



# It's More than Time and Money: High Stakes Dimensions of Productivity in Legal Practice

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## It's More than Time and Money: High Stakes Dimensions of Productivity in Legal Practice

The traditional lawyer's perspective on productivity can be myopic, focusing on the number of hours billed and dollars collected. The recently released *ABA Commission on Billable Hours Report* underlines the sad reality that the billable hour remains firmly entrenched in today's legal profession.<sup>1</sup> Both the ABA report and the legal profession in general often ignore the higher-level question of what other measures (or metrics) can – and should – be applied to determine value in providing legal services. In short, what does “productivity” mean in today's legal world?

When measured as a sum of all its parts, productivity is vastly larger and more complex than the traditional measures. Productivity, as we define it here, has at least seven dimensions, all of which have a fundamental impact on the competitiveness and efficiency of any business. We argue that the realities of life in our current economic climate compel a change in the business of law. Embracing the multi-dimensional perspective on productivity can open the door to new vistas for the legal profession: increased revenues, higher profitability, greater market impact, competitive advantage, optimized use of resources, more and better-leveraged intellectual, physical and digital assets, and greater momentum and overall viability. Examining the many facets of productivity and assessing how they can be integrated into your legal business could mean the difference between driving your legal business into the future or sitting at the back of the bus.

In this paper, we drill down to the business-transforming facets of the multiple dimensions of productivity in the legal world. We look at ways in which the imperatives of our modern world compel a change in the way lawyers view productivity in order to thrive in the current legal climate. We then examine the role that technology plays in the productivity equation – does it actually enhance productivity or simply create costs and add to overhead? Next, we identify ways in which the application of a multi-dimensional productivity model combined with the appropriate use of technology has improved productivity in several corporate legal departments.

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<sup>1</sup> *ABA Commission on Billable Hours Report 2001-2002*, American Bar Association Commission on Billable Hours, August 2002.

I. A New Perspective  
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in Business Today

Any assessment of productivity involves some measurement of output. Few would argue with the conclusion that productivity without associated value provides little benefit. A legal department that spends tens of thousands of dollars on outside counsel to research the same issue year after year, or a lawyer who bills thousands of hours a year but never collects the revenue, would not be considered productive endeavors, regardless of the amount of time or effort expended by those involved. In the legal world, where the output of a lawyer's work is largely a function of information, knowledge and skill, measuring productivity presents an even more daunting task than in other more tactile arenas such as manufacturing.

In order to assess the role of technology in legal productivity, it is important to understand the many facets that constitute productivity in today's world. Multi-dimensional productivity has at least seven high level elements:

- Faster
- Better
- Cheaper
- Increased quality
- Improved relationship capital
- Risk management
- Increased reward

Faster, better, cheaper, and increased quality are all readily identifiable, desirable attributes. The historical focus of lawyers has been on the billable hour, as an easy measure of productivity.<sup>2</sup> Going beyond these obvious metrics, however, are other less obvious, less tangible, but equally powerful, measures. Particularly for a lawyer operating in an information- and knowledge-oriented world, such intangibles play a key role in measuring productivity, and most importantly, determining the overall value to the client. They encompass and encapsulate the more important contributors to the overall value of a lawyer's work product to her client: creativity, expertise, risk assessment, relationship capital, experience and knowledge. These less frequently articulated measures of productivity, and their contribution to overall value, are the ones we emphasize here.

In a world where everything moves at a pace unimaginable a short time ago, speed is a key focus. "Faster" has several dimensions:

- Cycle time – the overall number of days, weeks or months it takes to complete a project from beginning to end;

<sup>2</sup> Interestingly, the billable hour has only achieved this status in the last forty years. Beginning in the 1960s, the billable hour became the chief focal point of valuing lawyer services. Prior to then, other methods such as flat fee pricing prevailed. The *ABA Commission on Billable Hours Report* suggests that inertia is one of the primary factors underlying the widespread use of billable hours as the key metric of lawyer productivity. If true, this conclusion suggests that an impetus to change this model may be all that is required to focus lawyers on new methods of valuing their services. As discussed in this paper, the trend in corporate legal departments toward focusing on the many tentacles of the productivity beast may provide the necessary momentum to institute a widespread change.



