

InfoPAK<sup>SM</sup>

# Managing Value-Based Relationships with Outside Counsel

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In today's competitive global economy, in-house counsel are under constant pressure to deliver increased value to the client. This InfoPAK<sup>SM</sup> addresses a variety of methods for increasing value by improving relationships with outside counsel. It begins by outlining the steps that in-house counsel should take before retaining outside counsel, including setting goals and defining value, creating a strategic plan, and structuring operations to achieve success. The InfoPAK then examines the steps to take after a matter requiring outside counsel arises, including determining the scope of work required, choosing the right firm and fee-structure to maximize value to the client, managing the matter as it progresses, and evaluating performance once the matter is resolved.

The information in this InfoPAK should not be construed as legal advice or legal opinion on specific facts, and should not be considered representative of the views of the author or of ACC or any of its lawyers, unless so stated. Further, this InfoPAK is not intended as a definitive statement on the subject, but rather to serve as a resource providing practical information to the reader.

This material was prepared by the Association of Corporate Counsel with the assistance of Mr. Frederick Paulmann. For additional details, see the "About the Authors" section of this InfoPAK or go to [www.acc.com](http://www.acc.com).

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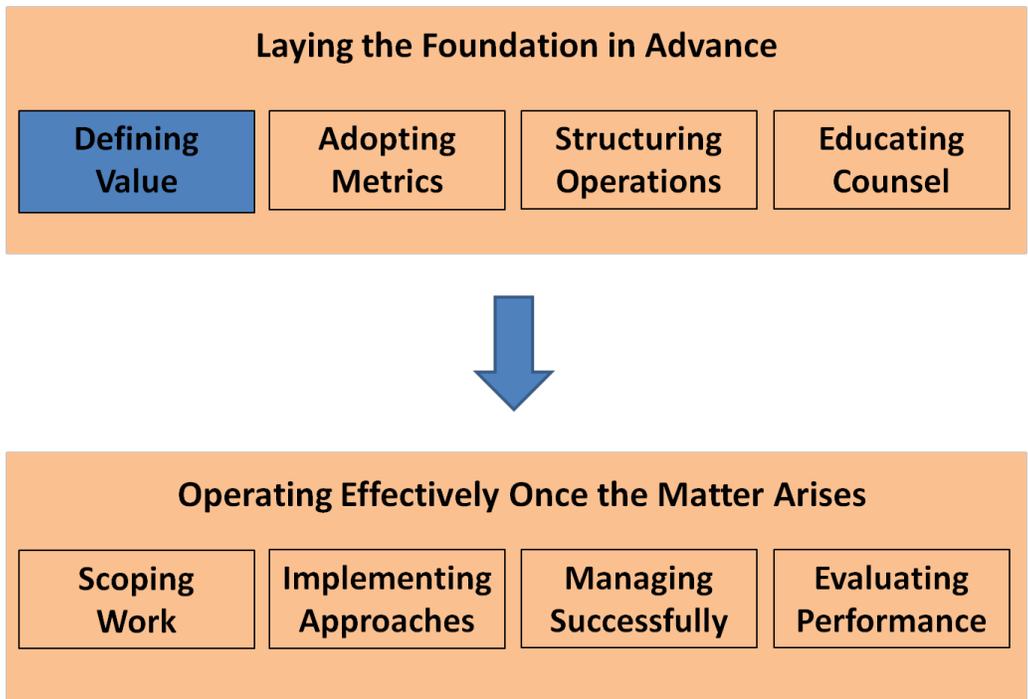
# I. Introduction

In-house counsel wear many different hats, ranging from skilled legal advisors to managers of vital legal services, with varied roles in between. However, a common theme running across all of these roles is the need to deliver greater value back to the client in an ever competitive global economy.

To support in-house counsel in these varied roles, ACC has launched its seminal *ACC Value Challenge*, has published an extensive collection of instructive materials, and has served as a leading source on innovative practices that help in-house counsel deliver greater value, which is discussed in detail in this InfoPAK. Specifically, this InfoPAK focuses on establishing and maintaining relationships with outside counsel in ways that are aligned with the law department’s and corporate client’s objectives.

The document divides the analysis of managing outside counsel into two main categories illustrated below: (1) Laying the Foundation in Advance (Section II below); and (2) Operating Effectively Once the Matter Arises (Section III below). Thus, it begins by outlining the steps for in-house counsel to establish a foundation for working with outside counsel (before a matter arises), including setting goals and defining value, creating a strategic plan, and developing an allocation plan. In the second part, after a matter arises, the InfoPAK examines strategies for determining the scope of work the matter requires, choosing the right firm and fee-structure to maximize value to the client, managing the matter as it progresses, and evaluating performance once the matter is resolved.

The below chart illustrates these two main categories of outside counsel management, with the components of each category listed horizontally:



## II. Part One: Laying the Foundation in Advance

### A. Step One: Setting Goals and Defining Value

“Begin with the end in mind.” This adage from Stephen Covey is a sound starting point when focusing on value-based relationships with outside counsel. It requires answering key questions, like:

- What do we, as a law department, seek to accomplish and why?
- How will we measure our progress?
- What are the best ways to achieve our goals?
- What resources do we need?
- What must we change and how?
- How do outside counsel and vendors fit into all of this?

Effectively answering these questions requires in-house counsel to first have a detailed understanding of business goals and business strategy, both currently and in the years ahead. Once legal department goals are aligned with the business goals, then the in-house team is in a position to effectively guide outside counsel on how they can best fit into these broader efforts and deliver greater value to the company.

Thus, a useful starting-point for in-house counsel is to develop and implement a strategic plan. A valuable resource to help with legal department strategic assessment is the ACC InfoPAK “Strategic Planning: Why a Plan is Needed and How to Develop One.”<sup>1</sup> It provides the following list of six steps in creating a strategic plan:

- Step 1: Understand the Corporate Strategy and Goals
- Step 2: Define the Department’s Vision, Mission, and Values
- Step 3: Understand the Department’s Differentiators
- Step 4: Define the Critical Objectives to Accomplish
- Step 5: Determine the Process Needed to Support Success
- Step 6: Identify Metrics to Measure Progress

(For details and a complete discussion of the above steps, see the InfoPAK, “Strategic Planning: Why a Plan is Needed and How to Develop One.”)

Next, in the strategic planning process, in-house counsel should answer four foundational questions in order to develop an allocation plan to best balance the mix of work completed in-house and work performed by law firms:

- Foundational Question #1: What Services is the Law Department Delivering to the Business?
- Foundational Question #2: How is the Value of the Services Prioritized?
- Foundational Question #3: Who Should Be Doing the Work?
- Foundational Question #4: What Can Be Done to Drive Costs Down?<sup>2</sup>

Addressing the foregoing questions will help a legal department to explain what drives value in its outside counsel engagements. For example, value can be driven by expeditious resolution of a major litigation, or effectively completing certain deals or transactions, or by providing advice and counsel to prevent certain issues from arising in the future. A law department should also determine which of the factors that “drive value” should take priority. In this way, each law department will ultimately define value in a unique and customized approach to fit its company’s specific goals and objectives.

Beyond subject matter (“the what”), there is valuable strategic guidance to be conveyed as to the manner in which the work is to be performed (“the how”). For example, what is the role of technology in utilizing existing work product and facilitating interaction among client, law firms, and vendors? How important are cost savings and what is the best way to achieve them? Is there a role for innovation in the delivery of legal services and emerging developments like alternative fees? What is the basic time frame for measuring success – one year, three years, five years? Answering these questions during the strategic planning process will help lay out a path for how best to structure outside counsel efforts and terms to deliver greater value in light of the client’s particular needs.

If planning – laying out the path – is the first part of the strategy equation, then monitoring progress to stay on course (and adjusting as necessary) is the equally important second part. This aspect of strategic execution goes far beyond a one-time planning process. It requires continuous effort in terms of aligning legal department structure with strategy, developing business skills among lawyers (inside and outside counsel), and building legal department credibility as a team that helps achieve business goals – even in the face of change.

The following resources elaborate on how in-house counsel can utilize these key aspects of strategic execution to deliver greater value.

## RESOURCES

Vicken B. Bayramian, “The General Counsel as Strategic Thinker,” ACC Docket 29, no. 2 (Mar. 2011): 23-27, *available at* <http://www.acc.com/legalresources/resource.cfm?show=1277470> (highlights the

importance of framing legal issues in the context of business advantage; see particularly, “Ten Ways to Improve Your Strategic Thinking,” p. 24).

Mark Roellig, “Making Your Legal Organization a Strategic Asset for the Business,” ACC Docket 28, no. 2 (Mar. 2010): 62-68, *available at* <http://www.acc.com/legalresources/resource.cfm?show=805483> (addresses how to align structure with strategy to achieve business objectives; also discusses use of a long-range strategic plan for the legal department, with annual measurement and feedback on progress vs. goals).

“Top Ten Tips for Speaking the Language of Your Business Partners,” ACC Top Ten (Oct. 2009), *available at* <http://www.acc.com/legalresources/publications/topten/speaking-the-language-of-your-business-partners.cfm> (see particularly #1, “Understand How Value is Defined, and #9, “Get the Best from Your Outside Counsel”).

“ACC Value Practice: Using a Disciplined Internal ‘Hoshin’ Planning Process to Enhance Alignment with Business Clients – Law Department Practices at Toyota Motor Sales, USA, Inc.,” ACC Value Practice (Sept. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=537228> (The annual process “allows the law department to demonstrate to business leadership that it is marshaling resources and addressing what is top-of-mind for them in a way that aligns priorities.” See also the included link to a sample strategic planning tool.).

## B. Step Two: Adopting Metrics to Measure Success

Increasingly, legal departments are being asked to join other divisions within the company in assessing performance in objectively measurable ways. Often, this involves creating “scorecards” to translate goals into measurable components intended to show progress and increased productivity. Whether you are required to do this or not, the approaches below are helpful in assessing various aspects of legal department operations and success. As you review them, it may be helpful to keep in mind the old saying: “you can’t manage what you don’t measure.”

The sources of data for tracking metrics are varied, but often come from places like:

- Matter management systems<sup>3</sup>;
- E-billing systems;
- Monthly reports showing number of new matters open, existing matters closed;
- Spending reporting from Accounting or Finance showing the amount of external fees and expenses incurred for various matters;
- Detailed budget reports for various matters (showing how money was spent and on which types of activities);

- Internal evaluations and scorecards concerning outside counsel’s performance; and
- Information from outside counsel.

There are several categories of metrics tracking effective legal department operations. Below is a list of those pertaining to outside counsel management (See the appendix in Section VI(A) for a broader list of metrics for internal law department operations, including individual in-house counsel performance metrics).

#### Outside Counsel Performance Metrics:

- Rate of overall success in achieving client goals (e.g., tracking “wins” where possible, or resolution of matters within expected parameters, or closing within a particular time period, etc.);
- Scores on qualitative measures assessed by in-house counsel, evaluating items such as creativity, responsiveness, efficiency, knowledge sharing, etc.;
- Financial metrics like the percent of matters for which a full year budget was submitted on time;
- Percent of matters managed for which forecast updates were submitted on time;
- Actual spending vs. budgeted spending, by matter;
- Comparative costs (what Law Firm A charges to produce a particular piece of work vs. what Law Firm B charges);
- Average blended rate for all law firm attorneys who billed to the client (i.e., divide total fees by number of hours billed, for each matter and across all matters); and
- Other process goals (i.e., goals relating to the process by which the work is completed), including timely completion or submission of:
  - Monthly reports;
  - Early case assessments; and
  - After action reviews / lessons learned.

