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Use Legal Analytics to Craft Customized Alternative Fee Arrangements and Better Predict Legal Spend

Law Department Management

Litigation and Dispute Resolution

Cheat Sheet

- **The problem.** The business is under pressure to reduce the overall costs of legal services without compromising on quality or service.
- **The answer.** Legal professionals can gain a competitive advantage by using legal analytics to make measurable predictions on topics like legal strategy and resource management.
- **Application**. Analyze past patterns to make predictions about what is likely to happen and consider your case data to understand what drives legal spend.
- **AFAs.** Alternative fee arrangements (AFAs) can deliver greater control of the litigation process for in-house counsel and have the potential to reduce legal fees.

Technology has changed how legal services are provided. From electronic discovery to the virtual office, today's lawyers are challenged to come up with innovative ways to incorporate technology into the practice of law. Corporate clients in particular have successfully implemented technology into their business models and are calling upon their lawyers, both in-house and outside, to do the same. Gone are the days when "that's just the way it is" is a satisfactory answer.

The traditional lawyer traits of cynicism, skepticism, and pessimism do not bode well in the changing legal landscape. There is increasing pressure from legal clients to utilize new technologies, such as artificial intelligence and data analytics, to work more efficiently and to do more for less. To remain competitive in today's market, lawyers must embrace these changes and meet client demands.

Legal analytics can be a useful tool to the corporate lawyer in the management of litigation. There is an abundance of data at our fingertips, and if applied strategically, the data can assist us in providing our business clients with a quality of service and predictability they can understand and plan around.

The conundrum

The quest of in-house counsel to corner the elusive target that is predictable legal spend has long been a conundrum. The business demands a more predictable budget, and legal teams struggle to tame the rogue nature of a lawsuit. Eric Sigurdson writes, “Worldwide, corporations across business sectors are under pressure to reduce the overall costs of legal services without compromising on either quality or service.” The billable hour, though it is still the leading method of charging for legal services, does little to answer the call and has had a corrosive impact on the profession as a whole. How can we move away from this model and provide better service to our clients?

Early case assessments (ECA) and decision tree analyses (DTA) are tools to get a handle on the run-of-the-mill case, but once those tools have been in use for a time, they tend to become routine ways to check a box rather than thoroughly evaluate a case or the costs that will be associated therewith. There is a better, more pragmatic way to satisfy the business’ demands to do more with less while maintaining the value received from both inside and outside counsel: legal analytics.

The benefits of legal analytics

Legal analytics is generally defined as the application of data to the business and practice of law. It is the process of using data to make measurable predictions and informed decisions on topics affecting law firms and lawyers, like matter forecasting, legal strategy, and resource management. When used appropriately, legal analytics can bring unparalleled transparency and insight to legal professionals, departments, and decision-makers, giving them a competitive advantage. With all this data readily available to us, it should be put to use in other ways, like building it into the legal fee structure.

Predictive data analytics

Data analytics plays an integral role in the way legal analytics achieves some of the objectives central to the in-house legal function including but not limited to managing risk, making good strategic choices, and controlling spending. Predictive data analytics in particular consider what is likely to happen using a variety of statistical techniques to determine past patterns and using that information to make predictions about the future or otherwise unknown events.

Alternate fee arrangement

It is beyond time for law departments and their outside counsel counterparts to come together and invest time and resources into employing legal analytics to develop a lasting billing model derived from value as opposed to solely time spent (aka the billable hour). This can be accomplished through a customized alternative fee arrangement (AFA) derived from legal analytics that meets the needs and demands of the corporate client while simultaneously ensuring that the law firm remains a profitable enterprise.

AFAs can deliver greater control of the litigation process, provide a better tool for in-house counsel, motivate speed and efficiency, and have the potential to reduce legal fees. This statement is not intended to besmirch the very real pressures both in-house and outside counsel face in their efforts to reduce legal spend but rather to emphasize the fact that the reduction in legal spend is only the tip of the iceberg in terms of the benefits that can be derived from AFAs.

