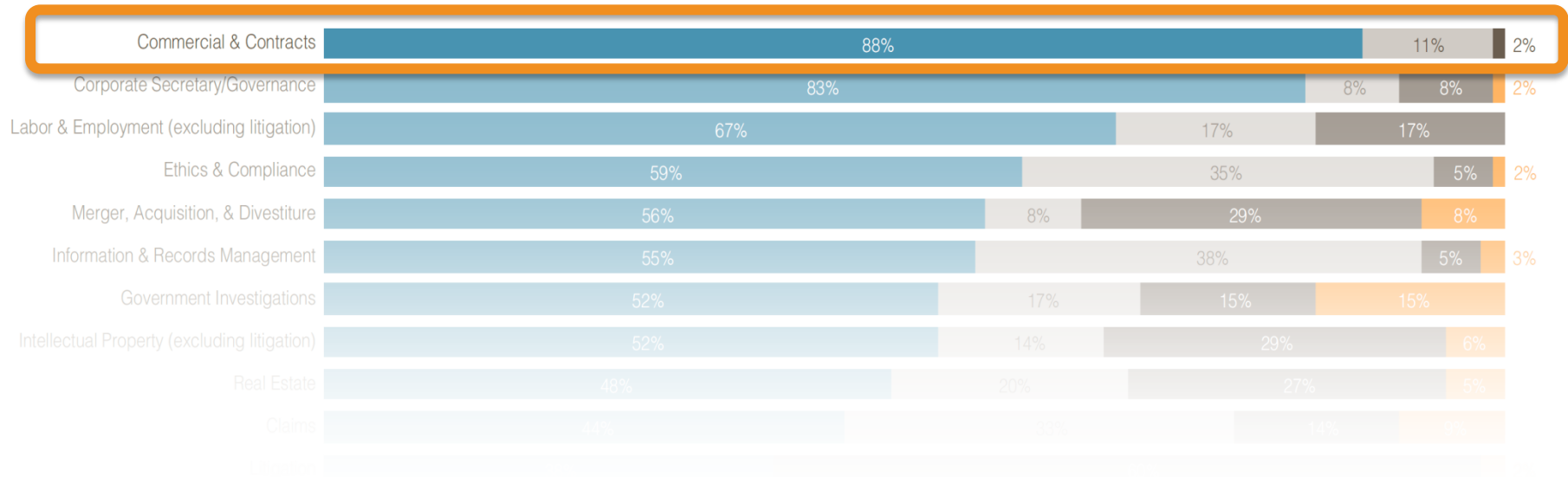
The Role of the Legal Department in Contract Management

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

Primary Staffing Model by Function



- Within Law Department
- Outside Law Department
- Outside Counsel/Vendor
- Not Applicable

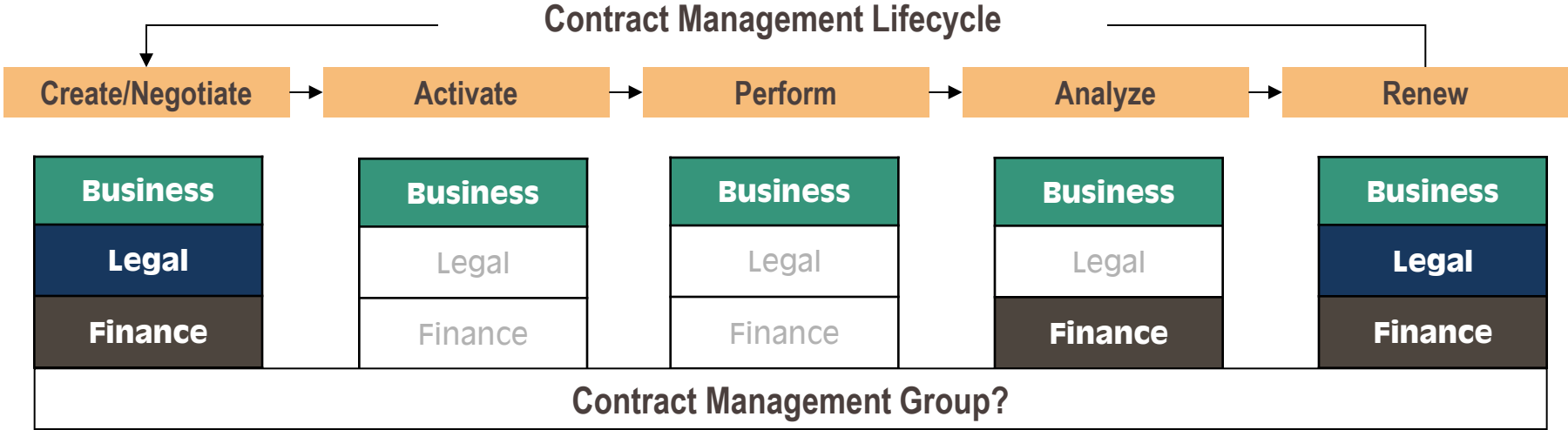


Source: 2014 Huron IMPACT Benchmarking Report

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.