#### External Spending<sup>4</sup> – Portfolio Management Metrics:

- Percentage of external spending allocated among the top 10 billing firms;
- Number of firms that bill 80% of the department’s external spending (see Endnote 4 for definition of *external spending*);
- Percentage of law firms that provide a discount (or that provide more than a nominal discount);

- Total value of discounts received as a percentage of overall external spending;
- Percentage of external spending allocated to alternative fee arrangements;
- Percentage of matters assigned via competitive bidding;
- Percentage of dollars spent working with women- or minority-owned firms;
- Percentage of hours worked or dollars billed by female or minority attorneys; and
- Number of internal evaluations completed regarding outside counsel performance.

In terms of frequency of analysis, the assessment periods will likely vary depending upon what is being tracked and the need for sufficient time to “course correct.” For example, a legal department might establish monthly tracking for items like actual spending vs. budgeted spending on key matters, quarterly tracking for items like number of outside counsel performance evaluations completed, and yearly tracking for items like amount of outside counsel spending managed per in-house attorney.

One of the most valuable uses of metrics and related analysis is determining how a particular figure fits within the context of other similar figures (e.g., comparative law firm costs to produce a certain piece of work). With targeted effort, you can tap several sources of information to produce this comparative assessment of metrics. First, look at your historical data. Some will be in useable format (either electronic or paper), while some may require a bit of “archeology.” If it is too hard to re-create the past, you can implement ways to effectively gather the data going forward, including targeted benchmarking, reviewing available surveys and data, and asking outside counsel about information they have on the historical costs and complexity of past issues and how that compares against their other clients.

The following resources elaborate further on the use of metrics to measure success.

### RESOURCES

“Viacom: Using Dashboards and Matter Management to Apply Business Rules to Outside Counsel Spend – Plus, Budget Training for Lawyers,” ACC Value Practice (Sept. 2010), available at <http://www.acc.com/legalresources/resource.cfm?show=1000941> (elaborates on use of real-time reports in managing matters and outside counsel).

“Assessing Legal Performance at Allstate – ‘Closing the Loop’ on Performance of Premier Law Firms and In-house Lawyers,” ACC Value Practice (Apr. 2009), available at <http://www.acc.com/legalresources/resource.cfm?show=189752> (describes use of annual surveys and related metrics to measure outside counsel and legal department performance).

“Outside Counsel Evaluations Lead to Enhanced Alignment and Value at Wal-Mart,” ACC Value Practice (Sept. 2008), available at <http://www.acc.com/legalresources/resource.cfm?show=39926> (discusses use of surveys and related metrics to measure outside counsel performance).

## C. Step Three: Structuring Operations to Achieve Success

Having decided upon a strategic course and set of metrics that will help deliver greater value, it is then critical to align both internal and external operations to execute these strategies. This entails, among other things, focusing on the core considerations below.

### I. Make Vs. Buy Analysis

One of the first steps in successfully structuring operations is conducting a “make vs. buy” analysis to determine whether there are certain tasks the legal department should be doing more or less of. By comparing core competencies, relative cost to produce, and available (or readily attainable) capacity, in-house counsel can make a very strong business case for effective use of company resources through a customized mix of work performed internally versus externally.

A valuable resource to guide this assessment is the ACC Value Practice Primer, “Using a Structured Process to Allocate Work.”<sup>5</sup> It outlines the following five core phases of analysis for in-house counsel to ensure efficient utilization of internal and external resources:

- **Assessment:** Identifying the current baseline approach to providing legal services – internal and external – to the business;
- **Value Prioritization:** Ordering tasks according to competitive advantage and risk potential;
- **Work Allocation:** Determining who should be delivering the services (e.g., in-house or outside counsel; attorneys, paralegals or managers; and law firms or vendors?);
- **Implementation:** Smoothly transitioning to the new work allocation; and
- **Measurement:** Ensuring desired results are achieved and/or course correcting to improve as necessary.

The following resources elaborate further on efficient utilization of internal and external resources.

#### RESOURCES

Kenneth A. Cutshaw, “Within the Legal Department, History Repeats Itself,” ACC Docket 28, no. 2 (Mar. 2010): 20, *available at* <http://www.acc.com/legalresources/resource.cfm?show=805966> (addresses the benefits of in-sourcing e-discovery work).

“Legal Process Outsourcing: A How-To Guide on Legal Process Outsourcing,” ACC Value Practice (Sept. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1112956>.

“Informal Outsourcing Checklist for In-house Counsel,” ACC Quick Reference (Oct. 2008),

available at <http://www.acc.com/legalresources/resource.cfm?show=402344>.

## 2. Preferred / Panel Counsel

Once the legal department has identified the scope of work to be performed by outside counsel, there is a core decision to be made as to whether the company would benefit from a preferred / panel counsel arrangement with fewer law firms and vendors. The terms “preferred counsel” and “panel counsel” are often used interchangeably to describe an arrangement under which the legal department and company consciously consolidate work among fewer law firms and vendors in exchange for preferred terms.

The degree of formality of these agreements varies. It ranges from a rigorous application and negotiation process to designate a list of firms who are “in,” to a more informal vetting of firms who, over time, perform higher volumes of company work based on preferred terms and performance, even absent a formally designated list.

The decision as to whether a preferred counsel structure makes sense for the company is a highly individualized assessment best made by the in-house lawyers who are closest to the work and most familiar with the client’s legal service needs. The potential benefits of preferred relationships should be weighed against potential drawbacks. The chart below highlights both sides.

<b>Preferred Counsel Arrangements</b>	
<b>Potential Benefits</b>	<b>Potential Drawbacks</b>
<ul style="list-style-type: none"> <li>■ Closer working relationships, producing better knowledge of the client’s business and operations;</li> <li>■ Savings via preferred terms and greater efficiencies;</li> <li>■ Better knowledge-sharing when fewer firms become more accustomed to collaborating to drive efficiency and manage risk; and</li> <li>■ Reduced administrative burdens (over time) in managing fewer firms.</li> </ul>	<ul style="list-style-type: none"> <li>■ Substantial investment of time and effort upfront to structure the program;</li> <li>■ Reduced flexibility in assigning new matters if the legal department is committing to assigning certain matters to preferred firms in exchange for more favorable terms;<sup>6</sup></li> <li>■ Potential lack of savings if many leaner, cost-effective firms are replaced with fewer bloated firms that end up costing more; and</li> <li>■ Risk of complacency among entrenched firms on the list who may not have the same levels of efficiency incentives in light of reduced competition from the broader law firm market.<sup>7</sup></li> </ul>

The following resources provide additional discussion, as well as actual practice examples from legal departments, on preferred counsel arrangements.

### RESOURCES

“Pfizer’s Legal Alliance Program: Collaboration and Focus on Relationships Produce Better Legal Outcomes and Cost Savings,” ACC Value Practice (Mar. 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1279390>.

“Levi Strauss: Global Partnerships for Corporate, Commercial and Intellectual Property Work,” ACC Value Practice (Mar. 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1279401>.

“How to Base a Partnering Program on Sound Principles,” ACC How To (Oct. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=56759>.

### 3. Quality Practices (Project Management, Technology, etc.)

A prime factor in determining the success of the law department’s outside counsel management efforts will be the quality of the management practices adopted – not those that exist on paper, but the ones actually used as a matter of routine.

Ensuring quality in actual management practices is often one of the biggest challenges facing legal departments. With important and pressing legal work to be done, the items that often get postponed are management-related tasks or “initiatives” that are important, but don’t register the same sense of urgency. Add in the fact that adopting quality practices often involves project management, financial analysis, operational change, and technology implementation – disciplines that many lawyers are not inherently familiar with – and the magnitude of the challenge becomes no surprise.

Below is a list of quality practices to review and consider in terms of whether they would help you and your department better manage value-based relationships with outside counsel. While you may have already implemented some of these practices, you may find ways to further refine and improve your approach so that you manage more effectively and, ultimately, maximize the value your company obtains in purchasing legal services.

- **Designate in-house relationship managers for core law firms.** Several companies have appointed in-house lawyers to serve as relationship managers for designated law firms with whom the company works closely. Benefits can include higher levels of responsiveness when law firms know their performance will be reviewed annually in a process led by the in-house relationship manager. The review process

can be as informal as periodic check-in meetings, or as structured as an annual process with objective scorecards and performance metrics. The law firms may also find it helpful to have an internal contact to help address questions and field suggestions. (For additional details, see ACC’s Value Practice, “Nationwide Mutual Insurance Co In-house Relationship Managers Play Key Role in Structuring and Maintaining Successful Relationships with Approved Counsel.”)<sup>8</sup>

- **Appoint one or more business managers internally.** To help in overcoming the time constraints described above, many companies have appointed non-attorney managers to help with important items like budgeting, forecasting, invoice review, and tracking performance scorecards. In some instances, these functions are performed by skilled paralegals. In others, the roles are filled by operations managers or finance or procurement managers. Depending on the scope and volume of work in the legal department, these roles can be structured as full-time positions, or as overflow or temporary help (where the person helps as a portion of their broader responsibilities).
- **Manage information and technology more effectively.** Legal departments are increasingly focused on how to use technology more effectively as a tool to increase productivity. Leveraging technology often involves key decisions about how the department’s work product, knowledge, and related information are assembled, stored, and re-used in the future. It also involves decisions on how technology can improve the flow of communications between inside and outside counsel. The following resources shed light on some helpful approaches in this area.

## RESOURCES

“Using Knowledge Management to Drive Value in Departments and in Firm-Client Relationship,” ACC Value Practice (Jan. 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1269800>.

“Data Analytics to Support Value-Based Fee Structures,” ACC Value Practice (Jan. 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1269660>.

“Hartford Financial Services: Legal Intranet Enhances Communication, Consistency and Efficiency,” ACC Value Practice (Aug. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=980136>.

“Mozilla Corporation: Maximizing Efficiency and Capturing Meaningful Process Metrics Using Matter Management,” ACC Value Practice (Aug. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=988404>.

“Electronic Billing – the Basics,” ACC QuickCounsel (Nov. 2009), *available at* <http://www.acc.com/legalresources/quickcounsel/ebtb.cfm>.

“Leading Practices in Electronic Billing: A Technological Tool for Corporate Legal

Departments” ACC Leading Practices Profile (Mar. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=168911>.

- **Conduct early case assessment to lay-out a strategic road map.** Many legal departments use a formal “Early Case Assessment” process to front-load fact investigation and strategic assessment with respect to a new matter. The commonly-cited benefits include: better lawyering as the matter progresses when the desired end-point is more clearly in focus; stronger interactions with the client when the options are assessed more concretely; and better management of outside counsel resources when the matter and budget assumptions are laid out in more detail.<sup>9</sup>
- **Adopt better approaches to budgeting, forecasting, and invoice review.** Regardless of who is responsible for budgeting, forecasting, and invoice review – in-house lawyers or other managers – there are tried and true approaches that legal departments have used to make these processes more effective. These include use of templates, data analysis to determine what the client is purchasing and what it should cost, and proper assessment of compliance with client-billing guidelines. The following resources provide additional insight on these approaches, with practice examples from actual law departments.

## RESOURCES

“How To Adopt a More Effective Invoice Review Process,” ACC Value Practice (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=709490>.

“Value Practice: CIGNA - Nailing the Basics,” ACC Value Practice (July 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=425083>.

## D. Step Four: Educating Outside Counsel and Inside Counsel

Having great policies or procedures that exist only on paper is of limited use. Recognizing this, leading legal departments have worked to educate counsel (inside and outside) on how to operate more effectively to help achieve the legal department’s goals. These educational efforts can take the form of a “kick off” meeting to elaborate on a big new initiative (like an outside counsel management program), or they may occur periodically as part of an annual review. Beyond conveying information, these efforts are often cited as a way to emphasize management’s commitment to improvement and as a way to strengthen relationships between inside and outside counsel. The following resources provide some additional guidance on educating outside and inside counsel.