- Process time – the total number of hours actually consumed in producing the end work product; and
- Learning time – the amount of time required to achieve proficiency in a particular area.

Each of these elements of “faster” bears a role in assessing productivity.

Although frequently confused with “quality,” the concept of “better” emphasizes the process elements of completing a given output. “Quality,” on the other hand, focuses on the end result or work product. Better processes enable increased output, often at lower costs, thereby contributing to overall productivity.

Costs and expenses dominate most discussions of productivity. Just as conducting the same research over and over would not be considered productive, outputs that come with an extremely high price tag or have large cycle times (that is, take a long time to complete) also fail to increase productivity. Monitoring and controlling expenses, without sacrificing quality, is a key element of any productivity equation.

Many of the less intuitive measures of productivity hold the potential to provide the most benefit in changing the productivity equation for lawyers.

Productivity is frequently enhanced through higher “relationship” capital. Striving for long-term, strategic relationships with suppliers and customers holds the potential to increase productivity in a number of ways. Not only are efficiencies realized through methods such as consolidation among one or a small number of suppliers, but increased value arises from a consistent, mutually-beneficial relationship where each of the parties possesses deeper understanding of the business operations and needs of the other party, and works not only to enhance their own business but that of both their customers and suppliers. As we discuss in Section IV, improving its relationship capital has been a key element of the dramatic increases in productivity achieved by the DuPont legal department over the past decade.<sup>3</sup>

In some respects a corollary of relationship capital, decreased risk presents an obvious element of productivity for the legal world. Since legal services are all about risk and risk management, eliminating unknown factors, taking actions to manage and control risk, and otherwise incorporating aspects of risk management into a law department or law firm, bears tremendous potential to contribute to the overall value of an output. In the legal world, managing risk not only goes a long way toward reducing the total number of problems that consume lawyer time, but it plays a key role in controlling costs and increasing productivity. Bristol-Myers Squibb’s risk management program outlined in Section IV illustrates an innovative approach to incorporating risk management in an effort to improve productivity, both within the legal department and its interaction with the business as a whole.

Decreased risk presents an obvious element of productivity for the legal world.

<sup>3</sup> Sager, Thomas L. and Shomper, James D., *Moving Ahead With the DuPont Legal Model*, DuPont Publications (2001).

Not yet widely recognized, but a looming presence, is the concept of intellectual property risk management. As posited by Thomas Stewart in *The Wealth of Knowledge: Intellectual Capital and the Twenty-first Century Organization*:

“Treasurers and CFOs know a lot about currency risks, environmental and legal risk, political risk in developing countries, or risks such as fire, hurricanes, strikes and product liability; but the field of intellectual risk management basically doesn’t exist – and needs to, since intellectual risk is the real threat twenty-first-century-companies face. Like the drunk in the old joke who looks for his lost keys under the streetlamp because the light is better, risk management is dealing with visible classes of risk while greater, unmanaged dangers accumulate in the dark.”<sup>4</sup>

In the legal world, where intellectual assets are paramount, risk management of those assets becomes a vital element of the productivity equation.

Increasing overall reward – whether defined in terms of profits in the law firm coffer or beating budget in a corporate environment – is a paramount concern to most businesses, legal or otherwise. Since the primary goal of most business is to make a profit, the reward aspects of productivity are an important consideration in the overall equation. Increased revenue, decreased costs, increased profits and overall valuation all play an important role here. The DuPont Legal Model demonstrates some ways in which changing the reward equation can benefit all the players in the productivity equation.

In his book *How Digital is Your Business? Creating the Company of the Future*, Adrian Slywotzky discusses the role of productivity in the world of digital technologies.<sup>5</sup> Slywotzky identifies three criteria of the productivity equation: (1) moving from getting information in lag time to getting it in real time; (2) moving from guessing what customers want to knowing their needs; and (3) moving from burdening talent with low-value work to gaining high talent leverage. These dimensions of productivity manifest themselves in process changes, often through the implementation of technology solutions. As discussed below, Sears Roebuck’s implementation of a productivity improvement program in its legal department provides some insights into how this perspective can positively impact productivity in novel ways.

Quality issues often only become evident when significant problems occur.

