

Benchmarking the Performance of Outside Counsel

The Project

As in-house counsel we've all had this file—the one where you just can't properly manage outside counsel's time. You feel the meter running as the case progresses, and the mere thought of receiving the account is frightening. When the account does come in, you delay looking at it. Why cause problems for yourself before you have to?

Unfortunately, we in-house counsel can't afford to ignore these problem matters. With class action law suits, hefty hourly rates for outside counsel, and budget cuts within our own companies, it is vital that all in-house counsel know which outside law firms work most effectively and which ones provide the best value. To determine this, we need to be able to measure the performance of outside counsel. And in turn, that means we need to know what aspects of outside counsel performance are important, so we'll know what to measure.

In this *HandsOn*, we provide a roadmap for how to assess the performance of your outside counsel. We also offer some tips on how you can apply this information to both cut your outside legal bills and improve the quality of services you receive.

Tackling the Project

What are other in-house counsel doing?

In the summer of 2005, Bottomline Technologies conducted an electronic survey of the in-house counsel/outside counsel relationship of Fortune 1000 companies and AM Best 200 insurers. Of the 200 companies that responded, the results are:

- Performance measurement is being used by 78%.
- Benchmarking is being used by 54%.
- Benchmarking is a relatively new practice for the survey participants who are using it, who reported that they have been using it for:
 - 5 plus years: 24%
 - 2 to 4 years: 52%
 - Less than 1 year: 24%
- Survey participants rated their current law firm measurement process as:

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Know the Terminology

Benchmarking. Performance management. Legal-spend management. These are relatively new concepts in the inside counsel/outside counsel relationship.

Performance measurement is an assessment of whether outside counsel are effectively serving the company. Such an assessment does not have to be perfect to be valuable. But the assessment should make like-to-like comparisons; remember that what you need from your litigation counsel can be quite different from what you need from your corporate counsel.

Benchmarking is measuring an outside counsel's services according to specified standards, so that you can compare services across law firms and improve the services you receive from the benchmarked firm. Benchmarking is more rigorous than performance measurement. If you're at a rudimentary level in terms of your assessment process, you may want to implement the process gradually, starting with some performance assessment processes and adding benchmarking over time. For those who can afford it, there are consultants who would be pleased to put your benchmarking in place quickly, for the appropriate fee.

Legal-spend management is aligning (1) the legal services you need with the services you're getting and (2) the price you should pay for those services with the price that you're actually paying.

- rudimentary: 37%
- pretty good: 37%
- robust: 18%
- exceptional: 5%

According to Tom Gaillard, vice president and general manager at Bottomline Technologies, these results indicate that the rising interest in benchmarking over the course of

the last few years has coincided with the maturation of IT solutions designed to automate process workflow and collect a broad spectrum of data.

Why are so many in-house counsel using performance management and benchmarking? According to the survey respondents, these techniques have enabled them to obtain better service at a lower cost using fewer outside law firms. Indeed, many

Supply List

In this *HandsOn*, we will provide helpful tips on:

- measuring outside counsel's performance;
- taking charge of the inside counsel/outside counsel relationship;
- strengthening your control over how outside counsel handles your work;
- improving the quality of outside counsel's work; and
- reducing the cost of outside counsel.

in-house counsel have found that by using fewer law firms, they can get the same amount of work completed with less effort on their own part. It's no wonder that there's a growing trend for companies to reduce the number of their outside law firms.

Setting your goals

As with any project you undertake, you need to determine your goals. What do you want to achieve through performance management and benchmarking?