### RESOURCES

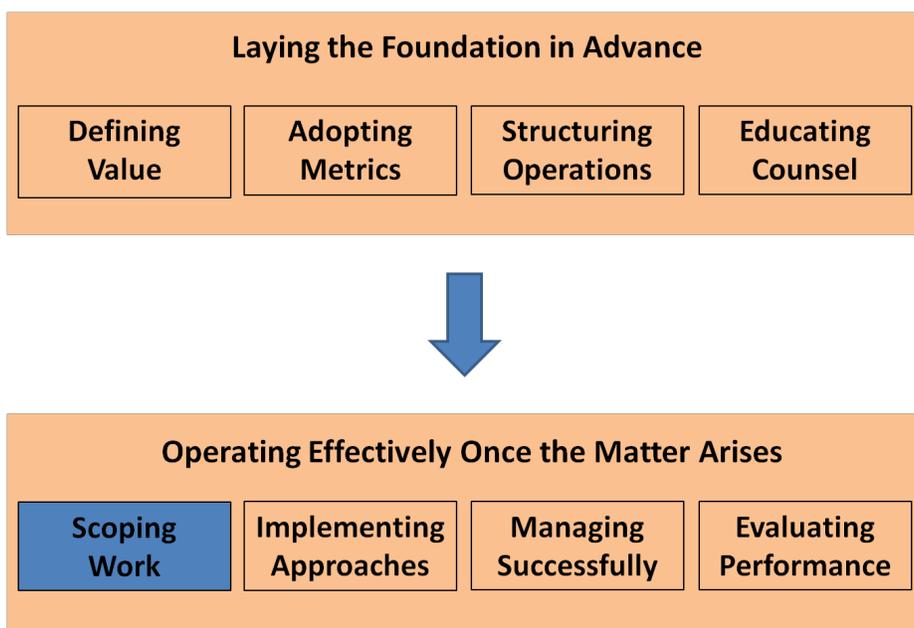
“Communications and Training for Preferred Provider Panel Law Firms: Focus on GE’s Mergers and Acquisitions (M&A) Panel,” ACC Value Practice (Sept. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=40315>.

“Pfizer’s Legal Alliance Program: Collaboration and Focus on Relationships Produce Better Legal Outcomes and Cost-savings,” ACC Value Practice (Mar. 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1279390>.

“Assessing Legal Performance at Allstate - 'Closing the Loop' on Performance of Premier Law Firms and In-house Lawyers,” ACC Value Practice (Apr. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=189752>.

## III. Part Two: Operating Effectively Once the Matter Arises

The issues described in Part One of this InfoPAK pertain to planning and execution outside the context of any particular matter. Ideally, much of that foundational work should be done in advance, so that once an important new matter arises you can hit the ground running and focus your energy on the matter-specific decisions addressed below. Like Part One (Laying the Foundation), Part Two consists of four main elements or phases, each of which is discussed in detail below.



## A. Step One: Scoping Out the Work

A critical first step once a new matter arises is scoping out the work to identify what needs to be done to achieve success. This may be obvious on some level, but “the devil is in the details” in order to achieve proper execution. The focus here must go beyond a gut feeling that items such as the staffing plan, the rates, and the budget “look right,” to a more exact level of detail enabling sound project management within a legal matter.<sup>10</sup> This may represent more administrative effort than some in-house counsel are accustomed to or comfortable with, but the benefits are legion. Effective project management (both in-house and within law firms) enhances the ability to implement value-based fee structures (like alternative fees) and manage outside counsel work in a more cost-effective way (even if the traditional hourly rate model is used). Discussed below are three methods for obtaining useful information on the projected scope of a new matter.

### I. Examine Existing Information within your Legal Department

Existing information within your legal department is a good place to start when defining the scope of work to be performed for a particular matter. If your department has handled several similar matters in recent years, then you have some reference points to help you address issues like:

- The work to be performed;
- The size of any outside counsel team required;
- The types of resources required;
- How the matter might unfold in terms of timing and duration;
- The sequence of steps in terms of project management; and
- The price you have paid for similar services in the past.

Depending on how your department functions, you can gather this information by:

- Speaking with your colleagues who have worked on these matters;
- Mining technologies/databanks that have captured data that can be useful;
- Reviewing summary documents (like status reports, budget templates, forecast updates, staffing plans, and project management documents) that were used to manage similar matters in the past (If you do not have these handy, perhaps past outside counsel might); or
- Checking electronic matter management and e-billing systems, depending on how effectively they are used in tracking key components of matter activity.

If you struggle to locate this information and you do not use summary management documents like those listed above, consider how you can improve your approach to gathering and keeping this information for future use. Ask outside counsel to provide this information in an effective

way, and then store it so it can be retrieved later. Also look at automated options that make the capture and future retrieval and manipulation of this information easier.

## 2. Tap into External Sources

If you are facing a new matter and your company has no relevant existing information to review, tap other sources – like other inside counsel – to discuss their experiences and expectations. You can benchmark value with other companies and ACC members, keeping in mind, of course, applicable antitrust and confidentiality rules or regulations.

## 3. Obtain Law Firm Input

After you have gathered all of your existing sources of information about the scope of the matter, you must determine whether you are going to assign the matter to a law firm without further input on scope. This is a key decision. If you as the client already have the core information on scope of work to be performed, then you may determine that you do not need to involve law firm(s) in the scoping process. But if your efforts to scope the matter produce gaps in what needs to be done, or if you are hiring a firm precisely because you have limited experience with this kind of work (and they've done it many times over for many different clients), then you should consider involving the firm(s) being considered to perform the work in the scoping process. Doing this may also produce greater "buy in" and commitment to project plans and budgets if the firm(s) ultimately assigned had a hand in crafting these plans.

From a client's perspective, effective scoping and cost conversations with law firms often occur when multiple firms are involved before the client chooses a firm. In this context, these discussions can validate basic assumptions and price points when multiple law firms independently gravitate around a similar set of activity assumptions and/or budget figures. For an illustration of how this pre-assignment scoping and cost projection is effectively done, see the resources below.

### RESOURCES

"General Electric Company: Successfully Using Alternative Fee Arrangements for Complex Intellectual Property Litigation," ACC Value Practice (Feb. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=776846> (Illustrates strategic use of competitive bidding among known and trusted firms).

"How to Prepare a Litigation Plan and Budget," ACC Value Practice (Nov. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=743311>.

The scoping process asks "what needs to be done" and "what is the most effective way to perform the work" – and thus, begins to outline a plan for effective execution. Critical to this process is identifying tasks that are "marginal" and which may not add sufficient value to justify doing them (i.e., must we take the deposition of every person with even miniscule knowledge of the

underlying facts, or should we only cull some of them via reasonable risk assessment?). Scoping is about properly allocating resources – not so you can save every dime on cost (i.e., being penny-wise on fees and pound foolish on outcomes) – but so you can strategically reduce spending on low-value work and free up spending for higher-value work, thus increasing your chance of getting desired results and winning where it counts most. In other words, by scoping properly and reducing low-value work, you free up dollars to spend more effectively on higher-value work. This could entail doing more on those matters in areas that move the needle, or could entail hiring more expensive/higher quality firms if need be.

## B. Step Two: Implementing the Right Approach

After scoping out the work involved in a particular matter, the next step is to assess and implement those approaches that deliver the greatest value to the client. Typically, implementation involves addressing: (1) who should perform the work, and (2) on what terms.

### I. Who Should Perform the Work? Selecting Firms and Vendors

Most in-house counsel have extensive experience in selecting law firms – the “who” part of the equation – and much has been written on this topic. This InfoPAK will not go into great detail here, other than to note two brief points:

- **It is important to consider not just quality but also cost.** How do you assess cost? It is not just about rates – that’s only part of the equation. Rather, assess law firm cost via:
  - Comparative all-in fee constructs;
  - Willingness to put “skin in the game”; and
  - Track record on prior value-based fee arrangements.

Thoroughly assessing comparative budget or cost information up front is an important step in helping to ensure costs are managed.

- **Consider who the right service providers are to handle the matter (or components of it).** Some matters may require the best-known experts in the world and others may not. Perhaps you want multiple law firms or vendors in the mix – or only associates or only partners. As clients increasingly “unbundle” work, the market is seeing extensive experience across the spectrum of providers, including bringing certain pieces of the work in-house, assessing how to get the highest use from each contributor to the matter, and outsourcing overseas for the right types of projects.

## RESOURCES:

“ACC Primer: Using a Structured Process to Allocate Work,” ACC Value Practice (Dec. 2010), available at <http://www.acc.com/legalresources/resource.cfm?show=1217370>.

“Looking Beyond Your Backyard: Outsourcing Legal Processes,” ACC Docket 28, no. 8 (Oct. 2010): 52, available at <http://www.acc.com/legalresources/resource.cfm?show=1052808>.

“Value Practice: Sourcing Legal Work in India Leads to Significant Savings,” ACC Value Practice (Jan. 2009), available at <http://www.acc.com/legalresources/resource.cfm?show=120834>.

“Selecting and Managing International Law Firms,” ACC QuickCounsel (June 2009), available at <http://www.acc.com/legalresources/quickcounsel/smilf.cfm>.

“Unbundling Legal Services & Strategic Use of Law Firms in Lower Cost Cities,” ACC Value Practice (Nov. 2009), available at <http://www.acc.com/legalresources/resource.cfm?show=742186>.

“Managing Outside Counsel: Using Law Firm Networks to Help Find Value with Small and Mid-sized Firms,” ACC Docket 28, no. 2 (Mar. 2010): 88-94, available at <http://www.acc.com/legalresources/resource.cfm?show=805664>.

“Value Practice: DuPont Paralegal Staffing,” ACC Value Practice (Sept. 2008), available at <http://www.acc.com/legalresources/resource.cfm?show=39865> (Encouraging effective paralegal utilization as a practice that adds value).

## 2. On What Terms? Value-Based Fee Options

The other half of implementing the right approach—“on what terms”—raises a host of options in terms of value-based fee structures. There are a variety of possibilities, depending upon how the work is segmented and whether outside counsel compensation is correlated in some way to the outcomes delivered.

At the outset, though, it may be helpful to distinguish some commonly used approaches that are not typically considered value-based fee structures, including discounts on hourly rates, tiered volume discounts, and use of blended hourly rates. While helpful in part (because they’re an “easy” short-term triage), none of these fit the definition of a value-based fee structure, which assesses the value of the service from the client’s perspective—and is not based on law firm-centric measures like profitability, utilization rate, hours worked, or cost to produce. A list of options that do fit this definition is set forth below.<sup>11</sup>

## a) Fixed Fees

Fixed fees are used to affix a price to a “deliverable” or a distinct piece of work, with all ancillary preparation and effort reflected in that price. Data to determine an appropriate fixed fee can come from multiple sources (historical information, other items in the portfolio, bids or price quotes from existing firms or new firms). Litigation examples include paying X as the “all in” fee for a law firm to draft and argue a summary judgment motion; paying Y as the “all in” fee per deposition taken’ and paying Z per page or per gigabyte for first level / responsiveness review on a document production. Transaction examples include paying X to produce an initial draft of a license agreement; Y to negotiate outstanding issues with other side; and Z to finalize documents and conduct closing.

Of course, not all matters or all deliverables are equally complex. As a result, ostensibly similar pieces of work – like a summary judgment briefing and argument – may cost very different amounts across two different matters based on complexity. That is as it should be. Increasingly, sophisticated clients are capturing their data over time to build fee schedules for pieces of work based on degrees of complexity. This enables them to compare prices of “like” projects or deliverables with similar complexity profiles to arrive at apples-to-apples assessments on cost. This requires an investment of time and effort, but the case studies below illustrate the larger benefits.

