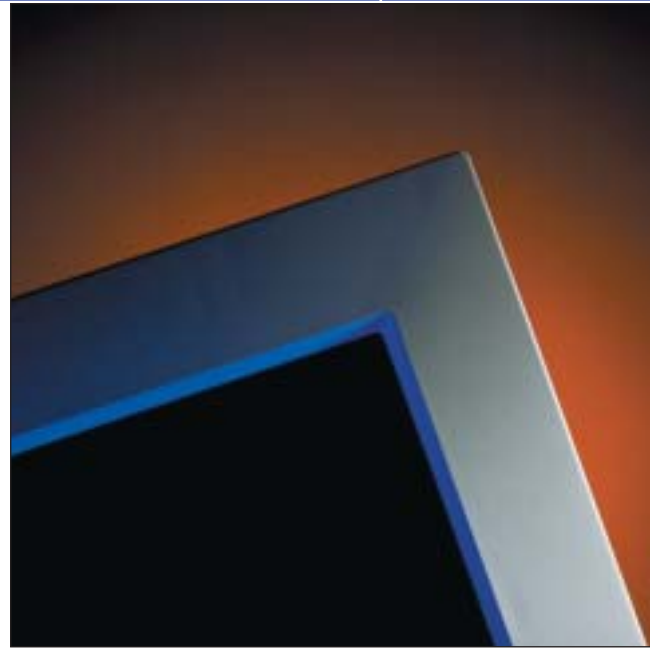


RETAINING **OUTSIDE COUNSEL** **ONLINE** AT MARKET PRICE

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Jeffrey W. Carr and Daniel S. Hapke Jr., "Retaining Outside Counsel Online at Market Price," *ACCA Docket* 19, no. 9 (2001): 76-93.



By Jeffrey W. Carr and Daniel S. Hapke Jr.

We begin our story of online counsel selection by sharing a professional experience.

Last year, coauthor Jeffrey Carr, then associate general counsel of FMC Corp. (“FMC”),¹ sought outside counsel to deal with a patent infringement of one of FMC’s products. Carr checked with several law firms upon which he relied for such matters and received amazingly consistent informal cost estimates from each. The firms wanted \$1.5 million for bringing and prosecuting a simple patent infringement claim, a figure that Carr viewed as the industry standard “rack” or going rate, but that far exceeded the annual gross revenues that the company could expect from the sale of the product in a good year.

Wanting to protect the company’s intellectual property, but only at a cost that he could economically justify, Carr needed to find a way to align corporate objectives—that is, success in an infringement action—with cost-effectiveness and right-sized legal services. He turned to eLawForum Corp. (“eLawForum”), an internet-based legal auction house, for help in accomplishing this task.

eLawForum is one of a number of online companies that offer services to assist corporations in selecting outside counsel. Its website enables a company to invite several law firms to view a request for proposal (“RFP”) that details the company’s legal needs for a particular matter and then to respond online with their qualifications and pricing. Carr viewed eLawForum’s service as an opportunity (1) to expand FMC’s pool of qualified law firms, (2) to convince firms to agree to share in the risk of the case’s outcome, and (3) to reduce the cost below the quoted rack rates.



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Daniel S. Hapke Jr., the 1993 ACCA Board Chair and former senior vice president and general counsel of Cordant Technologies, is an investor and consultant with the Washington, DC-based eLawForum Corp.

FMC's innovative proprietary risk-reward fee structure, known as FMC-ACES (Alliance Counsel Engagement System),² which requires law firms to assume some risk in the resolution of a legal matter, drove Carr's use of the online engagement process. He made a law firm's participation in the bidding process contingent on its acceptance of the FMC-ACES model.

Starting with a list of 30 potential law firms, including FMC's incumbents, new firms already registered with eLawForum, and other firms invited to register, Carr and eLawForum used the following three-step process:

- 1 Vet firms for conflicts and recognition of the proprietary nature of FMC's fee structure system.
- 2 Review the experience and capabilities of the nonconflicted firms on the basis of standardized responses to the RFP.
- 3 Invite the short-listed firms to compete in an online auction on the basis of price, using FMC-ACES.

Through this process, Carr narrowed the field to six firms that he believed were qualified to undertake the assignment. They included several of the American Lawyer's 100 top-grossing firms ("AmLaw 100") and several intellectual property litigation boutiques. These firms then participated

in a live online reverse auction, through which FMC narrowed the field to two finalists, both AmLaw 100 firms and one an incumbent. (See "FMC's RFP Engagement Process" sidebar on page 80.)

The results? The highest "indicative" fee estimate FMC received was \$980,000, nearly a 35 percent reduction in the offline price. By injecting competition into the process of retaining counsel, Carr saw cost savings. Even more important, some of the firms that participated in the auction had been among those that had quoted the \$1.5 million rack rate. During the auction, the six participants sharpened their pencils and substantially reduced their initial proposals. At the end of the three-hour online process, Carr received proposals from the two finalists that were more than two-thirds less than the original rack rates.³

To Carr, the experience confirmed his belief that he could achieve substantial cost savings by requiring law firms of comparable quality to compete for his company's legal work. He views the eLawForum service as providing the ideal environment in which to facilitate such competition. He was pleasantly surprised to realize these additional benefits:

- Participation of high-quality law firms that otherwise would not have been on his radar screen.
- Agreement by all participating firms to use his FMC-ACES risk-sharing fee model.
- Efficiencies and time savings over the traditional offline "beauty contest" used to screen and retain counsel.
- Demonstration to company management that even sophisticated professional services, such as legal services, are susceptible to the competitive marketplace of online procurement (an important lesson for any buyer and a threatening epiphany for any provider).