Here are some broad, general goals you may wish to consider:

- Cut costs.
- Appease others within the company who are not in the legal group and who complain about the cost of outside counsel legal fees.
- Respond to requests from a business unit to improve legal services.
- Increase the quality of service within the existing group of law firms. In other words, perhaps you really enjoy working with a particular firm and hope that, with a bit of objective criticism, they can step it up a notch.
- Award new work to the highest-performing law firms.
- Cut out the low-performing law firms.
- Reduce the number of law firms so that these relationships can be more easily managed.
- Better align the inside counsel/outside counsel teams, so that you can get the right combination of inside and outside attorneys to handle specific projects. You want to know which combinations of people don't work well.
- Improve the way that your company's business units obtain services from outside counsel. Basically, you want to advise the business units on how they can help get better, faster, cleaner processes and results when dealing with law firms.
- Take better control of the inside counsel/outside counsel relationship. In essence, you want to establish your own more stringent rules for the law firms and lay down the consequences if they breach these rules ("I won't pay your bill if . . .").
- Tie law firm compensation to the firm's performance on designated matters or types of files.
- Improve services as part of a corporate drive toward best practices within the entire company.

Once you've determined your broad goals, your next step is to refine each of these into more specific and measurable goals. For instance, one of your aims may be to improve litigation services. In that case, what concrete things would you be attempting to achieve? For example, you might be trying to:

- have everyone thinking in terms of early resolution;
- get to mediation and arbitration quickly;
- shorten the duration of cases;

- be kept informed by outside counsel;
- keep outside counsel costs aligned with the company's exposure; or
- have effective litigation management guidelines.

You should also consider who within the company is driving the performance assessment initiative. Is your legal group merely responding to complaints by others within the company, or does your group genuinely back the initiative? You'll get a better result if your group truly believes in the project and implements performance management as part of its mandate to provide superior legal services to the company.

What do you want to measure?

Once you have your goals in place, the next step is to create appropriate means for determining how well (or poorly) these goals are being met. Some of what you want to measure is objective: How well does the law firm do what it is assigned to do? Other aspects of the relationship with outside counsel are more subjective and have a strong personal component. Be sure that your measurement processes include an appropriate balance of subjective and objective measures—or you could find yourself working with someone that you really don't like.

Objective measures

Here are some objective measures that might help you in reviewing completed legal services.

- *Outcomes.* Look at the matter in the context of other issues, such as the total cost of outside legal fees, the value to the company of the result obtained, and the consequences for the company if the lawsuit had reached a different result.
- *Compliance with your guidelines.* Is outside counsel following your instructions?
- *Hourly rates.* Can you receive a discount off the regular hourly rates? What types of matters can be billed on a project basis, as opposed to an hourly-rate basis?
- *Charging correct rates.* See who is working on the matter. Ensure that the outside lawyers you've selected are the ones actually doing the work and that work isn't being passed down to other lawyers without your prior approval.
- *Case duration:* What are the potential defense costs compared to the liability of the company? Is outside counsel providing advice consistent with these two factors, or is outside counsel working the file?

Subjective measures

The following measures are somewhat more subjective. They are either hard to quantify, or the importance of the measures may vary, depending on the tastes and demands of each inside counsel and its client. Nevertheless, many in-house counsel believe these are key issues to consider in

any relationship with outside counsel:

- *Quality of personal service provided by outside counsel.* How responsive, trustworthy, reliable, and credible are the counsel?
- *Outside counsel's efficiency.*
- *Value of outside counsel's services.*
- *Internal client satisfaction with outside counsel.*
- *Outside counsel's reputation in the legal community.*
- *Diversity of outside counsel's employees.* Does this diversity satisfy you and your client?
- *Outside counsel's technological infrastructure.* Many in-house counsel demand electronic billing, use of the firm's word-processing services, and other desired value-adds.

Although these seven factors are hard to quantify, you can still use them to compare different law firms. For example, you might begin by rating these seven factors in terms of what is most important to you, on a scale of one to seven. Then rate each outside law firm on how they measure up. The results will give you a like-to-like comparison among firms.

Making the measurements

Benchmarking and performance management can seem like daunting new tasks to add to your already overlong to-do list. But take heart; it's a matter of finding the right place to start.

Informal surveys. For those who are just beginning, start

with something simple, such as anecdotal staff surveys: Just ask general questions of your staff and others. The questions can be very broad, such as "Who do you like to work with and who not?" Then drill down into the answers received. For instance, "Why don't you like working with Lawyer A in Law Firm X?" What you may find from these anecdotal surveys is that no one likes working with any lawyers in Law Firm X and that the only reason that staff have kept quiet is because Lawyer B in Law Firm X is a good friend of a company VP outside of the legal group. The legal world has changed, and this inefficient business connection should no longer be simply accepted by you or any other GC. The legal group can and should get rid of Law Firm X.

