

Technology Strategies for Corporate Legal Departments

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Editor's Note

This publication marks the first of what we hope will be many white papers that focus on the needs of a LawNet "Peer Group" – we're pleased to offer our corporate and government legal departments some advice and information that is pertinent to them, although the concepts covered by our authors will no doubt be beneficial to anyone in the legal profession. We gratefully acknowledge the experience, expertise and professionalism of our authors, and we trust you will find valuable information herein.

Randi Mayes
Editor

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Legal Departments and the Internet: The Second Potato Chip

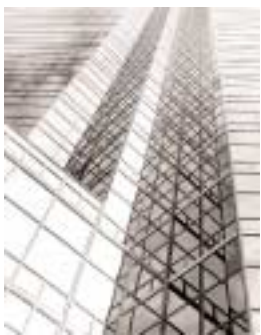
*by Rob Thomas
Serengeti, Inc.*

Although widespread use of the Internet has become commonplace in the corporate legal world the past few years, most legal departments are just beginning to think about ways to get the most out of the new connections offered by the Internet when they work with outside counsel and internal clients. The use of e-mail has given corporate counsel a good taste of what a difference it makes to have convenient access to documents and information from the files of outside counsel. Like that first potato chip, the initial taste of Internet access to information generally causes an even greater hunger for the whole bag: "Why can't we have immediate access to all of the work product that our law firms have created-so that our legal department, and our other firms, can save time on our other matters?"

In the not-too-distant future, the integration of disparate technologies, security issues, and law firm concerns about loss of control will probably all be resolved, so that legal departments and law firms will have seamless real-time access to one another's work. The real challenge will then become how to find and use only the information you need-the classic problem of sifting through the mountain of information brought to you by the Internet, only some of which is useful. Though these challenges are yet to be resolved, some current Internet solutions do give legal departments excellent new ways to work with outside counsel. This article will help you analyze those options and select the simplest, most direct solutions available.

Direct Access to Data-Why?

The basic answer to the question of why anyone would want direct access to data is that it saves time, which saves money. Let's say that you or one of your law firms needs to find an expert witness for an important case. Direct access to a database that includes assessments of the expert witnesses used in the past by your law firms would let you save the time otherwise required to conduct research and due diligence regarding potential expert witnesses. It would also spare you the delays and costs of phone tag, composing and sending written information, and following up with additional questions as you check out potential experts from scratch. And you are also more likely to achieve the results you want if you can find an expert witness who has performed well for your company in the past than if you must experiment with an untried expert.



When it isn't in such a database, key information is only as good as the memories of those who know it, and it is difficult for those seeking the information to know where to look. In addition, in these days of employment mobility, you never know whether that in-house lawyer or outside counsel whose advice you rely upon for information about experts will be around the next time you need to find one. Sharing such information in an Internet-accessible database makes it useful for all members of your team who come along in the future, whether or not the source of the information is still available. An expert witness database is just one example of how Internet-based access to information is saving legal departments time and money, helping them achieve better results, and preserving important institutional knowledge.

Many Data Sources, Many Users

Generally, Internet-based information used by legal departments involves multiple users who are contributing data and looking for it, using the Internet as a vehicle for their exchange. The simplest model involves an in-house attorney working with one internal client and one outside counsel on a single matter. The three of them can probably manage pretty well using e-mail to exchange documents and information, which is then selectively stored and organized on their individual systems according to their individual preferences. There's no problem so long as they all continue to work together-and do not work with any other in-house counsel, internal clients, or outside counsel who might be interested in their work product.

Unfortunately, life has a way of getting messy. The in-house client, working with another outside law firm on a similar matter, may not be able to find a copy of a document that could be useful for the new matter. This leads to a series of phone calls and e-mail exchanges trying first to locate the document and then to get it to the people who could use it. Groups come and go, group members come and go, and groups create relationships with each other. By taking a close look at the types of data sources and users, it becomes easier to find ways to use the Internet to serve the messy, constantly changing interactions that occur in the real world.

What Data Are Most Important?

All data are not created equal-some are much more likely to be used again to save time or achieve a better result in a future matter. Legal departments are in a unique switch-hitting role, sometimes acting as clients of outside law firms, sometimes acting as advisers to in-house clients. Therefore, the types of data important to legal departments include information necessary to handle legal work, as well as information necessary to manage the legal work being done by outside counsel. Each legal department will have its own definition of information it will need to use again, or will want outside counsel to use in future matters. A representative list of such types of data would include the following:

"Form" Documents - actual forms or well-drafted documents that are likely to be useful in future matters, such as agreements, briefs and pleadings.

Legal Research - memoranda or briefs that summarize areas of the law that come up in related factual situations or cases.

Collections of Documents - documents that may need to be produced to a third party or looked at in-house in the future, such as document productions and due diligence materials.

Legal Opinions - letters, memoranda and other legal analyses that provide helpful guidance to clients involving situations or issues that may arise again.

Information About Key Players - substantive information about outside counsel, expert witnesses, consultants, accountants, potential investors and the like that may be needed in the future. This could include performance data regarding outside counsel and experts derived from in-house assessments or electronic billing data.

Information About Legal Matters -key information necessary to support management decisions regarding legal matters, such as the jurisdictions and business lines involving the most litigation, potential litigation exposure during given time periods and the like.

What do all these categories of information have in common? If readily available, they can save members of legal teams significant time in conducting or managing future matters. If future teams can find this information easily, the wheel won't

have to be reinvented the next time someone needs a wheel. Instead, the team can put its time where it counts, taking the basic wheel and improving it for the unique road the organization must travel. In the legal context, this could mean that instead of having the same legal issue researched multiple times by outside counsel, one satisfactory report is shared through a legal research database, which would also include shared updates to the original research when the issue arises in another context.

It would be interesting to know how much money is spent annually by legal departments for work that has already been done, either internally or by one of their law firms. ("I can't believe that I have bills here from three law firms all researching the same issue.") It would also be interesting to know how much time is spent looking for prior work product, particularly when the creator or holder of the information is no longer a member of the team. ("Too bad Frank took off to Tahiti on his sailboat—he had that expert years ago who would be perfect for this case. Maybe we can track Frank down, or someone can go through his old files. . .") Internet-based access to data may be able to slash such unnecessary costs by giving legal team members access to documents and information that have already been created.

Increasing Usefulness of Data

If you can trap all this important information on your own internal department system (and you don't burn the system out in the process), then you don't need the Internet, except maybe as a vehicle to receive things from outside. However, if you really want the information to be useful, you also need to give outside counsel access to your internal system, which is where life starts to get messy again—and the Internet comes back into play. Let's take a look at some of the basic forms of Internet-based access to information, including the relative advantages and limitations.