- **Advantages:** This approach accommodates uncertainty and provides flexibility in the future scope of work by pricing “units” of work, which allows for fee adjustments as the number of units rises or falls. Such per unit tracking can also help avoid a hidden risk of flat and fixed fees – the potential that an unanticipated decline (or increase) in matter activity would produce a windfall (or shortfall) to the law firm if the original terms anticipated a higher (or lower) level of activity. Per unit tracking allows for fee adjustment up or down as necessary in order to avoid such windfalls (or shortfalls).
- **Drawbacks:** This approach may involve increased costs up front because it takes time and effort to properly craft the numbers and adjust for changes in case activity.

The following resources provide further insight into the use of flat and fixed fees.

### RESOURCES

“General Electric Company: Successfully Using Alternative Fee Arrangements for Complex Intellectual Property Litigation,” ACC Value Practice (Feb. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=776846>.

“De-constructing Legal Services - Calculating Unit Costs & Component-Based Pricing Structures - Johnson & Johnson’s Approach to Alternative Fees,” ACC Value Practice (Nov. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=738996>.

“Value Practice: Deconstructing IP Litigation Matters and Implementing Alternative Fee

Arrangements,” ACC Value Practice (June 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=379009>.

“Aligning the Interests of Client and Firm in Complex Litigation and Complex Transactions- Practices Implemented by Womble Carlyle Sandridge & Rice,” ACC Value Practice (Dec. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=750208>.

“Class Action Defense Via Flat Fees & Performance Incentives . . . Nationwide Insurance and Fowler White’s Different Approach,” ACC Value Practice (Nov. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=742577>.

“How to Migrate from Traditional Billing to Alternative Fees,” ACC Value Practice (Dec. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=745109>.

## b) **Capped Fees Under an Hourly Rate**

Capped fees under an hourly rate approaches are commonly used to set a ceiling on what the client will pay the law firm on a particular matter, or for a particular piece of work. Examples include payment of not more than X to prepare and argue a summary judgment motion, and payment of not more than Y to close an M&A transaction.

- **Advantages:** When executed properly, this approach resembles a fixed fee (discussed above), but in theory gives the client the added up-side of paying less if the law firm bills fewer hours than anticipated, thus not reaching the cap.
- **Drawbacks:** While this advantage sounds good, many observers have noted that the interests remain unaligned. The law firm does not have the incentive to invest in approaches that would reduce the cost of producing that piece of work, because it does not share in any upside for doing so. And since firms know they can bill until they reach the cap, many don’t attempt to control their costs until they are approaching the limit. There is also a concern about overpaying if the client selects the wrong ceiling, not having done enough comparative assessment. While theoretically, there is a risk of this occurring in any fixed fee structure, the risk of choosing the wrong ceiling is particularly high under a capped fee structure because caps are often set without first performing the robust level of data analysis that often precedes the structuring of a fixed fee. Still, this approach provides a stronger level of financial discipline as compared to unbridled hourly rate billing.

The following resources provide more detail on the use of capped fees under an hourly rate.

### RESOURCES

“Value Practice: Value Matrix for Intellectual Property Matters - Alternative Fee Structures Based on Level of Difficulty, Staffing Mix and Billing Guidelines and Informal Training,” ACC Value Practice (July 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=458576> (Illustrates the use of capped fees of varying amounts based on complexity of underlying work).

“Outside Counsel Fee Valuation Toolbox, Part 1,” ACC Presentation (Oct. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1236502>.

#### c) Flat Fee Per Month (or Some Other Period)

A flat fee per month (or some other period) is typically used to cover services delivered during the course of a specified period. Litigation examples include: a monthly or quarterly flat fee to cover strategy or case management in the course of litigation and/or a “per diem” fee for trial. Other examples include: a monthly fee for advice and counsel requests in addressing a particular issue of law. This resembles the “retainer” approach used more frequently in years past (e.g., pay X in advance for the right to call upon the lawyers for services in that particular area, over a given period of time).

- **Advantages:** Provides certainty and sets the price based on the value to the client (and presumably based on market reference prices for what other law firms of similar quality would charge for this period).
- **Drawbacks:** Some have argued that efficiency incentives may not arise if the flat fee amount per period is not actively managed (i.e., periodically reviewed and adjusted in light of actual experience regarding use and scope). Without further prodding from the client, outside counsel may not really have the incentive to adopt process improvements to reduce the monthly figure and share some of those savings with the client.

#### d) Portfolio Fixed Fee

Some clients have implemented a broader application of the fixed-fee approach by assigning large portfolios of work to a single firm (or a given volume of work to a firm) for a fixed fee, often after a competitive bidding process. These engagements also commonly provide for separate ways to address “one-off” matters outside the normal scope of the portfolio (e.g., a class action lawsuit), and also contain provisions to verify that scope/activity assumptions proceed as planned.

Examples include: all employment litigation for a fee of X; all product liability litigation of a certain type for a fee of Y; all transactions of a certain type for a fee of Z; and handling all securities portfolio filings for a fee of XX.

- **Advantages:** This larger pool of work enables the client and firm to better manage and “cover” or “self-fund” individual outlier matters where the activity and budget assumptions proved to be off. It also provides the firm with a greater incentive to help the client reduce legal risks and problems since the firm is paid to service a portfolio (e.g., HR and employment litigation) and can make more by preventing problems rather than rationing services. In fact, some clients build in an explicit provision linking outside counsel’s compensation to maintaining or decreasing total liabilities paid in connection with that portfolio of work.

The assigned firm often pays local counsel and manages vendors under this arrangement. To successfully execute a portfolio fixed fee, the client must perform due diligence, including assessing 2-3 years of historical data on: scope of work, fees paid, and outcomes/liabilities/recoveries. This due diligence is critical to properly define the scope of work to be performed and answer questions like: what are we buying, what has it cost us in the past, and what is a sound portfolio fixed fee number to deliver greater value?

These engagements also commonly provide for separate ways to address “one-off” matters outside the normal scope of the portfolio (e.g., a class action lawsuit), and also provisions to verify that scope/activity assumptions proceed as planned. Without these mechanisms, there is a risk that the actual scope of work could diverge significantly from the anticipated scope of work, thus upending the fixed fee number.

- **Drawbacks:** Properly implementing portfolio fixed fees requires time and effort to analyze historical data regarding matter activity and spending patterns. It also requires an assessment of how repeatable these patterns will be in the coming year or two. Not everyone is equally comfortable with making such projections and committing in advance to assigning to a single law firm.

The resources below illustrate these portfolio fixed fees in action, within larger and smaller legal departments.

## RESOURCES

“BCE Inc. & Bell Canada: Value-Based Fee Arrangement for Commercial Agreement Work,” ACC Value Practice (June 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=954803>.

“Ford Motor Company: Value-Based Fees for Litigation- Annual Engagements for Product Liability Matters on a Flat Fee Basis,” ACC Value Practice (May 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=919336>.

“Implementing a Portfolio-Wide Fixed Fee with a Single Law Firm,” ACC Value Practice (Nov. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=739110>.

“Levi Strauss & Co.: Global Partnerships for Corporate, Commercial and Intellectual Property Work,” ACC Value Practice (Mar. 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1279401>.

“Value Practice: Alternative Fee/Value-based Arrangement Implemented by Smaller Law Department - Securities Portfolio Work for Wolverine World Wide, Inc.,” ACC Value Practice (Sept. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=599874>.

“Value Practice: Employment Litigation and Counseling Portfolio Services on a Flat Fee Basis- Value Practices Implemented by Toyota Motor Sales, USA, Inc.’s Law Department,” ACC Value Practice (Sept. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=537543>.

#### e) Per Capita Fees / Ad Agency Model

While the fixed fee model described above focuses first and foremost on the project/deliverable, the *per capita* approach focuses on the professional(s) performing the work. The “ad agency” model fixes a set price to “purchase” the full-time or half-time services of a certain person or team of people, on the presumption that they effectively produce all the work required.

- **Advantages:** Savings, from the client’s perspective, are calculated vs. “rack rates” for an equivalent amount of that person’s time. The law firm typically conveys a discount in exchange for the advance certainty provided under this arrangement.
- **Drawbacks:** But the model is arguably flawed in that it does not measure efficiency, or create incentives to produce the work in less time.

#### f) Performance-Based Holdback

Any of the approaches listed above can be supplemented with a provision tying a portion of law firm compensation (i.e., a holdback amount) to achieving pre-defined outcomes or success metrics. This also can be (and often is) done in more conventional engagements structured under the hourly rate model. The holdback amount (e.g., 20% of fees billed) is typically subject to a multiplier (e.g., 0, 1, 2, or 3) depending on the extent of success achieved. Examples of pre-defined outcomes or success metrics include:

- Winning on summary judgment, at trial or on appeal;
- Resolving a matter at or below a specified resolution cost;
- Closing out a matter within a specified period of time;

- Completing a merger, acquisition, or deal;
- Managing an entire matter at or below budget for the legal services;
- Reducing the overall number of new cases filed; or
- Successfully achieving transaction results (e.g., shifting certain risks, etc.).

The resources below provide more details on how to correlate outside counsel compensation with outcomes generated.

## RESOURCES

“Value Practice: FMC Alternative Billing,” ACC Value Practice (Sept. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=40256>.

“Aligning the Interests of Client and Firm in Complex Litigation and Complex Transactions- Practices Implemented by Womble Carlyle Sandridge & Rice,” ACC Value Practice (Dec. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=750208>.

“Outcome-Driven Fees in High Stakes Litigation . . . Bartlit Beck’s Alternative Approach,” ACC Value Practice (Nov. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=743837>.

“What Do Hours Have to do with Value?,” ACC Docket (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=778084>.

### g) Pure Contingency

Pure contingency is a more intensified form of the performance-based hold-back. Under a pure contingency arrangement – most easily envisioned and applied when recoveries are sought – the law firm would be compensated via a portion of the amounts recovered, and would receive no compensation if no amounts are recovered. The terms can be adjusted and tempered to better manage the down-side risk of zero recovery, and the model can also apply to the defense context (earn X if you win, earn zero if you lose) – but that is harder to do since successfully defending against a claim does not typically result in a set recovery amount.

- **Advantages:** The interests of client and law firm are closely aligned under this structure. The more the client succeeds, the more the law firm gets paid – and vice-versa.
- **Drawbacks:** Under a contingency approach, a law firm could earn much more than

it might under a conventional hourly rate approach. Some clients are not comfortable with this.

The diagrams below are intended to help facilitate the analytical process of sorting through the various value-based fee options above.