Formal surveys. A somewhat more rigorous approach would be to perform a formal staff survey. Such a survey could examine, among other matters, the same issues examined in anecdotal surveys.

Ebilling. An electronic billing review can provide a wealth of information relating to outside counsel's staffing and billing. The review of ebills can easily spot changes in lawyer file staffing, duplicate entries, unapproved hourly rates, and unauthorized expenses. It is also a useful way to track costs in order to determine whether a specific matter should be settled. (For more information, see the article, "Electronic Billing Enters the Mainstream: How to Ensure a Successful

Ask the Experts

Q: Can you give any guidance on performance-based compensation? I'd like outside counsel to share not only the victories, but the losses too.

A: Performance-based compensation works in some, but not all situations. This type of compensation scheme can work only if:

- Performance criteria are relevant to the services being performed.
- Inside counsel can set specific service expectations.
- Performance criteria include both subjective and objective criteria.
- Performance criteria are fair.
- Outside counsel has some flexibility and is able to take risks.
- Both inside counsel and outside counsel can opt out of the arrangement based on a predetermined mechanism.

Q: Do you have any other suggestions for getting more value for each dollar paid to outside legal counsel?

A: Here are some tips.

- Try to reuse information from previous cases. Some of the larger law firms have strong knowledge management processes in place, which are accessible to outside counsel.
- Implement knowledge management processes within the company. Share best practices.
- On some files, have inside counsel administer files with outside counsel.
- Compare law firms with offices across the country on a segment-by-segment basis.
- Leverage technology to better study and understand outside counsel's billings.
- Determine the ratios of your various legal costs. For instance, determine the ratio of motion costs to total costs, or discovery costs to total costs.
- Look for trends in these ratios and changes in trends. Try to figure out the reasons for these trends and how you might change the numbers to your advantage.
- Encourage outside counsel to be flexible and try new things.

Launch for Your Law Department,” also in this issue.)

Audits. Audits involve a review of matters, both closed and active. The reviewer has a series of items to look for and record. This type of review lends itself to spotting trends and patterns.

Benchmarking. Benchmarking involves comparing your company’s outside legal costs with the costs of legal services for a typical company in your client’s particular industry. The latter, benchmark costs, are available through published studies, trade journals, conferences, and consultants.

Methods for improving performance

Once you’ve collected and analyzed your data, your next step is to use this data to improve the performance of outside counsel. We’ve listed some practices below that can help you implement new ideas and processes so that they become routine. If you decided to adopt some or all of these practices, it is vital for you to formalize them, document them, and distribute the documents to all appropriate company personnel. You should make the practices you adopt routine within your company’s legal group, corporate group, and whoever else is involved within the company.

Create a formal panel. One common method for improving performance is to establish a formal panel of selected, preapproved outside counsel. In order to be included on this panel, each of the law firms must satisfy your selection criteria. Each of these selected firms should have a single designated lawyer through whom all work is to be funneled

and who has formally accepted the role of managing your files throughout the firm.

Identify common goals. After you have selected your law firms, you need to work with outside counsel to identify some common goals. A typical goal is for the law firm to develop a solid understanding of the company’s business. Another common goal is for the law firm to understand how the company wants to approach certain types of matters. In almost all instances, one of the goals will be to create and maintain a collaborative, long-term relationship.

Use retainer letters. When dealing with outside counsel (as with so many other business issues), setting and managing expectations is frequently critical to ensuring a successful relationship and a good result. For the relationship to work, expectations must be clearly communicated, understood, and agreed on both sides. One of the most effective ways to establish the expectations for outside counsel’s representation and billing is through the retainer letter. A meaner, leaner retainer letter can be of great assistance in establishing the new norm and resolving billing disputes. It can help inside counsel determine, throughout the course of a matter, when emails, telephone calls, conference calls, and face-to-face meetings are needed to manage expectations.