Defining Ownership of Contract Management

	Business	Legal	Finance
Pros	<ul style="list-style-type: none"> ↑ Has to “live” with the contract terms during delivery ↑ Best knows customer needs ↑ Understand market and competitor position 	<ul style="list-style-type: none"> ↑ Central function with broad corporate view to increase consistency ↑ Focus on regulatory compliance ↑ Encourages Legal’s earlier involvement in direction and potential solutions 	<ul style="list-style-type: none"> ↑ Greater focus on maximizing total contract value – not just initial \$\$\$ ↑ Focus on process and escalation criteria
Cons	<ul style="list-style-type: none"> ↓ Less “checks and balances” on high risk deals ↓ Often higher turnover in sales ↓ Less process oriented 	<ul style="list-style-type: none"> ↓ Can view mission as removing “all” risk – limiting business flexibility/customer responsiveness ↓ Cost center at risk of staffing cuts 	<ul style="list-style-type: none"> ↓ Less knowledge of business to identify delivery risks ↓ Cost center at risk of staffing cuts

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: TBD, (e.g., Type of Contract – Enterprise Outsourcing)	No	Yes →	Involve Legal

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 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

CONTRACT PROCESS: CREATING CONTRACTS

Creating Contracts

- How to create templates
- How to use templates to create deal documents

Creating Templates

- Traditional contract language is dysfunctional
 - Critique of a Google services agreement (<http://www.adamsdrafting.com/googles-services-agreement-lots-of-room-for-improvement/>)
 - Critique of the new IBM cloud-services agreement (<http://www.adamsdrafting.com/my-critique-of-ibms-new-two-page-cloud-services-contract/>)
- Traditional substance can be dysfunctional
 - “Successors and assigns” provision
- With “free,” you get what you pay for

Creating Templates

- For clear and concise contract language, three steps required:
 - Adopt a style guide for contract language
 - <http://www.adamsdrafting.com/resources/model-statement-of-style/>
 - Train your personnel in drafting and reviewing consistent with the style guide
 - Redo your templates so they're consistent with the style guide
- For deal terms, avoid “drafting by committee”
- Inertia

Creating Contracts from Templates

- Word copy-and-paste
 - Slow
 - Mistakes
 - <http://www.adamsdrafting.com/a-copy-and-paste-train-wreck/>
 - <http://www.business-integrity.com/blog/the-drafters-fear-of-the-missing-provision-malaysia-airlines-insurance-coverage/>
 - Use of out-of-date templates
 - Unauthorized use of templates

Creating Contracts from Templates

- Automation
 - By completing a questionnaire
 - Benefits
 - Speed
 - Control
 - Delegation
 - Cost-benefit analysis
 - Based on mix of deal volume, deal value, and extent of customization
 - Can automation reduce your hiring needs?

Creating Contracts from Templates

- Automation Vendors
 - ContractExpress (Ken Adams)
 - Exari
 - HotDocs
 - K-Create (Bret Baccus)
 - CLM vendors, including ...
 - Apttus
 - Emptoris
 - Selectica

Creating Contracts from Templates

- Ken Adams automation resources
 - NDA template: www.business-integrity.com/test-drive/
 - Contract-Automation Clearinghouse: www.business-integrity.com/blog/