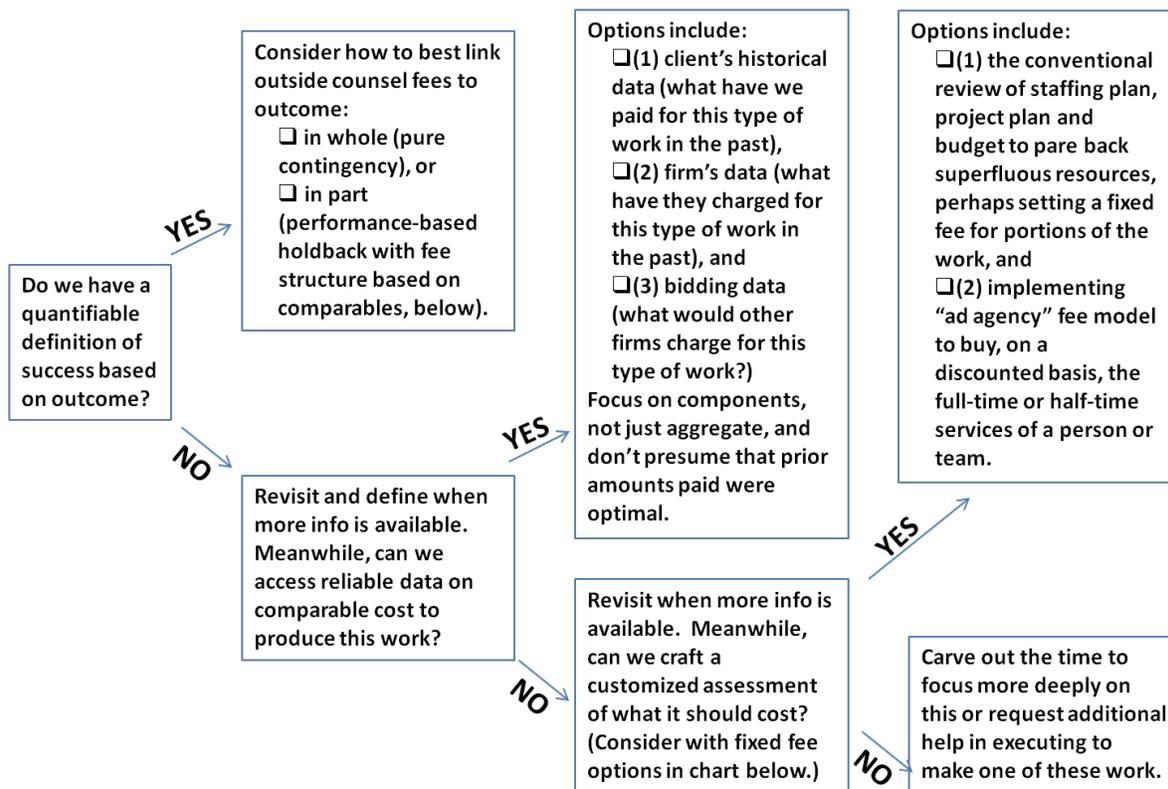
*(diagrams on next page)*

**Flowchart: Client Focus on Outcomes & Comparable Costs in Defining Value**

The chart below helps in answering two fundamental questions as a precursor to selecting the right value-based fee structure.

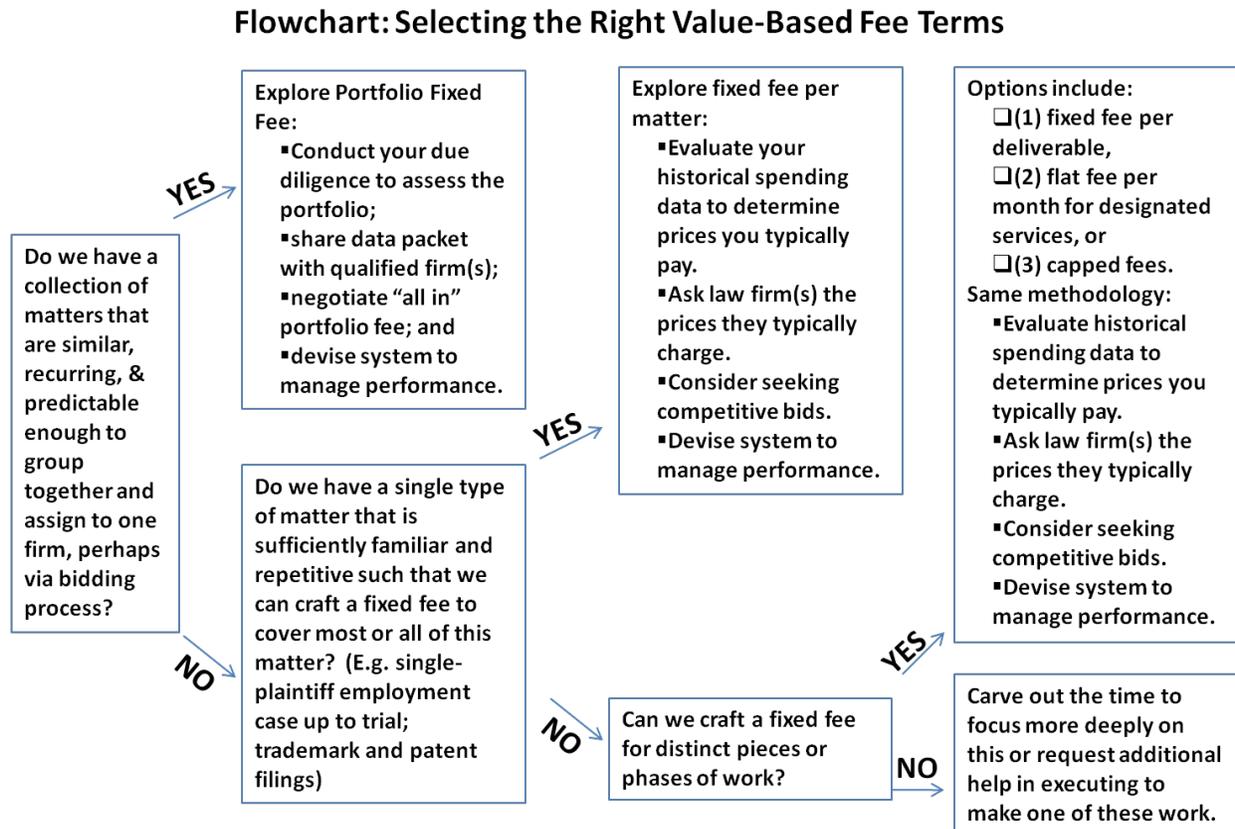
- Can success in this matter be defined by a measurable outcome, such that it makes sense to correlate outside counsel’s compensation, in part, on achieving that outcome?
- What data points are available to assess the comparable costs of producing similar quality work in this matter?

**Flowchart: Client Focus on Outcomes & Comparable Costs in Defining Value**



Having addressed these issues, the legal department has laid a foundation for selecting the right value-based fee terms. The next flow chart helps in selecting the best terms.

## Flowchart: Selecting the Right Value-Based Fee Terms



**For all of these, savings = reduction in historical spending patterns with same or better outcomes. Ideally part of law firm compensation will be tied to outcomes, even within these fee structures.**

The following is a list of additional items to consider when choosing between value-based fee structures.

- **Do you have a preferred law firm list already in place?** If so, what types of value-based fee structure terms have your outside counsel shown familiarity with?
- **Look over your outside counsel performance reviews to see who has the strongest success and track record on value-based fee structures matters.** If you don't track written reviews, talk to your colleagues to gather this feedback.
- **For outside counsel reviews from your peers, check out the ACC Value**

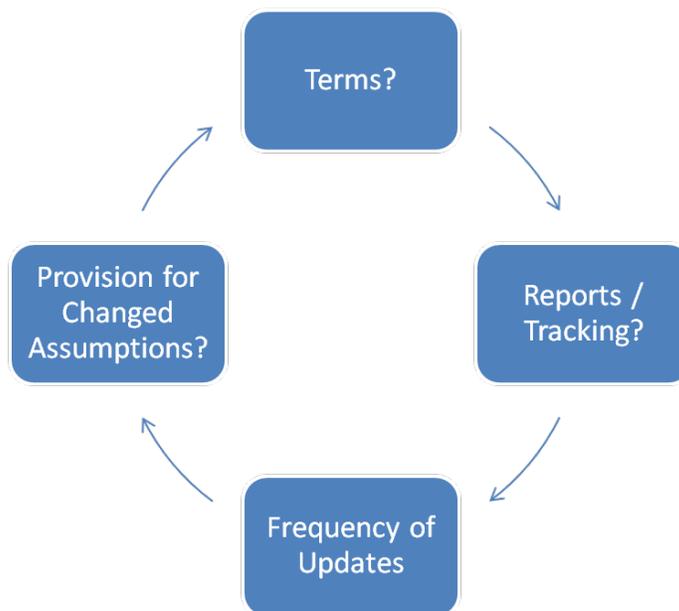
*Index:* [www.acc.com/valueindex](http://www.acc.com/valueindex)

- **How much competition will you interject into the process to assess which firms would deliver the best value on a particular matter?** This can range from informally speaking with a couple of trusted firms, to issuing an RFP and soliciting terms from multiple firms (including some “brand new” firms) to identify the best mix of quality, staffed talent, and cost.
- **Competition counts:** Some law firms may object to higher levels of competition, but there is a very reasonable conversation to be had about: (1) the economic and commercial realities facing your company, which have likely increased competitive pressures internally and externally across the board, and (2) the opportunity for additional business for those law firms that continually deliver the best value. It is also helpful to note the emphasis on long-term value (i.e., quality, cost, and outcomes) – not to be confused with just the lowest price. Executed correctly, value-based billing is a management approach focused on success in the long term, with deeply rooted incentives built on trust and mutual understanding.
- **Be sure to determine how reliable or believable a proposal is.** Think about a firm’s ability to meet budget historically. If warranted, adjust the figure to an expected value that properly reflects the real likelihood of achieving it.
- **Be sure to determine whether the budget will be viewed as an estimate or a quote.** To what extent will you hold outside counsel accountable? Does the plan include pre-agreed contingency or “safety valves” for unlikely but possible deviations based on how the matter unfolds? This can be one of the biggest determinants of value and savings.
- **In the end, trust is a key component in making these arrangements work.** Do client and firm believe that each will honor its commitments, behave fairly, and be able to work together in good faith to address unanticipated issues?

### 3. Four Key Aspects of Implementation

After assessing the options, the next step is to implement your value-based approach, assigning the various pieces of work to the right firms and vendors, under the right fee structures – all with a mechanism to monitor progress.

There are four key items to focus on in terms of implementation: 1) terms, 2) tracking, 3) frequency of updates, and 4) provisions for changed assumptions. Each is addressed in more detail below.



#### a) What are the terms?

- Pricing. Is it all value-based fee structures or a hybrid approach retaining some hourly rate billing? (See flow chart on selecting the right value-based fee terms).
- Payment. How should payment be phased for value-based fee structures? Is it equally apportioned across a certain number of periods, or does payment flow depending upon the completion of the underlying projects or the achievement of certain targets?
- Outcomes. What happens to the outcome-driven portion (e.g., set aside by the client for future payment or paid upfront but credited back by the law firm if necessary)? Both parties must pay close attention to this point since a common problem for some firms has been either: (1) professional concerns about setting arrangements that could raise ethical problems (*see, e.g.,* ABA Model Rule of Professional Conduct 1.5

that precludes firms for charging fees “not earned”) or (2) clients setting an outcome-based fee, but then suggesting that the firm should split the difference when the “windfall” was larger than expected or the matter was resolved earlier than anticipated.

- Look-back. Is there a “look back” provision using “shadow invoices” to compare flat fee amounts to what would have been paid under an hourly rate approach? (See Appendix for sample retainer agreement language.) If so, what rates should be used – rack rates or discounted rates? Or are the look-back fees only tracked to allow a better assessment/re-negotiation of the pricing for future matters?
- Structure. Is one outside firm responsible for managing the expenditures of another to make it all come in on budget? Are there concerns about fee sharing?

**b) What reports / tracking mechanisms are in place?**

- Staffing plan. Who will be working on this matter? Is it the right mix of seniority, experience and resources, with limited turnover? (This can be important, as some clients fear getting the law firm’s “B team” on a flat fee. This can be remedied, in part, by focusing on long term benefits, and emphasizing that success on this flat fee matter means an opportunity for more business in the future.) In the end, the assessments of how to best perform the work necessary to increase value should yield more effective staffing arrangements. Sometimes that may mean fewer people performing certain tasks and more people performing others. Some tasks will call for more senior resources and others more junior. But undoubtedly there is a strong correlation between the right staffing mix and the right outcome under a value-based fee structure, and the goal here is to illuminate the best “fit.”
- Project plan. What will outside counsel be doing, and when? How does each step connect to each other and to the budget?
- Budget and forecast. How much will it cost (piecemeal and total) and how will updates flow regarding progress vs. budget (covering both dollars and activity assumptions)?