It is our belief that virtually any corporation can achieve results similar to the ones that FMC has achieved. Moreover, companies that continue to rely on traditional ways of retaining counsel—that is, you pick up the telephone and call one of your company's primary law firms—run the dual risk that they may not retain the most qualified law firms for a particular matter and that they may overpay for the legal services.

A structured, competitive law firm selection process provided through such a service as

eLawForum empowers you to obtain a market price for high-quality legal services. These services act as an efficient, cost-effective tool for quickly identifying potentially qualified firms, gathering detailed and specific information about their qualifications, and helping you to make a choice online and/or through in-person offline discussions. We believe that the process fosters both professional values, by focusing competition on the actual expertise of lawyers, as opposed to mere reputation, and corporate values, by establishing an objective process for decision-making.

A primary goal of this article is to give you an overview of how these online resources can fit into your practices and practical advice on how to go about using them.

COST-CUTTING TRENDS

Although Jeff Carr's experience with eLawForum was born of compelling economic considerations, it took place against the backdrop of broader trends

FMC'S RFP ENGAGEMENT PROCESS

The following is a template that FMC Technologies, Inc. ("FMC"), sends to law firms when it uses its FMC-ACES billing model in selecting outside patent counsel online:

FMC has engaged eLawForum.com to facilitate the selection of outside counsel for this matter. The process FMC will use to select counsel will be as follows (dates subject to review and change):

PHASE 1. INITIAL RFP

- Invitation to participate to potential counsel.
- Vetting for conflicts.
- Confidentiality agreement for disclosure of details of FMC-ACES.*
- Firms to indicate interest in participation under FMC-ACES.

PHASE 2. DETAILED RFP/Q&A

FMC will provide the following information:

- Details of matter, including background documents.
- RFP-II Questionnaire.
- Details of FMC-ACES.
- FMC-ACES Excel spreadsheet to define variables.
- Firms may request additional information from FMC on the matter and FMC-ACES model.

Firms submitting responses must agree to the following terms:

- That further participation will result in a conflict prohibiting representation of the adverse party even if not selected by FMC.

- To use the FMC-ACES model.
- To the FMC billing procedures.
- Firms to provide capabilities proposal: staffing of team, resumes of team members, litigation or other matter philosophy, and experience.
- Firms to provide outline of matter strategy/timeline.
- Firms to provide budget.

PHASE 3. REVIEW/Q&A/INTERVIEWS, IF NECESSARY

- FMC to review proposals and capabilities.
- FMC may engage in telephone or in-person interviews with some firms.
- FMC to "short list" three to five firms, any of which FMC would be pleased to engage for matter.

PHASE 4. REVERSE AUCTION

- FMC to conduct live auction using eLawForum correspondence feature.
- At opening, firms to provide proposals in FMC-ACES spreadsheet format.
- Disclosure of proposals (without identity of bidder) and opportunity to revise their proposals.
- FMC will select counsel for matter.
- FMC reserves the right to make selection contingent upon a face-to-face meeting with business management involved or to select two firms for such a meeting.

*For a detailed description of the FMC-ACES billing model, see endnote 1 in the main text of this article.



affecting in-house counsel. Increasingly, law departments are feeling pressure to reduce their costs, including expenditures on outside counsel. Online retention resources that assist corporations with identifying and selecting outside counsel represent a very effective tool for responding to these growing pressures.

Over the past several years, new technological products and tools have emerged to make in-house counsel more effective, including case/matter management software applications, electronic invoicing, legal extranets, and other collaborative tools. The same consultants who have been pushing law departments to automate their infrastructure have also been promoting convergence or relationship-based partnering and other all too familiar best practices buzzwords. It is a fact of life in corporate legal departments, however, that best practices come and go. The only certainty is that there will be a new one to replace the latest and greatest.

Based on the actual experience of FMC and other corporations, we believe that online retention resources for identifying and selecting outside counsel are here to stay. Indeed, such resources are simply a more effective tool for achieving many of the goals that you are already pursuing. The potential benefits of their use are too compelling to relegate them to the best practices junk heap anytime soon.

Current Efforts to Manage Price

The movement to itemized invoices signaled the beginning of corporations' attempts to make law firms demonstrate that the services they provide justify the fees they charge. Today's efforts to better manage corporate legal costs continue these attempts and focus on the fees charged by outside counsel. Although some corporations attempt to aggressively manage the "prices" paid through their outside counsel, they are the exception rather than the rule. Our challenge is to create a marketplace in which law firms compete on the basis of price.

Today, the most widely used approach for bringing competition to the provision of legal services is the so-called beauty contest. You know the routine. Your department identifies several firms, either through referrals from colleagues or by the firms' general reputation. You then invite this group to make individual presentations to your law department. Typically, law firms send their rainmakers,

the big-name partners, to extol their firms' virtues and to charm your department into selecting their firms. The classic law firm beauty contest, thus, is a series of bilateral negotiations with two or more law firms in which firms do not compete directly on the basis of price.