Increasing quality permeates any assessment of productivity in numerous ways. The concept of “quality” is a subjective one. It bears a tangential relationship to pornography in that “you know it when you see it.” Most lawyers measure quality against standards that they have established for themselves and/or that have been adopted within their organization. While concrete measures such as correct spelling, grammar and punctuation provide some baseline metrics, at a higher level quality is much more complex and

<sup>4</sup> Stewart, Thomas A., *The Wealth of Knowledge: Intellectual Capital and the Twenty-first Century Organization*, at pp.224-225, Random House (2001).

<sup>5</sup> Slywotzky, Adrian J., Morrison, David J. and Weber, Karl, *How Digital is Your Business? Creating the Company of the Future*, Random House (2000).

ephemeral. Quality can have a long-term impact that is difficult to assess: a poorly drafted and hastily executed contract results in litigation several years later. Often, quality issues only become evident when significant problems occur: the company loses an important lawsuit, sanctions are imposed for failure to comply with a discovery order, or business is lost to a more nimble competitor. It may be impacted by other factors such as level of risk or specific time constraints. What is acceptable quality for one matter may be sub-optimal for another. What is acceptable quality to one lawyer may be shredding material for another.

Clearly, while articulating the dimensions of productivity may be relatively simple, finding concrete ways to measure the intangible is more complicated. As an increasing number of legal organizations are entering the relatively uncharted waters of new ways of conducting the business of law, productivity in all its dimensions becomes ever more relevant to staying competitive and vibrant. In an effort to illuminate the way in which some lawyers have tried to address these issues, in Section IV we examine several practical implementations of productivity-enhancing moves within corporate legal departments. First, however, we take a moment to consider the role of technology in the productivity equation and the ways in which technology is driving dramatic changes in businesses everywhere, including law.

## II. The Critical Role of Technology in the Productivity Equation

Nearly a decade ago, Forbes magazine published an article discussing the “Productivity Paradox.” The article highlighted the lack of any real measurable productivity increase resulting from the onslaught of technology in the preceding decade.<sup>6</sup> In summary, the author posits that technological improvements alone don’t increase productivity: the underlying business processes surrounding the new technology must mutate before true productivity gains can be realized.

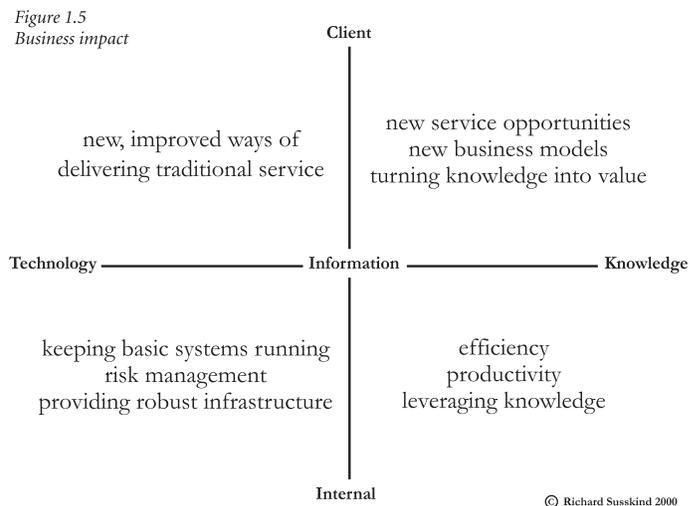
In his 1996 book *Only the Paranoid Survive*, Andy Grove discusses the concept of a “10x” change.<sup>7</sup> In short, he posits that when changes occur in an order of magnitude larger than the norm, businesses must alter the way in which they operate in order to survive the turmoil accompanying such enormous changes. Ultimately, the balance of forces will shift such that those businesses that fail to move from the old ways of doing business to the new ways of competing will not survive. We suggest that the legal industry is currently undergoing such a change. The forces of change in the legal world over the coming decade appear to be building to the level that only those businesses that radically alter the way in which they do business will survive. Lawyers who persist in the myopic billable-hours based view of productivity will not remain competitive.

Lawyers who persist in the myopic billable-hours based view of productivity will not remain competitive.

