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# Outside Counsel Management: Using Value-Based Fee Structures to Align Risks and Rewards



# ACC Value Challenge

## Reconnecting Cost and Value of Legal Services

- Online Resources – [www.acc.com/valuechallenge](http://www.acc.com/valuechallenge)
- Workshops – [www.acc.com/legalservicemanagement](http://www.acc.com/legalservicemanagement)
- Champions – [www.acc.com/valuechampions](http://www.acc.com/valuechampions)



# 2012 ACC Value Champions

- David Grumbine, Sr. Counsel, Whirlpool
- Greg Petouvis, Sr. Group Manager & Sr. Counsel, Employee Relations, Target
- Todd Schnell, VP & Sr. Associate GC, RBC Capital Markets
- Stephanie Aferiat, Sr. Counsel, Employment Law, The Home Depot



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# **IMAGINE A WORLD WITHOUT BILLABLE HOURS** *“AN ENDORSEMENT FOR VALUE BASED BILLING”*

**Association of Corporate Counsel  
Annual Meeting  
Orlando, Florida**

**David L. Grumbine  
Senior Counsel, Whirlpool Corporation  
October 2, 2012**



# DRIVERS SUPPORTING A DIFFERENT APPROACH

## CASE CYCLE TIME

- The longer a case is open, the more expensive the case. We validated by 10 years of data.

## INCENT FIRMS TO MAXIMIZE EFFICIENCY

- Hourly fees are counterproductive to maximize efficiency.

## HOURLY BILLING

- Focuses on activities and not value to client. Activities produce more revenue.

## COST PREDICTABILITY

- Hourly Budget forecasting is almost always wrong.

## COMMUNICATIONS

- Are negatively impacted by hourly billing.



# GOALS OF VALUE BASED BILLING ARRANGEMENT

- **IMPROVED BUDGETING PREDICTABILITY** – Fixed Fee Agreements will support better business planning by improved accuracy in financial forecasting and supports risk management objectives to better control costs.
- **DRIVE EFFICIENCY AND FOCUS** – Firm incented to value time invested as much as client. Motivates focus on outcome of effort, not on the activity.
- **SHARE IN RISK/REWARD** – As hourly places 100% of the risk on the client, provide holdback and rewards.
- **ELIMINATE COMMUNICATION BLOCKERS** – Hourly billing tends to inhibit communications with firm. Fixed fee should facilitate communications.
- **PAY FOR PERFORMANCE** – Incentivize good results.
- **CYCLE TIME MATTERS** – Like a wine, a case/project gets more expensive with age and often not better.



# LESSONS LEARNED AND COLLATERAL BENEFITS

## TRUST

- Critical Requirement. Intent is not to financially squeeze a firm, but to facilitate a partnership . . . a win/win. Never lose focus that the goal is to improve overall results and improve predictability and efficiency.

## INCENTIVES WORK

- Financial rewards for exceeding expectations are a critical component to improving results.

## SET CYCLE TIME EXPECTATIONS

- All of us operate from deadlines. Case in point . . . impending trial date drives efficiency. Drive cycle time goals to resolve disputes/project completions.



# LESSONS LEARNED AND COLLATERAL BENEFITS

## COMMUNICATIONS AND PARTNERSHIP ARE ENHANCED

- When hourly rates are eliminated, this facilitates communications and enhances teamwork . . . all on the same page.

## BUSINESS KNOWLEDGE IMPROVES

- Firms knowledge of business and its processes improve. Firms learn more about the company and processes when the weight of hourly fees are removed.

## EMPLOYEE TIME/INVOLVEMENT REDUCED

- Improved business partner knowledge greatly reduces educating firm, rework and hand holding.

## MEASUREMENT

- Continue to track cost efficiency and results to drive continuous improvement and learn.





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# Questions?