In the traditional billable hour fee model, the law firm sets its hourly prices, which you accept as a given, often without much discussion. You may use your corporate purchasing power to demand or negotiate discounts off of "normal" billing rates, but you usually make a commitment for a minimum volume of work in exchange.⁴ Thus, your relationship with the law firm actually imposes two costs on your company: the cost of the hourly rates and the obligation to funnel a certain amount of work to the firm.

You may feel that you have negotiated a good rate for a particular law firm relative to what you know it charges other corporations. But if you are honest with yourself, you must admit that you really do not know whether the negotiated rate is a market rate—that is, a rate that reflects a market in which several law firms of comparable quality compete head-to-head for the same business.

Billable Hours as Cost-Plus

The billable hour fee model represents a cost-plus pricing regime because the hourly rate increases as law firms raise associates' salaries and incur other costs of doing business, while preserving or increasing partner profitability. Many firms increase their effective hourly rate by shifting what would in a business context be considered overhead, such as telephone charges, internal copy and fax charges, computer assisted research, and secretarial overtime, into "disbursements" added to the hourly rate for professional services.

Such cost-plus pricing gives rise to an inherent conflict between the financial interests of the law firm and your company, the client.⁵ The law firm has no direct financial stake in the outcome of your company's legal matter and only the indirect incentive of avoiding damage to its reputation or the loss of your business. If the law firm fails to provide high-quality legal service, the financial risk is on your company. If litigation or a transaction drags on, the law firm benefits at the expense of the corporation. This situation leads to the subtly more pernicious effect that the billable hour system,

unless connected with meaningful budgets or capped fees, provides every incentive for the economically rational firm to maximize its revenue by billing more hours—all justified in the canonical law of “zealous representation.”

The courts have recognized the potential conflict of interest in the hourly billing fee structure. Recently, a federal judge observed that “the hourly rate fee structure . . . can motivate the attorney to pursue his or her own economic interest at the expense of the client.”⁶ This mismatching of incentives has motivated federal judges in dozens of class actions to order auctions to find new ways of selecting and compensating lead counsel.⁷

Corporate law departments have had limited success in their attempts to bring law firm prices more to the front and center of their dealings because they lack effective mechanisms for assembling multiple law firms to submit bid proposals on the same work. Online retention resources can provide such a forum. They offer a logical and systematic mechanism for reversing trends that threaten the professionalism in the attorney-client relationship.

BASICS OF ONLINE RETENTION RESOURCES

Most online retention resources share the following basic characteristics:

- Online posting of a description of the legal matter for which a law department seeks to retain counsel.
- Process for permitting law firms to view the posted legal matter.
- Procedure for law firms to follow in submitting qualifications and/or pricing.
- Process for law departments to review proposals and select a law firm to handle the posted matter.

At the same time, online retention resources differ in many important respects. Let’s look first at their common elements.

Posting a Matter

All online retention resources post on their websites a description of the legal matter for which a company or individual seeks representation. But service providers differ in what they put into these descriptions. For example, some retention providers rely solely on an online questionnaire to capture information

about the legal matter. eLawForum posts an online summary of the matter and the expertise needed plus a detailed RFP that participating law firms can download, fill out, and return online for you to review.

Identifying Participating Law Firms

Once they have posted a legal matter, all online retention resources have a method for inviting or allowing law firms to view it. Some open up a legal matter to all of the registered law firms on their website. Others allow you to select which of their registered law firms will have access to view a particular legal matter. eLawForum helps you with identifying law firms (both registered and unregistered) that meet your requirements (location and/or expertise) and invites only selected firms to view your posted matter.

Submitting a Bid/Proposal

All services enable participating law firms to respond to a posted matter. This response may be accomplished by the completion of a simple online form. Law firms responding to an RFP posted on the eLawForum website download and complete an RFP questionnaire, which you can tailor to your specific needs and requirements.


Selecting a Law Firm

Once all of the law firm proposals/bids responding to a posted matter have arrived, all retention resources permit you to review the proposals and compare the qualifications and/or pricing. In the case of eLawForum, all law firms complete the same questionnaire in an identical format, thus facilitating an apples-to-apples comparison. eLawForum also provides a bid analysis as part of its service, which compares the quantitative aspects of competing proposals.

GETTING STARTED: SELECTING A LEGAL MATTER FOR POSTING

By now, we trust that we have piqued your interest in trying out an online resource to assist your legal department with retaining outside counsel. You may be wondering, however, what type of legal matter would be appropriate to test this new process. And how do you differentiate among the providers and find the best match for your needs?





We believe that the potential universe of legal matters for an online RFP is almost unbounded. In any instance in which your company would like to select or could select among two or more law firms, you could use an online retention resource. You are likely to choose a matter for such treatment based on the subject and/or situational factors.

Subject Matter

Interestingly, the types of cases or matters that some in-house lawyers cite as being suitable for bidding are the exact opposite of the types cited by others. For example, some attorneys believe that such competitive processes should be limited to commodity type work, such as real estate closings, “standard” product liability litigation, immigration processing, collections, insurance defense, and patent preparation and prosecution. At the other extreme, some in-house counsel believe that such methods suit the selection of counsel in unique or specialty type cases, such as environmental actions, toxic torts, narrow regulated industry matters, initial public offerings, and intellectual property litigation. The FMC patent matter was the first that Jeff Carr posted. Whatever matter you choose for trying out one of the online services, you must feel comfortable about the process.

