

# Taking The Value Challenge Beyond Law Firms And Clients: Making Your Electronic Discovery Providers Step Up

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## APPLIED DISCOVERY

Even before the economy deteriorated, the Association of Corporate Counsel began seriously examining the value relationship between law firms and their clients. Since the ACC Value Challenge program's official launch in September 2008, the financial struggles of many law firms have only intensified. In this environment of corporate fiscal duress, the core ideas behind the Value Challenge continue to resonate, highlighting the disconnect between the value and cost of legal services and promoting the belief that law firms can improve the value of the services they offer while reducing costs ... and operating at profit.

Those law firm profits remain a major sticking point for corporate legal departments and the organizations they work for. The ACC cites a statistic from the *California Bar Journal*: in the last 10 years, non-law firm costs have increased by 20 percent. During the same period, however, large law firms have increased their rates by 75 percent.

The Value Challenge takes aim at that disparity by urging attorneys at law firms and legal departments to fundamentally rethink their relationships based on the value that the client ultimately receives, rather than an hourly rate, cost per project or the firm's profitability (see sidebar).

"Value from the corporate perspective means receiving a solution that addresses the client's problem – for an appropriate cost," said Association of Corporate Counsel GC Susan Hackett in an *American Lawyer* interview.

The realm of e-discovery, like that of all legal services, requires a re-evaluation based on the ACC's cost-value equation as an "appropriate cost," which has not traditionally been associated with the discovery process. A dreaded budget line item, discovery has a reputation for being unwieldy and inconvenient, with the potential for costs to spiral out of control. This is not without merit, as many cost-drivers (time, technology, supervision) are compounded when managed internally by legal teams not accustomed to the discovery process or by external vendors adding numerous hidden costs after a deceptively low initial bid.

As such, it is reasonable to expect e-discovery providers to create more value for clients within a reasonable budget while maintaining a strong bottom line. Here's how, in eight easy steps.

### How to Demonstrate Real Value

#### 1. Establish expectations

For many organizations involved in litigation, e-discovery, along with the

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vagaries of a jury, represents one of the great unknowns. What isn't in question is that the costs are high. According to the 2010 Socha-Gelbmann Electronic Discovery Survey, the value of the e-discovery market in 2009 was about \$2.8 billion, a 10 percent increase from 2008. And according to the survey, costs for e-discovery were set to rise between 10 percent and 15 percent in 2010 and 2011.

By demanding clear budgets and estimates early on, or as soon as practical, in-house counsel can be sure they understand the scope and cost from the beginning of a lawsuit or investigation. The more detail providers can offer, the better the quality of the decision-making by in-house counsel. For example, a client faced with potentially large expenses for an e-discovery matter may decide it is cheaper to quickly settle, rather than slog through discovery only to settle later on.

#### 2. Hire the experts

Offering in-depth knowledge and expertise is another way that e-discovery providers can demonstrate value. Many in-house counsel, particularly at smaller legal departments, act as generalists. They know a little bit about a lot of different areas of the law. Counsel should be able to rely on e-discovery providers to help fill the knowledge gap by offering education and explanations regarding the latest trends and court rulings in the discovery realm.

#### 3. Prioritize project management

Solid project management can make all the difference, both in quality control and in cost management. An outstanding project manager, combined with the right technology, ensures that projects are handled efficiently, cost-effectively and on time. The right PM can make the difference between success and failure on a given discovery project. Counsel should know who will be running the project before it starts and shouldn't be afraid to ask for project management credentials. Counsel should also not expect to pay an hourly fee for project management as ensuring that projects are managed efficiently and on time is just part of the new value proposition.

#### 4. Communicate well... and often

One of the particular challenges of electronic discovery projects is their tendency to fluctuate in size and scope with frequently changing deadlines. A judge may set a new deadline, or the team may find that it makes sense to adopt rolling deadlines as discovery evolves. By communicating frequently with attorneys and other key stakeholders, e-discovery providers can allow the client to adapt to the new schedule or make decisions with as much notice as possible.

#### 5. Bill transparently

E-discovery providers should have transparent billing systems and flexible billing practices. For example, rather than simply telling clients how they will be billed, e-discovery providers should work with clients to customize an approach. For some clients and some matters, a per-document rate may work better, while others may prefer a per-gigabyte or even an hourly rate.

#### 6. Improve efficiencies

When rethinking their value proposition, e-discovery providers must keep in mind that the goal is getting the job done as efficiently and cost-effectively as possible. So it's important to always seek efficiencies and ways to lower costs – and proactively present these suggestions. Like a law firm, e-discovery providers can sometimes gain from inefficiencies. Counsel should continuously demand – and providers should proactively suggest – better processes and tools to lower overall costs.

#### 7. Suggest alternative fee structuring

Many in-house counsel tire of being the ones to ask providers for alternative fee arrangements and other ways of structuring billing and work. By proac-

tively suggesting alternatives, e-discovery providers can demonstrate their willingness to try new approaches. In addition, e-discovery providers should be open to client suggestions in this area.

#### 8. Use good technology, and use it well

As technology has exploded, organizations are struggling to keep pace with the volume of data and information that is now discoverable. So it's time to turn technology to the advantage of the client by leveraging technology to the extent practicable. Electronic discovery providers can bring a unique value here, since many law department and law firm attorneys don't have the time to become experts in cutting-edge, discovery-specific tools. Automating whenever possible is one way to greatly increase efficiencies. New early case assessment tools can substantially reduce the size of the data set required for document review. "Review analytics" can further speed and lower the cost of document review by tracking the proficiency and efficiency of the review team – and individual reviews – in real time.

While most of the talk about the Value Challenge has revolved around law firms, e-discovery providers are perfectly positioned to create their own unique value propositions, and corporate counsel should demand that they do. Providers have extensive experience and knowledge of discovery, and clients should be the beneficiaries. However, the dialogue cannot be one-sided. It's important to discuss and brainstorm with everyone involved, from in-house counsel to IT staff to law firm attorneys. By being open to new ideas and approaches, e-discovery providers can truly tackle the value challenge.

## Covenant With Counsel

As part of the Value Challenge, the Association for Corporate Counsel has created the "Covenant with Counsel." Highlights include the following: we will

- Learn your business and strategic objectives and apply that understanding to your matters.
- Give honest feedback on whether your objectives in a matter are realistic and attainable.
- Use the most appropriate staffing and tell you if we don't have the needed expertise.
- Designate one lawyer to serve as our relationship manager, whose time will not be billed for this role.
- Proactively offer value-based alternative fee structures.
- Provide budgets and estimates for specific engagements up front and advise you immediately if there may be any material changes.
- Understand that we are responsible for our budgets and estimates and that our experience forms a basis for accuracy.
- Seek to reduce our costs creatively and constantly, and share those savings with you.
- Understand that you seek neither elegance, new law, nor perfection unless these provide value consistent with your company's objectives.
- Train our associates efficiently and effectively without imposing additional and unwarranted costs on you.
- Never "reinvent the wheel;" we will look first to past work product and encourage efficiency and continuous improvement.
- Not ask for blanket conflict waivers and discuss with you any client or issue conflicts.
- Use technology to our mutual benefit, including billing.
- Meet deadlines and keep in touch.

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