E-Mail

As noted, e-mail is great for specific information or documents. However, you only have access to what you want if you make sure you receive, store

and organize everything you need. We have all experienced the limitations of e-mail as a collaborative tool. If you don't have what you need, you need to find out who has it, contact that person, wait for that person to send it to you, and then store it internally where you can find it again. You get only what you ask for, you get it once, and you can only share it by sending it to selected individuals. If you lose it or can't find it, you have to restart the process.

Internal Systems and Intranets

An internal system, including an intranet, is one step closer to ideal access. Generally, you can find things yourself, without getting another person involved. If you do need help finding something, you hopefully can get help from someone in your organization. Documents and information are always available and can be conveniently found—if you have a good system organization or search engine. Internal databases, forms, online training, and online legal advice can provide legal department knowledge to other segments of the organization.

The limitation is that it will usually involve significantly more work to put documents into your system from someone outside your organization into your system, or to provide such documents to them. It is not a good solution if you work regularly with people such as outside counsel who have important information outside your organization and who aren't entitled to full access to everything inside it.

Extranets

Many law firms have responded to legal department requests for access to information by creating extranets. There are also variants on extranets consisting of internal system software that provides Internet-style access to selected third parties. Law firm extranets give a specific client, or group of clients, direct access to specific information or documents selected from the law firm system. Some law firm extranets are much more than document repositories; they provide collaborative functionality like document checkout and version tracking, threaded discussions, and so on. Others

also provide basic online legal advice, responding with relevant information to simple client questions. The advantages of such an extranet are that the client can access the selected information any time from anywhere with Internet access, without having to contact outside counsel or move the information to another system.

The two primary downsides of extranets are the expense and the inconvenience for corporate legal departments that work with many different law firms. Extranets can involve a significant expense, particularly for law firms that are not experienced with the technology, and clients can expect to pick up much of the tab, either directly or indirectly. In addition, if a legal department works with many law firms, it will have to go to many different extranets to get its key information. Generally, each extranet has a different look and feel, which means getting used to many different methods to find your information. In addition, law firms may not be enthusiastic about using their extranets to give other law firms access to their work product, even though they all represent the same client, making it a less than ideal way to share information across law firms. Finally, scalability is often an issue if a client wants to have a significant amount of information, or many users, on a law firm extranet.

Some legal departments are creating their own extranets (or are using Web-connected internal systems) so as to have only one place to go for their work product. This solution may work better from the client's perspective, but it still involves the cost of creating and maintaining the extranets. It also creates a corresponding convenience issue for outside counsel, who must access multiple client extranets. In addition, if there is no way to search across multiple extranets, finding the information you need is a real challenge.

Third-Party Collaborative Internet Sites

Third-party Internet sites offer the advantages of extranets while addressing the convenience and expense issues. Such sites run the gamut from basic Internet places to share information to sites that are specifically tailored to the needs

of the legal profession. Instead of having a dizzying array of law firm extranets that all function differently for different matters, legal departments can ask all their law firms to share documents and information in organized files on one Internet platform.

The advantage of such sites is that both law firms and clients have one Internet-accessible place and way to work together, and to share organized information. System security permits authorized users to see only those matters to which they have been given access by the matter creator. The time and expense of setup and maintenance are not an issue, because such services come through application service providers, which have already handled the hardware and software issues. Users only need to have Internet access and a Web browser. Cost is also generally significantly lower than extranets, because the system expense is shared across a large base of users.

The primary downside of application service providers is that customization is generally not possible, so it is important to select a service whose functionality closely matches your intended uses. For corporate legal departments and their outside counsel, such a match is more likely when working with an application service provider that tailors its services specifically to the legal profession, or even more specifically to in-house counsel working with law firms.

A Few Words About Security

Most attorneys breathed a sigh of relief when the ABA issued an opinion stating that the use of unencrypted e-mail over the Internet for privileged confidential communications does not per se constitute an ethical violation of the obligation to maintain client confidentiality (*Formal Opinion No. 99-413*). However, many attorneys are not aware of that opinion's qualifying language, which severely limits the general rule:

The conclusions reached in this opinion do not, however, diminish a lawyer's obligation to consider with her client the sensitivity of the communication, the costs of its disclo-

sure, and the relative security of the contemplated medium of communication.

Particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters. Those measures might include the avoidance of e-mail, just as they would warrant the avoidance of the telephone, fax, and mail.

The bottom line is that it is the attorney's responsibility to discuss with the client the system of security that is in place to ensure that it is adequate for the confidential information being exchanged. A system is only as secure as its weakest link—which is often something as low-tech as a password written on a piece of paper taped to a monitor, making the system accessible to anyone in the office after hours.

Using the Internet for increased access to confidential information involves a responsibility to ensure security both during transmission and at the repository of the information. With the help of IT staff, attorneys should ask questions until they are comfortable with the security of any Internet-based system, from e-mail to application service providers. Most application service providers to the legal profession are used to responding to such concerns, and have prepared materials that explain the security of their data centers, encryption of transmissions over the Internet, and software security controls to ensure that only authorized users have access to their systems.

If you worked in a closed office shared by all members of your legal teams, security would not be an issue. Unfortunately, with the convenience offered by the Internet come additional security issues. Such issues provide an opportunity for attorney and client to work together to ensure that the various elements of their systems are secure for the confidential information that they plan to exchange.

Small Steps Leading to Great Strides

Many vendors of Internet-based products encourage corporate legal departments to discard what they are currently using in favor of an entirely new

system. This might be a good approach if you are certain that the new technology is exactly what you need for the foreseeable future, and will work exactly as advertised. Given the rapid pace of change and the unpleasant surprises that may accompany new technology, it is often wiser to look for technology that incrementally improves current systems by adding Internet-based functionality to the ways you currently work.

For example, many in-house legal departments need strategic information about how many matters they have, what the expected spending will be on those matters during the coming year, what their potential exposure is, what firms are handling the matters, which outside counsel are doing the best work, and other related information. This information is necessary to respond to management questions, prepare spending forecasts, uncover trends, and make decisions about what firms to use for new matters.

The problem has been that most of the relevant data (except for outside counsel performance assessments) resides at the law firms. Therefore, many legal departments have to gather that information from the law firms and reenter it into their own systems before they can produce aggregate reports. Unsurprisingly, these reports are often incomplete and outdated because the information is not current.

An Internet-hosted application that connects law firms and legal departments in a structured information exchange can provide a solution to the basic problem of obtaining current information regarding legal matters. Legal departments begin this process by requesting that for each new matter, the law firm complete an electronic form available on a collaborative Internet worksite. A shorter form is completed on a periodic basis with updated information regarding matter developments and fees. From this Internet-based platform, the legal department can then view at any time the current data, organized in ways that support its strategic decisions, including exposure analysis, spending forecasts, analysis of actual spending versus budgets and the like.