***Contract 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

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

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

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

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

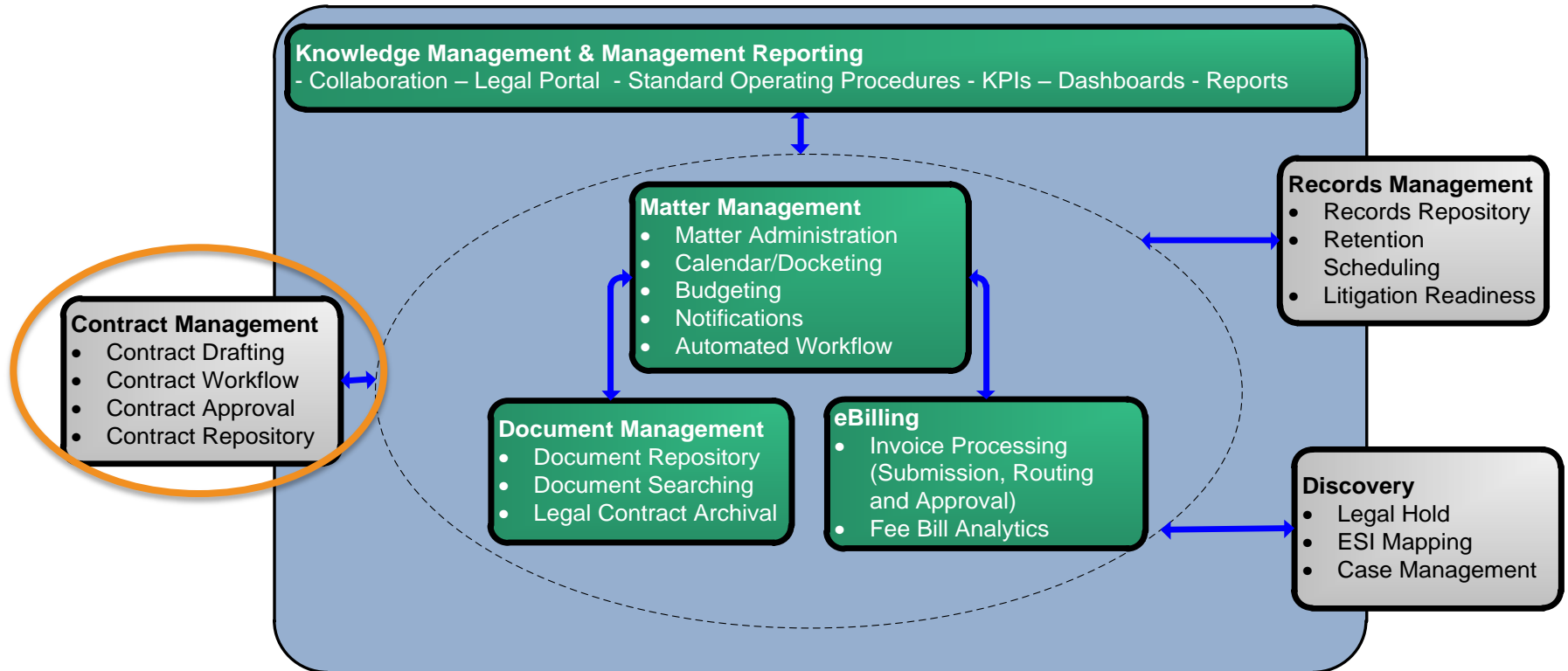
Contract Negotiation – Other Duties

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 Process:
Tracking Information After Signing***

An Integrated View of Legal Systems Related to Contracts



Benefits of Streamlining Legal Processes through Technology

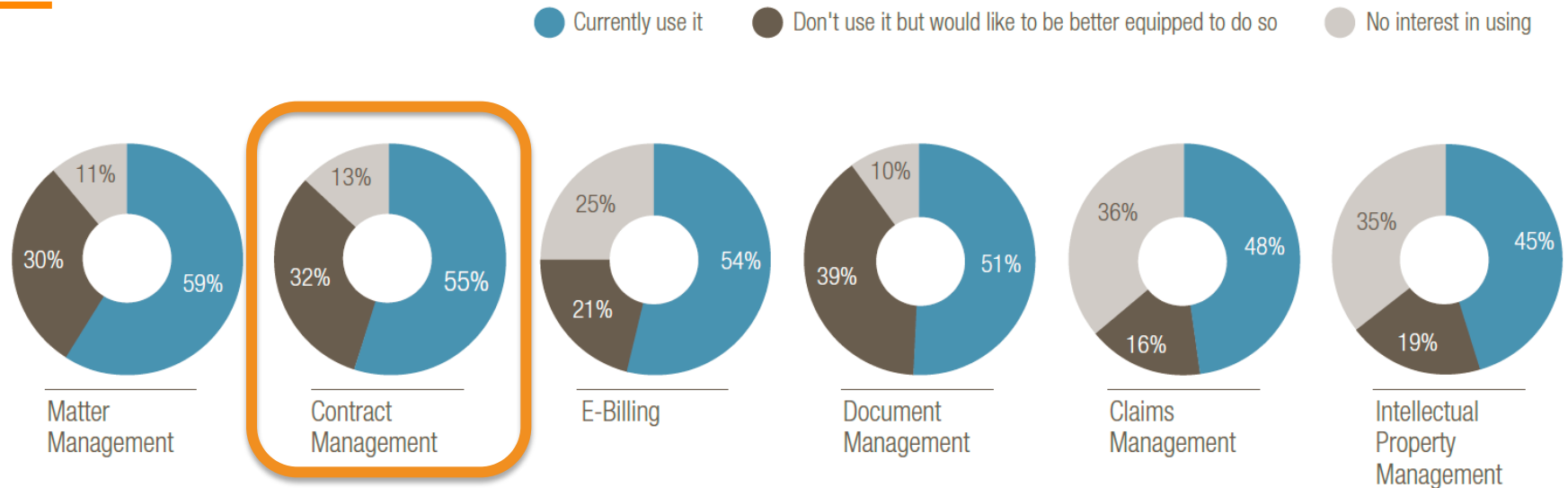
The right technology when paired with policies and processes can help achieve the following:

- 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

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



Source: 2014 Huron IMPACT Benchmarking Report

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	○	○	○	○	●	• Mitrtech TeamConnect, Bridgeway eCounsel, Wolters Kluwer
Document Assembly	○	●	○	○	●	• Huron K-CREATE, 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

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

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:

<p><u>Matters:</u></p> <ul style="list-style-type: none">- Case notes/Status reports- Negotiations- Judgments/Settlements- Contract Management- Fees and Costs- Budgeting- Resource Management	<p><u>People:</u></p> <ul style="list-style-type: none">- Staff- Witnesses- Experts- Parties- Outside attorneys- Board members	<p><u>Calendaring:</u></p> <ul style="list-style-type: none">- Deadlines- To do lists- Events- Court/review board dates- Ticklers/Workflow- Trial/Hearing Dates
<p><u>Organizations:</u></p> <ul style="list-style-type: none">- Law firms including performance- Vendors- Other service providers- Business units/departments- Customers- Business partners	<p><u>Reports:</u></p> <ul style="list-style-type: none">- Management reports- Performance metrics- Client communications- Case assessment	<p><u>Financials:</u></p> <ul style="list-style-type: none">- Budgets- Invoices (from eBilling)- Phase/Task costing

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.”

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

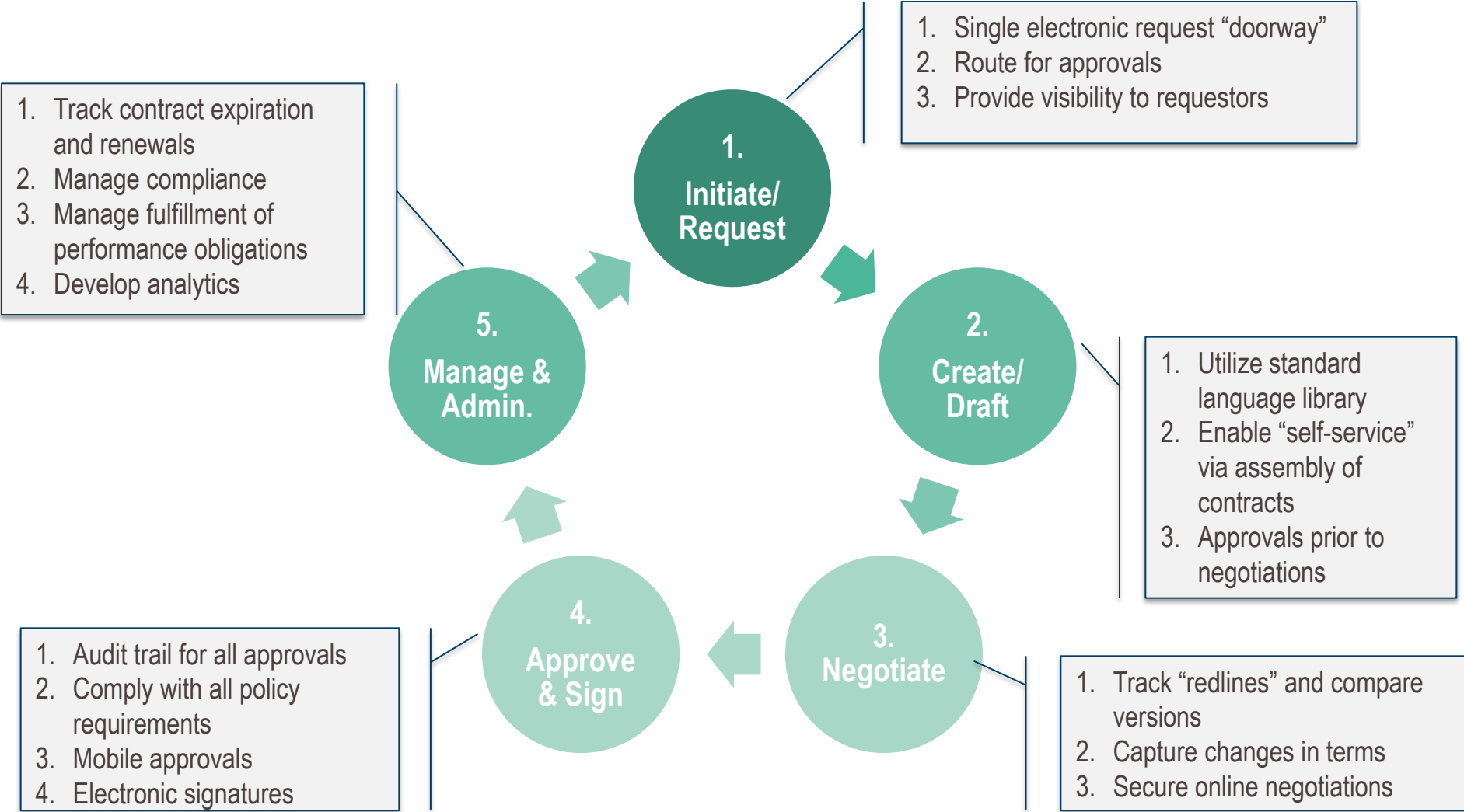
“Records provide evidence of the activities of a given organization’s functioning and policies. Records often have strict compliance requirements regarding their retention, access and destruction.”

