

Valuing Litigation:

Lessons Learned from Collaboration

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Imagine a law firm designed by today's value-focused corporate counsel.

What would remain from traditional law firm models? And what would be scrapped as excessive luxury, outmoded practices or unnecessary costs? This precise exercise and others focusing on value in litigation were among the topics at a recent ACC Value Challenge, ABA Litigation Section Leadership event in Washington, DC, at which leaders of corporate and law firm litigation departments rolled up their sleeves and tackled the complex issues surrounding present day concepts of value in litigation.

The level of commitment and engagement by attendees demonstrated that litigation thought leaders, both in corporations and law firms, are keenly sensitive to how relationships have changed and to the economics of litigation in the 21st century. And the commonality of themes from both sides of the table was a surprise and cause for encouragement to attendees from in-house and outside. For example, while the attendees quickly acknowledged the apparent

divergence between corporations' desires for low costs and law firms' desires for high profitability, the conversations promptly moved to the more significant relationship "deal makers and breakers" that drive the choice of outside counsel.

An important take-away was that the firms that get — and keep — the business do so based on old-fashioned concepts of top service and value. Their skilled lawyers are trusted advisors, who communicate well and frequently, offering candor and transparency in their approach. While project management, budgeting and alternative fee options are increasingly critical to corporate clients, a clear message was that the core characteristics of the law firm providers of choice have not changed. Corporate counsel want to work with law firm partners who are aligned with them; who share their values; and who know their business. These basics are especially important now when all are experimenting with new litigation models.

The intention — creating models for experimentation

The symposium was the brainchild of the leaders of the ACC and ABA Section of Litigation, and in particular, Susan Hackett, senior vice president and general counsel of ACC, and Hilarie Bass, global operating shareholder of Greenberg Traurig, LLP, and chair of the ABA's 700,000 member Litigation Section. Their goal was to offer a safe arena in which to encourage candid dialogue, wrapped around real-life hypotheticals, to prompt law firm and in-house litigation department leaders to engage in a meaningful exchange about value. The focus was to equip participants to change their behaviors and to enable their focus on giving and receiving value — not just to learn what others are doing.¹

The ACC and ABA leaders tapped Laurie Miller, chair of Nixon Peabody LLP's Corporate Integrity Practice, and Barb Dawson, co-chair of Snell & Wilmer LLP's Commercial Litigation Practice Group, to spearhead this project. The experiment was a success. ACC and ABA thought leaders came together and collaboratively advanced the ball. Their collective experience allowed them to identify what works, and what does not work, in valuing litigation in a variety of scenarios.²

The participants — value-focused counsel who are up to the "Challenge"

The discussions were successful because they were not abstract ideas explored by people thinking about them for the first time. Instead, the participants were all seasoned veterans in creating and implementing alternative litigation models at significant law departments and law firms targeted to solve real-life problems.³

From the corporate counsel side of the table, participants ranged from those managing numerous firms in geographically diverse areas to those with more focused litigation needs.⁴ Most were responsible for the management of litigation teams with multimillion-dollar budgets and significant pressure for cost reduction. Some had used alternative fee arrangements for years — with varying success. Common themes that drove them to make the symposium a priority were pressure from above for budget cuts, law department goals of enhanced predictability and the personal desire for stronger, better law firm "partnering." The symposium's "value" focus meshed with their company's business needs, their team's agenda and their personal objectives. Throughout the



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two-day symposium, participants were interviewed, and their videotaped comments explain clearly why they attended — redefining "value" in litigation is a top priority across the board.⁵

The pervasive theme seemed to be that the old billable hour model, without more, may work for some types of projects, but is inadequate to meet more complex, future needs. Clients wish to redistribute the responsibility and risks of cost and unpredictability in litigation, and consider alternative approaches.

Offering the law firm perspective, relatively equal representation from litigation department leaders in

firms of fewer than 200 lawyers, between 201 and 499 lawyers and more than 500 lawyers, created a balanced range of views.⁶ The law firm participants expressed practical concerns. Firms are routinely offering value-based alternative structures and are still limited in data showing if their offerings are successful or not. Many clients say they want alternative arrangements, but balk and opt for the hourly discount later. Neither firms nor clients are comfortable in this process yet, and accordingly, are seeking external verification that their choices make sense.⁷

At the core, the engaged participants shared the desire to sort through conflicting objectives. Shared goals that came through loud and clear were the desire to work with in-house/outside counsel in a relationship of mutual trust and respect. That foundation — which offers nothing new or novel but has perhaps diminished over the years — appears to be particularly valued as both sides in the relationship take on new risks in pricing litigation apart from strict billable hour formats. It was clear that the stronger the in-house/outside partnership, the better the teammates expect the litigation models to work because an open relationship will allow for candor in communication about how the model is proceeding — and what needs to be fixed for it to succeed — without the fear of "gotcha" surprises too far down the road for workable corrections to be employed in course.