The legal department can also add its own information to the same system, such as comments upon the performance of outside counsel, which can be viewed only by other members of the legal department. When an in-house attorney wants to refer out a new matter, the system can report which outside counsel have historically handled that type of matter in that jurisdiction and provide information about those matters as well as performance assessments by other in-house counsel. In seconds, in-house counsel can access all of the background information necessary to make an informed decision about which outside counsel to retain for that new matter, saving time and achieving a better result through the use of accessible institutional knowledge.

Such a system is a good example of how the incremental use of Internet connectivity can lead to significant strides in productivity. It gives law departments the strategic data they need through the Internet, without requiring them to change their work methodology (except for saving time by not re-entering data). Law firms also save time by forgoing the production of paper status reports and by reducing client inquiries regarding administrative matters. The system does provide in-house counsel with instant access to the information they need to manage their outside legal work. It also captures the institutional knowledge for later use by other members of the law department. Finally, it uses the Internet to improve the efficiency of workflow for in-house and outside counsel. These traits should be sought when selecting any Internet-based service to improve the productivity of workflow among the law department and outside counsel.

In conclusion, Internet-based systems promise improved access to information, increased efficiency, and better decisions from applying prior knowledge. Legal departments, which by their very nature are at the intersection of the many sources of information and the many users of that information, will reap significant benefits from the advantages that are just beginning to be realized from the new Internet connectivity.

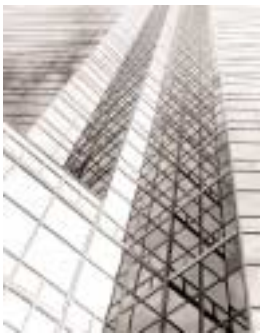


Records Management Software:

Helping the Legal Department Manage Litigation Cost and Risk

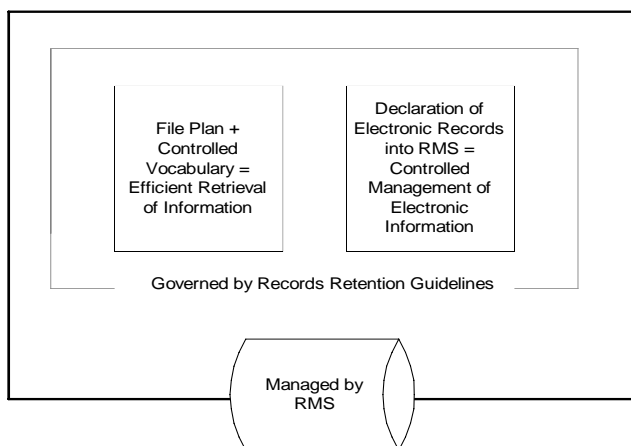
by Beth Chiaiese

LegalKEY Technologies, Inc.



The threat of litigation is an ever-present fact for most large corporations. The typical request for production routinely demands the release of specified records in any media, including electronic documents and e-mail. Locating the precise electronic records that satisfy the subpoena can be difficult and costly if the organization has not developed consistent document creation and naming methodologies for its electronic systems. There are also worries about document content. The dynamic nature of electronic records increases the possibility that word processing, spreadsheet or other digital records have been modified by the author or by other users, thus compromising the integrity of the original document. In addition, electronic records, particularly e-mail, often include information that is potentially damaging to the organization.

Therefore, legal departments spend a significant part of their litigation management resources on the identification of records that satisfy production requests. Once these records are found, additional resources are expended to review them for content. Although traditional litigation support tools can organize and manage documents that have been approved for production, another technology exists that manages records before the initiation of litigation and thus not only minimizes the cost of litigation but also helps manage the risks associated with the production of potentially dangerous information.



An automated records management system (RMS), supported by a records management program approved by the legal department, is a tool that can help an organization identify its electronic records for production, manage them as static documents, and automate their destruction according to ordinary-course-of-business rules that define when records exceed their useful and required life. Thus the use of an RMS lowers the cost of litigation and minimizes risks associated with the production of records. The basic elements of this approach are as illustrated.

This article discusses how an RMS is a critical tool for the management of electronic records created before litigation commences. The RMS contributes to litigation management in the following ways:

A file plan determining the organization of records

A controlled vocabulary for naming records

Automated declaration of electronic records (from document management and e-mail systems) into a controlled RMS repository

Records retention guidelines that define the life cycle of declared records

Identifying Electronic Records for Production

Although a request for records will also demand production of paper-based records, most organizations will find their greatest struggle to be the identification of those electronic records that satisfy the requirements of the subpoena. These records are generally not as well described as paper-based records and are usually much harder to isolate. Several reasons explain this: ¹

Inadequate Controls Over Creation and Maintenance

Enterprise-wide deployment of electronic records creation software has resulted in wide variations in the ways that individual users create and maintain records. Although some organizations publish and enforce document creation standards, many do not, resulting in inconsistencies in naming, formatting or approved content.

Redundancy of Information

An electronic record does not usually exist as a single entity. Users might make multiple copies, storing some on hard drives or floppy disks. Copies might reside in multiple e-mail messages, some of which might exist outside of the organization. In addition, some records might be saved in new formats, such as PDF files or images.

Inconsistent Classification

Although most large organizations have developed some means of classifying records for later retrieval, many companies have not, allowing

users to employ a variety of naming conventions. In addition, to the extent that a company does set forth classification standards for the metadata fields used to profile documents in a document management system (DMS), they are often inconsistently used or ignored. Thus, users might classify all documents as "general" or avoid completion of document description fields, even in organizations that have defined document type values for use in the DMS.

Inconsistent Backup Strategies

Opposing counsel will demand the production of all electronic records regardless of where they are stored, which means that backup tapes must be examined as well. If the organization does not have a defined policy for the rotation and life cycle of backup tapes, the search for requested documents can be never-ending. Unfortunately, however, many companies store backup tapes on an ongoing basis, with no process to recycle and thus eliminate older tapes.

Use of a Records Management System

For these reasons, the hunt for records that comply with a production request can incur significant costs in the earliest stages of the lawsuit. An RMS can minimize these costs in the following ways:

Defining a File Plan for the Organization

The file plan is the basic building block of records management and instructs users within the corporation how to organize their records. The file plan should be applied to both physical (paper) and virtual (electronic) records.

Most file plans are hierarchical, with a one-to-many relationship existing between parent and child levels. In a corporation, the highest level of the hierarchy might be the entity itself, or the various entities within the corporate family. Beneath the entity level are various operating departments, each of which generates specific records series. A records series might consist of several discrete document types. For example, the records series "Accounts Payable" will include vendor invoices, payment requisitions and check stubs. To illustrate:

Entity = Universal Pharmaceutical

Department = Accounting

Records Series = Accounts Payable

Records = Invoices, Requisitions, Check Stubs

The RMS will be configured to reflect the organization's file plan. When users access the RMS to look for specific records, it should display them in their hierarchical order, and also display metadata that describes specific records series and discrete records. This metadata usually includes date of creation, creator, active and inactive life cycles, location, and media type. The latter is critical, since it helps the organization manage all records, regardless of media.

