



## ACC Value Challenge

### SESSION SUMMARY REPORT Jacksonville, FL – March 24, 2010

#### **Program Title**

This unique event in support of the ACC Value Challenge was titled, “Defining and Delivering Greater Value for Clients in 2010.” The program involved panel presentations by five seasoned in-house counsel (one of whom is now an expert electronic discovery consultant) and an experienced trial lawyer.

#### **Co-Moderators and Guest Panelists**

Lisa Ormand Taylor, Program Chair of the North Florida Chapter, introduced the program co-moderators and panelists:

- Lisa Ormand Taylor, VP, Asst. General Counsel & Corp. Sec., Pacer International, Inc.,
- Peter Jenkins, President, LawPartnering, Inc.
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- Richard Mosher, Chief Legal Officer, Loctronix, ACC Board of Directors DFW Chapter
- Katherine Bertini, Assistant General Counsel, United Technologies Corporation
- Erin O’Brien, Senior Counsel - Litigation, CSX Transportation
- Douglas Northup, Chair, Fennemore Craig Commercial Litigation Practice Group
- Patrick Oot, Vice President and General Counsel, The Electronic Discovery Institute
- Susan Taylor, Manager –eDiscovery Compliance, CSX Transportation

**PART A – Overview of the ACC Value Challenge.** Peter Jenkins, President, LawPartnering, Inc., introduced the program.

#### **Key Points From Peter Jenkins’ Introduction:**

- **The Question of Value.** If someone who charges \$450 for his/her time invests five hours in providing services to a client, does this necessarily mean the client has received \$2,250 in value? Depending on your perspective, you might answer, “Of course” or “No way” or “Well, it depends.” The “value received’ in terms of legal services is, of course, judged by the client, But, as lawyers, we are not trained to think in terms of the real value we are providing to our clients.

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- **An Eye-Opening Fact.** In the past ten years, costs to U.S. companies went up 20%, except legal costs, which have increased 75%. This is not sustainable, and the system needs to change the system.
- **The ACC Value Challenge.** We need to find effective ways to change the system – to drive better alignment between value and costs of legal services. This is the primary goal of the ACC Value Challenge.

[With the permission of Michael Roster, Chair of the ACC Value Challenge Steering Committee, Mr. Jenkins offered PowerPoint slides developed by Mr. Roster among the session handout materials to highlight the following points.]

- **The Challenge of Change.** The habits of both outside counsel and clients, including in-house counsel, must change. However, overcoming long-time habits of thinking and action, existing methodologies, legacy systems and structures, established cultures and income expectations is challenging.

For success, there needs to be trust and a true dialogue. Among other things, in-house and outside counsel need to learn how to think like managers, not lawyers (focusing on outcomes versus process); how to define and measure value; how to involve the next generations and how to get desired results.

- **Advances in Aligning Value and Costs.** There has been progress and innovation on both sides. It is apparent that additional skills and resources are needed – e.g., finance, project management, procurement, marketing, etc. See, [www.acc.com/valuechallenge](http://www.acc.com/valuechallenge). Metrics are very important – consider leverage ratios, lawyer turnover and revenue per lawyer, rather than measures such as average profits per partner, which emphasize achievement of goals that do not relate to delivering high value at reasonable costs.
- **Things Law Firms Can Do.** Consider asking clients for whole portfolios of work for a fixed fee. Propose other alternative billing approaches and relationships. Get skilled at setting budgets and holding to them. Re-evaluate staffing for greater efficiency. Provide better training and mentoring, focusing on efficiency and delivering value as defined by the clients. Implement knowledge management – don't reinvent the wheel; pass along your savings to clients.
- **Things Clients Can Do.** Stop saying, “We hire the lawyer, not the firm.” Stop focusing on discounts. Develop manager skills among in-house team members. Examine your own methods and thinking, with a focus on value and outcomes, not process. Work towards longer-term, trusted relationships with outside counsel (versus RFP's for every matter, audits, etc.). Be receptive to firms' proposals. Stop rejecting involvement of associates. Communicate expectations clearly and ask for budgets up-front.