WE BELIEVE THAT THE POTENTIAL UNIVERSE OF LEGAL MATTERS FOR AN ONLINE RFP IS ALMOST UNBOUNDED. IN ANY INSTANCE IN WHICH YOUR COMPANY WOULD LIKE TO SELECT OR COULD SELECT AMONG TWO OR MORE LAW FIRMS, YOU COULD USE AN ONLINE RETENTION RESOURCE. YOU ARE LIKELY TO CHOOSE A MATTER FOR SUCH TREATMENT BASED ON THE SUBJECT AND/OR SITUATIONAL FACTORS.

Some companies have posted RFPs online for outside counsel to handle all or most of their immigration work. Unlike an isolated litigation matter, immigration work typically involves a volume of recurring legal work made up of multiple tasks. As an example, a single law firm could handle all of a corporation’s immigration visa applications, which may vary in type and classification,

but require immigration expertise in their handling. In addition to being susceptible to aggregation on a prospective basis, immigration matters are much less geography-dependent than other types of legal matters, and they turn on a single body of federal law. As a result, the realm of potential law firms that might have the experience and expertise to handle an immigration assignment could be very broad geographically.⁸

Besides immigration work, other types of recurring legal matters that lend themselves to online counsel retention include the following: the preparation, filing, and prosecuting of a volume of related patent applications; the handling of a volume of recurring/similar litigation in a specific geographic area; and the handling and coordinating of national leasing needs.

Situational Factors

Rather than considering the nature of the legal matter, you might evaluate situational factors. Law departments have been comfortable in trying out an online service, for example, in the following situations:

- When they can retain new counsel with a substantive expertise not satisfied by existing outside counsel relationships.
- When they can retain new counsel in a geographic area not satisfied by existing outside counsel relationships.
- When they are not fully satisfied, for one reason or another, with representation by existing counsel.

This last category may be more prevalent than you might expect. According to a survey conducted at the 2000 ACCA Annual Meeting, 63 percent of respondents said that they had severed relations with at least one law firm in 2000.⁹ Similarly, in a recent report published by BTI (Business & Technology Integration) Consulting Group, about 75 percent of Fortune 1000 general counsel indicated that they were not satisfied with their current outside counsel.¹⁰

You would probably not want to turn to an online service to retain counsel for a bet-the-company legal issue, although we submit that your company’s interests might be served by doing so to assist in identifying the “best in class” counsel. Query, what if Microsoft had engaged David Boies before the Department of Justice did? Otherwise, there are very few types of matters that would not be amenable to an online, merit-based competitive process.

SELECTING THE APPROPRIATE ONLINE RETENTION RESOURCE

Once you have chosen the legal matter, you will know your service needs and thus be in a position to determine which online retention resource suits you best. Each service provider approaches the goal of serving buyers of legal services differently. Some target small businesses and even individuals in search of counsel. Some address several professional services markets, while others specialize in the legal industry. Some function primarily as matchmakers, while others provide robust environments for conducting sophisticated online auctions. These differences mean that one platform may be ideally suited to your corporate law department, but not to another.

The following overview of websites will give you an idea of the variety of services that exist in the marketplace. (See sidebar for a list of additional service providers.) We intend to be illustrative, not comprehensive, with this list:

- **FeeBid.com** (www.feebid.com) focuses strictly on clients seeking intellectual property (“IP”) counsel.

FeeBid.com allows prospective clients who need to file for a patent, trademark, or copyright to send an RFP to intellectual property (“IP”) attorneys in the United States who have registered on the site. Although you cannot pick specific firms to participate in an RFP, the site does allow users to select certain geographic or expertise levels. The site uses a preset RFP form, one for each of the three types of IP work that it accommodates. FeeBid’s fee generator gives you a fee estimate for each RFP. You can use the number as a reference point; it is not binding on you or the bidding law firms. The site also contains advertisements for law firms and related legal vendors.

- **HeadCounsel, Inc.** (www.headcounsel.com), in contrast, focuses on purchasers of legal services who would otherwise use a contract lawyer agency to find legal assistance. It also offers an auction component. The site appears to be especially well suited to private practice attorneys who need to hire temporary help in practice areas that their firm either does not possess or has insufficient capacity to meet. The service bidders are apparently lawyers at regional and

HANDY LIST OF ONLINE LEGAL SERVICE PROCUREMENT VENDORS

The following vendors operate websites or offer services that assist corporations in retaining outside counsel. Except for the vendors discussed in the main body of this article, the authors obtained the following information online and have not attempted to verify its accuracy.

- **eLawForum Corp.** (www.elawforum.com): See discussion in article.
- **FeeBid.com** (www.feebid.com): See discussion in article.
- **Firmseek.com** (www.firmseek.com): Firmseek.com is an online marketplace for business and government users of professional services. It provides an array of professional service providers in the legal, consulting, accounting, finance, public relations, and lobbying services.
- **FirstLAW** (www.firstlaw.co.uk): See discussion in article.
- **FreeMarkets, Inc.** (www.freemarkets.com): FreeMarkets, Inc., creates business-to-business online markets and provides electronic commerce technology and services for the procurement of industrial parts, raw materials, commodities, and services. FreeMarkets focuses on legal services in which one can readily quantify the work associated with a matter.

