

Law Department Budgeting for Outside Counsel Expenses and the Use of AFAs

ILTA CONFERENCE
Law Department Session
August 30, 2012

Panelists

- **Jonathan Cooperman, Partner**
Kelley Drye & Warren, LLP
- **Aileen Leventon, President and Founder**
QLex Consulting, Inc.
- **Eric Lieber, Director of Legal Technology**
Toyota Motor Sales
- **John Thompson, Senior Analyst- IT Administration**
Purdue Pharma, L.P.
- **Sharon Woodhouse, Litigation Process Manager**
DuPont Company

Eric Lieber

Toyota Motor Sales

- Director of Legal Technology at Toyota Motor Sales, U.S.A., Inc.
 - Currently oversees TMS' eDiscovery efforts and technology projects for the Legal and Corporate Responsibility department
- Worked in the Legal Field since 1993
- Worked as Associate Director for Gibson, Dunn & Crutcher LLP, where he was responsible for application development and system implementations
- Consultant for various Corporate law departments

Budgeting/AFA



- Law Department Budgeting for Matters Using Outside Counsel
 - Estimate department budget based upon experiences from prior years
 - Matter by matter evaluation with outside counsel
- Data to support the process
 - Matter Management Reports
- Alternative Fee Arrangements
 - Retainers
 - Negotiate discounts (not an AFA)

Knowledge isn't just "power" ... it's also your responsibility

Sharon Woodhouse, DuPont Company



- Litigation Process Manager, DuPont Legal
 - Identify and implement process and technology improvement opportunities related to best practices and managing costs
 - Enhance the value derived from the DuPont's engagements with outside counsel and service providers via value-based billing and performance-driven metrics
 - Experience working within corporate, law firm and vendor organizations for past 20+ years specializing in the areas of legal spend management, litigation support, business development and managing client services



Be Inquisitive...Curious...Just Plain Nosey

DuPont's 2012 Process for Budgeting and AFAs



Templates for Budgeting

- 1) Fees
 - Uses UTBMS Task Codes
 - Details Phase, Activity and Task
- 2) Expenses
 - Uses UTBMS Expense Codes
 - Tracks for Firms and Third Parties
- 3) Staffing
 - Includes Level, Location, Years of *DuPont* Experience, Hourly Rate, Projected Hours for Year, Description of Work; Start/End Dates on Matter
- 4) Forecasting
 - Includes Month-by-Month Planning for Each Phase and Activity
- 5) Quarterly Updates
 - Includes YTD by Quarter and Changes to Scope for Remaining Quarters for Fees and Expenses
 - Prepared by Law Firms

Best Practices

- ✓ Initiated by leadership
- ✓ Managed by in-house legal teams with support
- ✓ Perpetual requirement
- ✓ Focus on matters with significant dollar value thresholds
- ✓ Keep templates simple – most prepared by law firm finance or billing personnel and reviewed/approved by counsel
- ✓ Consider e-billing/matter management systems with advanced budgeting modules and AFA tools
- ✓ Schedule quarterly matter updates with law firms to review performance against budget
- ✓ Communication is key

Fee Template Sample [The Counsel Management Group, LLC]



Litigation Fee Budget			
Law Firm Name:			
Matter Name:			
Matter Number:			
	Fees	Hours	
L100 Case Assessment, Development & Administration			
L110 Fact Investigation / Development			
L120 Analysis / Strategy			
L130 Experts / Consultants (including reports)			
L140 Document / File Management			
L150 Budgeting			
L160 Settlement / Non-Binding ADR			
L190 Other Case Assessment, Development & Admin			
L200 Pre-Trial Pleadings & Motions			
L210 Pleadings			
L220 Preliminary Injunctions / Provisional Remedies			
L230 Court Mandated Conferences			
L240 Dispositive Motions			
L250 Other Written Motions & Submissions			
L260 Class Action Cert & Notice			
L300 Discovery			
L310 Written Discovery			
L320 Document Production			
L330 Depositions			
L340 Expert Discovery			
L350 Discovery Motions			
L390 Other Discovery			
L400 Trial Preparation and Trial			
L410 Fact Witnesses			
L420 Expert Witnesses			
L430 Written Motions & Submissions			
L440 Other Trial Preparation & Support			
L450 Trial Hearing & Attendance			
L460 Post Trial Motions & Submissions			
L470 Enforcement			
L500 Appeal			
L510 Appellate Motions & Submissions			
L520 Appellate Briefs			
L530 Oral Argument			
Total (Calculates Automatically):	-	-	