The experiment's platforms and programs

So what did the symposium participants do? The simple answer is that they role-played — again and again. The groups worked through real-life scenarios where in-house/outside counsel teams needed to structure litigation engagement terms that both sides could accept — without resorting to old-fashioned hourly models.

The thorny one-off litigation

As always, the devil was in the details as the scenarios provided plenty of real life thorny issues. For example, one hypothetical required the teams to come up with fee options for a one-off project. This scenario examined how client and firms who do not know each other, and have little historical experience or data on which to rely, can apply value concepts. A primary lesson learned was that communication is required up front. In that scenario, the law firm more likely would know the potential costs, assuming it had previously handled similar matters. In that circumstance, the success of any alternative fee arrangement would greatly depend upon the extent to which the in-house and outside counsel team had common expectations about what would likely occur and be included in the cost of litigation, so surprises based upon disparate understandings would not creep into the picture. Definition of “scope” was critical, lest the thorny one-off litigation quickly lead to multiple misunderstandings.

The portfolio of work

Another model for experimenting used as a working hypothetical the existence of a portfolio of similar operational work. The scenario examined how clients and firms who do know each other well can apply value concepts. Under this scenario, the teams explored ways to structure an engagement involving work for which both sides had prior representative experience with comparable cases, and accordingly, had a basis upon which to estimate costs.

Issues that arose in this scenario included the extent to which each side’s historical data would be shared, and again, both sides preferred an open relationship of candor in which a “win-win” situation might be achieved. With repeat work, the expectation was that the law firm would have internal teams up to speed so that the corporate clients would benefit from project management efficiencies. A common theme from the in-house side was that it was up to the law firms to manage for efficiency, just as in-house counsel must do within a corporate law department. With a portfolio of cases in which new or novel scenarios are not routinely encountered, the concept of “commoditization” came into play.

While this characterization has in the past caused outside counsel to cringe, it did not evoke such a reaction in the law firm leaders around the symposium tables. Instead, they saw such portfolios as a basis for enhanced efficiency on their side, recognizing that the firms that are out front in dissecting the case costs are going to be best positioned to profit under a model requiring flat fees for standard matters. In other words, this group did not “fight the hypo,” likely because their own experience tells them that alternative fee structures for routine work are coming fast and will be here to stay.

ACC Extras on... Driving Value

ACC Docket

- *Instead of the Billable Hour, What? A Proposal for Litigators (Oct. 2009).* Hate it or love it, employ it or avoid it, the billable hour has been the primary expensing tool used in the industry. In often variable and unpredictable litigation matters, it seems to be the only practical option to recoup charges — or is it? www.acc.com/docket/billhour_oct09
- *What Do Hours Have to Do With Value? (Oct. 2009).* This article gives in-depth background and possible solutions for assessing legal value and practices to add value. www.acc.com/docket/what-do-hours_oct09

ACC Value Challenge Resources

ACC Value Challenge resources offer proven tools and tips to help you save time and money, while increasing your value to senior management. For more information and resources, visit www.acc.com/valuechallenge.

- *ACC Value-based Staffing and Process Management Primer (Nov. 2010).* www.acc.com/value-based-staffing-primer
- *Nationwide Mutual Insurance Company: In-house Relationship Managers Play Key Role in Structuring and Maintaining Successful Relationships with Approved Counsel (Sept. 2010).* www.acc.com/relation-mgmt/nationwide_sep10
- *Viacom: Using Dashboards and Matter Management to Apply Business Rules to Outside Counsel Spend — Plus, Budget Training for Lawyers (Sept. 2010).* www.acc.com/vp/viacom
- *ACC Value-based Fee Primer (July 2010).* www.acc.com/value-based-fee-primer
- *Sample Employment Litigation RFP — Office Depot (July 2010).* www.acc.com/rfp-officedepot_jul10
- *Strategic Management of Technology and Resources to Increase Attorney Productivity ... Cisco's Approach (Nov. 2009).* www.acc.com/strat-mgmt/cisco_nov09
- *Value Practice: Value Matrix for Intellectual Property Matters — Alternative Fee Structures Based on Level of Difficulty, Staffing Mix, and Billing Guidelines and Informal Training (July 2009).* www.acc.com/value-matrix-ip_jul09

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The “draconian” scenario

Finally, a third scenario was used to rock the teams just when they became comfortable. Under this hypothetical, the C-Suite mandated permanent, across-the-board reductions in the overall spend of a size that required both the firm and law department to re-examine every aspect of the work and relationship, with no temporary “discounts” allowed. This scenario contemplated a 25 percent budget cut in the legal department for all outside counsel engagements. It required the teams to roll up their sleeves and find ways to reduce permanently litigation costs, leveraging value-based relationship structures, while keeping the goal of greater predictability in play. It was not enough simply to cut the billable hours by 25 percent. Different types of litigation called for different — and creative — problemsolving.

