

Legal Project Management Tools for M&A

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Objectives of Legal Project Management

Increase speed, efficiency and effectiveness in M&A execution by using tools to:

- Increase the predictability and efficiency of legal spend, and reduce legal spend, with planning, budgeting, and reporting tools.
- Promptly identify gating items for the execution team. This allows the team to increase its focus on, and speedily resolve, these items.
- Decrease the time to close in a competitive environment.
- Enhance communication and coordination among team members, who are frequently geographically dispersed and operating in diverse business units.
- Increase in-house counsel's visibility to the focus, activities and legal spend of outside counsel. This enables in-house counsel to direct resources toward the highest value issues, to deemphasize less important issues and to manage costs.

A Project Management Tool For Budgeting Large Transactions



Bill Kleinman
Partner

Introduction

In-house attorneys are expected to control their outside legal costs. But when a transaction involves many outside attorneys working on many tasks simultaneously, costs are prone to exceed estimates—an embarrassing situation for all involved.

We have developed a project management tool that is built around a budget to minimize costs, drive efficiency and avoid billing surprises. The tool fosters greater planning, reporting and collaborative decision-making between in-house and outside counsel.

Nobody Likes Surprises

A transaction that goes over budget is a source of great frustration for in-house attorneys. The legal department is expected to adhere to a budget just like any other department. The client may view costs as excessive, and in-house counsel may wonder if hourly billing provides appropriate incentives for outside counsel to control costs. Outside counsel does not like to deliver a big surprise either. An unexpectedly large bill undermines goodwill, even for a transaction that has gone well.

Everyone Else Can Budget—Why Can't the Lawyers?

Before a corporation undertakes a major project, management spends much time planning the effort, examining alternatives and looking for efficiencies. Can we lawyers say the same thing about legal projects? Corporations frequently undertake large, complicated projects, like plant construction or software development, and complete them according to plan and on budget. Perhaps that is why clients are puzzled and frustrated when legal costs unexpectedly exceed expectations.

The primary method that attorneys use to manage costs is to review the monthly bill. Needless to say, a more effective way to manage costs would be to review costs as they were being incurred, not after. But there are real differences between a construction budget and a legal budget:

- In a construction project, the owner, general contractor, subcontractors and suppliers all agree to fix costs. In a legal project the opposite party to a transaction or lawsuit does not agree to fix costs; in fact, the opposite party may run up costs in pursuit of its own agenda. For example, a litigant may file numerous motions to impede the lawsuit and run up costs accordingly.

- Construction risk is easier to quantify than legal risk, and it is easier to allocate. An owner may know that Grade A441 structural steel is sufficient to support the load of the building being constructed. But what is the risk that the manufacturer of that steel will default on its delivery obligations, and what will be the damages to the owner? The owner is reasonably certain that there is no need to spend more for a higher grade of steel, but the owner wants the supplier to bear the risk of performance default. So, how hard should the owner's lawyers negotiate the provisions of the steel supply contract in order to put that risk on the supplier? When does the cost of additional negotiations exceed the potential benefit?

Although managers can expect a construction budget to fix costs, managers should expect a legal budget to minimize costs by (i) setting expectations and then (ii) giving the lawyers real-time information about the costs being incurred, i.e., an opportunity to exercise judgment when it can affect the outcome, not after the fact.

The Goals of the Project Management Tool

The project management tool we describe below is designed to do just that. Specifically, the goals of the tool are:

- To minimize outside legal costs, yet enable outside counsel to devote adequate resources to the project and do quality work.
- To efficiently allocate the workload between the legal department and outside counsel.
- To increase the ability of the General Counsel to manage the project while the work is underway, and make real-time decisions to narrow or expand the scope of work based on costs and benefits.
- To increase the ability of in-house and outside counsel to detect and respond to cost overruns as they happen.
- To increase the ability of the General Counsel to assess the status of the project, and to report to management that the transaction is on schedule and on budget.
- To bring the transaction in on budget, or to obtain approval before exceeding budget.