6 Rothschild, Michael, *The Coming Productivity Surge*, Forbes Magazine, March 1993. Rothschild’s article summarized an earlier paper by Paul David, a professor of economic history at Stanford. For an in-depth look from the perspective of economics, see, David, Paul, “Computers and Dynamo: The Modern Productivity Paradox in a Not-Too-Distant Mirror” in *Technology and Productivity: The Challenge for Economic Policy*, Organization for Economic Co-operation and Development, Paris (1991).

7 Grove, Andrew S., *Only the Paranoid Survive: How to Exploit the Crisis Points that Challenge Every Company*, Random House, (1996).

One view of technology's momentum in driving new ways of providing legal services is articulated in Richard Susskind's work, *Transforming the Law*.<sup>8</sup> Susskind cogently articulates the ways in which technology is pushing the legal profession inevitably toward new business models and new ways of providing legal services. He illustrates the business impact of technology in the legal world in the following diagram, highlighting technology's role in driving new legal business methods of the future.



In Susskind's view, lawyers have no choice but to integrate technology and adapt to the changes wrought by the impacts of technology on the world at large. Lawyers who stay mired in the backwater of merely using technology as basic internal systems are falling behind in the race to stay competitive in light of the many changes in productivity compelled by forces outside the control of lawyers. In short, lawyers no longer have a monopoly on information about legal issues. The billable-hour mantra will be overrun in the face of productivity changes wrought by ready access to information. Ubiquitous access to information and knowledge previously held only by lawyers may well be a 10x force, in the face of which the legal profession as we know it must either adapt and find new ways to turn its knowledge into value, or perish. The increasing movement toward radically altering the way in which corporations view legal services illuminates the beginnings of this hurricane force. Whether it hits you as a tornado or a welcome rain may well depend on your ability to take advantage of appropriate technology and use it to better manage your resources and your business before the storm arrives.

<sup>8</sup> Susskind, Richard, *Transforming the Law: Essay on Technology, Justice and the Legal Marketplace*, Oxford University Press (2000).

### III. Technology Can Enhance Legal Productivity and Change the Way Lawyers Do Business

Analogous to the Productivity Paradox posited over a decade ago, legal writers recently have discussed the impact of technology permeating the legal profession. For lawyers, however, the paradox has been described slightly differently: faster and more efficient lawyers make less money in a billable-hours driven world so why implement expensive technology that reduces hours.<sup>9</sup> As a result, the natural tendency has been to resist process changes that decrease the number of hours required to produce the same work product. The resistance is even higher to implementing technology that will increase efficiency and thereby drive down hours, and may require a significant outlay of precious capital.<sup>10</sup> Yet, increasingly law firms are faced with the reality that in order to remain competitive, effective use of technology is mandatory. As Susskind articulates, the forces of change are upon us, and lawyers who wish to survive must find a way to reinvent their value proposition. Clearly, the conundrum facing the legal profession is how to integrate technology into the law office, provide added value and increase productivity while maintaining profitability in the process.

Law firms are faced with the reality that in order to remain competitive, effective use of technology is mandatory.

Most lawyers and law firms today already have incorporated a significant amount of technology into their every day worlds. Desktop computers, email, PDAs, Blackberries, notebook and tablet computers, word processing, discovery tools, document management and timekeeping systems . . . the list goes on and on. Unfortunately, the Productivity Paradox remains all too prevalent in many legal environments today. Untold capital has been invested in sophisticated technology, but few strides have been made toward achieving true productivity gains through the use of that technology. How then, can lawyers utilize technology effectively and efficiently to achieve meaningful productivity gains? How can we apply the intellectual power of machines to the information knowledge of a lawyer to maximize the value of providing legal services in a technological world?

The questions contain at least part of the answer: "information" and "knowledge" are what lawyers are all about. Capturing that knowledge and allowing lawyers to re-use their expertise in ways that increase its value, as well as providing other lawyers with ready access to that expertise are two obvious areas in which technology seems like a natural answer. Technology also plays an obvious role in managing electronic documents. Putting technology to work in the discovery process to achieve tremendous productivity gains is a logical extension of machine power to increase the value of human intellectual capital.

<sup>9</sup> Lauritsen, Marc, *It's About Time: Break the Hourly Billing Habit. Let Automated Practice Systems Power Pricing Innovations*, Law Practice Management (April 2002).