**c) What is the frequency of updates?**

- Deciding frequency. The frequency of updates should vary depending upon what is being tracked, and how important the need is for sufficient time to “course correct.” For examples every two weeks for items like progress vs. budget on key matters that are moving forward; quarterly for items like progress vs. budget on routine matters; and bi-yearly for items like performance reviews.
- Multiple update methods. The fact that updates for the plan take place on a certain

schedule does not mean that other kinds of communications cannot be scheduled (e.g., an email every week noting developments or milestones in cases where the action is faster paced, or a voicemail from the partner in charge every two weeks to report on emerging challenges or to simply check in to say “nothing new to report”). But while these kinds of more frequent contact can be informative, they should be supplemental to the plan’s more “formal” approach of monitoring the terms. They should be based on the client’s appetite for communication: some love frequent interaction; others don’t want to be bothered unless it’s urgent and only want written updates.

- Periodic updates. The legal department must also plan periodic updates on: substantive legal issues, activity assumptions, project plan, staffing plan, and financial forecast.

**d) What are the provisions for changed assumptions?**

- Material change. What is the definition of material change in assumptions requiring revisions to budget (up or down)?
- Budget formula. Is there a formula for revising the budget?
- Decision-making. Who is involved in that discussion and how will decisions be made?

## C. Step Three: Managing for Success

Managing is a corollary to implementing, requiring time and attention as an engagement unfolds to ensure quality execution of the agreed-upon terms. Good managing also involves, where necessary, changes to ensure that performance stays on track. This may mean changing the way work is done (to be more effective), changing the timing of tasks (to stay on schedule or budget), changing or reviewing the performance of contributors/players (to assure that the right workers do the right work), or changing the scope of the project plan (to better reflect changed assumptions around matter activity).

This step – effective management of legal services – is another one that could fill a book in and of itself, and much has been written on this topic. Highlighted below are key points that are particularly relevant to value-based fee structures.

The core management questions to answer on a consistent basis include:

- Are we effectively executing against the plan? If not, why not?
- What changes are necessary?
- How strong is the quality of the work produced?
- How strong is the process of producing the work? (Are we on time, with enough advanced notice?)
- How strong are the information tracking and communication processes? Are periodic updates provided in a timely fashion, with the right level of detail? Are unanticipated developments communicated effectively so as to avoid unnecessary “big surprises”?
- How are things faring according to both quantitative measures (wins/losses, timely completion of work and deliverables, on budget) and qualitative measures (client satisfaction, responsiveness, creativity, etc.)?
- How did we do? Did we achieve the desired results? Are there lessons learned so we can improve next time (e.g., After Action Reviews)?

There are additional items to consider with respect to project management. First, if you are scorecarding law firm performance, consider sharing the criteria with the firm(s) up front and schedule periodic meetings to discuss progress. Second, emphasize accountability by addressing non-performance early on (especially around budget management) to avoid later pitfalls. Third, consider using a master calendar and management dashboard in shared electronic workspace with your core outside counsel.

The following resources expand further on the topic of effective management of legal services.

## RESOURCES

“Perfecting Project Management,” *ACC Docket* 28, no. 10 (Dec. 2010): 64, *available at* <http://www.acc.com/legalresources/resource.cfm?show=1215121>.

“How to Train Staff to Properly Manage Budgets,” *ACC Value Practice* (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=709602>.

“CIGNA Law Department’s Budget Management Practices: ‘Nailing the Basics,’” *ACC Value Practice* (July 2009), *available at* <http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=425083&page=/valuechallenge/resources/topics/budgeting.cfm&qstring=pafilterID=312&title=Value%20Practice%3A%20Cigna%20-%20Nailing%20the%20Basics>.

“ABC Value Assessments, Billing Practices and Convergence- Value Practices at Zurich North America,” *ACC Value Practice* (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=717135>.

“Value Practice: Liberty Mutual Law Department’s Enhanced Approach to Metrics: Business Focused Effort Includes Quantitative Assessments and Quality Audits,” *ACC Value Practice* (June 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=313898>.

“Value Practice: Value-Based Fee Arrangements - The Body Shop’s Approach to Structuring Relationships,” *ACC Value Practice* (Sept. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=611756> (addresses management of outside counsel performance).

### D. Step Four: Evaluating the Performance

Thoroughly evaluating performance at the end of a matter will shed light on the quality of all the preceding efforts and will help to answer the following important questions:

- How well did we do as in-house partners/managers? How well did the firm do?
- How well did the team collaborate?
- How well did the team stay on track or on budget?
- How well did we do on our metrics, targets, and goals?
- Where did we succeed most strongly?
- How can performance be improved next time?
- How does this matter “stack up” against other matters with similar features?

- Are there cross-matter lessons to be learned or that inform other work?

Of course, some of these issues would be identified during the life of the matter, as part of quality management. But a more formal evaluation at the end ensures that the questions will be answered and information gathered across the board.

It is particularly helpful if the information will be preserved for easy access in the future to help drive effective decisions on future matters. These records should include performance and pricing data to select the right law firm on the right terms when matters like this arise in the future.

In addition, while there should be great emphasis on law firm evaluation, there is also a role for evaluating the legal department's success in handling, planning, collaborating, performing and improving. The following is a list of additional items to consider when evaluating performance at the end of a matter.

#### Additional Items to Consider:

- Consider conducting a formal after-action review. (See ACC's "Value Practice: FMC Technologies: After Action Reviews.")<sup>12</sup>
- Evaluate both law firms and vendors – perhaps carving out time for annual meetings to discuss performance and improvements. Identifying areas for improvement and giving firms the chance to show how they grow in these areas can go a long way toward better management and better results.
- Consider what the clients think (company business people and business units).
- How did any fixed-fee arrangement work out? What changes or improvements would you make for next time? Was outside counsel any less responsive because of the fixed fee?
- What per-unit data points might be helpful for next time?
- How well did inside counsel manage performance and partner with outside counsel to increase value delivered? Increasingly, legal departments are assessing this formally as part of inside counsel's annual performance review and bonus criteria.
- What suggestions do outside counsel have for improvements in the future?
- Consider adjusting invoices based on the client's reasonable perception of value received (see Valorem example below).

The following resources provide further insight into evaluating the performance of both in-house and outside counsel.

## RESOURCES

“ABC Value Assessments, Billing Practices and Convergence- Value Practices at Zurich North America,” ACC Value Practice (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=717135>.

“Value Practice: Maximizing Value in Fee Relationships - Valorem Law Group,” ACC Value Practice (June 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=323972>.

“Value Practice: FMC After Action,” ACC Value Practice (Sept. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=40522>.

“Value Practice: Assessing Legal Performance at Allstate - 'Closing the Loop' on Performance of Premier Law Firms and In-house Lawyers,” ACC Value Practice (Apr. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=189752>.

“Value Practice: Outside Counsel Review Committee Adds Value for Southern California Edison’s Law Department,” ACC Value Practice (June 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=378916>.

“Value Practice: Liberty Mutual Law Department’s Enhanced Approach to Metrics: Business Focused Effort Includes Quantitative Assessments and Quality Audits,” ACC Value Practice (June 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=313898>.

“How to Formally Evaluate Outside Counsel’s Performance to Improve Service,” ACC Value Practice (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=709546>.

Frederick Paulmann. “Effective Partnering Between Inside and Outside Counsel: Two-Year Performance Highlights and Data from Pfizer,” *ACC Docket* 26, no. 9 (Nov. 2008): 90, *available at* <http://www.acc.com/legalresources/resource.cfm?show=86898>.

## IV. Conclusion

Effectively managing value-based relationships with outside counsel involves strategic thinking, good communications, advance planning, flexibility, project management and trust. The above creates a framework for assessing law department needs, laying the foundation, and operating effectively. Time spent up front and implementing business processes to help bring discipline to the legal service relationship can enhance the value that in-house and outside counsel – working together – bring to the corporate client.

## V. About the Authors

### Association of Corporate Counsel

The Association of Corporate Counsel is the bar association for attorneys in the legal departments of corporations and private sector organizations worldwide. ACC has more than 26,000 members in over 75 countries, employed by over 10,000 organizations.

### Frederick Paulmann

Frederick Paulmann is the founder of The Counsel Management Group LLC, and helps corporate legal departments achieve greater value from law firms and vendors by implementing alternative fees, best practices and data-driven solutions. He may be reached at [fpaulmann@counselmgmtgroup.com](mailto:fpaulmann@counselmgmtgroup.com).

## VI. Sample Forms

### A. Appendix: Categories and Examples of Metrics

#### Legal Department Metrics

- Legal department spending as a percentage of revenue
- Number of in-house attorneys per billion of revenue
- Ratio of inside legal spending to external
- Performance against budget
- Recoveries gained
- Liabilities averted
- Value delivered
- Winning percentage, charting wins and losses (measured against pre-defined success criteria from an Early Case Assessment exercise, for example)
- Extent of Knowledge Management utilization (showing re-use of existing work product to better manage demand)
- Number of initiatives successfully launched
- Measuring utilization of temps or contract attorneys
- Extent of off-shoring
- In-sourcing success – money saved by bringing work in
- Preventive efforts: number of training seminars delivered
- Number of training modules created and accessible via intranet

#### Matter trends:

- Number of matters active
- Number of matters open in the year

- Number of matters closed in the year
- Cycle time: average amount of time between opening and closing a matter
- Measuring milestone events reflecting activity levels (and cost per each):
  - Number of cases tried (or number of trial days)
  - Number of appeals brief / argued (and won)
  - Number of summary judgment motions filed (and won)
  - Number of deals closed
  - Number of custodians whose documents were harvested for discovery
  - Number of gigabytes of documents processed in e-discovery

#### Outside Counsel Performance Metrics:

- Percent of matters for which full year budget was submitted on time
- Percent of matters managed for which forecast updates were submitted on time
- Actual spending vs. budget, by matter
- Average blended rate for all law firm attorneys who billed to the client (by matter, and across all matters— divide total fees by number of hours billed)
- Success in predicting total cost resolution range for a matter (e.g. compare Early Case Assessment projection to actual results)
- Other process goals . . . timely completion / submission of:
  - Monthly reports
  - Early case assessment
  - Mock trials
  - After action reviews / lessons learned

#### External Spending . . . Portfolio Management Metrics:

- Percentage of external spending allocated among the top 10 billing firms
- Number for firms that bill 80% of the department's external spending

- Percentage of law firms that provide a discount (or that provide more than a nominal discount, e.g. in excess of 5%)
- Total value of discounts received as a percentage of overall external spending
- Percentage of external spending allocated to alternative fee arrangements
- Percentage of matters assigned via competitive bidding
- Percentage of dollars spent with women or minority owned firms
- Percentage of hours worked or dollars billed by women or attorneys of color
- Number of internal evaluations completed regarding outside counsel performance

#### Individual In-house Counsel Performance Metrics

- Amount of outside counsel spending (in dollars) managed per in-house attorney
- Number of full-time equivalent resources managed per in-house attorney (take total number of hours billed on all matters managed by that attorney, and divide by 2,000)
- Percentage of matters handled internally, without any outside counsel involvement (and value generated, i.e. what would outside counsel have cost?)
- Percent of matters managed for which next year's budget was submitted on time
- Percent of matters managed for which forecast updates were submitted on time
- Actual spending vs. budget, by matter
- Success in predicting total cost resolution range for a matter (e.g. compare Early Case Assessment projection to actual results)
- Other process goals . . . timely submission of:
  - Monthly reports
  - Early case assessment
  - Mock trials
  - After action reviews / lessons learned

## B. Appendix: How to Effectively Partner with Your Law Firms to Achieve Greater Value

### ▪ **Defining what you hope to accomplish**

What are your main goals in partnering more effectively with outside counsel?