Have a formal intake procedure. Another useful method for managing outside counsel is to establish a formal intake procedure for each new matter. This subjects the matter to a standard review and approval process, but the process may vary according to the nature of the matter and the anticipated fees. For

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Meaner, Leaner Retainer Letters

To get better results from your outside counsel, consider including these items in your short, to-the-point retainer letter:

- Bills from outside counsel must be provided on a regular, timely basis. This basis can be monthly, bimonthly, or whatever you prefer.
- All bills from outside counsel are to go to a specified billing address. They are to be sent “nowhere but here, and to no one but me.”
- There shall be no general matters or billings.
- Outside counsel will accept no work directly from someone in a business unit. All work must come from your legal group.
- Only preapproved lawyers can work on a matter. If a lawyer leaves the firm, the firm must absorb the time incurred in bringing a replacement lawyer up to speed on the file. This time is nonbillable.
- Specify how and when outside counsel should communicate with you concerning progress on a matter (perhaps a combination of monthly, quarterly, and annually). Tell outside counsel what information they need to provide. Make sure that communications must be comprehensive. Outside counsel must understand that you want absolutely no surprises.
- After initial communications on a new matter, outside counsel will deliver, within a specified number of days, a written plan and budget for the matter.
- Certain outside counsel expenses, which are specified on a list, are not billable. They are considered part of the firm’s overhead.
- Outside counsel’s fees and work must align with the value of the matter to the company and the exposure the matter creates for the company.

For More Information

You might find the following resources helpful when researching law department benchmarks:

- Altman Weil, Inc., *Law Department Management Benchmarks Survey, 2005 Edition* (Altman Weil, Inc. 2005).
- Virginia Grant, "Three Not So Simple Rules for Law Departments Serious About Controlling Costs," Altman Weil, Inc. (June 1, 2004), www.altmanweil.com/dir_docs/resource/3a352cc0-1f28-4c73-9876-9f079eac3ca2_document.pdf.
- Rees W. Morrison, *Law Department Benchmarks: Myths, Metrics and Management* (Hildebrandt International 2001).

Useful websites include:

- www.altmanweil.com
- www.bottomline.com
- www.calatystlegal.com
- www.hildebrandt.com
- resources.martindale.com

instance, if a new matter is expected to have fees that exceed a certain amount (say, \$5,000), work should not begin until the law firm has submitted a budget that has been accepted in writing by the general counsel. For less costly matters, the process can involve an intake conference call, where the information is presented and the law firm provides an initial assessment.

Watch the budget. While a matter is ongoing, you should regularly compare actual activity and billings against the matter's plan and budget. This should be done on an informal basis every 30 days. After this review, you should modify the plan and budget, as needed.

Have a formal review process. You may also want to put in place a formal review process for every matter, with such reviews occurring every 90 days. Such reviews of the work and billings of outside counsel allow you to update the plan and budget for the matter—and also provide other important benefits.

- The formal review helps you to assess outside counsel's work. (By the way, make sure you engage outside counsel in the review of their performance. That way, both of you will get a better understanding of what the other side wants and expects.)
- The formal review provides an opportunity to reconsider a particular matter and develop further strategies. When

confronted with questions such as “How can we be only this far along when we’ve spent so much money?” a law firm may become more creative and more open to new suggestions for resolving a particular matter.

Debrief after completion. After a matter is resolved, you may want to have a postcompletion debriefing from outside counsel. Work with outside counsel to assess how well counsel performed in this matter. Compare the original plan and budget with the actual, final one. If there were any significant discrepancies, why did they occur? Such information can be used to provide more accurate plans and budgets in the future.

Performance-based compensation

Performance-based compensation is becoming more common, particularly in litigation matters. It is a value-based approach to compensating outside counsel that ties a law firm’s compensation directly to the benefit the company derives from the service.

In order to implement this type of compensation, in-house counsel and the law firm need to agree, at the beginning of an engagement, on the criteria that will be used to assess performance. At least three criteria should be agreed to, and at least two of these should be objective measures.