- **HeadCounsel, Inc.** (www.headcounsel.com): See discussion in article.
- **LegalMatch.com** (www.legalmatch.com): LegalMatch serves as an intermediary by matching small businesses and individuals with attorneys. Customers anonymously submit their cases for bid to qualified licensed attorneys. When posting a case, a customer answers questions that a lawyer would ask during an initial interview.
- **LegalPath.com** (www.legalpath.com): LegalPath, Examen Inc.’s business-to-business service, provides companies an internet directory of legal professionals and enables them to find counsel, review pricing, and assign, track, and bill legal matters through a secure website. It assists myriad organizations, including corporations, financial services, firms and institutions, and insurance companies.
- **Provere, Inc.** (www.provere.com): An internet auction site, Provere connects anyone needing legal services with a lawyer. Neither the lawyer nor the users must join anything or subscribe to Provere. Although Provere is open to any user and qualified lawyer, it focuses on small businesses that view legal services as a commodity.

boutique firms, solo practitioners, and alternative trackers, such as former large firm lawyers. In addition to running the bidding for legal assignments, HeadCounsel purportedly performs attorney quality control and billing and invoicing and provides electronic workspaces.

- **eLawForum Corp.** (www.elawforum.com) provides a range of services to assist in-house counsel at Fortune 1000 and Euro 500 companies to identify and retain an outside law firm. The company uses an online RFP process with offline components, such as interviews of the finalists, tailored to your needs. (See “The Need for Offline Discussions” sidebar.) eLawForum’s staff provides law firm research services for corporations and drafts the RFP/questionnaire. It also

gives you and the law firms “live person” support throughout the RFP process.

- **FirstLAW** (www.firstlaw.co.uk) is an incorporated, London-based United Kingdom law firm with a staff of practicing lawyers. The company targets the needs of individuals, as well as companies. After you have registered and indicated a need for legal services on its website, FirstLaw conducts a detailed analysis of the matter and advises you on how to proceed. FirstLaw assigns you a professional agent, called a case manager, who will assist in selecting the law firm, negotiating your retention agreement with the firm, managing your relationship with the firm, and supervising legal work after it has begun.

THE NEED FOR OFFLINE DISCUSSIONS

Q Can the entire counsel retention process be completed online?

A No. Providing legal services involves considerable personal interaction.

Q Does the spread of online retention services portend a diminishing role for such personal interaction?

A The answer for at least one of the providers of online retention services, eLawForum, is no. It has a three-part web-based system that involves both online and offline processes, including the following components:

- **Price competition**

eLawForum establishes market price online, thereby avoiding contentious face-to-face discussions and fostering relationships. The corporation controls the process by selecting only the law firms that it wants to participate. eLawForum’s platform allows requests for hourly billing, but also enables corporations to solicit innovative fee and service arrangements by shifting some or all of the risk to the service provider. This option is especially attractive in large cases and in cases in which legal fees are disproportionately high relative to the economic value of the matter. When the law firm takes a financial stake in the outcome, the client saves money, not

only in lower fees, but also in the creation of incentive to be efficient.

- **Quality competition**

eLawForum addresses quality online. Legal services are a national and increasingly global business. The RFP elicits the profile of law firms invited to bid and, instead of relying on brand names and general reputation, establishes the track record and qualifications of each attorney to perform the assignment. If new attorneys are more qualified than attorneys who have worked for the corporation or if their relative competitive advantage requires further inquiry, corporations may request additional information or decide to conduct discussions offline.

- **Relationship competition**

Online interaction gives the corporation a sense of how easy it would be to work with the law firms. But face-to-face meetings may remain the best way to assess chemistry and determine whether the differences between a new attorney and a familiar attorney are sufficient to warrant a change.

According to eLawForum, purchasers of legal services who use its platform can require professional service providers to compete vigorously on the basis of price, quality, and relationship. In addition, many corporations also ask for detailed information about law firm core values, such as diversity and their commitment to providing pro bono services. Such requests for information are another way to find out whether the law firm’s values are compatible with those of the company.

*From this point on . . .
Explore information related to this topic.*

ONLINE:

- James D. Shomper and Gardner G. Courson, "Alternative Fees for Litigation: Improved Control and Higher Value," *ACCA Docket* 18, no. 5 (2000): 20–34, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/mj00/fees.html.
- Stuart E. Rickerson, "Beyond Task-Based Billing: Dramatically Improve Results with Strategic Legal Management," *ACCA Docket* 19, no. 1 (2001): 28–48, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/jf01/beyond.html.
- "Outside Counsel Policy—Billing Requirements and Disbursement/Expenses Summary" on ACCA OnlineSM at www.acca.com/education99/cm99/808.html#bill.
- "2001 ACCA Partnering with Outside Counsel Survey" on ACCA OnlineSM at www.acca.com/protected/legres/surveys/ELF/Survey.pdf.

ON PAPER:

- *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* (Robert L. Haig ed.) (West Group & ACCA 2000).

Obviously, you must perform your own due diligence as to the exact scope and nature of vendors' services before you choose one. There are, however, certain variables you should keep in mind. Below is a list of factors to weigh as part of your decision-making process:

Management Team Domain Expertise

We cannot overemphasize the importance of the education, experience, and track record of the service provider's management team. If management has the domain expertise—that is, the depth of knowledge about the needs and requirements of general counsel—then a more successful result is likely to occur. When a provider's executives have had in-house experience themselves, they are more

apt to understand and address your concerns better than executives who may have had experience only in the technology arena, for example.