Expense Template Sample [The Counsel Management Group, LLC]



Litigation Expense Budget				
Law Firm:	0			
Matter Name:	0			
Client Matter Number:	0			
Expenses (Non e-Discovery)	Law Firm Expenses:	Vendor Expenses:	Vendor Name:	Scope Details
E101 Copying				
E102 Outside Printing				
E103 Word Processing				
E104 Facsimile				
E105 Telephone (Long Distance Only)				
E106 Online Research				
E107 Delivery Services/Messengers				
E108 Postage				
E109 Local Travel				
E110 Out-of-Town Travel				
E111 Meals				
E112 Court Fees (e.g. Filing Fees)				
E113 Subpoena Fees				
E114 Witness Fees (Non-Experts)				
E115 Deposition Transcripts				
E116 Trial Transcripts				
E117 Trial Exhibits				
E118 eDiscovery				
E118 Jury Consultants				
E118 Media and PR Consultants				
E118 Other Litigation Support Vendors (Not E-Discovery, Jury Consultants or Media/PR)				
E119 Experts				
E120 Private Investigators				
E121 Arbitrators/Mediators				
E122 Local Counsel				
E123 Other Professionals				
E124 Other				
Total Expenses (Calculates Automatically):	-	-		

Developing AFAs from a Corporate Perspective

- Appreciate AFAs are unique to each matter
- Review historical AFAs
- Solicit ideas from law firms
- Examine:
 - Objective
 - Staffing
 - Efficiency
 - Outcome
 - Cycle time
 - Cost (hourly vs. AFA)
- Collaborate with law firms to develop a matter plan:
 - Scope of work (who, what, where, when and how)
 - Define in-scope and out-of-scope activities
 - Define assumptions or events that trigger re-negotiation of the AFA
- Monitor work against the plan consistently
- Capture knowledge of AFAs (good and bad) for future AFAs

John Thompson, Purdue Pharma, L.P.

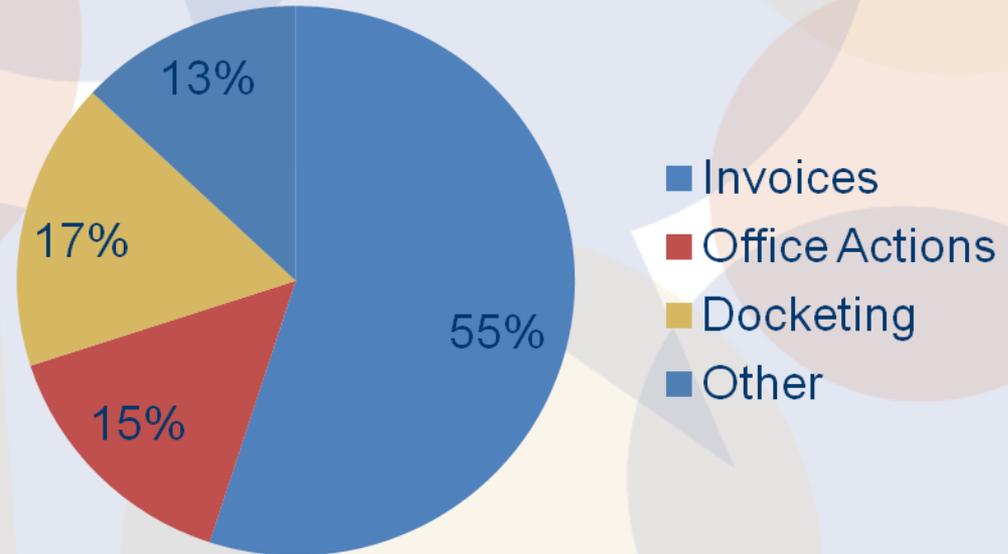


- Sr. Analyst for the IT Administration department at Purdue Pharma, LP.
- Currently serving in a project management/data analytical position within IT Administration and responsible for the development and maintenance of operational standards regarding projects and tasks for the Office of General Counsel.
- Primary focus is providing detailed data analysis on cost avoidance and risk for outside counsel firm management, and serves as a project manager for several Discovery Management, IP Management, and Records Management.