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- **Examples of What is Working.** Among numerous things, in addition to those outlined above, clients and firms have found varying degrees of success in training lawyers in Six Sigma / Lean principles, consultation retainers, fixing prices by stage of work or type of matters, setting maximum staffing ratios, creating knowledge banks shared by preferred outside counsel (see, DuPont Legal Model), unbundling and outsourcing support services to sole providers, and having law firm attorneys work on the client's site.
- **Bottom Line.** Continue the dialogue. Meet-Talk-Act. Talk candidly about working together. Ask, "How do we improve the value of legal services?" Try something new to achieve better value-cost alignment, even on a small scale. Periodically assess the efforts; and expand what works. Share both failures and successes with others. Remember, "In the end, it's all about value."

## **PART B – Panelist Presentations**

### **Cost Savings through Proactive Early Case Assessment and Disposition**

#### **Key Points from Mr. Mosher's Presentation**

- **About Loctronix.** Loctronix is a privately owned company specializing in universal location technology. The founders of the company are leading experts in low-cost, high-performance GPS positioning. The company is emerging from start-up mode into alliance-partnership-testing-development-manufacturing modes. The company is managed by a small management team and a very experienced Board of Directors.

The law department has historically consisted of one in-house counsel, consultants, two primary outside law firms (one corporate and one patent firm), and patent lawyers-agents in many countries. The scope of legal work is heavily centered on IP law and protection, with the usual mix of legal work in corporate governance, regulatory compliance, shareholder-financing agreements, tax, securities, contracts (including complex partner-customer development agreements), and employment law.

- **Premise.** Corporations are under increasing pressure to reduce outside legal costs and minimize the time spent by key employees in litigation. Law firms must be proactive to avoid losing business due to the convergence of retained law firms by corporations and competition from other law firms.
- **What Is an Effective ADR System?**

Classifying and Prioritizing Disputes: Settle, Try, or Compromise?

Identification of Legal Risk, "Surprises", Business Objectives, Solutions, and Time-Lines

Realistic Budgets: Forecasting, High-Low-Target Resolutions with Budget-Time Impact

Aggressive Implementation

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- **Goals of the System**

Must Meet Business Objectives

Reduce Cost; More Accurate Budget; Reduce “Surprises”; Maximize Staff Time and Minimize Key Employee Time in Litigation

Wins for Law Firms: Increase Piece of Budget Pie; Become Real Partner with Company, and Make Convergence Cut

- **Keys to Success at Loctronix.** Our current approach to litigation management, similar to the CLO’s previous work at Ball, Maytag and Hoover, consists of the following:
  - extremely early case assessment with involvement and buy-in by the business unit
  - early ADR whenever possible
  - always look for (and expect outside counsel to look for) potential business advantages/benefits from litigation, such as potential licensing, better agreement terms, additional revenue streams
  - candid communication between inside and outside counsel on any proposal to staff and manage litigation
  - very detailed written engagement letter with outside counsel spelling out expectations
  - cost-effective management of litigation, as opposed to being overly concerned about hourly rates
  - mediation/arbitration in all international disputes in a neutral common law forum, whenever possible; avoid foreign courts at all costs
  - hire the lawyer not the law firm
  - rare use of alternative fee arrangements, other than a few fixed fees, not to exceed agreements, or negotiated hourly rate discounts
  - select attorneys based on personal references or networking through the Association of Corporate Counsel – look at attorney and firm background and specialties in Martindale Hubbell
  - limited use of competitive bids, which are not always very efficient or productive.
- **Balancing the Interests of All Parties.** In implementing our system, stakeholders included the financial, management and technical staff (within our company) and the management committee (within the law firms). At first we didn’t fully appreciate the internal issues of outside counsel. It was also difficult to get outside counsel to freely communicate what their internal concerns were so those could be addressed. We overcame this issue by providing better communication and a clear picture of what we were trying to accomplish.

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Our breakthrough in this endeavor was getting the outside law firms to finally see the future business that could be gained by more cost-effectively managing the work on initial litigation for our team. We sold this new concept to management and the in-house team by explaining the practical benefits of settlement – e.g. if we spend \$50K on litigation, you will need to sell X more equipment. We motivated team members by explaining that we were always looking for the business advantage in our decision making. This prompted earlier buy-in and involvement of business people, which is best done with a formalized process. We implemented the change gradually. We continue to evaluate the success of this program and effort.