Target User Characteristics

As noted earlier, different online retention resources target the needs of different potential client populations. You should feel comfortable that the online retention resource you choose can obtain the participation of firms that fall within the geographic, quality, and practice-area criteria set by your legal department. We note again that some providers specialize in a limited set of practice areas, such as litigation or intellectual property. It may be advantageous for you to go to a specialist; or you may prefer one-stop shopping with an online retention resource that can handle (almost) all practice areas.

Control over the Process

Service providers also vary significantly in the degree of control that they give you over the firm selection process. Some online services act as matchmakers and exercise their own judgment as to which law firm best suits a client for a particular matter. More common is the model in which a service provider assists in identifying, comparing, and ultimately selecting counsel, but you exercise sole control over the process. Also, as previously mentioned, online retention resources vary as to which law firms they permit to view a client's matter. Some sites permit all registered law firms to view a corporation's posting for potential work, while others allow a law department to invite particular firms to participate in the process.

Breadth of Services and Flexibility

Online service providers vary considerably as to the breadth of services they offer, as well as the flexibility they give you to modify the process to suit your needs. Some providers merely match potential buyers with potential sellers of legal services. All discussions and negotiations between buyer and seller take place offline. At the other end of the spectrum are websites that provide a range of services for the vetting of conflicts, qualifications, and fee structures.

Online resources also differ as to what aspects of their process they consider mandatory or optional. Some providers require particular steps of all par-

ties, including the client, while others provide options that allow you to custom tailor the process to suit your needs. Although providers with more options tend to take better advantage of the efficiencies afforded by the internet, those sites that force undesired options on you may not be ideal.

Privacy and Security

As part of an online retention resource-assisted selection process, you will have to disclose sensitive information about your company and the matter in question. Even after a conflicts check, site confidentiality and privacy will still be very important. A high-quality service provider will have in place effective privacy protocols and protections. It will also ensure site security. For example, until a potential legal services provider has cleared a conflicts check, the online retention resource must prevent it from gaining access to data that firms who have completed conflicts checks can see. Similarly, a site that is simultaneously conducting several competitions must ensure that both corporations and law firms are able to access data pertaining only to those matters to which they have been authorized access.

Cost/Fee Structure

Clearly, you will want to consider the costs involved in using an online resource. Each provider has a different fee structure. Some charge corporate customers and/or participating law firms an annual registration fee. Others charge both an annual registration fee and a fee for each transaction. Still others charge only upon the successful engagement of a law firm found by using the service. For example, eLawForum's fee schedule is paid by the client (not the engaged firm) and generally reflects a percentage of total fees paid.

The time frame in which payment is due can vary, as well. You should guard against billing structures that constitute impermissible fee splitting. Providers who charge you a fee for their services based on a percentage of the fee you pay to the engaged firm or on a percentage of your calculated savings from this engagement system present no ethical problems. In evaluating online retention resources, you should determine the total fees to be charged and what your company gets in return for such payment.

Technology

Although some in-house counsel have the capability to understand and evaluate computer and internet technology, many do not. Therefore, we strongly recommend that your information technology ("IT") department review the technical aspects of the online service providers that you consider. Some companies can actually offer too much technology. Specifically, some sites require you to use their electronic billing and invoicing, along with counsel selection-related services. Having unneeded services forced upon you may defeat your purpose in using an online retention resource to better manage outside legal services.

AS PART OF AN ONLINE RETENTION RESOURCE-ASSISTED SELECTION PROCESS, YOU WILL HAVE TO DISCLOSE SENSITIVE INFORMATION ABOUT YOUR COMPANY AND THE MATTER IN QUESTION. EVEN AFTER A CONFLICTS CHECK, SITE CONFIDENTIALITY AND PRIVACY WILL STILL BE VERY IMPORTANT.

Customer Service and Support

In addition to evaluating the underlying technology of a service provider, you must gauge its support capabilities. Some companies are internet-only operations, leaving law firms and corporations to deal with support themselves. Other companies provide a full range of support services for both corporations and law firms. Besides such basic items as customer service hours of operation, you should inquire about whether a provider's staff will assist you with such tasks as drafting and editing RFPs and ensuring full participation by registered and nonregistered law firms in the process.

References

Each service provider should give you a number of references with whom you can speak. In addition, you should consult attorneys at other companies who have had experience with a particular online retention resource and can attest to its track record.



Realizing Benefits of Quality and Price

In-house counsel realize many benefits when they use an online retention resource to assist in selecting outside counsel.

First, by using a merit-based competitive process that includes only a select number of prequalified law firms, you can be more confident that your company has retained a high-quality attorney at a market price.

Second, by establishing a selection process similar to those used in other parts of your company, your decisions about outside counsel selection become more credible and understandable to nonlegal senior executives. When questioned why you chose a particular provider for a particular matter, you can point to a documented process.

RELATIONSHIP MAY BE THE MOST OVERUSED, YET MISUNDERSTOOD TERM USED TO DESCRIBE AND DEFINE THE INTERACTION BETWEEN CORPORATE LEGAL DEPARTMENTS AND THEIR OUTSIDE COUNSEL.

Third, you have the opportunity to be exposed to a larger number of firms and attorneys than you would be otherwise.

