

Shell's Shift to Appropriate Fee Arrangements

Catherine J. Moynihan, ACC's senior director for legal management services, interviewed Brad Nielson, Shell's general counsel for Global Litigation, about the company's turn toward appropriate fee arrangements. Excerpts are below.

You have focused on controlling spending, while pursuing aggressive litigation strategies. Can you explain your key value initiatives, and how you achieve cost containment along with favorable legal outcomes?

It comes down to managing our litigation as a business. Those who manage it as litigation get locked in to the litigation process — proceeding without having a business objective in mind and they soon find themselves in a reactive mode. We understand that (to play on a familiar phrase) “litigation happens,” but once it happens, it is up to us to take control of the matter and manage it to achieve well-defined business objectives.

A great illustration of how we think of and manage our litigation as a business is how we have responded to litigation filed to challenge actions of government agencies in relation to authorizations and permits issued in support of certain Shell operations. After Shell had gone through the very detailed and thorough process to obtain permits from the relevant government agencies, those who opposed our plans would wait until the last minute to challenge the validity of those permits. The resulting litigation would set the whole project behind schedule. As a result, we decided to accelerate the process by proactively filing motions asking the relevant court to declare that the actions of the agency were valid. This proactive strategy was very valuable in enabling us to bring the whole legal issue and challenge forward in time.

When the Shell businesses that we support undertake any project, they first define the objective of that project, develop a strategy for developing that project, establish a budget and then manage that project to completion at the lowest cost

possible. We approach litigation the same way. We articulate the business objective, the strategy for reaching that objective, a critical step, and the budget. That is what drove us to AFAs, which in my lexicon are “*appropriate* fee arrangements.” They are not “*alternative*” fee arrangements — Shell no longer manages *any* new litigation on an hourly fee basis. We price it according to what we believe is the value of the legal services required to achieve our objective. As a result of this approach, we have experienced more favorable outcomes, which include earlier resolutions, at lower costs.

As general counsel of global litigation for Shell, you have a vantage point to compare litigation and matter/spend management practices across global regions. In what ways is the EMEA region most different from, say, North America or Latin America?

Of course, the EMEA region in itself is very diverse. Regrettably, civil justice practices in certain parts of the EMEA region are adopting what I believe are flaws in the US civil justice system, such as collective redress, contingency fees and more protracted litigation processes. The same can be said of billing and the delivery of legal services, which, over the years, has been influenced by cross-Atlantic law firm mergers. When I first moved to London 20 years ago, litigation and billing practices in the United Kingdom were very different than in the United States; today, they are very similar.

The civil law countries in Western Europe are more similar to Latin America and the Caribbean, where the judicial process is rather efficient and fast-moving. In Germany, it is even rather rigid, including with regard to what you pay. In Eastern Europe, it's not uncommon to see set fees per stage of the court process, and in Nigeria and much of Latin America, fixed fees are the norm.

In the Middle East, the most wonderful dissimilarity is that there is not much litigation (touch wood).



Brad Nielson

You recently hosted an ACC Value Challenge Legal Service Management workshop for your European-based team and key outside counsel. Can you tell us about that workshop and how it advanced your value agenda?

ACC and its terrific faculty put on a one-day slice of the Legal Service Management workshop, focused on structuring AFAs and included a session on litigation process improvement. We invited participants from nine of our relationship firms to join Shell's internal litigation counsel for the workshop.

The instruction was very practical in nature, and much of the time was spent on exercises. In one exercise, small groups worked on structuring fees for a "thorny, one-off" litigation matter; in another, they negotiated fees for a portfolio of related matters. Some in-house and outside counsel switched roles, giving each a better understanding of the perspective of the other. They did a lot of practical work, with faculty guidance, on how to launch a new engagement on an AFA — collaborating on the tools to help make it go smoothly, such as checklists and templates, for specific types of work. I was pleased to see all participants, outside counsel as well as in-house counsel, embracing this new way of pricing and managing matters.

In part, that's because the workshop was also an important platform for me, as the general counsel, to deliver a very clear message. From the outset, I let everyone know that we will be using AFAs going forward, and that we will be selecting which of our relationship firms we will be working with in the future based on how enthusiastic and committed they are to helping us manage our litigation as a business using AFAs to value and pay for external counsel services.

What's next on your value journey? And what is your key focus for Europe and the Middle East?

The focus going forward is the same globally. We need to continue to embed project management and the AFA approach. I understand that law firms are in the business of making money and I don't fault them for that; however, our challenge

is to really understand the value that they bring to managing our litigation and price it accordingly. They are entitled to earn a reasonable profit (although, in my opinion, it has moved beyond reasonable), and those law firms that we will use to assist us in managing our litigation in the future are those who "get it." By that I mean, they understand that we (corporations) need to reduce our litigation costs and be more efficient in how we manage our litigation, and they will be willing to adjust their practices to meet those needs.

We are really driving hard on costs, and measuring the savings is a real challenge. Part of that is because of the docket's age. Some matters are five or 10 years old. It's hard to find apples to compare. I am, however, determined to find real savings, not the fictitious sort you get from shadow billing. We must move completely away from building and tracking budgets based on the billable hour, and get to what the law firms are doing for us and what it's worth. I believe that today's hourly rates are completely out of touch with — and divorced from any real measure of — the real value of legal services.

The other priority going forward is to ensure that lessons from the litigation are incorporated into future business processes, policies and activities. Litigation is a terrible thing to waste. We have recently introduced an "After Action Review" tool, and we review what we have learned with the managers of the relevant business unit, making sure that the recommendations are shared widely, not just with the unit that triggered the litigation.

What advice do you have for other legal executives just now embracing the ACC Value Challenge?

Embrace it wholeheartedly, with both arms. The rise in external legal costs over the last 10-15 years is completely out of proportion with other business expenses. There is significant value there. We owe it to our shareholders and our clients to reclaim some of that value. **EMEA**