Data to Support the Process

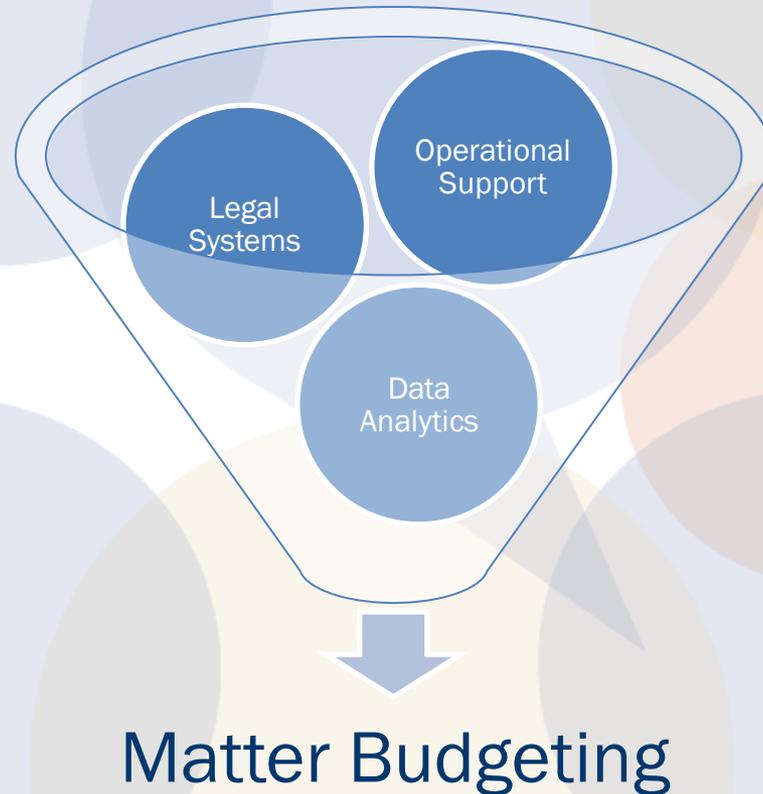
- Data derived from invoices, collaboration memos, and case file updates
- Data is also derived from outside sources, such as market place analysis, legal support publications, content specific websites devoted to legal trend analysis
- Data is used to formulate trend reports on spend, costs, duration, volume, and resources.
- The key is transparency details of what is reported and what is expected from a vendor when planning a budget.

Information Sources



Data to Support the Process

- Purdue utilizes electronic EBilling and Matter Management for data collection (TyMetrix T360, Anaqua Enterprise Solution, SAP)
- The data used to support a budgeting model depend upon which matters are typically most important in terms of cost, volume, or business value.
- Budgets are developed based on what type of analytics can be found across the lifecycle of a matter and across the matter program (i.e., litigations, prosecutions, counseling, etc.)
- Developed inconsistent measure with OC, high confidence to quality of budget



The Outside Counsel Perspective

Jonathan K. Cooperman

- Partner at Kelley Drye & Warren LLP; With Firm Since 1985
- Trial Attorney and Nine-Year Member of the Firm's Executive Committee
- Long Time User of Alternative Fee Arrangements
- Co-Chair of the "Faster-Cheaper-Smarter Working Group" of the Commercial and Federal Litigation Section of the New York State Bar Association, which issued a lengthy June 2012 Report on Strategies to Streamline Litigation

Alternative Fee Issues

- A Client's Budget Timeframe Is Often Different Than The Timeframe For A Legal Task
- A Law Firm Needs Sufficient Information To Make Informed Fee And Cost Estimates
 - The Longer The Term of An Engagement, The Less Informed A Decision May Be
- An Alternative Fee Should Be Fair To Both The Client And Firm
 - Goal Is To Allow For Predictability vs. Just Lowering Fees
- Alternative Fees Are Often Best Used When The Client And Firm Have A Long-Term Relationship
- Many types of Alternative Fees Should Leave Room To Deal With Unanticipated Contingencies

Scope of An Alternative Fee and the Budgeting Process



- Is The Alternative Fee For The Entire Case or Matter?
- Are Task-Based Fees Appropriate?
- How Specific Does A Budget Need To Be?
- Specificity May Cause The Law Firm To Give More Thought To A Realistic Budget
 - However, A Highly Specific Budget May Not Be Appropriate For Every Task
- What Are The Consequences For Missing A Budget?
- What Is The Time-Frame For The Budget?
 - Yearly vs. Shorter Intervals
 - Budget Updates?

Alternative Fees – Law Firm Preferences

- Fixed Fee
 - For Matter
 - Task-Based
- Negotiated Discounts For Exceeding Budget
- Incentives For Law Firms To Perform
- Will The Firm Be Judged on Variance from a Budget?