Standard Classification Terms

In addition to the file plan, it is important to develop a controlled vocabulary for naming records. This vocabulary should be defined at the department level so that records creators in the department use terms that are meaningful to them. The RMS will require selection of a term from the controlled vocabulary when records are entered into the system. Using a controlled vocabulary will make it easier to locate records in response to a subpoena.

Managing Multiple Media

As mentioned, the RMS will manage multiple media, including paper-based files, filmed records and digital records. There are several ways in which the RMS provides access to these records. The first, as noted, is simply to catalog the records and their locations in the metadata of the system. However, integration with electronic records creation systems can provide varying degrees of access and control over the non-paper records themselves. At one end of the scale, the RMS can integrate with a digital system to launch the native application and view the record from within the RMS. However, it is now possible for the RMS to take control of the electronic record, preserving its integrity within a secured repository. This is discussed more fully later in this article, in the section on managing electronic records.

Allowing Search and Retrieval Across the Database

Because the RMS is a database, it allows search and retrieval of metadata fields, thus facilitating the identification of records required for production. It can also allow full-text searchability of any records within the RMS repository, so that records can be located by terms not contained within the metadata.

Controlled Management of Electronic Records

Records are defined as recorded information that evidences an organization's activities or decisions. Just as not every document created on paper is a record worthy of being retained for later use, the same is true of electronic data. Many of the electronic documents the organization creates or e-mail messages sent or received by employees are not records and are not necessary to support the company's decisions or activities.

However, to the extent that an electronic document should be preserved for later use, it is important that it accurately reflect its intention. Indeed, our entire ability to rely on business records is based on our faith that they have not been changed and that they stand for their intended purpose. Although it is very difficult to alter physical records, this is not the case with digital records, which are easily modifiable by either their authors or by other users.

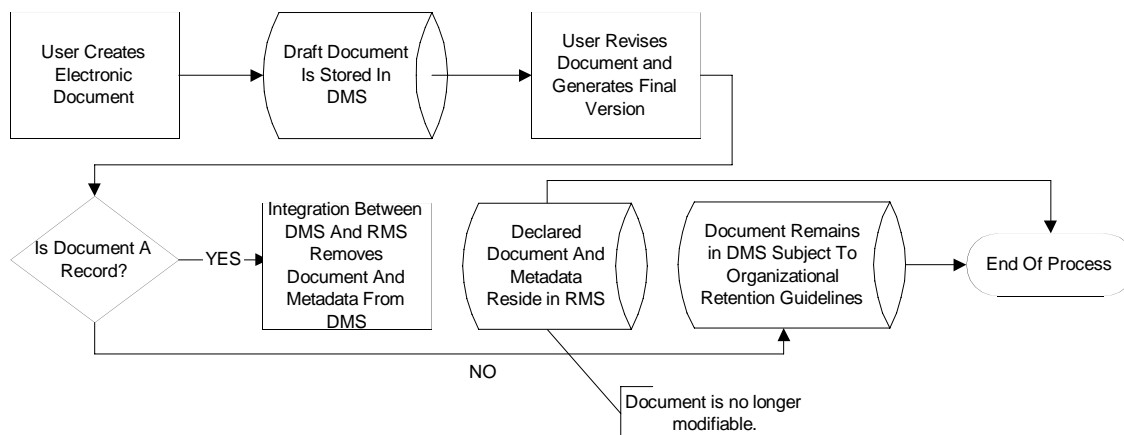
For corporate organizations, it is critical that electronic records produced in response to subpoena accurately reflect the intention of the corporate author. Although records can be designated as read-only in a document management system, this functionality does not usually extend to the document author, who has full rights to the document.

An RMS with electronic records management functionality is a critical litigation management tool. These systems can capture the electronic record in a separate repository, which prevents alteration by any party. If the integration between the RMS and DMS is configured to do so, the document is removed from the DMS repository and only exists in the RMS. This means that electronic records produced in response to subpoena are reliable and reflect the original intentions of the author.

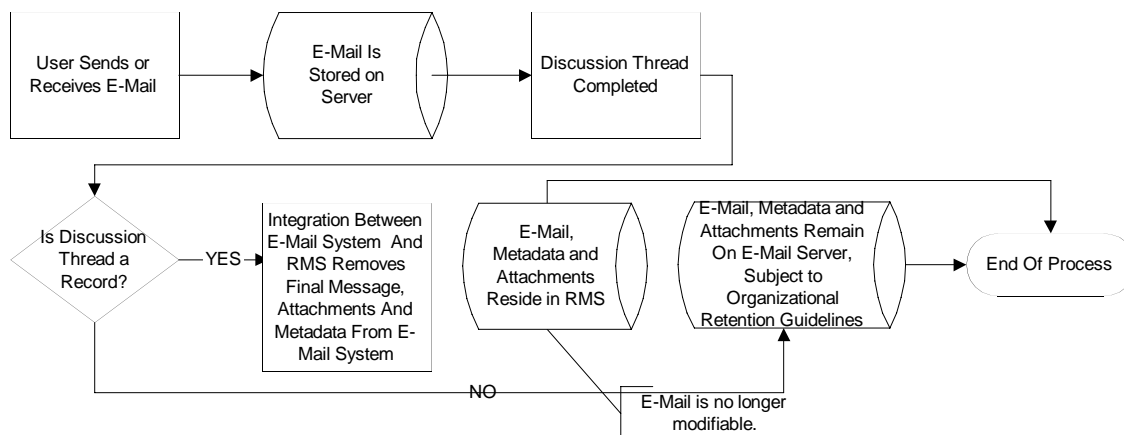
The process of removing the document to the RMS is called *records declaration*. It should occur when the document has been completed and is considered a final version. Although it is possible and perhaps desirable to declare draft documents as well, it may be a best practice to allow drafts to remain in the DMS where they will be destroyed at an interval defined by the organization, as discussed in the section on Retention later in this article. In the meantime, the declared final version remains in a non-modifiable state where it can be located and produced if required.

When the user declares the electronic record, it is classified to its appropriate location in the file plan. Thus the careful design of the file hierarchy and the use of a controlled vocabulary to describe the records become critical parts of the organization's ability to locate the record when needed.

The basic records declaration process is as follows:



The RMS can manage e-mail as well as documents in a DMS. When an e-mail discussion thread comes to an end, the user can declare it to the RMS, along with any attachments. Thus private folders are no longer the only way the organization has to manage e-mail that should be preserved as a record—once it is declared to the RMS other users can view it, and it can easily be recovered and produced if required.² This workflow is as follows:



Records Retention Policies

Whereas the file plan is the essential building block of any records management system, a records retention policy is its foundation. A records retention policy defines the legal, fiscal and operational life cycle of specific records, making it clear when those records are no longer needed and when they can be destroyed.