And finally, using an online retention resource allows you to use your time and resources more effectively and efficiently.

We recall the experience of a former general counsel of a Fortune 500 corporation who had to retain counsel in the United Kingdom. After having obtained the names of seven London firms, the general counsel took three separate trips abroad to meet and interview the firms. Had an online retention resource for identifying and selecting counsel existed at the time, he could have vetted all seven firms online, and only after he had narrowed the group to two or three finalists, would he have made a trip to interview them and make a final selection.

Taking the time to research and investigate one or more online retention resources will help you to ensure that you select a service provider matching

your needs and requirements. If you view the use of an online resource as more than a one-time occurrence, you will be making an investment that pays continuous dividends.

PERCEIVED DRAWBACKS TO USE OF ONLINE RETENTION RESOURCE

Some in-house counsel, however, worry about the effects that their use of an online outside-counsel retention resource may have on their existing law firm relationships. Some also believe that price, quality, and relationship considerations are inseparable and that any attempt to require outside counsel to compete for legal work will necessitate a decrease in quality.

We contend that there should not be an adverse effect on existing law firm relationships or on quality. In fact, your use of an online resource to reintroduce objectivity and competition in the retention process can have a positive effect on your current law firm relationships by returning them to a truly professional footing. We also believe that web-based services, unlike the beauty-contest method, allow corporate counsel to evaluate law firms in a structured and objective manner.

Probing "Relationship"

Relationship may be the most overused, yet misunderstood term used to describe and define the interaction between corporate legal departments and their outside counsel. Convergence teaches that, in order to strengthen your relationships with outside law firms, you must reduce the number of outside firms used by your law department. The theory is that, if you decrease the number of firms and promise to provide a higher volume of work to those you select, you will develop stronger relationships. We question whether such a reduction in counsel has a significant effect on better aligning the interests of corporations and their outside counsel. (See discussions of "Current Efforts to Manage Price" and "Billable Hours as Cost-Plus," above.)

Besides convergence initiatives, legal departments have used other methods to strengthen their relationships with law firms. Online collaborative tools, for example, promise to improve your communications



with the outside attorneys whom you supervise. Electronic invoicing purportedly allows billing disputes to be resolved online without contentious or awkward discussions over fees for services provided. By avoiding such negative discussions, you may preserve and nurture relationships.

The reality is that, although the interaction between your corporate legal department and its outside counsel is relationship-based, it is a relationship with a price: the fees charged by the law firms and paid by your law department. The price aspect of the relationship, however, still largely remains a taboo subject, even though law departments continue to struggle to find ways to reduce the cost of legal services. As might be expected, law firms contribute to, if not directly perpetuate, this problem by raising the specter of a deterioration in the relationship and eventually in quality when corporations make serious efforts to manage price.

Restoring Competitive Footing

The use of an online retention resource does not per force require or result in a change in existing counsel. This misconception is intertwined with the objection that use of online services will negatively affect relationships. A company that turns to an online retention resource to establish a market price for its services may (and likely will) invite its incumbent firms to participate. Economic theory suggests that the incumbent firm will submit a bid that, if not the lowest, is at least competitive. Indeed, the incumbent's existing relationship and knowledge about its client should give the law firm an advantage in preparing its bid/proposal, and its potential loss of capacity load provides a compelling need to ensure that its proposal is attractive.

But you are not required to accept the lowest bid. We all recognize that there are other considerations of quality and chemistry that may lead in-house counsel to select a firm with a higher bid. When you do select a higher bid, however, you establish a market price and come much closer to quantifying the premium, if any, that you are willing to pay for such intangible attributes.

Controlling Price without Quality Compromise

We believe that general counsel and their staffs, by and large, have accepted the proposition that competition among law firms for corporate work



will result in a decrease in quality. As a consequence, you acquiesce to open-ended billable hour fee arrangements with a handful of known firms. You encourage a highly inefficient legal market in which it is very difficult to establish a market price for high-quality legal services. During the past two decades, corporate legal departments have responded to this situation by handling an increasing number of legal tasks in-house by growing their staffs. In this way, general counsel have taken direct control over the quality and price of legal services, and the department's relationship with providers—in this case, their own staffs.

Corporations have historically lacked effective tools to introduce significant price competition among law firms. In traditional beauty contests, invited firms focus on chemistry and minimize price considerations. Invitations are often ad hoc and largely extended on the basis of one corporation's (limited) experience or word-of-mouth anecdotal information. Not only are the results of such efforts unsatisfying, but also they are time-consuming and costly for all of the participants.

Web-based services have the potential to provide a disciplined, efficient, and objective process for selecting outside counsel on terms that better, but not unfairly, align with the interests of the corporation. These neutral third-party services can give parties more useful information with which to make decisions about representation. They can also buffer contentious price negotiations and level the playing field so that more qualified law firms have an opportunity to be considered.

CONCLUSION

Online retention resources that assist legal departments in identifying and retaining outside counsel can empower you and your company for the first time to establish a market price for high-quality legal services. Today, bilateral price determinations, if they occur at all, do not significantly reduce the cost of services. In contrast, when incumbent and nonincumbent law firms compete through an online retention resource, you may arrive at a true market price.

