

Mastering the Art of Pricing in Complex Litigation

► **Kurt Glitzenstein of Fish & Richardson discusses the firm's integrated approach to Litigation Legal Operations.**

CCBJ: Fish has an award-winning Litigation Legal Operations group that is setting new standards for pricing and managing complex litigation. Tell us about what Fish is doing and why it has been so successful.

Kurt Glitzenstein: One of the biggest challenges that law firms face is developing pricing and budgeting for litigation services. In-house counsel in many different sectors continue to demand that their law firms offer alternative fee arrangements (AFAs) for litigation matters. With each client having a different business need and each litigation matter having different complexities and commercial and legal objectives, many law firms struggle to offer AFAs tailored to specific matters.

We have devoted enormous time and resources to creating a Litigation Legal Operations group to address these issues, and we offer a professional and integrated solution for pricing litigation matters correctly, managing them efficiently, and capitalizing on our vast institutional knowledge. The group comprises three business units at our firm – Litigation Pricing, Legal Project Management (LPM) and Knowledge Management – which collaborate closely with each other to ensure a best-in-class experience for our clients.

These groups also work closely with firm attorneys and clients. The Litigation Pricing team employs a data- and experience-driven model to price our patent litigation services. They develop pricing and budget options tailored to clients' business needs

and litigation objectives, including AFAs, which Fish pioneered in early 2009, long before AFA became an industry buzzword. AFAs currently represent more than 30 percent of Fish's litigation business.

Fish's ability to price patent litigation services with great confidence is a result of the firm's extensive institutional knowledge. For each case, pricing proposals are tailored to the client's business goals and expectations, as well as to the case strategy needed to meet and exceed them.

What role does your Legal Project Management team play in managing litigation?

Once we have agreed with a client on the terms of an AFA, our LPM team works with the case team to ensure that the matter is managed efficiently to deliver the highest-quality work product. To assist with this, the firm has developed proprietary budget management tools that are combined with deep experience in handling more patent litigation matters than any other firm.

That allows Fish's LPM team to track the costs of every AFA matter. In addition to tracking the budget, the LPM team initiates process improvements to ensure that matters are managed efficiently. The LPM team also delivers feedback to the Litigation Pricing team to ensure that they can factor in what the LPM team is seeing in these cases, in order to fine-tune our pricing models.

Our LPM specialists are all certified project management professionals. They are embedded in case teams, with an expansive role that includes keeping cases on track, on budget and efficiently managed, all while delivering exceptional client service. By closely collaborating with clients, the LPM specialists have the flexibility to provide customized reporting and

update deliverables to accommodate each client's specific needs and requirements.

Together, these two teams help Fish's lawyers meet their clients' business, legal and financial objectives in an efficient, cost-effective and value-oriented manner.

Where does the Knowledge Management team fit into the mix?

Since we handle more patent litigation than any other firm, we have vast institutional knowledge about how to prepare for and try these cases. Our Knowledge Management team captures this knowledge and makes it available to the entire group, to ensure that we can deliver the highest level of service in the most efficient manner possible. To this end, Fish has made, and continues to make, significant investments in technology resources – including custom software development, augmenting existing and third-party systems, and automation of tasks using machine learning and other technologies – to increase efficiency and reduce client costs. Our LPM specialists work with our Knowledge Management team to ensure that case teams are reaping the benefits of these existing resources, not reinventing the wheel.

These efforts have resulted in the firm's eFISHency™ suite, which our lawyers, paralegals and secretaries use to reduce costs to our clients and improve our delivery of legal services. The catalyst was our litigation group's desire for a better way to streamline operations by putting key information and tasks at caseteams' fingertips.

We are very pleased that these efforts have been recognized in the industry. In 2019, Fish & Richardson was the only IP firm named an

“Innovation Champion” by BTI Consulting Group in its Market Outlook and Client Service Review. Fish earned a spot on this elite list based on feedback from in-house counsel who recognized Fish as one of the best firms at providing clients with access to industry-leading, customized data-management tools and systems.

How are Fish's AFAs different, and how do they benefit clients?

As I mentioned earlier, we started our AFA program over 10 years ago, and we have consistently been a trailblazer in this area. Our AFAs are data- and experience-driven. This positions us to have great confidence in predicting what will need to be done to win any given case, based on all of the variables involved, and it allows us to create a fee that represents an outstanding value.

In our long-running AFA program for Microsoft, we showed that it was possible to price complex patent litigation cases using fixed fees, giving Microsoft the confidence to move most of their remaining legal work to AFAs. Microsoft's and Fish's interests were aligned by focusing on lowering costs while still delivering exceptional results.

We are proud of our strategic approach to developing AFAs that address our clients' needs and objectives. In a BTI Consulting Group survey, Fish was the only IP firm that corporate counsel found to be among the best at making AFAs a successful cost-control tool.

One of the many benefits of having these conversations with our clients at the outset of a case is that it ensures that everyone is on the same page. We discuss the schedule. We talk about when the case will be busy and when it might slow down, so that clients know when their scientists, engineers and

businesspeople will need to engage. We explain how the case is likely to unfold on the merits, and what the settlement windows and options look like. We develop an understanding of their commercial and legal objectives. Then we come up with a creative and flexible proposal that takes into account all of these considerations.

Can you give us a real-world example of how you developed an AFA for a prospective client?

Last year, Fish was approached by a long-term, confidential client (an international technology giant) to propose a fee for a set of cases it was intending to file. Our Litigation Legal Operations team reviewed the pricing of services of previous comparable cases and devised a model for how the specific set of cases would be managed and litigated. One particular challenge was the fact that the set



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of cases was expanding, so the team had to come up with a fee platform that was scalable as more matters were added. As each case within the set centered on at least one patent, and often more, the fee structure had to be flexible enough to account for the specifics that actually materialized for each matter. Also, each case included extensive overlapping administrative tasks. We developed an approach that was tailored to the specifics of each matter,

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but at the same time avoided duplication of effort and capitalized on economies of scale.

Specifically, we developed a pricing plan that had one set amount for each case and one additional set price for the number of patents in the case, in groups of three. For example, a case with nine patents would be priced by adding the case fee and the set patent fee, multiplied by three (for a total of nine patents). As the number of cases in the set grew from three to eight, each involving a different number of patents, the flexibility of the formula proved invaluable.

Ultimately, the client agreed upon the fixed-fee structure, and Fish was hired for the entire set of cases. Currently, all eight matters are moving forward.

How do you measure your Litigation Legal Operations team's success?

Client satisfaction is paramount, and we seek feedback from both our internal and external clients regarding our legal operations services. We are committed to maximizing client value and improving the financial performance of the practice group by providing outstanding customer service and business deliverables – by working smart, by innovating, sharing information, developing actionable data analytics, and continually improving processes in alignment with industry best practices. ■