Reasons for Records Retention Policies

A records retention policy serves three basic purposes. In a paper-based world the policy, by permitting the ongoing weeding of obsolete records, manages the physical space allocated for record keeping and thus reduces cost. To the extent that most organizations continue to retain records in physical form, this is still an important consideration. In addition, however, a records retention policy can enable IT staff to better manage server space allocated to electronic documents, a particularly important issue for e-mail systems.

Second, the elimination of unneeded information enhances the retrievability of the remaining, viable collection. When combined with a well-designed file plan and controlled naming conventions, the retention policy is a powerful tool for the access and production of documents in response to subpoena.

Finally, the retention policy can result in the ordinary-course-of-business elimination of potentially dangerous information. Although it is never acceptable to destroy records that are within the scope of pending or real litigation, courts recognize that organizations must manage their costs on an ongoing basis by destroying obsolete information within reasonable guidelines. If an organization cannot produce all records that satisfy a request for production because the records have been destroyed in accordance with the company's defined records retention policies, the court will not impose sanctions on the organization. However, if those records do exist, perhaps because there is no retention policy or it was not followed, then they must be produced regardless of content.

Criteria for Retention Periods

The first step when creating a retention policy is to define the records collection by inventorying all records series and records.³ This is usually done at a department level, and must include records in all media, including electronic records. The organization must then take several criteria into account to determine appropriate periods for the retention of specific records. The resulting retention period for each records series will be the longest period defined by each of the following criteria:

Legal Requirements

The organization must understand its legal requirements to retain records. This includes researching regulatory requirements for varying operational departments, such as personnel or tax, as well as any requirements that exist for the organization's basic industry. For example, regulatory records retention guidelines exist for the pharmaceutical, energy, chemical and securities industries, as well as many other regulated industries. To be legally sufficient, that is, defensible before the court, records must be retained for the length of any statutory or regulatory period.

Fiscal Requirements

Records might be required as the basis of developing fiscal policy, budgeting, or to satisfy other financial requirements for the organization. The company's director of finance can provide guidance in this area.

Operational Requirements

Each operating department will require referential access to older records for a specified period. Department managers should examine their reference rates and define a period after which records are rarely accessed and can be defined as obsolete.

Historical Requirements

Depending on the organization, some records are valuable because they evidence the historical growth and development of the company. These records should be considered archival and given permanent retention status.

Role of the RMS

The RMS will include functionality to store retention periods by department or records series and to apply it to all records within the system. The system will generate eligibility reports that list records for which the retention cycle has expired. These reports can be used as the basis for initiating destruction processes.

Even though the records themselves are destroyed, many experts believe that the RMS

metadata should remain in the system. This is the organization's proof that it follows its retention policies, which will be part of the evidence presented to court if its records destruction processes are challenged. Certificates of destruction for physical records, eligibility reports, and the policy itself are also supporting documentation.

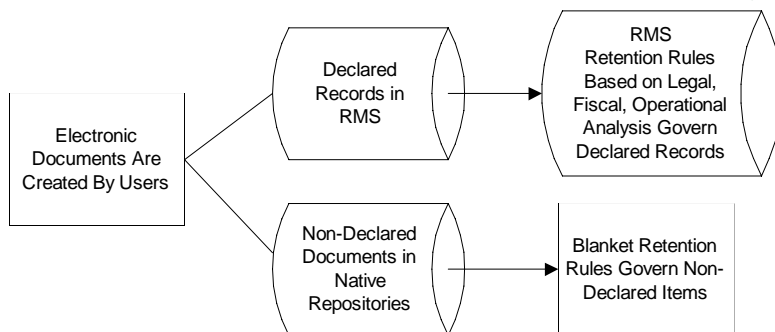
Application of Retention Policies to Electronic Records

Four factors must be considered when applying the resulting retention periods to electronic records:

Management of Undeclared Records

According to the model illustrated here, only certain electronic documents will be considered records and be declared from their draft repository to the RMS. The organization should develop a policy that will define the fate of undeclared records. From both discoverability and space management perspectives, it may be a best practice to destroy drafts and undeclared documents after a specified period has elapsed. This enables an organization to enforce a policy that destroys all e-mail on the e-mail server that has aged for a defined period. Doing this removes casual and potentially dangerous material from the risk of discoverability and allows the IT staff to manage space more effectively on the server.

The application of retention rules to declared records (in the RMS) and non-declared records is illustrated in the following figure:



Media Choice

Depending on the industry and the type of document, it may not be necessary to retain both electronic and physical records for the entire length of

the retention period. Three choices exist: retaining physical records while eliminating electronic copies; retaining electronic records while eliminating physical copies; or retaining all media for the length of the retention cycle. In making this choice, each organization should examine its requirements for use and access, as well as any regulatory requirements that records must be retained in hard copy. However, eliminating one medium in favor of another once again facilitates the production process by shrinking the size of the collection.

Destruction Methodology

The organization should examine how electronic records will be destroyed. It is not sufficient to simply eliminate a marker or index to the record, since skilled forensic technologists can still recover the records. In addition, it may not be adequate to simply write over the record, since underlying data might still be present. The Department of Defense, in its guidelines defining requirements for electronic record-keeping systems, states that an RMS: "shall delete records and/or profiles that are stored in its repository and have been approved for destruction, in a manner such that the records cannot be physically reconstructed."⁴

Identification of Multiple Copies

To the best of its ability, the organization must destroy electronic records wherever they reside. It may be impossible to track records that end users save to floppy disks, but measures should be in place to require documents to be saved within an organization's networked environment. In addition, the organization's backup policy should be streamlined to require the regular recycling of backup tapes, so that only a defined number of backups can exist for any single document. The retention policy should state how long backed-up information will survive, once it has been purged from the main server.

Role of the Corporate Legal Department

Because of its critical importance to the organization's litigation management strategy, the corporate legal department should participate in the development of records management processes, policies and systems development. In many large

organizations, the corporate records manager reports directly to the general counsel, so that the legal department can provide immediate quality assurance and enforcement of the policy.

Management of the organization's records before litigation arises is the best way to reduce litigation costs and risks. Using an automated records management system, along with a defined policy and legal department support, is the best way to ensure that all required electronic documents are produced and that these documents have resided within a controlled environment. It is also the best way to manage and schedule the life cycle of organizational information, from creation through disposition.