Aileen Leventon, Esq.

www.QLexConsulting.com

Background:

- Practiced law for 20 years (AmLaw 50 firm and Fortune 500 company). MBA, Launched QLex in 2006 after an MBA, accounting and operational and leadership positions at PwC; boutique firms; and turnaround projects
- Works with both buyers and sellers of legal services to improve the economics of law practice and corporate spending.

Buyers (in-house counsel; law department executives; business clients)

Goals: Predictability; lower cost; better budgeting; better ROI; work process improvement and project management

Sellers (law firms, LPOs, individual lawyers and vendors)

Goals: better understanding of the client's real needs; better realization, profitability;

Tools: data analytics; work process improvement and project management

“Alternative fees” conflates two concepts

PRICING: Determining what a seller will receive in exchange for its services

FEE STRUCTURE: the way in which payment for services will be and the fee arrangement

- Alternatives to standard hourly rates are not alternative fee structures if they are based on an hourly measure of input (time)
 - Discounted hourly rates and blended rates are generally NOT alternative fees; they are just means of pricing the work
- Since the advent of timekeeping systems – only over the past 40 years – legal fees have been based on “standard rates” – the rate per hour at which a lawyer’s time would be billed for time spent
- In the past 20 years, any fee structure other than one based on the standard rate has been called an “alternative fee” because of law firm metrics

Law firm metrics are based on “realization”

- Realization is a metric of law firm productivity
- It is based on the target of collecting 100% of fees for all hours billed by timekeepers at the standard hourly rate
- When the rate is discounted 10%, then the law firm is billing at 90% of standard. Even if the law firm collects 100% of amounts billed at that rate, the realization is only 90%.
- Client requirements:
 - If all timekeeper hours are not charged/billed to the client, the discount is steeper, and realization declines further.
 - Holding rates at a prior year’s level creates a discount from standard
- From the vantage point of law firm metrics, any fee that is based on an arrangement that puts 100% realization at risk is consider an alternative fee

Adjust comparables to set pricing for new matters

- Determine whether and how well any of the following cost reduction techniques have been applied to the comparables. . . **then set a % adjustment to the fee base**
- Redesign Work Process
 - Workflow analysis
 - Six Sigma
 - Lean techniques
- Use Legal Project Management techniques:
 - Project Charter and Scope of Work
 - Work Plan, Budget process
 - RASCI and Reporting
 - Project Manager effectiveness
- Require Knowledge Management
 - By law firm based on prior work with other clients or with you
 - By company in its approach to “need to know” or “need to share”

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SUPPLEMENTAL MATERIALS

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Pricing with respect to comparables

- Fixed fees should be used when one has comparables from analysis of data on key elements:

Type of transaction	Type of case
Size	Jurisdiction, Judge
Other party, Their counsel	Plaintiff, Opposing Counsel
Business Unit	Business Unit

- Adjust comparables by other relevant factors
- Address levels of uncertainty both before and after the matter is completed
and give appropriate credit in designing the fee structure

Legal work may be segmented by business needs and legal work characteristics – context

<div style="text-align: right; padding-right: 5px;">Legal Work</div> <div style="text-align: left; padding-left: 5px;">Business Needs</div>	Extraordinary	Specialized	Highly Patterned
Strategic	Higher profile / risk: Significant M&A or high exposure litigation	Competitive Regulatory Work	High exposure portfolio litigation
Mandatory	High visibility compliance	Industry-specific compliance	Ongoing regulatory compliance
Operational	Not applicable. If so, it would be strategic	Regulatory compliance for new operations	Commercial contracting

Context determines appropriate sourcing and pricing

<div style="text-align: right;">Legal Work</div> <div style="text-align: left;">Business Needs</div>	Extraordinary	Specialized	Highly Patterned
Strategic	High profile M&A for a company	FTC / Antitrust issues to address conduct of a competitor	Toxic torts
Mandatory	Under scrutiny by regulatory for violations	FDA Compliance	SEC compliance
Operational	N/A	Acquire software license for new technology	M&A transaction for a private equity firm

Legal work may be segmented by business needs and legal work characteristics

Legal Work \ Business Needs	Extraordinary	Specialized	Highly Patterned
Strategic	Emphasize Project Management	Emphasize Knowledge Management	Emphasize
Mandatory			Process
Operational	N/A		Improvement