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Litigation Management

Do not treat any litigation as routine.

Treat each case as a series of purchasing decisions, and establish in advance what you are prepared to pay for the various steps in the litigation process. For instance, specify that there are to be no more than X number of motions prior to trial and no more than Y number of depositions.

Among the criteria you may wish to consider are:

- the duration of the matter;
- the outcome of the matter;
- outside counsel’s compliance with in-house counsel’s guidelines;
- the extent and quality of communication between outside counsel and your company;
- the total cost, including not only the fees paid to the law firm, but all other costs, such as the expenses of experts;
- outside counsel’s strategic performance; and
- your client’s satisfaction (are your company’s senior


executives pleased, content, or dissatisfied with outside counsel's service?).

Under a performance-based compensation scheme, outside counsel is paid at a reduced rate during the life of the matter. Basically, the law firm receives a negotiated rate based on the minimum fees that the firm needs to do the work, plus a percentage. Either periodically or when the matter is completed, the law firm receives additional compensation at the performance rate.

Finishing Touches

Inside counsel sometimes need outside counsel. It's a fact that cannot be avoided. Another fact is that outside counsel are often expensive. And that they want work from us.

As in-house counsel, we are better off driving the relationship than allowing ourselves to be pulled along for the ride. We pay the bills, and this allows us to set some standards.

However, we must go beyond just setting standards. Law firm performance needs to be *measured* against the standards that we set. Only then will we know that the company is receiving the value that it deserves. 

This HandsOn is drawn primarily from Course #305 at the ACC 2005 Annual Meeting, presented by Thomas D. Gaillard, vice president and general manager, transaction services, Bottomline Technologies; Richard A. Parr II, executive vice president and general counsel, Concentra, Inc.; Robert H. Peahl, vice president claims litigation, American International Group (AIG). Course materials are available at www.acca.com/am/05/cm/305.pdf. ACC thanks Patti Phelan for preparing the course summary upon which this article is based. Patti is legal counsel at NDI (Northern Digital Inc.) and the current chair of the ACC New to On-House Committee. She can be reached at pattiphelan@sympatico.ca.

Have a comment on this article?
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ACC Resources on . . .

Outside Counsel Relations

Committees:

More information about these ACC committees is available on ACC OnlineSM at www.acca.com/networks/committee.php, or you can contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or windley@acca.com.

- Litigation
- Small Law Departments

Leading Practice Profiles:

- Law Department Metrics (2005). www.acca.com/resource/v5899.

Survey:

- 2005 ACC/Serengeti Managing Outside Counsel Survey Report. www.acca.com/Surveys/partner/2005.

InfoPAKs:

- "Alternative Billing" (2005). www.acca.com/resource/v5799.
- "Outside Counsel Management," (September 2004). www.acca.com/infopaks/ocm.html.

Webcast:

The following webcast is available at www.acca.com/

networks/webcast/:

- Managing Outside Counsel: Getting Off on the Right Foot—And Staying in Step (January 18, 2006)

Annual Meeting Course Materials:

- Deryl L. Earsom, John Ogden, and Dennis L. Schoff, "How to Measure the Effectiveness and Value of the Legal Department," ACC 2005 Annual Meeting material for course 705. www.acca.com/am/05/cm/705.pdf.

Virtual Library Sample Forms and Policies:

Sample forms and policies available via ACC's Virtual LibrarySM (www.acca.com/vl) include the following:

- Law Department Evaluation of Outside Counsel (2004). www.acca.com/protected/forms/outsidecounsel/evaluate_oc.pdf.
- Outside Counsel Policies and Procedures (2005). www.acca.com/protected/forms/outsidecounsel/manage.pdf.
- Outside Counsel Evaluation Form. www.acca.com/protected/forms/outsidecounsel/evaluate.pdf

For more information on these topics, don't forget to see "Triple Time: Three Hot Ideas for Improving Law Departments," and "Electronic Billing Enters the Mainstream," both in this issue.