Endnotes

- ¹ See William Saffady, *Managing Electronic Records*, 2nd ed., (Prairie Village, Kansas: ARMA International, 1998), p. 9.
- ² The declaration of e-mail to a secured repository should not take the place of an internal policy that governs e-mail creation and use. It is still important to discourage the casual or personal use of e-mail by company employees.
- ³ The methodology for developing retention policies and schedules is covered in many books and articles. Here are two excellent basic works: *Developing and Operating a Records Retention Program* (Prairie Village, Kansas: ARMA International, 1989), and David O. Stephens and Roderick C. Wallace, *Electronic Records Retention: An Introduction* (Prairie Village Kansas: ARMA International, 1997).
- ⁴ Department of Defense Directive 5015.2, "Department of Defense Records Management Program," §C2.2.9.3.

Contract Management

*by Curt Canfield
Hildebrandt International*

Corporate legal departments often struggle to draft or review contracts for the purchase or sale of goods and services. These chronically understaffed departments tend to be the last to learn of such transactions and find themselves rushing to resolve legal issues or just to turn the document around. Even though the legal department is critical to these significant revenue- or expense-generating transactions, it is often poorly equipped to deal with them.

Corporations all too often think of the legal department as a peripheral operation, counting it as overhead when it comes to staffing and technology. By the same token, contract management is often hit-or-miss because the emphasis is on closing the deal quickly and moving onto the next one. Sales has paramount consideration and, as a result, the contracting process itself, with all its careful review and crafting of terms and conditions, doesn't always get the attention it deserves. The same can be said for contract maintenance and all of its compliance functions. Proper contract management can, however, yield:

- 90 percent or more increase in compliance

- 75-90 percent decrease in erroneous payments (either to the corporation or its vendors)

- 50 percent faster contract negotiation

- 30 percent increase in renewal revenue

- 10-30 percent reduction in operating and processing costs (after initial, one-time costs for systems are factored in)

More to the point, contract management can result in savings of 10-25 basis points of revenue.

Hildebrandt recently undertook a Contract Processing Survey designed to benchmark how information technology (IT) product and service companies manage and operate their customer contracting processes. The survey was focused on five key areas: roles and responsibilities, processes, metrics, training, and technology.

The survey was sent to 29 national or global technology companies that sell both standard and sophisticated products or services, 16 of which completed and returned the surveys. An analysis of the survey results revealed three major themes:



No company excelled in the contracting process overall.

Although several companies had adopted best practices in some of the survey areas, none appeared to be applying them in most of the areas. In fact, none of the respondents seemed to have a significant edge. The fact that the surveyed companies may be selling to as well as buying from one another may help explain the lag in best practices. There are no clear leaders to set an example.

Customer contracting is still a manual, paper-based process; it is not as responsive or cost-effective as it could be.

Unlike other business processes, customer contracting has not yet been effectively reengineered to cut costs, increase service levels and reduce cycle times. The use of paper for drafting, tracking, filing, retrieving and managing contract documents entails longer processing times and more effort than would be necessary if the contracting parties had direct access to the required information and documents over their corporate network and a shared network with their customers.

Management of the contracting process is more art than science.

Of the respondents, only five indicated that they measured the volume or turnaround time for their customer contract processing. None of the respondents used a document management system to provide version and access control. And only three had a computer-based matter or contract management system to either track contracts in progress or profile executed contracts. This seems to be closely related to the second theme. It would appear that many groups do not gather and report metrics because, without effective use of IT, it is simply too time-consuming and subject to error.

In summary, the survey results indicated that, aside from e-mail and networked word processing, most corporations are still processing and managing customer contracts with yesterday's technolo-

gies and organizational structures. Though these results are somewhat disheartening, they do indicate an opportunity for significant improvements in cycle time, service levels and costs in all areas of the company—not just the legal department. Those improvements will, however, require significant investments in reengineering the existing technologies, processes and organizations associated with contract processing. The end result, however, would be closer and more strategic ties with customers, as well as increased internal efficiencies.

Getting the Job Done

Following are what we consider best practices in contract management. These practices are presented in the order they should be established, as the ones listed earlier provide the fastest payoff and serve as a basis for later measures. Where it makes a difference, they deal with the revenue or sales and marketing side of contract management. Clearly, there is also the expense or procurement side of the process. Most of the principles apply equally to both sides of the corporate equation, but it's clearer to discuss them in specific terms.

1. Structuring Deals

Customer contracting generally takes place on one of two levels: complex, custom contracts involving strategic issues or significant expense; or simple, standard contracts for commodity products and services.

Generally, the account executive first discusses the complex, custom deals with customer executives. If interest continues beyond this point, the appropriate business unit personnel (marketing, financial and technical specialists) are brought in to work with their customer's counterparts to further structure the deal in terms of technical details, deliverables, prices and timelines.

The legal and contract management group should be involved in these discussions as soon as practical to identify and resolve any potential issues or opportunities. For preferred customers, many corporations have developed a master agreement that covers non-deal-specific terms and conditions. In this event, a rider or supplement is subsequent-

ly prepared for individual transactions to address the unique aspects of that transaction.

2. Negotiation Protocols and Procedures

Establishing protocols and procedures at the outset of contract discussions sets expectations for both parties on manageable details and enables them to focus on the substantive elements of the deal as they work through the negotiation process. Resolving these protocols early in the process through a single meeting where each protocol is considered within the context of the offer is preferable to addressing and resolving each item on a piecemeal basis as it arises during the negotiation process. Specific discussion of these matters minimizes risk and eliminates the element of surprise. Following are the types of protocols and procedures that should be discussed at the outset of negotiations:

Which party drafts the initial customer contract

How changes are to be tracked and reflected in each draft

How drafts are exchanged

Time limits

Periodic status calls

Escalation processes

Once both parties agree to these protocols and procedures, it is best to confirm them in writing (e-mail or paper).

3. Requesting and Negotiating Simple or Standard Contracts

Simple or standard contracts are designed to streamline and simplify the contracting process for both the customer and the company. The requestor can be either the customer or the business unit personnel. Account executives should only be advised on submissions of these simple or standard agreements.

Ideally, the contract group will have a Web site that provides the requestor with direct access to an "intelligent" electronic contract request form or contract template that would present constant information and prompt the user for the variable

information to complete this form. These forms and templates will have hyperlinks adjacent to their variables that will provide the user with access to more detailed instructions, warnings or examples.

Once completed, the form would provide the user with a transaction ID (a reference number) and notify the appropriate person (via e-mail) to receive and process that request. The fulfillment of the electronic contract request form would be monitored for timeliness by workflow software. If the request is not fulfilled within a set number of days, the workflow software will follow programmed instructions and either route the form to another party for preparation or send an e-mail alert to management.

Requests for these simple, standard contracts should be sent to a responsible contract group member (a contract manager or analyst-titles may vary) who is familiar with the variable contract terms and the contract processing technologies. The standard document should be quickly and efficiently assembled by merging the stored variables (gathered from the contract request form) with the standard document template (text).