- Better outcomes . . . by having a more knowledgeable team in place when matters arise
- Stronger working relationships . . . with highly-motivated firms who already know your company, in-house legal team and operating procedures
- Improved preventive law efforts . . . by teaming up with outside counsel proactively to better advise the business on how to mitigate risk (not just address issues after they arise)
- Reduced administrative burdens . . . by training counsel up front on your operating procedures (e.g. billing guidelines), reducing the amount of time you have to spend correcting things later
- Greater efficiency and cost savings . . . from more effective fee structures when client and firm trust one another enough to commit to risk-sharing and alternative fee models that eschew the hourly rate approach

(Practice tip: While it would be ideal to accomplish of these at once, it is often best to focus in on achieving a couple of key goals at the outset, then expanding from there)

### ▪ **Improving outside counsel's working knowledge of your business**

- Information exchange . . . share with outside counsel key updates and reports from the business and the Legal department. These can be documents or presentations on:
  - Business performance (annual reports and SEC filings)
  - Product issues (marketed products or those in development)
  - Strategic initiatives (to the extent these should be shared)
- Increased interaction
  - Invite some of your key outside counsel to join inside counsel on a tour of a manufacturing plant or other company facility
  - Include outside counsel at some of your periodic group / department meetings

- Offer to provide client perspective at the firm’s retreat or annual meeting
- Annual preferred counsel meeting . . . consider inviting your key law firms to join members of the Legal department to discuss key updates on the business, legal initiatives, the broader legal and regulatory environments, and inside / outside counsel operations

(Practice tip: doing these things is not easy, but it’s a good investment of time. It enables your key law firms to help identify issues in advance to mitigate risk, and to “hit the ground running” when new matters do arise. It also contributes to higher motivation to serve a preferred client.

- **Strengthening preventive law and anticipatory counseling efforts**

Target specific issues that are important to your company, and collaborate with outside counsel to craft a series of training sessions or modules. Examples include:

- Hot topics and legal developments concerning:
  - Emerging trends in litigation (types of cases, plaintiff bar tactics)
  - Growing enforcement or regulatory actions from different agencies
  - Recent judicial decisions and opinions, and their impact on defense strategies
- Training modules to help in-house counsel better perform their jobs, e.g.
  - Updated boilerplate language for contracts and transactions . . . in light of new legal developments
  - Key considerations regarding e-discovery and document retention obligations
- Training modules to help business people better perform their jobs, e.g.
  - Effective communications guidelines
  - Employment law training for HR managers

(Practice tip: these preventive law efforts are win / win. They help your department and company get key updates to shape behavior for better results. They also help your law firms by providing introductions and opportunities for “rising stars” and attorneys from other practice groups who are interested in showing you what they can do, in the hopes that you will keep them in mind for the future.)

- **Collaborating on value-added projects**

Identify a list of projects serving the dual purposes of enabling inside and outside counsel to work together while advancing the company's or legal department's interests. Examples include:

- Pro Bono: team up together to staff legal "in-take" clinics, or collaborate on counseling / litigation representation for non profits
- Diversity, recruiting and talent retention: offer to help your law firms recruit and retain talent by establishing rotational opportunities, where a top candidate would be invited to work on key projects for your company and get some client exposure. See, Brent L. Henry & E. Macey Russell, "Developing Great Minority Lawyers for the Next Generation," *ACC Docket* 28, no. 6 (July 2010): 26, *available at* <http://www.acc.com/legalresources/resource.cfm?show=970657>.
- Secondments: establish 6-month rotational opportunities, where a lawyer from one of your key firms would work in your legal department, side-by-side with your team
- Articles and Association projects: select projects or topics worthy of a joint inside / outside counsel effort (e.g. effective Knowledge Management; improving the UTBMS Codes), and invest time to advance the initiative and/or write articles (this is good from a professional development standpoint for your in-house attorneys as well)
- Six sigma projects for better legal operations, e.g.:
  - Improving invoice review
  - Strengthening the company's approach to electronic discovery
  - Improving budgeting and forecasting
  - Unpacking data to enable fixed fee structures
  - Updating the Legal department's form files: contracts, confidentiality or non-disclosure agreements etc.

- **Strengthening use of technology**

- Consider establishing a portal enabling your department to better interact with outside counsel. Functionality could include:
  - Blogs, wikis, & question / answer forum
  - Expert witness data base

- Document repository (e.g. org charts, legal department policies and procedures, list of corporate subsidiaries for litigation disclosures)
- “On-boarding” guide for outside counsel who are new to the engagement team
- List of preferred vendors (court reporters, jury research firms etc.)
- Knowledge management tools to store and access work product

**Practice Tip: Consider selecting a roster of preferred counsel**

It is often easier to implement these various approaches to “partnering,” if you have designated a core list of preferred counsel firms. This also delivers greater value by leveraging the company’s purchasing power among fewer, more engaged firms.

## C. Appendix: Value-Based Fee Matrix

<b>VALUE-BASED FEE MATRIX **</b>			
<b>Type</b>	<b>Description</b>	<b>Example</b>	<b>Ideally Suited For</b>
Fixed Fee per Deliverable	Affixes an “all in” price for a distinct piece of work, encompassing all of the law firm’s ancillary preparation and effort.	<ul style="list-style-type: none"> <li>▪ Pay X for a law firm to draft and argue a summary judgment motion;</li> <li>▪ Pay Y per deposition taken; and,</li> <li>▪ In the transactions context, pay Z to produce an initial draft of a license agreement.</li> </ul>	Situations in which certain component pieces of work are distinct and measurable such that client and law firm can agree upon a workable fee schedule, even if the number of “units” of work may vary going forward.
Capped Fee	Commonly used to set a ceiling on what the client will pay the law firm in a particular matter, or for a particular piece of work. Resembles a fixed fee, but with certain drawbacks (discussed in the “Assessing” section below.)	<ul style="list-style-type: none"> <li>▪ Legal fees for this matter, in this calendar year, not to exceed X.</li> <li>▪ Fees for drafting and arguing this appeal not to exceed Y.</li> <li>▪ Fees to handle this transaction not to exceed Z.</li> </ul>	Situations in which the client is most comfortable with the hourly rate billing model and favors greater predictability (by capping fees on the high end) as opposed to lowering fees (by sharing with the law firm a portion of savings generated under fixed fees).
Flat Fee per Period	Typically covers distinct categories of services during the course of a specified period.	<ul style="list-style-type: none"> <li>▪ Monthly flat fee to cover advice and counsel requests on regulatory issues of a certain type;</li> <li>▪ All-in “per diem” fee for trial representation for whole trial team;</li> <li>▪ Monthly flat fee to handle administrative management during certain phases of litigation.</li> <li>▪ Quarterly flat fee for handling all intellectual property litigation of a certain type or in a certain area.</li> </ul>	Situations in which distinct pieces of work need to be performed on a recurring basis, and the client wants to create an economic incentive for the law firm to staff and perform the work more efficiently (i.e. reducing its own cost to increase its margin).

		<ul style="list-style-type: none"> <li>▪ Quarterly flat fee for handling a certain volume of commercial agreements.</li> </ul>	
Portfolio Fixed Fee	Represents a broader application of the fixed fee approach by assigning a large portfolio of work to a single firm for a fixed fee, usually after a competitive bidding process. Duration can vary, but generally a multi-year term (2 or 3-years) is common; payment schedule may be monthly, quarterly or on another set period.	<ul style="list-style-type: none"> <li>▪ All employment litigation for a fee of X,</li> <li>▪ All product liability litigation of a certain type for a fee of Y,</li> <li>▪ All transactions of a certain type for a fee of Z,</li> <li>▪ All securities portfolio filings for a fee of XX.</li> </ul>	Situations in which a group of matters is sufficiently similar, recurring and predictable so as to lend itself to relatively consistent year-over-year patterns in terms of activity and fees.
Per Capita Fee / “Ad Agency” Model	Fixes a set price to “purchase” on a discounted basis the full-time or half-time services of a certain person or team, who then produces the work required.	<ul style="list-style-type: none"> <li>▪ For the coming year, pay X to purchase 50% of the billable hours for attorneys 1, 2, and 3 to work exclusively on this client’s identified matters.</li> </ul>	Situations in which a client wants particular outside attorney(s) to be available and the law firm is willing to provide a discount in exchange for the certainty of revenue in advance – <u>and</u> the volume of work is sufficiently predictable so as to keep these folks busy.
Incentives/Performance-based Hold Back/Success Fees	Aligns interests by tying a portion of law firm compensation to outcomes achieved. (Can be used in conjunction with any of the value-based fee options described above).	<ul style="list-style-type: none"> <li>▪ Percentage (e.g., 20% or some other number) of fees billed will be set aside by client and paid to the law firm subject to a multiplier (e.g. 0, 1, 2) depending upon the extent of success achieved (e.g. win a motion to dismiss, win a jury verdict, resolve a matter below a specified amount, close</li> </ul>	Situations in which the client is able to define success (entirely or in part) according to objectively measurable markers that the law firm can help attain via strong performance.

		<p>a deal by X date, etc.)                  Without a holdback, opportunity for bonus based on results achieved and value delivered (e.g., resolve a matter below a specified amount, close a deal by X date, reduce number of new cases in litigation portfolio by certain percentage, etc.) .Bonus could be calculated based on some portion of the costs avoided or value delivered.</p>	
Pure Contingency	Law firm compensation depends entirely upon achieving certain outcomes.	<ul style="list-style-type: none"> <li>▪ Law firm fee is equivalent to X% of the client's recoveries in a particular matter.</li> <li>▪ Reverse contingency can also apply where, e.g. defense law firm gets paid only if it wins a dismissal or jury verdict.</li> </ul>	Situations in which client seeks recovery and/or is cash-strapped and is therefore willing to forego a larger portion of its upside stake in exchange for protection on the downside (i.e. pay large fee for a win and no fee for a loss). This is higher risk and higher reward for the law firm.
Hybrid	Combination of one or more of the above approaches on a given matter or for a portfolio	<ul style="list-style-type: none"> <li>▪ Flat fee for handling litigation plus per diem for trial and success bonus for outcome</li> </ul>	Situations where client and firm wish to be flexible to address various touch points differently and reward results.
<p>**This matrix does not include certain approaches that are <u>not</u> typically considered value-based fee structures (but which some may still use and find helpful on their own or in conjunction with these value-based fee approached), including discounts off hourly rates, tiered volume discounts, and use of blended hourly rates. While helpful in part, none of these fit the definition of a value-based fee structure as a construct that assesses the value of the service from the client's perspective.</p>			

## D. Appendix: Advantages & Drawbacks of Various Value-Based Fee Arrangements

Type	Advantages	Drawbacks
Fixed Fee per Deliverable	<ul style="list-style-type: none"> <li>▪ Uses “comparables” data to set price more effectively.</li> <li>▪ Data can come from multiple sources (historical information, other items in the portfolio, bids or price quotes from existing firms or new firms).</li> <li>▪ Accommodates uncertainty and flexibility in the future scope of work by pricing “units,” which allows for fee adjustments as the number of units rises or falls.</li> <li>▪ Will increase competition over time to drive down price.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Requires time and effort to track.</li> <li>▪ Existing e-billing data does not lend itself to this type of analysis without further refinement.</li> <li>▪ Reference to just historical data will likely include junk data and sub-optimal billing practices.</li> <li>▪ Law firm may have incentive to skimp if it underbids. Client has to keep an eye on quality and think about long term incentives.</li> </ul>
Fixed Fee per Matter	<ul style="list-style-type: none"> <li>▪ Sets price more effectively by analyzing past data on similar matters.</li> <li>▪ Allows for supplemental client assessment of value underlying matter in setting price.</li> <li>▪ Offers predictability and simplicity when executed on the right types of matters.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Investment of time is required to assess parameters and costs of similar historical matters.</li> <li>▪ Unforeseen changes in activity or complexity can pose challenges.</li> <li>▪ Reference to just historical data will likely include junk data and sub-optimal billing practices.</li> </ul>
Capped Fee	<ul style="list-style-type: none"> <li>▪ Provides predictability by setting an outer limit on fees.</li> <li>▪ Manages costs better than unbridled hourly rate billing.</li> <li>▪ Can produce savings if the number is set correctly.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Not easy to pick the right number. Doing so requires investment of time and effort.</li> <li>▪ If the wrong ceiling is selected, client may pay more than it should.</li> <li>▪ Creates limited incentive for efficiency, since outside counsel does not share in the value it would otherwise generate.</li> </ul>