Following the use of these scenarios as the basis for experimenting, Susan Hackett led an open forum focusing on the use of the request for proposal or RFP. With the focus on process and format, she tested the idea of whether clients and law firms are able to agree on a model RFP process, and if so, what form it should take as a strategic tool.

Collaboration is critical in the brave new world

The lessons learned can be grouped into three categories: what we expected; what we feared; and what surprised us. What we expected was the shared view that alternatives to the billable hour are here to stay and the in-house and outside counsel who understand their case costs best will be ahead in this movement.⁸ What we feared was that we are at various experience levels, neither speaking the same language nor sharing the same expectations. Moreover, when we are in relationships where trust and candor are not at the core, the potential for bad outcomes is high for both sides. What completely surprised hardened veterans was the shared focus on relationships — with a common desire for open communications, teamwork, and adaptability — as this is a brave new world for all.⁹ Specific “findings” are discussed below.

First, in designing the perfect law firm litigation practice/law department litigation client:

- Both inside and outside counsel wanted to suggest that the other was responsible for most shortcomings;
- While cost dominates the discussion, the real “culprits” were not costs, but failures in efficiency, alignment staffing, data and management; and
- The most important attributes of good partnering were abundantly clear: trust and communication leading to increased certainty or predictability.

Turning to the hypotheticals, the “thorny one-off” experiment taught us:

- It is critical to have goal/staffing conversations before work begins;

- Where historical relationship data do not exist, we need to harness data from other matters;
- Set fees (or at least no surprises) are a high priority for clients; and
- Good communication and budgeting are critical to the success of the retention.

The “portfolio of value work” demonstrated:

- Good data plus cemented relationship allow for discussions about adjustments to the retention progresses;
- Staffing can be set and commitments predicted;
- This model allows for better associate training;
- It rewards continuous knowledge improvement; and
- It rewards preventive focus.

Challenges include: Can firms continue to lower costs each year? How do you become a preferred firm AND profit?

The “25 percent reduction” scenario shed light on the following:

- Discounts don’t work after a certain point — only a change in work methodology creates savings on a larger/more permanent scale;
- Process/project management tools are critical; and
- Early case assessment and disposal are essential.

Challenges include: Who assumes what risks? Can you provide other ways to drive acceptable results?

And, finally, the discussion surrounding RFPs made clear that RFPs may be used for both good and evil:

- Clients may use them to leverage current relationship firms with the threat of sending the business elsewhere;
- Firms may not intend to do what they bid; and
- RFPs are hugely expensive for both in-house and outside counsel.

All participants agreed that the model form should be short and simple, with the ability to attach more information on the baseline categories.

Where do we go from here?

The best take aways from this edgy experiment were in the form of predictions as to where we are heading in litigation management. The shared views included:


- The challenge is change/behavior management, not a question of “can you figure out an AFA model to apply;”
- Efficiency and accountability are not strong suits for many lawyers, especially when there are a lot of members on the team; and

- Evaluations (regular and granular) of the relationship are key.

From a practical perspective, what will bring the sides together most effectively are either or both sides opening the door — quickly — to candid and direct discussions about fee alternatives in the quest to tie litigation fees to value concepts. A surprising mantra from in-house attendees was that it is hard to start alternative fee discussions with long-time counsel. This perception may mean that outside counsel has an opportunity to add value simply by placing the issue on the table even in long and trust-based relationships.

What may tear the sides apart is the failure to communicate, be transparent and be true to one's word. Both sides value trust above all else, so it remains the key component for success.

Who will thrive and who will struggle will be interesting. Those experimenting now will adapt faster than those who are in avoidance mode. Those who see the challenges of providing — and proving up — value in litigation as opportunities will be well ahead of the game. And those who best manage the quantifiable data upon which alternative fee arrangements will be based are best situated to profit under this new paradigm. Teaching litigation teams about project management and alternative options now will allow those teams to flourish faster, as trial and error are unavoidable in this area, and practice is critical to ultimate success.

A major take away from the “Valuing Litigation” symposium is that the ongoing, open discussion of this topic adds great value for both sides.¹⁰ Clearly, the marketplace is fast evolving, and as ACC and the ABA Section of Litigation realized in structuring this forum, we all do better when we work together. 