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

Contract Management

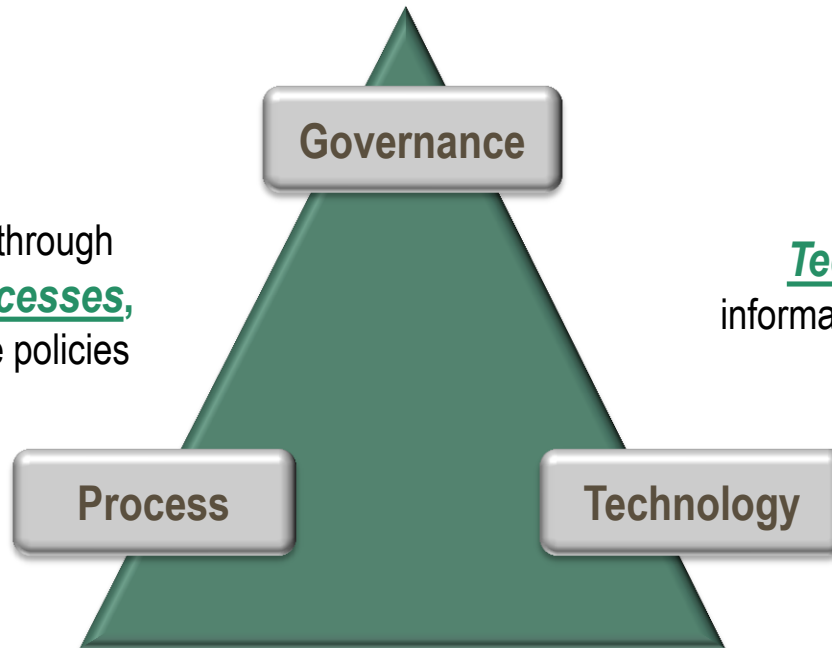


Defining Your Implementation Approach

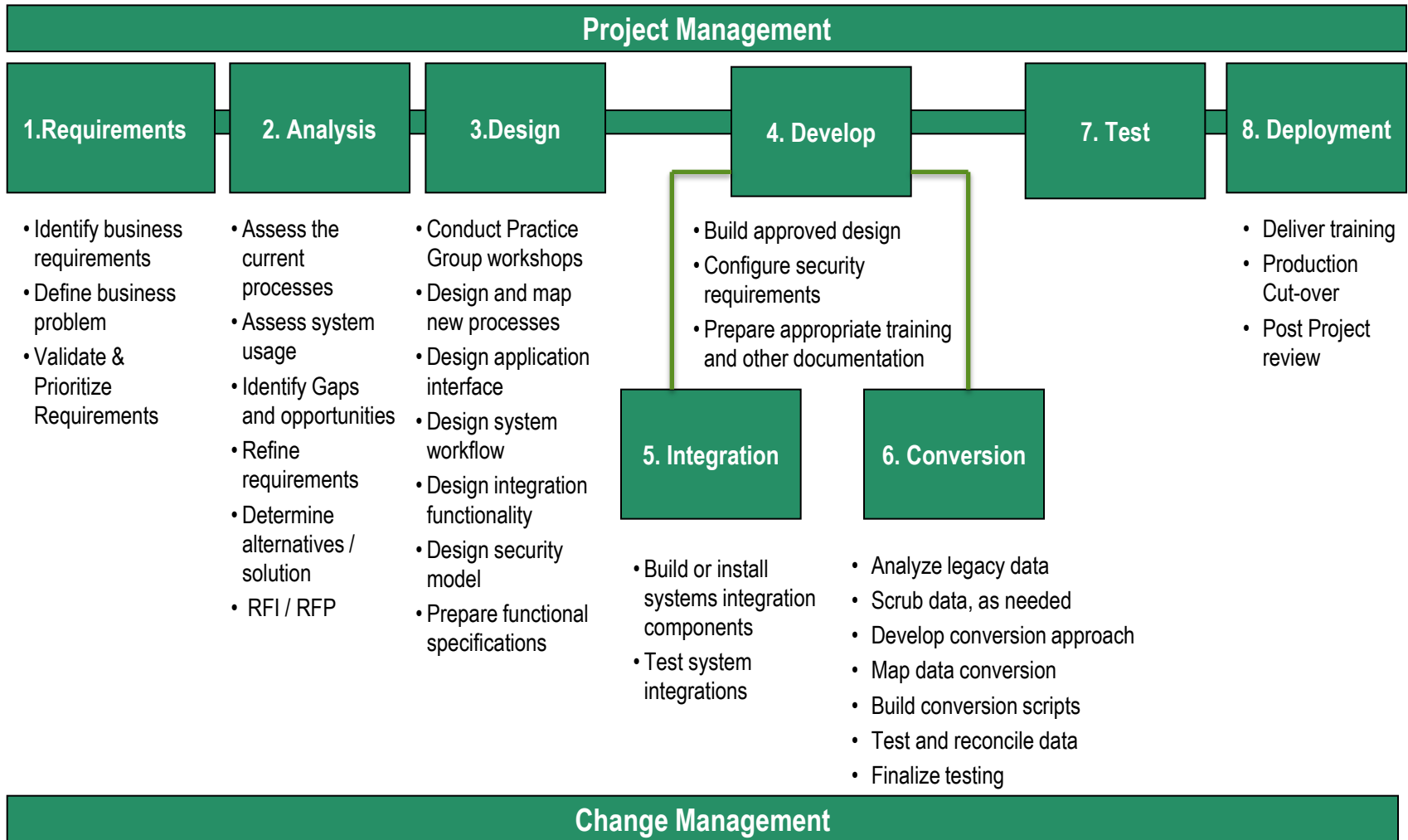
Best practice framework for developing an information management program begins with **Governance**, which builds the foundation for accountability with program strategy, oversight, roles and responsibilities, policies, and compliance.