# Fixed Fee, or Not Fixed Fee, That is the Question

Greg Petouvis

Sr. Group Manager & Sr. Counsel, Employee Relations  
Target Corporation



# Target At A Glance

- 355,000 team members
- Over 1,700 stores in 49 states; 37 distribution centers nationwide
- HQ locations in Minneapolis, MN, Mississauga, Canada, and Bangalore, India
- Employee and Labor Relations team separate from Law Department
  - 20 attorneys
  - Responsible for overseeing all employment-related litigation



# Goals of Process

- Expense control
- Enhanced ability to forecast monthly spend
- Maintain flexibility to select counsel
- Minimize administrative burden associated with invoice approval
- Fairness to participating firms
- Maintain high-quality of work



# Request for Proposal

- Process managed through Target's Vendor Procurement/eSourcing process
- Focus on single-plaintiff litigation
- Minimal expectations - fee structure left open to firms
- Suggested that any proposal built around 4 stages:
  - Pre-Answer/Investigation/Settlement
  - Initial Motion/Dismissal
  - Answer/Discovery and Settlement/Mediation
  - Summary Judgment
- Consider success bonus
- Ensure adequate partner oversight



# The Results

- 19 firms asked to participate in RFP; majority responded with proposal
- 2-year master service agreements
- Two general approaches:
  - Fixed fee up to cap
    - Flat fee phased proposals are maximum caps; Target to pay only amount of actual hourly fees if less than cap
  - Phased billing
    - Flat fees paid at beginning of phase, regardless of amount of work that subsequently occurs



# The Results (cont.)

- Differing approaches from the firm
  - Varied phase dollar caps based on jurisdiction
  - Preferred provider status designation (but no guarantees)
  - Limits on number of depositions and interrogatories
  - Limits on number of claims and individual defendants
  - Flexibility to raise cap if unused fees in earlier phases (fixed fee w/cap only)
  - Blended rate or % discount off rates



# Key takeaways

- Cost savings not as significant as expected, though predictability was a big win
- Need to ensure firms are proposing model they can live with over length of agreement
- Tension between billable hour and fixed fee models in terms of individual attorney's willingness to work on Target matters
- If done right, have substantial flexibility to still choose which firm work on which case
- Less need to scrutinize and reject itemized expenses
- Increased monitoring of quality needed (continued oversight regarding who is doing what on cases)







# Fixed Fees: Beyond Litigation

- Monthly retainers
- EEOC charges
  - Flat fees for position statements, requests for information, mediation, on-site investigation, fact-finding conferences, witness interviews
  - Increased charges for multi-plaintiff charges or charges where firm partner takes lead
- Attorney letters
  - Includes investigation and negotiation
- NLRB unfair labor practice charges



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# Questions?



# RBC Capital Markets

## **Managing for Continuous Improvement: Creating, managing, and evaluating value-based fee arrangements.**

Todd W. Schnell

Vice President, Senior Associate General Counsel



# Who are we:

- Royal Bank of Canada's US Operations:
  - Capital Markets, Wealth Management, Banking, Insurance, and related operations.
  - 7,500 US employees.
  - Small portfolio of civil litigation, arbitration, and administrative matters.
  - Team of 3 experienced employment law attorneys.



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# What were we solving for?

- Controlling costs with a small portfolio of employment related litigation and administration matters.
- Budget Predictability for Clients.



# What we ask for:

1. A proposed budget and billing arrangement for your services in this matter, in the form provided on Page 3 of this letter. RBC desires a retention arrangement that includes a blended billing rate and aggregating capped fees proposed by stage of the matter, with collars (as further defined below) in the event any applicable cap is not reached or is exceeded.
2. A *curriculum vitae* for each lawyer you propose for the litigation team as well as a short description of any cases handled by the team members that you believe are similar to this action. Please also include information as to diversity of staffing.
3. The team members' experience in this forum.
4. A brief discussion of your proposed litigation strategy.
5. Anything else you think may be relevant to RBC's decision.



# How we want it presented:

## PROPOSAL GUIDELINES

RBC desires a blended hourly billing rate accounted against an aggregating stage “cap and collar” to maximize efficient legal spend. Please propose a blended hourly billing rate, as well as fee caps by case stage, as outlined below:

<u>Case Stage</u>	<u>Fee Cap By Stage</u> (utilizing blended hourly billing rate)	<u>Aggregating Cap</u>
I. Investigation and Answer	\$	\$
II. Discovery (including motion practice)	\$	\$
III. Dispositive Motions	\$	\$
IV. Pre-Trial Matters (including preparation, briefs and jury instructions)	\$	\$
V. Trial	\$	\$
VI. Expert Costs/Fees	\$	\$
VII. Extraordinary Disbursements	\$	\$

If total billings in the case are within 10% (below or above) of the then-current aggregate cap at the time of final disposition (whether via settlement, voluntary or involuntary dismissal, or decision and award), your firm will be held to the result and no billing adjustments (positively or negatively) will be made. However, if total billings in the case are outside 10% (below or above) of the then-current aggregate cap at the time of final disposition, your firm and RBC will split the difference 50-50 to an amount that is within 10% of the applicable cap (positively or negatively).