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NOTES

- 1 View video clips of Hilarie Bass and Susan Hackett at www.youtube.com/watch?v=GpgZUWxfj_U.
- 2 View video clips of Laura Miller and Barb Dawson at www.youtube.com/watch?v=Wc0uqAcl2D4.
- 3 For example, the faculty were veterans of ACC Value Challenge initiative projects and master classes. They included Pam Woldow, a partner and general counsel at Edge International, Patrick Lamb, founding member of Valorem Law Group and Bill Garcia, executive director of Strategic Initiatives and a partner at Howrey LLP.
- 4 Participating in-house counsel included: Abbott Labs (Theresa Martorana); AOL, Inc. (Courtney Barton); AVAYA Inc. (Vito Carnevale); Brown University (Beverly Ledbetter); Bunge North America, Inc. (Beverly Garner); Chartis Insurance (Terry Williams); Comcast Cable Communications

LLC (Thomas Nathan); Computer Sciences Corporation (Raquel Tamez); Continental Casualty Co. (Michael Bruton); Darden (Sally Blackmun); Deere & Company (Julie Olszewski); Dell Inc. (Marc Vockell); Electronics for Imaging, Inc. (Alex Grab); FINRA (Terri Reicher); Illinois Agricultural Association and Affiliated Companies (James Jacobs); National Grid (Phillip Scott); Nationwide Insurance (Cathy Geyer and Martin Susec); Optinuity Alliance Resource Corporation, an MBIA Inc. company (Jonathan Harris); Prudential Financial (Eric Schwimmer); RBC (Emily Jelich); SanDisk (Carol Smith); Selective Insurance Company of America (Thomas Clark); SVB Financial Group (Chester Te); Victory Wholesale Group (James Office); Whole Foods Market, Inc. (Roberta Lang); and W.R. Grace & Co. (Dori Kuchinsky).

- 5 View video clips from corporate counsel explaining why they attended: AOL, Inc. (Courtney Barton); Illinois Agricultural Association and Affiliated Companies (James Jacobs); Brown University (Beverly Ledbetter); Abbott Labs (Theresa Martorana); FINRA (Terri Reicher); SanDisk (Carol Smith); Computer Sciences Corporation (Raquel Tamez); and SVB Financial Group (Chester Te), at www.youtube.com/watch?v=LvcrugJoedo.
- 6 Participating outside counsel included: Allen, Norton & Blue, P.A. (Susan Potter Norton and Brian Koji); Arnall Golden Gregory LLP (Ashley Kelly and Robert Rothman); Baker, Donelson, Bearman Caldwell & Berkowitz, PC (Roy Cheatwood and Jill Steinberg); Crowell & Mooring LLP (Robert Lipstein); Drinker, Biddle & Reath LLP (Michael McTigue and Gregory Miller); Fenwick & West LLP (Laurence Pulgram); Frost Brown Todd LLC (Alan Brown and Richard Moore); Jenner & Block LLP (Jerome Epstein and Lorie Masters); Lynn Tillotson Pinker & Cox LLP (Eric Pinker); McMillan LLP (Brett Harrison and Markus Koehnen); Sander Ingebretsen and Wake, P.C. (Richard Sander and Kirk Ingebretsen); Schopf & Weiss LLP (Steven Weiss and Paula Litt); Shipman & Goodwin LLP (Robin Frederick and Rob Simpson); and Sidley Austin LLP (Sara Gourley).
- 7 View video clips of outside counsel at www.youtube.com/watch?v=OHFQrEN6pJI.
- 8 View video clips of corporate counsel discussing their challenges, including: AOL, Inc. (Courtney Barton); Nationwide Insurance (Cathy Geyer); Illinois Agricultural Association and Affiliated Companies (James Jacobs); RBC (Emily Jelich); Abbott Labs (Theresa Martorana); FINRA (Terri Reicher); SanDisk (Carol Smith); Computer Sciences Corporation (Raquel Tamez); and SVB Financial Group (Chester Te), at www.youtube.com/watch?v=zFlh3H18muk.
- 9 View video clips of corporate counsel discussing what law firms do right, including: AOL, Inc. (Courtney Barton); Nationwide Insurance (Cathy Geyer); RBC (Emily Jelich); Brown University (Beverly Ledbetter); and Computer Sciences Corporation (Raquel Tamez), at www.youtube.com/watch?v=Uo8IIqy7PEQ.
- 10 View video clips of corporate counsel discussing lessons learned, including: Illinois Agricultural Association and Affiliated Companies (James Jacobs); Brown University (Beverly Ledbetter); and FINRA (Terri Reicher), at www.youtube.com/watch?v=TSmWgV5NT-4.