A Working Example: Budgeting for a Stock Purchase Transaction

The easiest way to understand the project management tool is to see it in action. A portion of a sample plan appears below. To use the tool, in-house and outside counsel

jointly work through five phases: planning, publication, monitoring, managing and assessing.

Planning: In-house and outside counsel break the transaction down into key phases, documents and tasks. In the sample, counsel have divided a stock purchase transaction into (i) drafting the principal documents, (ii) negotiating the principal documents, (iii) tax planning, (iv) benefits planning and (v) due diligence. The due diligence portion of the plan appears below. It reflects the key tasks, the key documents to be prepared, and the key assumptions that together translate into a budget.

The General Counsel and the outside Engagement Partner jointly have sought opportunities to prudently narrow the scope of the work and to efficiently allocate tasks between the legal department and outside counsel. In the sample, they have decided that the legal department is best suited to review the target's customer contracts, while outside counsel should review the target's financing documents. Seller's counsel will obtain third party consents, which will be monitored by in-house counsel.

Outside counsel estimates the cost for each phase. *With the project broken down to this level of detail, experienced counsel can prepare good estimates.*

Publication: The planning attorneys circulate the budget and explain it to the legal department and outside counsel. Thus, all participants know the scope of work and the budgetary expectations before the project starts.

Monitoring: Outside counsel creates a billing task-code for each phase of the project. Outside attorneys bill their time to the appropriate task-code and close their time by Friday of each week. On Monday morning, the Engagement Partner reviews a billing summary and reports to the General Counsel regarding the progress of each phase and its status versus the budget. The Engagement Partner is responsible to identify the source of any material variances. For example, the sample budget assumed that outside counsel would review 15 financing agreements, but the seller's counsel produced 15 closing binders instead, resulting in a possible expansion of the due diligence workload.

Managing: With this information in hand, the General Counsel can report to management on the progress and cost of the transaction. In addition, the General Counsel can decide whether the scope of outside counsel's efforts should be modified. (In the example, the General Counsel would consider whether outside counsel should review the full closing binders or keep the review limited to the financing agreements.) If the scope is expanded, the increased work

will be authorized, the budget will be revised, and a nasty surprise will have been avoided.

The Engagement Partner reviews the billing summary with the outside legal team so that the project leaders can manage their projects to budget and identify potential variances.

Assessing: After the project has been completed, the lawyers review their performance against the plan and budget, identify lessons learned, and refine the tool for the next transaction. Thus, the tool becomes a repository of legal expertise available to the entire legal department.

What it Takes to Make this Work

Besides the project management tool, the lawyers planning the project need several additional elements to make this process work. They need:

- Attorneys with an appetite for planning and a knack for visualizing an entire project.
- Outside and inside legal organizations willing to invest time and resources in project management.
- A teamwork culture and a cooperative, win-win relationship between the legal department and the outside law firm.

Takeaways

Due to the competing agenda of the party across the table in a transaction or lawsuit, the amorphous nature of legal risks, and the inevitable surprises and change orders in a transaction or lawsuit, counsel should not expect that simple cost budgeting will lead to precise control. However, counsel should expect that good project management, built around good legal budgeting, will minimize costs and increase the value obtained for legal spend. To budget for efficiency, counsel employing the project management tool should:

- Establish a reasonable range of expected costs for each task.
- Set targets at the low end of the range.
- Expect that requests will be made for increases in budgeted authority for some of the tasks, but that final costs will fall within the budgeted range.