<sup>10</sup> Hildebrandt, Bradford, *Increasing Productivity With Computers*, New York Law Journal (October 1991).

At Attenex, our focus is on developing software products that allow lawyers to achieve 10x – or higher – productivity gains. We focus on those areas of the practice of law that are ripe for such improvements: information management, or more particularly, electronic discovery, and knowledge management. The potential applications of machine power to the intellectual power of lawyers provide limitless opportunities to alter the way in which electronic information is handled in the litigation context. In the area of knowledge deployment, our products focus on easily and intuitively capturing the expertise of lawyers and maximizing the value of that information, both by the individual knowledge expert and efficient re-use by others within her organization. Our customers have experienced dramatic increases in productivity that empower them to think creatively in terms of the value proposition to their clients. Not only have they been able to loosen the shackles of the billable hour by doing their work better, faster and cheaper, but dramatic improvements in the overall quality, increased relationship capital and reward have been realized.

IV. Some Practical  
Implementations of  
Multi-Dimensional  
Productivity

Examples of the current trend toward using multi-tiered productivity measurements in corporate legal departments illustrate the need for lawyers and law firms to shed the myopia of the billable hour, focusing instead on the multi-dimensional aspects of productivity. Over the past decade, an increasing number of corporate legal departments have taken a fresh look at productivity, assessing it in ways that include many of the dimensions of productivity defined above. Examining several of these innovative approaches illustrates some ways in which successful legal businesses of the future will measure productivity and benefit from the forces of technological change.

### A. The DuPont Legal Model

The innovative DuPont Legal Model is a noted and laudable implementation of a multi-dimensional assessment of productivity. In the early 1990s, DuPont initiated a corporate-wide effort to increase productivity, looking to cut costs while improving quality. In fulfilling its role in this effort, DuPont's legal department set out to create a new set of metrics against which it could measure productivity – both in terms of its internal performance, as well as performance of its outside counsel and other suppliers.

At its core, the DuPont Legal Model focuses on many of the productivity factors that we outline above: relationship capital or strategic partnering, risk assessment, increased quality, reduced costs, internal and external reward equations, metrics, lag time to real time access to information, guessing to knowing client needs, and focusing on use of the best talent for high value work. Although the words used to describe these dimensions differ, the ultimate outcome is the same: focusing on the many dimensions of productivity allowed DuPont to incorporate technology into its legal business to drive business process and productivity changes of an unprecedented magnitude. Although the



model has evolved to address the changing legal environment over the decade since its inception, the current incarnation focuses on several key strategies and initiatives:<sup>11</sup>

- Improving productivity through statistically driven changes to legal processes that make them more efficient.
- Using technology to maximize the transfer and re-use of information among and between DuPont and its external information experts – outside counsel.
- Improving proactive and preventative legal processes by focusing on risk management and best practices for managing current liability.
- Creating financial incentives to maximize the risk/reward ratio for all participants.
- Improving quality and lowering costs through partnering with suppliers and outside counsel who have in-depth knowledge about and understanding of DuPont’s core business strategies and goals.
- Using paralegals to efficiently and effectively manage many of the day-to-day tasks that don’t require high-cost/high-value legal talent.

In short, DuPont has rejected the billable hour as a primary measure of productivity in favor of a more comprehensive approach that combines hard metrics such as time and quantity with intangibles such as quality, creativity, expertise (knowledge plus information) and experience. DuPont’s demonstrated success has opened the door to other corporate legal departments to join the charge in changing the way in which law firms and legal suppliers view the business of law.

## B. Sears’ Home Office Productivity Improvement Program

Another successful, although more recent, productivity-focused program is the Home Office Productivity Improvement (“HOPI”) program launched by Sears, Roebuck and Co. in August, 2001. HOPI represents Sears’ effort to increase productivity, reduce costs and improve the bottom line across the corporation.<sup>12</sup> The legal department’s efforts included acquisition of new technology and process changes that dramatically changed the way in which Sears’ in-house lawyers approached their tasks. While the newness of the program doesn’t provide hard data on actual savings, the consensus from Sears’ lawyers is that it has dramatically freed up their time to actually practice law and resulted in overall improvement in productivity and quality.

