Cost Recovery of LexisNexis and Westlaw

By John Hoffman

For private law firm librarians, there are three great unsolved philosophical problems: (1) consciousness, (2) certainty, and (3) cost recovery of online services. Online service recovery is the process of administering and billing clients for the electronic services used on their behalf. Management of this process can be a frustrating, high-stakes task that involves librarians, senior firm management, billing partners, and clients.

What Librarians Are Up Against

Trends in the legal industry are not helping recoveries:

- More clients are refusing to pay for expensive online services.
- Billing partners, therefore, write-off more unbilled online charges.
- “Big Two” costs remain high. LexisNexis and Westlaw discourage firms from cherry-picking resources to lower costs. Recoveries are unable to offset contract commitments.

The industry has been nibbling on these issues for years. In the meantime, we have a budget to meet with recovery goals for the Big Two. We can’t change these trends, so what are our options for response?

Improving Recoveries by Changing the Recovery Model

A recovery model is a calculation to designate how online charges end up on client bills. Integral to most models is the idea of actual cost plus reasonable overhead. Overhead in this case is any cost associated with the administration of the contract. American Bar Association (ABA) Formal Ethics Opinion 93-179 phrases it: “The lawyer may recoup expenses reasonably incurred in connection with the client’s matter for services performed . . . so long as the charge reasonably reflects the lawyer’s actual cost.” Are the hours involved in administering the contract overhead? Is training? These—and most recovery model issues—aren’t for you to decide. Go to the designated attorney for firm matters in your office. While waiting for an appointment, please consider these models:

Retail price-based recovery models. Pass along the retail price from your invoice to clients. It’s simple, easy to explain, and it works—if you pay retail. If not, you will over-recover, and this you cannot do.

Retail price with sliding discount. This is a good model with a big problem. Take your monthly (or quarterly) usage—that’s a retail number—and what you paid for the service during that period, and derive a discount. Apply that discount percentage to all client billing. But as your usage goes up or down from period to period, the client will pay a different amount for the same search because of the changing discount. The clients (and your attorneys) will not understand.

Retail price with fixed discount. Review your usage trends over a longer period (maybe a year or two): look at what you paid, predict usage, derive a discount, and use this percentage for everything. The fixed discount model provides consistent charges, but predicting future usage is a problem. Frequent review and recalculation of the discount helps, but remember ABA opinion 93-179 and “the lawyer’s actual cost.” The discount percentage prudently tends to be set too low because of the danger of over-recovery. Potential recoveries are lost.

No recovery model. Shouldn’t we roll online services into the billable hour just like other office costs? What’s not to like—you can save administrative time and remove a major source of billing friction. But not all research is equal. Some issues require specific and expensive research tools. Some might not require using Lexis or Westlaw at all. Rolling-in may discourage the purchase of specialized research tools—tools that clients expect.

Lexis Advance and WestlawNext retail models. One model highlights billing per search and one by the document. In each case, anything free to the end user means lost recoveries. My instinct is that billing should be balanced between searching and document fees, a balance not available in the Advance or Next retail models. You’ll have to develop your own model, make your own recovery predictions, fuss, and worry.

Improving Recoveries through Efficiency

Recoveries can be improved through more efficient administration. OK, it’s time for a collective “arrgh.”

Client validation. If you haven’t implemented one of the web monitoring services (OneLog, Research Monitor, or others), remember that the Big Two offer proprietary validation of your client list. Validation saves time when you have to fix the mistakes and omissions at month’s end. These products are generally stable, but if the validator crashes, you may not be able to use the service.

Monitoring. Look at problem users, new folks, summer and fall associates—anyone with usage potentially out of line with the research value added by the expenditure. PowerInvoice (Lexis) and QuickView (West) will generate weekly usage reports. These are required reading. Most attorneys want to know when they have made a mistake—a mistake that will
get them in hot water with the billing attorney. When it's time for them—and you—to justify the expense, be ready to provide prompt search history backup and explanation. The Big Two get kudos for expanding their search history in Advance and Next to better coincide with the typical billing cycle.

**Policies and guidance.** An extra-large "ARRGH" here. What is your online recovery policy? Do you give attorneys the policy when they start and have them acknowledge it? Who do they call for help or online backup? What about out-of-contract costs? No matter how beautifully crafted, don't write a policy that you can't enforce!

**Data.** As you work through your policies and guidance, you'll find you need certain data points: usage, write-offs, recoveries, in-contract costs, out-of-contract costs, user data, practice group data. You'll need ratios: invoice price to recoveries, budget to recoveries. The Big Two may be able to compile some of these for you.

**Non-billable use and discipline.** Sometimes new or timid attorneys are reluctant to put in a client number. Sometimes the correct number is a mystery, and the attorney has to get going with the research. Don't let them bill the office! Get the correct client number! Even if you receive excuses and evasions, the idea that someone is watching often enforces the discipline needed for efficient research.

**Training and resource organization.** A training program in cost-effective use can increase total usage. This sounds wacky, and I don't have any numbers to support my claim. The Big Two have 40 zillion databases, and most searchers use about 20 of them. If you increase user confidence on the billing side and combine this with better knowledge of available sources, this should bring more usage and recoveries. Besides training sessions, don't forget to emphasize organizing research tasks on your intranet and highlighting high-quality, recoverable resources. Take advantage of any potential alignment between better research and better recoveries.

**Improving Recoveries on the Cost Side**

Now it gets tough. Take a break, have a coffee, and, if you're a careful reader, add a shot or two of espresso. While our mission as librarians to provide the best research to the firm's clients is unchanged, the research world is in flux. Over the past five years, has your usage of the Big Two increased or decreased? Are attorneys going to other subscriptions or even free sources to avoid write-offs? Lexis and Westlaw are amazing products, and both companies are dedicated to making themselves the best. But recoveries in the industry are declining, and the cost pressure on library managers is unrelenting.

**Contract negotiation.** The Big Two live in a difficult market. Each is investing heavily—Advance and Next weren't cheap—and their acquisitions and content additions continue. They want to increase revenue, firm research spend generally is flat, and the resulting negotiations are sometimes tense. The Big Two negotiate million dollar contracts every week, but what about you? If your firm doesn't have the resources to help you negotiate, remember that there are a number of good consultants out there who can help.

**Elimination of one contract.** Most of the contracted materials overlap, so can you justify having both? Is user preference the primary motivation in keeping both, or are there deeper research needs? Should you keep one contract but not bill it back? If you go with a sole provider and it doesn't work, where is your leverage when negotiating with the other vendor? Big decisions. The crown is heavy!

**Elimination of both and substitution with other vendors.** If your firm has a niche practice, maybe you can get by with neither of the Big Two. For a varied practice, it may be impossible not to have one. Free sources are very useful for background or overview, but when you want to be sure, log on to something for background or overview, but when you want to be sure, log on to something you want to be sure, log on to something you can trust.

Recoveries management is a critical, big-dollar task. For many years, private law firms have been flirting with treating online service costs as overhead. This change will happen, but don't hold your breath! Online recoveries, though dwindling, are still a solid chunk of revenue, impossible to resist. Recoveries budgets will be set optimistically, and the management challenge continues.

**John Hoffman**

(johoffman@mwe.com) co-directs the Research Department at McDermott, Will & Emery LLP in Washington, D.C.