The responsible contract group member generally coordinates negotiations between the contracting parties (the customer and internal contacts). This interaction is generally well structured with simple, easy-to-follow guidelines for negotiating terms and conditions with the customer and instructions for contacting in-house counsel or the relevant business unit on questions that fall outside those guidelines.

4. Drafting and Negotiating Custom Contracts

Custom contracts generally involve technically or structurally complex terms and conditions or scope of work. They generally have significant value to the customer and the company.

The person requesting a custom contract is generally someone who is in a position to commit resources to the development of a contract, and who has a relationship with the customer execu-

tive authorized to ultimately approve the contract. This would either be an account executive or an executive in the business unit.

The requesting party completes an "intelligent" contract request form that is automatically routed to the appropriate drafting party. As with simple, standard contracts, these forms and templates will have hyperlinks adjacent to their variables that will provide the user with access to more detailed instructions, warnings or examples.

The electronic contract form requesting the drafting would be routed to each party via e-mail and monitored for timeliness by the workflow software. If the e-form is not completed and advanced to the next party within a set number of days, the workflow software will follow its instructions either to route the form to another party or to issue an e-mail alert to management.

Generally, a responsible contract group member orchestrates the contract drafting and negotiation process. This individual sets up a task list with assignments and a corresponding timeline to meet internal and customer expectations.

The statement of work is generally drafted by the business unit responsible for the products or services being contracted. The contract group manager will ask in-house counsel to draft the contract's terms and conditions and review the overall structure and content of the contract.

The contract group manager, either directly or indirectly, structures or directs contract negotiations with the customer. Generally, these negotiations involve not only negotiating with the customer, but also with the in-house counsel and with the internal business units providing the products or services.

These negotiations should be conducted with groupware-software that "memorializes" the flow of the negotiations (the logic of decisions) and enables the parties (internal or external) to go back and understand why certain positions were taken at certain points in time.

Quality control should be undertaken for all drafts going out to the customer. This process is simplified by using the document management system that provides version control on documents and document comparison (redlining) software which provides flexible formatting and processing of the comparison process with minimal effort. Quality control is generally a two-step process overseen by the contract group manager. The first step involves a check of the document's structure, format and spelling by the contract group manager. The second step involves a substantive review of changes to the terms and conditions or statement of work by the contract group manager and the parties responsible for the drafted or changed items.

5. Storing and Indexing Contracts

Companies can use the features and functions of their matter management system as a centralized contract management system. The system is maintained by either a central or distributed contract-processing group (the same group responsible for generating and tracking the contract from request to execution).

For contract management, the matter management system would have two major components: a contract profile database that would be populated with the variable data used to assemble the variable terms and conditions and statement of work of the contract, and a scanned image of the executed agreement that would show the original signatures and any initialed marginalia.

The contract management aspects of the system should be integrated so that users can retrieve and display an image of the contract itself from the screen that is displaying that contract's profile. The scanned image should also be accessible by searching on one or more of the contract variables such as product name, customer name, expiration date, effective date, etc.

This system should also be browser-based with the appropriate access controls to enable access by all authorized internal clients and outside counsel.

6. Document Exchange and Comparison

Submission of requests is done by accessing either an online, electronic contract request form or a document assembly template. Either of these two vehicles should prompt for contract variables, validate against a database of prior contracts and store those variables in a contract management database.

A member of the contract management group should be able to use a document assembly program to merge those stored variables into a boilerplate document template (standard or custom) and produce a final document in the company's word processing program. This word processing program should be able to output the file in a portable document format such as Adobe Acrobat's PDF.

Both the word processing document and the portable document are then stored and indexed in a document management system by the contract management group. The storing of the completed contract, in turn, triggers the workflow software to generate an e-mail notice (with a hyperlink to the document) to parties in the contracting process stating that the document is ready for review. The document management system provides these parties with version control, access control and powerful full-text and fielded search and retrieval facilities for these documents.

Contract processing parties outside the legal department or contract management group can click on the document hyperlink in their e-mail system to review and annotate the contract in the portable document format. The document management system then stores the reviewed document as a new version. Once the document is back in the document management system, an e-mail notice is generated to notify the contract manager or in-house counsel that it has been reviewed.

The contract management group can review the annotations in the stored document and make the appropriate revisions. If the annotations require a change to the stored variables in the database, then those changes are made to the database via

the electronic form, and the document is reassembled and stored as another new version of the original document.

If the changes are to boilerplate text, then the document in the word processing format is retrieved from the document management system, the changes are applied, and the document is stored as a new version of the original document.

Changes from version to version can be tracked and illustrated in a variety of formats using commercial document comparison software (also known as redlining software). These redlined versions can be saved as new versions of the document as well.

7. Escalation Procedures

Escalation guidelines (how issues are routed up the management ladder) are defined for particular terms and conditions and for statements of work related to particular products or services. These guidelines will be available in an online document management system with full-text search capabilities.

Workflow software provides an electronic escalation request form that will route an escalated issue to the proper authority and monitor the review and approval process so that the issue is resolved promptly. This software will provide management with metrics for measuring the number and duration of escalation issues.

Support Structures

To make these practices work, legal departments need to be able to track what is happening. They also need the human and technological resources to support the practices. Here are what we regard as the basics:

Metrics

Legal departments and contract management groups should collect and report chargeback statistics (time records and actual expenses), but not necessarily debit the requesting departments with those charges. Minimally, chargeback statistics should be collected and reported so that manage-

ment understands the cost basis for its contract processing operation and can make the appropriate business decisions regarding its budget, efficiency and service levels.

Workflow, document assembly, matter management and document management systems can be designed to measure volumes and turnaround times with minimal effort and a good deal of value. These statistics can help the legal and contract groups to monitor trends and focus resources on preventing potential problems or realizing potential opportunities to save costs or time.

These types of metrics should be unique to the company's business goals, objectives and strategies. The Balanced Scorecard philosophy is a good example of metrics that focus on and reinforce a particular company's strategic initiatives.

Metrics are less meaningful for complex and custom contract processing. However, they can be helpful, from a customer service level and from a future forecasting perspective, to measure variances (both over and under) between requested and actual turnaround times.

Training

All individuals involved in the contract process (internal and external to the legal department) should have regular, ongoing training in those areas related to their areas of responsibility.

The training organization (internal or external) is invariably determined by the scale, frequency and specific expertise of the training course and content. The training materials should, whenever possible, be tailored to fit the specific business unit (product or service) or positioned to make the effort more interesting and relevant to the trainee.