A carefully managed RFP-type process, assisted by the right service provider, such as the one that Jeff Carr developed with eLawForum to find patent infringement counsel, offers you the potential to foster professional values by focusing on each law firm's strengths to handle specific legal assignments. We believe that the time when corporations routinely turn to such services to meet a significant amount of their legal services needs is fast approaching. If you make an effort now to investigate available service providers and match your needs with the services and the support that they offer, you will reap rewards many times over. 📌

NOTES

1. FMC recently has announced plans to separate into two separate companies: FMC Corp. focusing on the current chemical businesses, and FMC Technologies, Inc., focusing on the current equipment businesses.
2. With FMC-ACES, FMC seeks to align its interest in rapid, successful, and cost-effective resolution of disputes with a fair compensation model for the outside law firm. Through this proprietary system, the subject of a business process patent application, FMC defines the success criteria for a legal matter. If an outside firm achieves success, FMC pays a bonus. If FMC cannot define the objective, then it should not be hiring outside counsel.

FMC and the law firm begin by developing a case/matter budget that groups the activities in the legal matter into four or five major categories, such as initial pleadings, discovery, mediation/settlement, pretrial preparation, and trial, and sets a budget target for each. Budget targets are flexible and subject to revision for unanticipated events; they serve to identify baseline assumptions. The aggregate of the activity budget targets is the total matter budget target.

Within each activity grouping, the firm bills FMC at its usual hourly rates, subject to FMC's billing policies and procedures. Until the law firm reaches the target for any

particular activity group, FMC pays a percentage (typically 75 percent) of the billed fees. It places the unpaid fees (typically 25 percent) in a success "bucket."

Once a law firm has reached the target for an activity, FMC reverses the proportion of payment to the bucket. The firm will recover these fees, as well as unpaid fees in the first phases, if it achieves success and will forfeit them if it does not. In this phase reversal, FMC usually pays 25 percent of the fees to the firm and places 75 percent in the bucket. In either phase, firms may place a greater amount of money at risk. Under some engagements, the percentage of fees placed in the bucket increases in later phases, thus placing more firm profit at risk and encouraging early success.

If the firm achieves success, FMC pays a bonus equal to the amount in the bucket plus a multiplier. The amount of the multiplier depends upon when the firm achieves success: a multiplier of 100 percent applying in the early stages before substantial expenses accrue; a multiplier of 50 percent kicking in for dispositive motions or alternative dispute resolution; and 25 percent applying at trial. This declining multiplier has the effect of paying higher hourly rates for early success and lower rates as a matter drags on before resolution. FMC and the engaged firm may mutually agree on different multipliers.

FMC pays a second level bonus by adding 1 percent to the bucket multiplier for each 1 percent of total matter target saving. For example, if a firm expends only 40 percent of the total matter target, an additional 60 percentage points would be added to the applicable bonus multiplier.

3. Actual fees paid to the engaged firm may be higher or lower than the proposals presented and will reflect the operation of the FMC-ACES model. See note 1 *supra*. In this regard, the proposals do not reflect fixed or capped fee arrangements.



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4. A law firm marketing consultant recently admitted that law firms raise their billing rates as much as clients can bear in good economic times, in part, because the firms know that clients will ask them to provide discounts in leaner economic conditions. *See Offering Discounts in an RFP*, THE LAW MARKETING PORTAL (July 28, 2001), compiled by Linda McCarthy J.D., director of marketing for Even, Crandall, Wade, Lowe & Gates, at www.lfmi.com/best/AnswerRFP.cfm.
 5. *See* Daniel S. Hapke Jr., "Professionalism, Quality, and Hourly Billing: Are They Compatible?" *ACCA Docket* 11, no. 3 (1993): 30-38.
 6. Auction Houses Antitrust Litigation, 2000 W.L. 1372867 (S.D.N.Y.). U.S. District Court Judge Lewis A. Kaplan ordered an auction for the selection of lead counsel in the Sotheby's/Christie's price-fixing class actions.
 7. *See e.g.*, *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re* Lucent Tech., Inc. Sec. Litig., 194 F.R.D. 137 (D.N.J. 2000); *Sherleigh Assocs. LLC v. Windmere Durable Holdings, Inc.*, 184 F.R.D. 688 (S.D. Fla. 1999); *In re* Network Assoc. Inc., 76 F. Supp. 2d 1017 (N.D. Cal. 1999); *In re* Cendent Corp. Litig., 182 F.R.D. 144 (D.N.J.1998); *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp 1190 (N.D. Ill. 1996); *In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal. 1990).
 8. eLawForum has conducted several RFP competitions for corporations seeking new immigration counsel. In each case, it has worked with the corporation to craft an RFP to meet its unique requirements. In several of the competitions, the corporation requested a flat fee structure for enumerated types of applications and then an hourly fee with a cap for any work that required more complex advice. eLawForum prepared lists of potential law firm candidates, relying on both its existing database of registered law firms, as well as research into nonregistered firms. In addition to incumbent firms, the law firm lists generally included a mix of national and local firms, as well as immigration boutiques and law firms with a broader practice scope. According to eLawForum, the competitions have been highly successful, with a very high rate of participation by invited law firms and a broad range of proposals submitted.
 9. *See* "Survey of Chief Legal Officers Reveals Concerns, Priorities," *ACCA Docket* 19, no. 1 (2001): 8.
 10. BTI CONSULT. GROUP, THE STRATEGIC REVIEW AND OUTLOOK FOR THE LEGAL SERVICES INDUSTRY 69 (2001).
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