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

Technology facilitates the information management processes.



Defining Your Implementation Approach (Cont.)



Acknowledging Your Current State

Understanding current pain points will help the law department define its optimal state contract 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

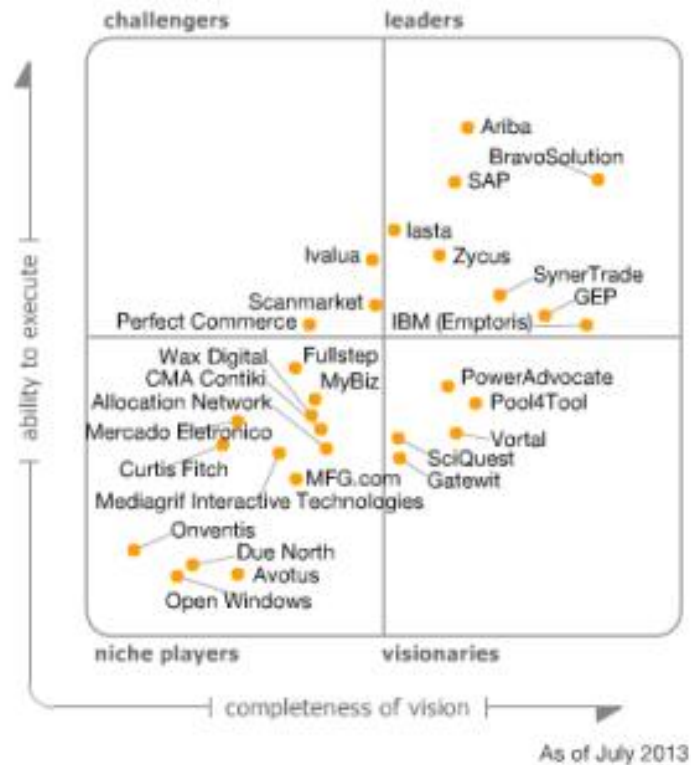
Prioritizing Requirements & Setting Business Objectives