**Purchase of Stock of Target
Sample Plan and Legal Budget for Buyer's Counsel**

Phase	Description of Work	Outside Counsel Budget Range
<p>Due Diligence, Disclosure Schedules and Third-Party Consents</p> <p>Task Code: _____</p>	<p>Tasks and Deliverables</p> <ul style="list-style-type: none"> <input type="checkbox"/> Prepare Due Diligence Request <input type="checkbox"/> Review documents Target produces. <input type="checkbox"/> Prepare Due Diligence Memorandum. <input type="checkbox"/> Review Target's Disclosure Schedules. <input type="checkbox"/> Obtain third-party consents <p>Division of Labor</p> <ul style="list-style-type: none"> <input type="checkbox"/> In-House Counsel will prepare the Due Diligence Request; Outside Counsel will review. <input type="checkbox"/> In-House Counsel and Outside Counsel will jointly review document production for completeness. <input type="checkbox"/> Outside Counsel will review approximately 15 financing agreements, 10 employment agreements, 10 pending lawsuits, stock ledgers and minute books. Local counsel, if needed, will be billed separately. <input type="checkbox"/> In-House Counsel will review all customer contracts, supplier contracts and site leases. <input type="checkbox"/> In-House Counsel and Buyer's staff will review employee handbooks and records, financial statements and industry specific documents. <input type="checkbox"/> Outside Counsel will prepare a Due Diligence Memorandum summarizing the materials it reviewed for In-House Counsel. <input type="checkbox"/> Seller's Counsel will prepare the first draft of the Disclosure Schedules; In-House Counsel and Outside Counsel will review and comment. <input type="checkbox"/> Seller's Counsel will obtain customer consents under the supervision of In-House Counsel. <p>Key Assumptions</p> <ul style="list-style-type: none"> <input type="checkbox"/> The Target's minute books have been kept up-to-date, are complete and have been maintained in accordance with sound business practices. <input type="checkbox"/> The Target's stock ownership records are accurate and reflect all stock issuances—there are no oral or other agreements relating to the issuance of stock. <input type="checkbox"/> Clean-up of problems, settling litigation and other matters not known at this time will be budgeted as they arise 	<p>Hours</p> <p>_____ to _____</p> <p>Fees</p> <p>_____ to _____</p> <p>Expenses</p> <p>_____ to _____</p>

Sample Legal Project Management Tools

Status Report: Asset Purchase Transaction

This **Status Report** should be used in connection with periodic status calls or progress reports for the deal. Frequency will depend on the complexity and speed of the deal. The report should be prepared by the General Counsel or Lead Outside Counsel with the intention of giving the deal participants a quick and concise overview of the status of the tasks, and helping them identify snags and gating items that warrant intensified attention. Ideally, the General Counsel or Lead Outside Counsel will survey the participants in advance of the call and then circulate an up-to-date Status Report, in order to keep the discussion crisp and on point.

Task	Target Completion Date	On Target? (Yes/No/Caution)	Status; Gating Issues	Action Plan
LOI				
Business Terms				
Draft				
Negotiate				
Purchase Agreement				
Draft Main Body				
Draft Economic Terms				
Draft Working Capital; Finance/Tax Reps				
Draft Specialized Reps				
Negotiate				
Financing Documents				
Related Agreements				
Due Diligence				
Financial/Business				

Task	Target Completion Date	On Target? (Yes/No/Caution)	Status; Gating Issues	Action Plan
Material Contracts				
IP				
Environmental				
Litigation				
Third Party Approvals				
Closing				
Integration				
Business Processes				
Information Systems				
Financial Reporting				
HR				

About Bill Kleinman



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Areas of Practice

- Mergers and Acquisitions
- Corporate Strategic M&A
- Private Equity - M&A
- Joint Ventures
- Capital Markets and Securities
- Corporate Governance
- Public Company Transactions
- Venture Capital/Emerging Company
- Licensing, Information Technology, and Intellectual Property Transactions
- Social Media
- Corporate Technology

Education

- J.D., University of Texas at Austin School of Law, 1983, Associate Editor, *Texas Law Review*
- Chemical Engineer, B.S., Massachusetts Institute of Technology, 1979

Bar Admissions

- Texas

Bill Kleinman focuses on corporate, securities and technology law. His experience includes public offerings and private finance, mergers and acquisitions, strategic alliances, corporate governance, SEC/S-OX compliance, and technology/commercial contracting.

Bill is a member of the ABA's Task Force on Legal Project Management. He assists general counsel and corporations that have robust legal needs by coordinating service delivery, project management and budgeting across all sections of the firm.

Bill was recognized by Best Lawyers in America in Mergers & Acquisitions Law, 2012-2015 and is AV® Peer Review Rated Preeminent by Martindale-Hubbell® Law Directory.

