

How to Make the Contracting Function Better in Legal Departments

Opportunities

The contracting function represents a significant opportunity for law departments to exhibit leadership in providing value-added services within the company. Inside lawyers have a unique opportunity to combine effective legal advice with business understanding and company knowledge in leading and implementing change programs that are multidisciplinary in both the skills they employ and the organizational units they affect. The contracting function is especially well suited to this approach.

One of the benefits of strengthening the contracting function is that the return on investment can be seen in concrete financial terms. Improving contract management and administration can reduce the risk of losing revenue owed to the company through contractual arrangements such as licensing agreements. Providing systematic approaches and resources to the task of monitoring contract payments and terms can reduce financial leakage.

Threats

Failure to pursue opportunities can often become a threat or a risk. Legal support for contracting can become a source of irritation and dissatisfaction among law department clients throughout the company. Such dissatisfaction often results from the combination of factors: the ever increasing demands on the law department without increased legal resources to meet those demands; growing volume of contracting activity; rising pressure on business clients (by their leaders as well as their external contractual counterparts) to complete these activities quickly; and the sense of responsibility among inside lawyers to not rubberstamp the agreements that cross their desks. Beyond these factors, the technology revolution – especially the much loved/hated encroachment of email into everyone’s business lives – has had an enormous impact in raising client expectations about lawyers’ ability to provide virtually instant turnaround service.

In a broader sense, potential threats can be more significant than client dissatisfaction with the timeliness of legal services. Increased liability exposure, loss of intellectual property rights, unfavorable financial arrangements and a host of other risks accompany a poorly designed contracting function and process. Moreover, failure to organize and maintain contracts and agreements represent a major problem when disputes arise or in the context of regulatory reviews or governmental investigations that require access to complete company documents and records.

Elements and Scope of a Contracting Function Improvement Program

In this article, "function" refers to all of the key elements of a business activity: strategy, organization, staffing, management, policies, procedures, processes, systems, and performance measurement and reporting. Improvement may reach into any or all of these elements of the contracting function. Improvement programs may have a narrow scope – e.g. within a single element, process or department. To achieve real impact, a broader scope should be addressed. The improvement program may encompass many of the elements, reach across many different categories or types of contracts, and cover a world-wide or enterprise wide scope. The more ambitious the scope of the proposed program, the more important it is to clearly define the goals, boundaries and stakeholders and to obtain top-level sponsorship and support.

Contracting cuts across many parts of the law department. At the attorney level, a range of legal specialties need to be available for different types of contracts and agreements. Regarding efficiency and leverage, portions of contracting work can be delegated to trained and experienced paralegals and contract support staffs. Law department matter, document and knowledge management systems may be tailored to support specific aspects of the contracting process. Additionally, law departments may develop and maintain specialized systems and databases facilitate contract creation and management tasks.

More so than other areas of legal service, the contracting function involves wide parts of a company. By definition, it becomes a target for process improvement, which typically involves achieving better and faster communication, coordination and workflow across the different parts of an organization. It is also important to recognize the potential interrelationships and integration points between contracting processes and systems and other processes and systems. These related processes and systems may be at the enterprise-wide level, or in particular business units or staff functions, such as a procurement or strategic sourcing group.

Overview of Contract Management Lifecycle and Technology Opportunities

The critical elements of a contract management program follow the life cycle of the contract through five stages: creation, negotiation, approval, performance, and expiration. The appropriate degree of automation, process and controls for any one of these stages is driven by an array of considerations that are unique to each company based upon the company's industry, business drivers, and tolerance for risk across its various types of agreements.

Through data collection and analysis, law departments can determine the appropriate workflows, tools, and controls in each of the following phases of a contract's life:

- Management and assembly of templates and clauses to empower contract creation
- Real-time and asynchronous collaboration to enable contract negotiation
- Workflow and digital signatures to facilitate contract approval and execution

Contract administration to monitor performance and enforcement

- Records management to retrieve historical information at expiration

Because of the wide-ranging potential scope and mix of potential elements that might be included in a contracting process improvement program “ and the fact that many of these elements overlap or relate to other company processes and systems - identifying the right combination of process improvements and technology tools can be a challenge.

Contract Generation Evaluating the right solution “ ranging from form-filling software through macro/template software to complete document assembly tools - requires a solid understanding of the nature of the agreements in relationship to a company’s industry business practices as well as internal business characteristics. For each type of agreement, issues related to volume, negotiation, authority levels, and risk tolerance drive decisions like the need for clause selection which differentiates document assembly tools from macro/template software and the tools inherent within basic word processing software.

Contract Negotiation There are advantages and disadvantages of using real-time collaboration rather than asynchronous systems. Some companies have adopted third-party real-time collaboration tools while others rely on more basic, built-in utilities to facilitate collaboration. Companies need to determine whether the contracting process would be more efficient: 1) using a collaboration tool from one of the leading document management system vendors that links into a company’s existing systems via browsers; 2) using a distinct collaboration space; 3) a space that can incorporate customized, company-specific business processes, or 4) using an add-on to existing email-based document exchange.

Contract Authorization One of the biggest improvement opportunities “ via reduced delay and efficiency “ is in the contract authorization and execution stage. Process and system changes through workflow and business process automation tools can reduce bottlenecks and increase cycle time.

Contract Administration Contract administration solutions vary in complexity from simply adding fields to a document management system through having an independent database to a system that is fully integrated to accounts payable and/or accounts receivable and inventories. The variety of vendors and diverse levels of complexity of these products do not lend themselves to quick classification.

Contract Expiration/Retention The field of document and records retention has become a major corporate focus in recent years, with the emergence of new standards and scrutiny and the impact of litigation and electronic discovery. Document and records management vendors are continuing to update their core and electronic records management solutions to facilitate the adoption of more effective and compliant programs.