# How we compare proposals:

Firm	AAA	BBB	CCC	DDD	EEE
<b>Attorneys</b>	Bert & Ernie	Ponch & Jon	Laverne & Shirley	Ross & Rachel	Justin & Selena
<b>Hourly Rate</b>	Blended rate of \$375/hr	Blended rate of \$360/hr	Blended rate of \$310/hr	Blended rate of \$395/hr	Blended rate of \$500/hr
<b>Stage 1 - Investigation and Answer</b>	\$15,000	\$7,000	\$10,000	\$25,000	\$25,000
<b>Stage 2 - Discovery (including motion practice)</b>	\$37,500	\$28,000	\$40,000	\$95,000	\$90,000
<b>Stage 3 - Dispositive Motions</b>	\$22,500	\$30,000	\$30,000	\$40,000	\$60,000
<b>TOTAL THROUGH SJ</b>	<b>\$75,000</b>	<b>\$65,000</b>	<b>\$80,000</b>	<b>\$160,000</b>	<b>\$175,000</b>
<b>Proposed hours:</b>	<b>200</b>	<b>181</b>	<b>258</b>	<b>405</b>	<b>350</b>
<b>Stage 4 - Pre-Trial Matters (including prep, briefs, and jury instructions)</b>	\$37,500	\$35,000	\$40,000	\$50,000	\$50,000
<b>Stage 5 - Trial</b>	\$37,500	\$20,000	\$40,000	\$50,000	\$75,000
<b>TOTAL THROUGH TRIAL</b>	<b>\$150,000</b>	<b>\$120,000</b>	<b>\$160,000</b>	<b>\$260,000</b>	<b>\$300,000</b>
<b>Proposed hours:</b>	<b>400</b>	<b>333</b>	<b>516</b>	<b>658</b>	<b>520</b>
<b>Stage 6 - Experts Costs/Fees</b>	\$10,000	\$0	\$10,000	\$10,000	\$30,000
<b>Stage 7 - Extraordinary Disbursements</b>	\$7,500	\$0	N/A	\$25,000	\$5,000
<b>TOTAL ADDITIONALS</b>	<b>\$17,500</b>	<b>\$0</b>	<b>\$10,000</b>	<b>\$35,000</b>	<b>\$35,000</b>
<b>Exclusions</b>	E-discovery processing	Counterclaims; experts; ind defendants; response to Plaintiff SJ; post-trial; appellate work; extensive e-discovery	Discovery budget assumes no more than 5 depositions	Disbursements factor in e-discovery consultant if needed	



# What we give our clients:

BUDGET DETAIL			SPEND DETAIL
Case Stage	Fee by Stage	Aggregate Cap	Total Spend
I. Investigate & Answer	\$15,000	\$15,000	<u>FY2011:</u> Q2: \$20,198.50 <b>Stage Total: \$20,198.50</b>
II. Discovery	\$20,000	\$35,000	<u>FY2011:</u> Q3: \$ 4,410.00 Q4: \$11,812.00 Tot: \$16,222.00  <u>FY2012:</u> Q1: \$10,668.25 Q2: \$ 6,840.25 Tot: \$17,508.50 <b>Stage Total: \$33,750.50</b>
III. Pre-Hearing Preparation (including briefs)	\$25,000	\$60,000	<u>FY2012:</u> Q1: \$ 0.00 Q2: \$4,718.00 Tot: \$4,718.00 <b>Stage Total: \$4,718.00</b>
IV. Actual FINRA Hearing	\$17,500	\$77,500	N/A
<b>Total</b>		<b>\$77,500.00</b>	<b>\$58,647.00</b>



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# Questions?