For law firms, one very real consideration is that AFAs make it easier to forecast firm revenue. This fact alone can assist corporate counsel with selling the appeal of an AFA to their outside counsel counterparts. AFAs satisfy client demand in a better way.

The options for AFAs are limitless. A couple of the more common approaches are the fixed fee and the reverse contingency fee. Fixed fees are, as the name implies, agreed to by the lawyer and client at the outset of the representation. This helps the client avoid the unpredictability of hourly billing and incentivizes the firm to avoid “over lawyering” the matter. A reverse contingency fee is based on a percentage much like traditional contingency fee representation, except the fee is based on a percentage of the amount that the firm saves for the client. However, depending on the trends you glean from your own in-house data, you can create your own customized AFA to meet your company’s needs.

Case data

Consider what data you have. Most corporate clients already have systems in place to keep track of their cases and can, with little to no effort, run various reports to determine what case types make up what percentage of their docket. If your department has handled several of these matters in recent years, with a good degree of similarity, then you will have some reference points. Pull your data relevant to:

- **Case types:** This is the area where the client truly has access to the most relevant data.
- **Case timelines:** Knowing the timeline data of a particular case set is not only important for determining case strategy, but also helps the parties better predict how much that case strategy will cost.
- **Case outcomes:** Outcome data factors to consider are the judge’s tendencies to rule on certain issues (experts, motions, etc.), the likelihood of the case to go to trial, the likelihood of the case to proceed after final judgment through an appeals process, in the case of a recurring party and/or opposing counsel, what is their usual case strategy or approach to litigation?

By analyzing the data and applying legal analytics, you’ll be able to better understand what drives your legal spend. When something is personalized this way, the corporate client takes control of its docket to achieve the desired outcome. Without question, the trend of clients being more demanding of control and transparency in the management of their litigation will continue.

Outside firms that can customize billing in this manner set themselves apart and become more attractive to corporate clients. Plus, offering such fee customization can foster client retention. Firms are already using their own data to evaluate whether a particular case is profitable; corporate clients can similarly use their data to determine and control the right cost of a legal matter. The more we can glean from the individual client’s data analytics during each phase of litigation, the more custom the AFA becomes and the more predictable legal spend becomes.

Technology is here to stay

Whether we as lawyers are comfortable with it or not, technology is here to stay. *Forbes* conducted a poll of senior executives on utilizing big data in some form across the healthcare, insurance, legal, science, banking, and governmental industries. Law finished second to last, beating only government. By contrast, in 2017, 53 percent of companies — and inevitable clients of law firms — reported using big data. In his praise for Michele Destefano's Legal Upheaval, Jeff Carr, SVP general counsel and corporate secretary at Univar Inc. says that "innovation is one of the most misused and misunderstood terms in Law Land…Those who can create and work in an innovative, collaborative, problem solving environment will sharpen skills, open minds, and change the way they work in delight to their customers." In that same vein, in-house counsel should explore ways to use data analytics (as well as other technologies) to ours and our client's advantage It is the only way to remain competitive in the changing legal market and worth the investment to meet client expectations.

A new era

We've reached a new era of accountability in law. The way in which lawyers work is changing radically. New ways of delivering legal services have begun to emerge, and, as Richard Susskind puts it in Tomorrow's Lawyers, we are being confronted with the challenge to do more for less. In-house legal departments are being held to the same standards as their business unit counterparts and expected to more empirically answer the questions of budgeting, outside spending, and prioritization. Corporations are expecting from their legal counsel greater efficiency, predictability, and cost-effectiveness. No longer can in-house lawyers be mere monitors of external law firms assigned to the company's legal work. Corporate counselors are turning from consumer to providers in response to the inefficiencies of the billable hours. Simply put, any law firm leader today who thinks they can do 100 percent of work on billable hours forever is not going to have a law firm for very long.

Legal analytics can bridge the gap by enabling lawyers to provide legal services on the business' terms. If we put aside our tendencies toward skepticism, cynicism, and pessimism, and rise to the "more-for-less challenge," we will more effectively demonstrate our value to the organization. By utilizing the data at our fingertips, we can integrate legal analytics into a custom AFA pricing model that can be a tremendous tool to accomplish these goals.

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