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	•	○	•

System Selection Vendor Landscape

Magic Quadrant

Figure 1. Magic Quadrant for Strategic Sourcing Application Suites



Source: Gartner Group

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

System Selection Evaluation Criteria (Cont.)

Technical Evaluation Criteria

- Compliance to technical corporate standards and direction
- Application architecture
 - Hosting
 - Internal vs externally hosted
 - 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

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

OUTSOURCING

Outsourcing Template Creation

- Outsourcing template creation
 - Contract drafting is specialized; consider leaving it to specialists

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.



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:

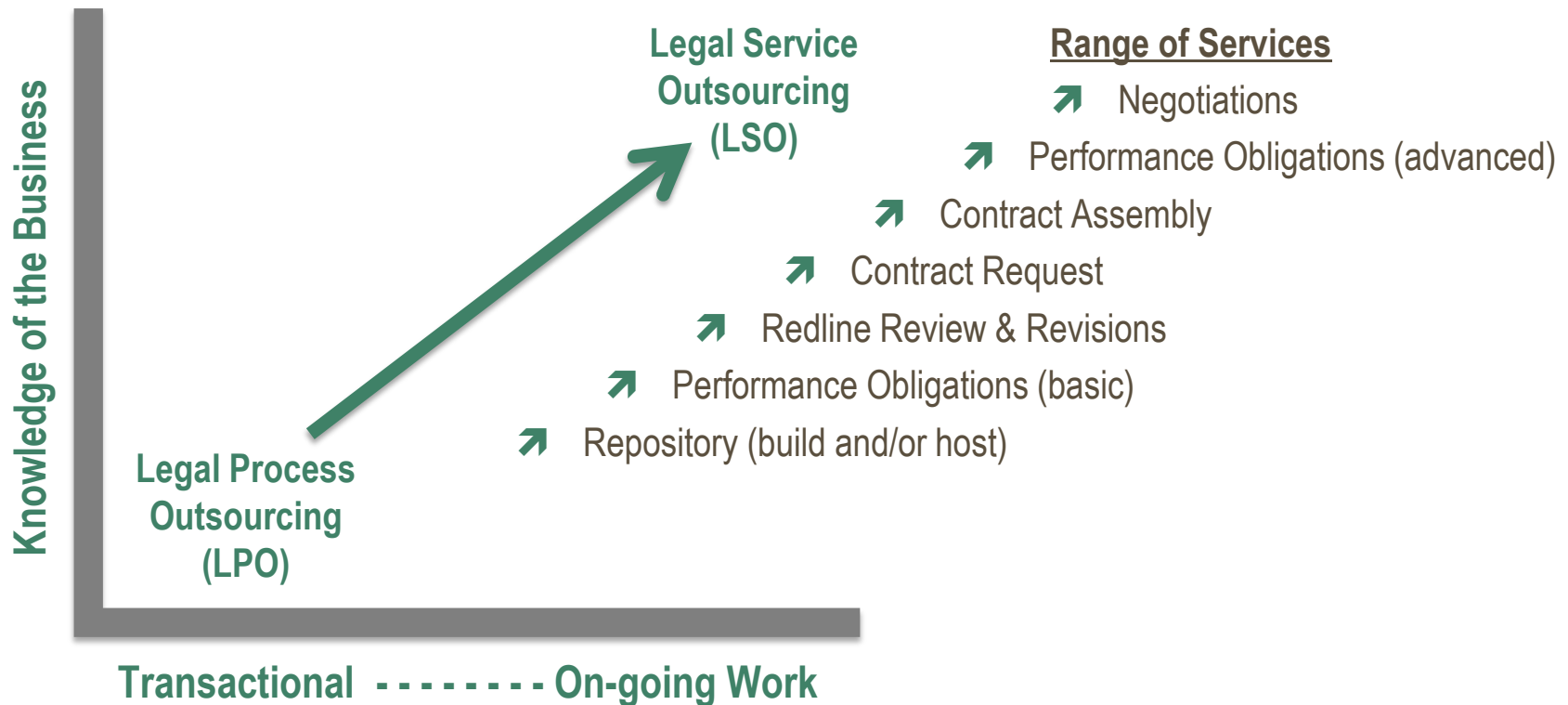
- Focus on the business' core concerns/issues/strategy.
- Improve service and accuracy in areas of work that are low-risk/low-value and time consuming to the company, but required nonetheless.
- Take advantage of advances in technology without the accompanying overhead investment and maintenance costs.
- 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).