# Taking the Fixed Fee Plunge

Stephanie Aferiat

Senior Counsel, Employment Law

The Home Depot



# The Home Depot Overview

- Over 300,000 associates
- Over 2,000 stores (All 50 states, Canada, Mexico); distribution network, services business
- U.S. Employment Law team
  - 11 attorneys
  - Manages all employment-related litigation and high-profile EEO charges
  - Large portfolio of single plaintiff litigation (120 -160 new matters/yr.)
  - Significant class/collective action matters as well



# Goals for Change to Fixed Fee Retainer

- Cost control
- Better value for spend
- Budget predictability
- Alignment of interests with Outside Counsel for early, cost-effective resolution; reduce case inventory
- Maintain team of high quality core counsel with HD familiarity
- Sustainable program long-term – for both sides
- Promote greater efficiency among outside counsel group
- Enhance feedback loop to mitigate future risks



# Mechanics of HD Retainer Programs

- Employment Law Programs began in 2008
  - Regular Litigation Program
    - Covers all employment litigation with 5 or less plaintiffs
      - Only phase excluded is trial stage (separate fixed fee negotiated)
    - Also covers high-risk agency charges and miscellaneous advice
    - U.S. is divided geographically among 12 firms
    - Fixed fee for proposed territories is renegotiated annually through RFP process
      - We provide basic data on new matters for last 3 years and open matters by state
    - Territory size varies; annual fee ranges from \$75k - \$2M per firm
    - Includes all costs (except expert witness fees); includes local counsel fees
    - Shadow bills are submitted with year-end reconciliation for extreme high or low billing
      - Below 90% we share half of savings; above 120% we pay half of cost



# Mechanics of HD Retainer Programs

- High Exposure Employment Retainer Program
  - Covers alleged class and collective actions and cases involving 10+ plaintiffs
  - Nationwide portfolio of work has been handled by either 1 or 2 firms with significant expertise
  - Fixed fee is renegotiated annually through RFP process
    - We provide basic data on new class/collective matters for last 3 years and open class/collective matters
  - Facilitates strategy coordination for similar matters
  - Forces greater efficiency, leaner staffing on these matters
  - Same reconciliation process





# Mechanics of HD Retainer Programs

- Rolled out similar programs across Legal Department
- Examples:
  - **General Liability Program:** Litigation divided geographically among 15 firms with annual fixed fee per territory
  - **Consumer Class Actions:** handled by one firm nationwide with 3-year term
  - **Customer Commercial Litigation:** handled by 9 regional firms on a fixed fee per matter basis
  - **Corporate Transactional Matters:** M&A, bond issuances, contract matters handled via fixed fee per transaction
  - **Securities/Governance Matters:** handled by one firm with annual fixed fee
  - **Real Estate Portfolio Management:** handled by 5 regional firms with annual fixed fee
  - **Patent Application Program:** covers patent application fees at a fixed fee per patent
  - **Benefits Retainer Program:** covers advice and counseling on benefits issues and ERISA litigation at a fixed annual fee



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# Takeaways

- Reduced total legal fee spend by 45 – 55% over pre-Program fees
- Predictability of spend has been even more valuable than anticipated
- Case turn has increased – alignment around incentive to position cases for faster closure
- Different programs illustrate applicability to all sizes of companies, different types of work
- Explore value-based thinking in related third party relationships
  - Expert witnesses: value is in analysis/conclusions, not number of hours worked
  - Mediators: what incentive does hourly rate mediation create?
  - Local counsel
  - Discovery services providers



# Takeaways

- Be aware of Unintended Consequences
  - Need to manage potential incentive for firms to delay (do nothing and get paid anyway)
  - Potential incentive for firms to inflate settlement recommendations to end case
  - Some firms face internal pressure not to put “star” associates on fixed fee matters full-time
- We have found firms’ incentive to preserve reputation and deliver quality services has not gone away
- Monthly tracking of shadow billing vs. negotiated fees helps identify problems early
  - Have not yet done away with shadow bill review
  - Shadow bills aid in renegotiation process
- Monitor success by tracking median settlements, % wins, and changes in annual retainer fees vs. case volume



# Questions?

## In the end, it's all about VALUE