Bill's recent transactional matters include:

- Represented a private equity-backed international manufacturer in its acquisition of a U.S. operation focused on oilfield equipment, in order to enter the U.S. market.
- Represented companies in industries such as telecommunications hardware, enterprise software, wireless PCS and international distribution in IPOs, public offerings of equity and debt and 144A transactions
- Represented buyers and sellers of companies in industries such as technology, software, service, and industrial products in mergers, stock and asset acquisitions, auctions, private equity and ESOP transactions
- Represented publicly traded companies in connection with corporate governance matters, defensive measures and SEC reporting and compliance
- Represented industrial and service companies in connection

with the formation of domestic and international joint ventures and strategic partnerships

- Represented start-up companies and their investors in segments such as VOIP, network processors, semiconductors, outsourcing and internet media in seed and venture capital fundings, stock option plans, stockholder agreements and strategic agreements

Technology Capabilities

Bill graduated as a chemical engineer, and he has a broad understanding of the science and technology that drive today's most innovative companies. He helps companies implement technology intensive business strategies and transactions, and turn their technology advantage into competitive advantage. Bill has represented companies in the following industries:

- Aerospace
- Biomed/Drug
- Biotech/Devices
- Chemicals Manufacturing
- Clean Tech
- Communications Security
- Consumer Products
- Defense Electronics and Equipment
- Industrial Equipment
- Internet Media
- Materials
- Metals
- Networking
- Oil and Gas
- Outsourcing
- Power and Utilities
- Radio
- Remote Medicine
- RFID
- Semiconductors
- Sensors
- Softswitching
- Software

- Telecom Hardware
- Telecom Services
- Telecom Software
- Wireless Voice and Data

Publications and Presentations

- "Legal Project Management Tools for M&A," white paper, February 2015.
- "Challenges of Strategic Transactions," Association for Excellence in Corporate Development, September 20, 2012; June 4, 2013.
- "Strategic Partnerships in the Cloud," white paper, April 19, 2012.
- "Integration between In-House and Outside Counsel," *GC Netweavers*, February 2012.
- "Best Practices for Corporate Governance and Compliance," (Book Chapter), *Inside the Minds*, Co-Author with Larry Gaydos, Aspatore Books, 2008.
- "Managing Reputation Risk," Society of Corporate Secretaries and Governance Professionals, 2007.
- "Above and Beyond," *The Deal*, 2004.
- "Directors' Duty to Respond to Whistleblower Reports and Implement a Compliance Program," *Directorship*, 2003.
- "The (Developing) Role of the Legal Department Under 404," American Society of Corporate Secretaries, 2004.
- "Attorney Standards of Professional Conduct: Practical Implications for Legal Departments and Law Firms," Haynes and Boone's Corporate Officers Forum 2003.
- "Sarbanes-Oxley Codes of Ethics: Practical Considerations," Haynes and Boone Legal Officers Forum, 2002.
- "The Board's Duty of Oversight," Haynes and Boone Legal Officers Forum, 2002.
- "Practical Aspects of Going Public," Haynes and Boone Legal Officers Forum, 2002.

Honors and Recognitions

- Recognized by *Best Lawyers in America* in Mergers & Acquisitions Law, 2012-2014
- Martindale-Hubbell® AV® Peer Review Rated Preeminent

Memberships

- American Bar Association Task Force for Legal Project Management, (Business Law Section, Committee on Mergers and Acquisitions, Committee on the Regulation of Securities)
- Steering Committee, Association for Excellence in Corporate Development
- Board of Directors, Metroplex Technology Business Counsel
- Steering Committee, General Counsel Netweavers
- Partner, CEO Netweavers
- Fellow, Texas Bar Foundation
- Corporate Practices Committee & Public Company Affairs Committee, Society of Corporate Secretaries & Governance Professionals (2008-2010)
- Board of Directors, Texas General Counsel Forum (2008-2009)
- Development Board, University of Texas at Dallas (2006-2012)
- Co-Chair, Best Practices Program, Corporate Compliance Center (2004-2007)
- College of the State Bar of Texas (2005-2006)