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?

Trends In Contract Management Outsourcing

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

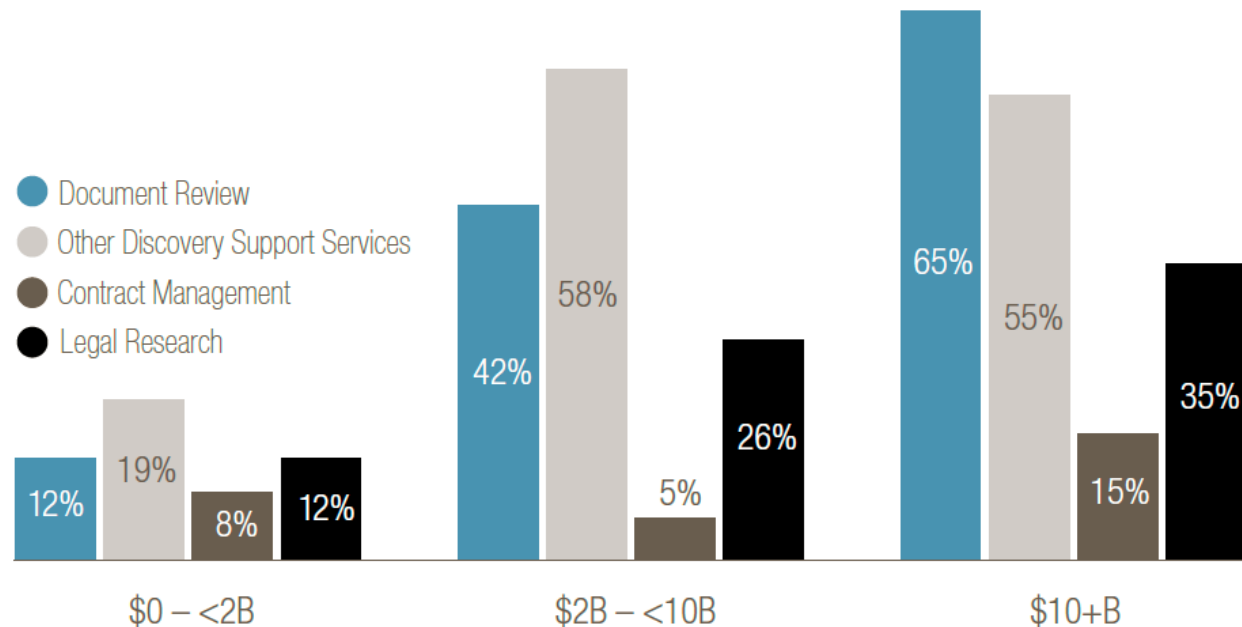


Industry Usage of Alternative Service Providers

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

Alternative Service Provider Usage

by Revenue Segment

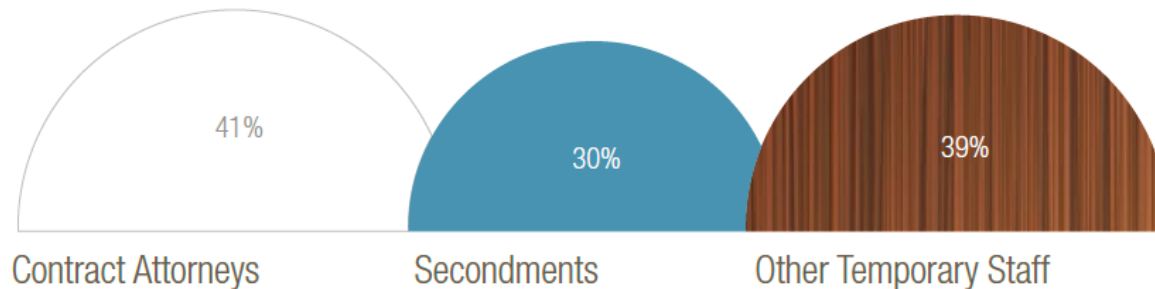


Source: 2014 Huron IMPACT Benchmarking Report

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



Source: 2014 Huron IMPACT Benchmarking Report

See Things Differently.

HuronLegal