Type	Advantages	Drawbacks
Flat Fee per Period	<ul style="list-style-type: none"> <li>▪ Predictability</li> <li>▪ Savings if the number is set correctly</li> <li>▪ Creates incentive for law firm to be more efficient (because it can earn a greater margin)</li> </ul>	<ul style="list-style-type: none"> <li>▪ May overpay if number is set incorrectly</li> <li>▪ Hard to determine whether change in activity warrants an upward or downward adjustment (unless you track hours, which gets back to the hourly billing rate concerns)</li> </ul>
Portfolio Fixed Fee	<ul style="list-style-type: none"> <li>▪ Predictability</li> <li>▪ Savings if the number is set correctly</li> <li>▪ Reduced administrative burdens for client</li> <li>▪ Law firm builds deeper working knowledge of client operations, which should increase efficiency</li> <li>▪ Proper terms increase incentives to reduce both fees and liabilities</li> </ul>	<ul style="list-style-type: none"> <li>▪ Requires time and effort to properly assess portfolio, interview / select firm, and implement effective terms.</li> <li>▪ Locked into one firm.</li> <li>▪ May need a provision to deal with one offs.</li> <li>▪ May see some unfamiliar faces at law firms (junior attorneys, training opportunities).</li> </ul>
Per Capita / “Ad Agency” Model	<ul style="list-style-type: none"> <li>▪ Predictability</li> <li>▪ Client gets desired staffing mix</li> <li>▪ Discount can work well if client uses that many hours.</li> <li>▪ Some would say this is hourly rate billing refined.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Not clear that this creates incentives for efficiency.</li> <li>▪ Challenges ensue if the client predicts the volume incorrectly (either low or high).</li> <li>▪ Some would say this is hourly rate billing refined.</li> </ul>
Performance-based Holdback	<ul style="list-style-type: none"> <li>▪ Strong business case for law firm compensation being tied in part to outcomes, value delivered.</li> <li>▪ Aligns incentives, rewards efficiency.</li> <li>▪ Flexible enough to enable adjustment along the way (e.g. outside counsel fee for trial work can be finalized as trial approaches, when more information is in hand)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Requires time and effort to define value.</li> <li>▪ Lawyers are not always so comfortable with decision tree analysis and calculating expected value.</li> <li>▪ Can be challenging without the proper foundation of trust and long-term incentives.</li> </ul>
Pure Contingency	<ul style="list-style-type: none"> <li>▪ Stronger correlation between law firm fees and value generated</li> <li>▪ Lots of potential upside</li> </ul>	<ul style="list-style-type: none"> <li>▪ Lots of potential down-side</li> <li>▪ Harder to craft effective terms outside the context of recovery-type work</li> </ul>

## E. Appendix: Value & Scoping Questions (Checklist to Discuss with Law Firms)

### □ Defining Value

- What are the desired results? What is a reasonable definition of success on this matter, based on what is currently known?
- Are there dollar ranges, timeframes or other measurable outcomes associated our definition of success?
- If not, what information is needed in order to arrive at a more specific, measurable definition of success? When would we be in a better position to assess?
- Are there matter milestones during which we should re-group and consider any adjustments to the definition of success? Which milestones?
- What would the law firm suggest in terms of mechanisms or fee structures to tie a portion of compensation to outcomes delivered on this matter?
- What experience does the firm have with type of fee structures suggested? Which service providers in their firms are most expert at delivering services within those structured fee relationships?
- Would other firm client(s) be willing to speak with us about their experience with the firm's value-based fee structures?

### □ Scoping Generally:

- What service items are we buying in connection with this matter?
- What are the component projects or deliverables?
- What is the timing? When do these need to be done?
- By what type of resource?
- What interdependencies?
- Who would be managing all of this?
- What vendors and additional resources are required? Can they be deployed in this project to save money, time, improve results, create new capacities?
- How about local counsel or boutique counsel who can take on defined slices of the work more efficiently?

- How about external experts or other service providers?
- What are the lines of communication (Front-line in-house lawyer to Engagement Partner? Senior in-house lawyer(s) to Relationship Partner? What about other support personnel like project and finance managers?) In what manner should communication be maintained: regular conference calls, on a virtual project platform, via email? What is everyone's appetite to talk/consult regularly?

□ Scoping – More Detailed:

- In order for us to achieve our goal(s), what work is required over the next 12 months?
  - More detailed for months 1-3
  - Moderately detailed for months 4-6, and
  - Less detail for months 6-12?
- List the assumptions around drivers. E.g., How many witnesses to be interviewed? What parameters of due diligence?
- Duration and cost of various phases?
- Likelihood that B will follow after A? Where are you more confident and less confident in the assumptions?
- What contingency plan if one aspect heats up? (Mandatory vs. discretionary work)
- What project management approach? Let's see the sample reports and tracking documents.

□ Metrics and Improvement:

- What metrics should we use to measure success?
- How should we gather metrics data and build it into the process?
- How can we 'bake' improvement processes into the relationship?

## VII. Additional Resources

“Outside Counsel Management,” ACC InfoPAK (Jan. 2006), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19673>.

“ACC Value-Based Fee Primer,” ACC Value Practice (July 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=967965>.

“ACC Overview of Value-Based Fees and Staffing,” ACC Value Practice (Sept. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=777723>.

“51 Practical Ways for Law Firms to Add Value,” ACC Value Practice (June 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=939328>.

“Legal Department Leading Practices for Adding Value and Moving Beyond the Cost Center Model,” ACC Leading Practices Profile (Sept. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=16804>.

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Philip A. Pesek, “Breaking Away from the Status Quo: A Survival Guide for Managing Outside Counsel Fees,” ACC Docket 26, no. 9 (Nov. 2008): 106-116, *available at* <http://www.acc.com/legalresources/resource.cfm?show=86928>.

Margaret Seif, “Talking Down Your Budget,” ACC Docket 28, no. 8 (Oct. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1053950>.

Hayden O. Creque and Irvin Schein, “A Primer on Retaining and Relating to Outside Counsel,” ACC Docket 28, no. 2 (Mar. 2010): 38-49, *available at* <http://www.acc.com/legalresources/resource.cfm?show=805423>.

Patrick Lamb, “Affirmative Fee Arrangement: Wannabes, Pretenders and the Real Deal,” ACC Article (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=783349>.

“Outside Counsel Retention Agreements,” ACC QuickCounsel (Dec. 2009), *available at* <http://www.acc.com/legalresources/quickcounsel/ocra.cfm>.

“Top Ten Practical Suggestions for Managing Outside Counsel Spend,” ACC Top Ten (Mar. 2011), *available at* <http://www.acc.com/legalresources/publications/topTen/Outside-Counsel-Spend.cfm>.

“Top Ten Considerations When Evaluating a System for Managing Outside Counsel Work,” ACC Top Ten (Mar. 2011), *available at* <http://www.acc.com/legalresources/publications/topTen/Managing-Outside-Counsel-Work.cfm>.

“2010 ACC/Serengeti Managing Outside Counsel Survey Report,” ACC Survey (Oct. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm>.

[fm?show=1249457](#).

“10<sup>th</sup> Annual ACC/Serengeti Managing Outside Counsel Survey,” ACC Webcast (Oct. 25, 2010), *available at* <http://webcasts.acc.com/detail.php?id=130129&go=1>.

“50 Ways and Counting to Drive Value into Law Firm Relationships,” ACC Presentation (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=736858>.

“Outside Counsel Fee Valuation Toolbox, Part 1,” ACC Presentation (Oct. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1236502>.

“Outside Counsel Fee Valuation Toolbox, Part 2,” ACC Presentation (Oct. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1237217>.

“Taking Charge of Escalating Law Firm Costs – Connecting Costs with Value,” ACC Presentation (Apr. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19819>.

“Law Departments Adding Value: Structuring and Managing Outside Counsel Relationships and Beyond,” ACC Presentation (Mar. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=211421>.

“The Slow Motion Riot – Revolutionizing Law Department Cost Management,” ACC Presentation (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=736253>.

“ACC – Managing Outside Counsel Getting Off on the Right Foot-And Staying in Step,” ACC Presentation (Jan. 2006), *available at* <http://www.acc.com/legalresources/resource.cfm?show=16401>.

“ACC’s Value Challenge: Reconnecting Costs to Value in Outside Legal Services (Part I: Introduction),” ACC Presentation (Oct. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=154405>.

“ACC’s Value Challenge: Law Firm and Corporate Counsel Workshops (Part II),” ACC Presentation (Oct. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=154915>.

“Building/Maintaining Relationships with Outside Counsel,” ACC Presentation (July 2006), *available at* <http://www.acc.com/legalresources/resource.cfm?show=20196>.

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“Outside Counsel Retention Letter,” ACC Form & Policy (Mar. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=194769>.

“Sample Document – Wal-Mart Outside Counsel Guidelines,” ACC Form & Policy, *available at* <http://www.acc.com/legalresources/resource.cfm?show=40433>.

## VIII. Endnotes

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<sup>1</sup> “Strategic Planning: Why a Plan is Needed and How to Develop One,” ACC InfoPAK (Sept. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=99365>.

<sup>2</sup> *See id.* for additional discussion on these four foundational questions.

<sup>3</sup> Matter management systems are designed to help legal departments track work flow and measure performance. This typically entails managing key information for new matters such as: type, description particulars, start date, team assigned, due dates, budget, etc. Metrics measured might include cycle time and overall cost. For more information, see “Project Management Software Overview,” ACC Value Practice (Jan. 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1269502>.

<sup>4</sup> External spending, as used here, refers to the amount spent on law firms and/or vendors.

<sup>5</sup> “ACC Primer – Using a Structured Process to Allocate Work,” ACC Value Practice (Dec. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1217370>.

<sup>6</sup> This is often remedied by the client stating up-front that it reserves the right to assign a new matter to a law firm outside of the preferred counsel list if it is the best interests of the company to do so. If used sparingly, this “business need” exception can function smoothly. But exercising this option too often can undermine and undo the benefits sought from a preferred counsel arrangement in the first place.

<sup>7</sup> There is a remedy to this issue as well—evaluating multiple firms on the preferred counsel list before assigning a new matter and planning a review every two years, for example, to assess whether the list of preferred firms should change based on factors like performance and efficiency.

<sup>8</sup> , “Nationwide Mutual Insurance Company: In-House Relationship Managers Play Key Role in Structuring and Maintaining Successful Relationships with Approved Counsel,” ACC Value Practice (Sept. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1049987>.

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<sup>9</sup> *See* “How to Conduct an Early and Periodic Case Assessment,” ACC Value Practice, *available at* <http://www.acc.com/legalresources/resource.cfm?show=779199>.

<sup>10</sup> “Sound project management,” as used here, refers to a system of managing the work to be performed according to specified standards, established in advance. It entails scoping out the work—in writing—to address the specifics of what will be done, when, by whom, at what cost, and illustrates the inter-dependencies among different pieces of work.

<sup>11</sup> The Appendix contains a Value-Based Fee Matrix, which lists various types of fee arrangements, along with examples of when they might be used, along with advantages and drawbacks of each.

<sup>12</sup> *See* “Value Practice: FMC After Action,” ACC Value Practice (Sept. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=40522>.