Technology

The contract group hosts an intranet or extranet home page to enable authorized participants in the contracting process (internal and external) to use their browsers to access information from core systems:

Online, "intelligent" contract request forms and contract templates

Profile information on executed contracts including, key dates, signatory parties, and other terms and conditions

Scanned image of executed agreements

Print image of contracts-in-process

Profile information on contracts-in-process:

Assigned contract group rep, business unit project manager and lawyer

Status of the contract-in-process

Contract terms and conditions

The contract management group uses the following core systems to produce, process, manage and store contracts:

1. Workflow software to shepherd the contract process from initial request through escalation and negotiation. This software uses electronic forms integrated with e-mail (for routing) and the case and matter management system (for storing contract variables).
2. Document production software including document assembly, word processing, portable document processing, OCR scanning, image scanning, and document comparison.
3. Document exchange software including network faxing and encrypted e-mail.
4. Groupware to provide facilities threaded discussions with hyperlinks to relevant documents, calendars, tasks and e-mail.
5. Case and matter (contract) management system to track the key data attributes of executed contracts and contracts-in-progress. This system will store the variables collected by the workflow or document assembly software.
6. Document management system to provide version and access controls of executed contracts and contracts-in-progress (as well as to facilitate their retrieval through profile and full-text searches).
7. Records management system to track the location of physical files.

eBilling Workflow: The Future Is Here

by Jeff Hodge
DataCert, Inc.

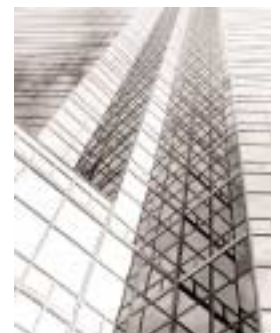
Electronic billing and accounts payable is a complex process, involving far more than the simple receipt of incoming invoices online. In fact, movement of an electronic invoice, while critical, is only one element of the problem being addressed by e-billing.

The movement of the electronic invoice is more than critical, it is key. It is equal in importance to the creation of the invoice on the law firm side or management of the invoice on the corporate side. Together, *creation*, *movement* and *management* are the three core components of an e-billing project.

The advent of the Legal Electronic Data Exchange Standard (LEDES), a standard for organizing the information in an invoice, and of the UTBMS (Uniform Task Based Management Standard) codes, a methodology and code set for lawyers to digitally code their time, have somewhat simplified the *creation* of an electronic invoice—though the industry is still far from standardization. Additionally, a few companies offer the service of controlling *movement* of the invoice from law firm to corporation, an absolutely critical component. In the process they clean the invoice, validate it, and apply electronic business rules with the goal of delivering only clean, useable data. The element that has until recently been missing and largely ignored is the *management* of the invoice after it reaches the corporate legal department. Most will understand this management as *workflow*, and it is this concept that most frequently drives a corporate e-billing project. (“How do we get this thing routed, approved and paid electronically?”)

Rather than using the generic term *workflow*, it is more precise to think of *modeled workflow*. That is, deriving an understanding of how any particular corporate legal department routes and approves its invoices and then modeling that process in a computer program. Of course, that workflow is never static and so the application must also give managers and supervisors, and perhaps even attorneys, the ability to modify the workflow in process.

Additionally, because one of the goals of any e-billing project is to pay invoices faster as well as communicate progress and adjustments back to the law firm, the workflow application must have secure messaging and transaction tracking capability.



After creation, movement and management, reporting and analysis of invoice data may also be important to the corporation paying the bills. However, reporting and analysis are not critical to the management of the invoice itself. In this sense, reporting and analysis are strategic goals, while e-billing is much more tactical or operational. In any event, e-billing is an absolute prerequisite to reporting and analysis. An e-billing project should therefore evolve from movement, management and workflow toward reporting and analysis. The reverse is simply putting the cart before the horse.

Creation → Movement → Management → Workflow → Reporting

Once an invoice arrives at the corporate legal department, the department can take either of two approaches. Option #1 is to deliver the invoice to a billing administrator who reviews and then routes it to the appropriate approver, simulating the manual process. This method removes paper from the workflow but does little to automate and streamline the administration of the invoice. Nonetheless, it may be preferable if the matter information the approver needs to use to match and create routing for the invoice is low in quality and needs careful review, and there may be other reasons to use this approach in some legal departments.

Option #2 requires some level of electronic storage for information about the matter being billed, including the approvers for the matter and their approval authorities. This information is typically kept at the corporate legal department in a matter management system (MMS). Alternatively, the workflow application itself should also be able to house this information independently for those lacking an MMS. The concept here is for the workflow application to be able to (a) establish information about the bill that it will give to approvers, and (b) generate an approval workflow for the bill based on criteria established by the corporation. The application should also be able to report back to administrators, or those in the workflow, about the results of these checks and the progress and outcomes of the workflow.

Routing

There are any number of criteria that can be used by corporate legal to route an invoice for approval. Some of the more recognized are dollar limits assigned to each approver, the role of the approver for a particular matter (supervising counsel, junior counsel or paralegal), matter type (litigation, employment, and so on) or the workgroup assigned to the matter. In a fully automated mode, corporate legal will have set up the routing logic before the first invoice arrives, will have established dollar limits, workaround criteria and time limits associated with the workflow.

Additionally, the department will have decided whether it is preferable to process invoices serially (from person to person in a linear succession) or

in parallel (the invoice simply needs to be approved by a given number of persons and once it has, the approval process is complete). Key to any workflow will be the assumption that the approval process must be pushed to conclusion—a necessary measure if one of the e-billing goals is to process invoices quickly.

Pushing work simply means assuming that workers are busy and tend to procrastinate, and that people take sick leave or go on vacation. The application's logic should give administrators the option of setting time limits for tasks. From there, the application should both remind and eventually push work around people who miss the deadlines, and perhaps notify supervisors if individuals do not perform their share of work.

Once the workflow has been set up, it is the application's job to tell individuals that they have work to do and then pull them directly into the work or open the invoice for them to begin work. Once there, the application should allow for any number of means of viewing, evaluating, and adjusting or commenting on the invoice, as would occur in a manual environment.

It should also provide tools, within authorized limits, to adjust the workflow if an individual feels overloaded. This allows the approver to pass the invoice to persons outside the established workflow or to hold the work for other approvers to complete their tasks. Again, the application should be flexible enough to model even the most complex manual process . . . within reason and with limits.

Resolving the Workflow

Resolving the workflow for an invoice simply means getting it paid and archiving it afterwards. The workflow application should have the ability to push an approved invoice electronically to accounts payable for payment and pull the payment record back to the application and associate the payment with the approved invoice. This functionality may be accomplished solely by the workflow application or may be shared with an MMS. The important point is the integrity of the final

approved bill and its association with the payment information. It may also be desirable for administrators to be able to print the final bill and manually route it for payment, and perhaps also to be able to manually input payment information.

E-billing ideally involves much more than creation and movement of the invoice from the law firm to the corporation. It elevates the value of an e-billing project immeasurably when the corporate systems can electronically mimic the manual workflow associated with the approval process.