Although implementing new technology was a key component of the HOPI program, process changes turned out to be the true linchpin of productivity increases. As part of the program, Sears changed the way in which it developed reserves for legal claims. In revamping its old time and labor-intensive process, Sears narrowed the number of people involved, decreased time spent on the task,

Process changes turned out to be the true linchpin of productivity increases.

<sup>11</sup> For a detailed look at the many components of the DuPont Legal Model, see DuPont’s publication, *Moving Ahead With the DuPont Legal Model*, by Sager, Thomas L. and Shomper, James D., DuPont Publications (2001).

<sup>12</sup> Johnson, Lloyd and Kelly, Anastasia, *HOPI Helps Sears Identify Its Efficiencies*, Corporate Legal Times (August 2002).

cut the amount of guesswork, and eliminated the opportunity for manipulation of the system. All of this resulted in reduced costs and improved quality. In terms of our productivity dimensions outlined in Section I, Sears made their method of doing business:

- better
- faster
- cheaper
- higher quality, and
- based on knowing instead of guessing.

At the same time, Sears:

- relieved lawyer talent of the burden of low-value work to free them up to perform high-value work
- decreased risk
- increased the overall reward for the legal department and the company as a whole, and
- increased the legal department's relationship capital with business units and outside counsel.

### C. The Bristol-Myers Squibb Risk Management Program

Bristol-Myers Squibb's efforts to increase productivity within the legal department drove a creative solution to the venerable challenge of managing litigation within a corporation entrenched in a litigious industry. Looking out over the long term, Bristol-Myers' Legal Division had the foresight to examine its services in light of future needs of the corporation. It undertook the process of change by first examining whether the services of its Legal Division were properly aligned with the needs of the business. Were they flexible enough to address the future? Were they using the appropriate level of technology? Were they creating further productivity leverage by appropriately balancing internal resources with external resources?<sup>13</sup>

Bristol-Myers then focused on risk assessment as a primary component of improving the productivity of its litigation processes. By becoming more involved in the business strategy of its internal clients, and developing closer relationships with primary outside counsel, Bristol-Myers found that an increase in relationship capital combined with focused risk assessment measures had a profound impact on its overall productivity equation. A natural outcome of such focus was a dramatic decrease in costs – both the cost of outside law firms as well as decreasing the costs of litigation through discovery savings and lower claim payouts. By implementing technology to manage discovery costs and understand potential evidentiary exposure in the early stages of litigation, Bristol-Myers was able to make intelligent decisions about liability at a much earlier stage.

<sup>13</sup> Willett, Linda A., *A Winning Litigation Strategy: Using Risk Assessment to Avoid and Anticipate Issues in Litigation*, The Metropolitan Corporate Counsel (December 2000).



## V. Conclusion

Technology alone does little or nothing to increase productivity. On the other hand, technology designed in close collaboration with smart lawyers and processes ripe for improvement has the potential not only to increase productivity, but to fundamentally and positively alter the way in which businesses operate. In Slywotsky's terms, a digital lawyer is one who uses technology to devise new value propositions for its clients and the lawyers' own talent – one who expands the notion of the billable hour to include new methods of creating and capturing profit through increased productivity and value. In Susskind's view, lawyers who fail to take advantage of technology to leverage their intellectual prowess will be buffeted by the gale winds of the technology revolution and will quickly become obsolete. Take a hard look at your own internal business processes and those of your partners under the lens of a multi-dimensional productivity microscope. You may discover areas in which your organization could benefit from the implementation of appropriate technology to shore up your business processes so that you can capitalize on the new rigors of business in a world where incremental evolution is insufficient to stay competitive.

At Attenex, we design our products with a commitment to at least 10x productivity improvements and the forces of change in the legal world foremost in our minds. We invite you to examine the Attenex Patterns E-Discovery Platform and Attenex Structure Knowledge Assembler and learn how they can help you move into a world where you control and benefit from the forces of technological change – a world where you participate in altering the productivity equation of your business.

For more information about Attenex ,and the Attenex™ Patterns™ E-Discovery Platform or the Attenex™ Structure™ Knowledge Assembler please contact:

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