## **Alternative Fee Arrangements – Promoting Predictability & “Skin in the Game”**

### Approach to the Discussion / Questions Presented

Where is your company with alternative fee utilization?

How did your company get started?

What are the obstacles and opportunities for implementing alternative fee arrangements?

What are the tools to succeed for alternative fee implementation?

### Key Points from Ms. Bertini’s Presentation

- **United Technologies Corporation (“UTC”)**
  - A description of UTC was provided so that participants would understand the context in which UTC’s alternative fee initiative was implemented. UTC is a large conglomerate with 206,700 employees, \$52.9B in revenues in 2009 and operations in 180+ countries. UTC’s largest business units include UTC Fire & Security (electronic security and fire protection), Hamilton Sundstrand Corporation (aircraft and space systems and engineered industrial products), Sikorsky Aircraft Corporation (helicopters), Pratt & Whitney (gas turbine aircraft and industrial engines, and space propulsion), Otis Elevator Company (elevators, escalators, moving walkways and other horizontal transportation systems), and Carrier Corporation (air conditioning, heating, and refrigeration systems).
  - The law department mirrors the business unit organization. Our 248 in-house lawyers are located at the business units and in 21 countries. Though there is significant coordination among in-house lawyers, the law department is decentralized with direct reporting to the business unit presidents and dotted-line reporting to the UTC general counsel.

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- In the early 2000s, UTC began a consolidation of its firms. When consolidation efforts began, UTC had over 800 firms. The 800 firms have been reduced to approximately 420 firms, which has been relatively constant over the last four to five years. Of the 420 firms, less than 100 are “preferred” with which UTC works closely. UTC spends 75% of its total spend with preferred firms. The consolidation of firms and concentration of spend positioned UTC to take the next steps to engage firms on an alternative fee, non-hourly basis.
- **Where is your company with alternative fee utilization?**
  - In 2005, 23% of UTC’s global outside counsel spend was under an alternative fee arrangement. For UTC, an alternative fee arrangement is broadly defined and would include any financial arrangement except where compensation is based upon hours worked (i.e., lawyers are paid hourly). For example, UTC would not consider discounted hourly rates as an alternative fee arrangement.
  - In 2009, 55% of UTC’s global outside counsel spend was under an alternative fee arrangement. Since 2007, over 80% of UTC’s IP spend was handled pursuant to alternative fee arrangements. For general matters, the percentage of spend on an alternative fee grew from less than 30% in 2007 to almost 50% in 2009. Over this time frame, UTC has been more successful in implementing alternative fee arrangements in the United States than outside the United States.
- **How did your company get started? Beginning the Discussion**
  - Talk to your firms to make sure that you are on the same page. Alternative fee arrangements do not mean law firm profit loss. UTC promotes law firm profit sustainability, even growth, but not law firm revenue expansion. The profitability comes through arrangements that incentivize firms to achieve desirable results and to work efficiently, enabling the firm to share in the rewards while taking financial risks.
  - The firms should be committed to collaborating, sharing data, and continuous improvement. The continuous improvement of firms’ processes drives efficiencies, thereby enabling firms to increase profits.
  - UTC’s alternative fee arrangement with Seyfarth Shaw was discussed as an example of a firm using process improvement methodologies to dramatically change the way legal services are provided, to manage its costs and to pass savings to its client in a fixed fee based upon data analysis of a litigation portfolio and a defined, mapped litigation process.
- **UTC Implementation Factors**
  - To facilitate alternative fee implementation, there are a number of factors that come into play. Having “top down” senior management support is key because the firms

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- know that you are serious.
- Be selective. Focus on your low hanging and/or expensive fruit (e.g., is there a portfolio of cases concentrated geographically or of a similar nature for which there is data? Is there a significant spend that can be reduced?).
  - Alternative fees are easier to implement with firms you know and trust than unknown, unproven entities. In the absence of a relationship with the firm, implementation is doable, though more challenging. In these scenarios, demonstrable evidence (like data analysis and robust processes) may bridge the relationship gap.
  - Set up your alternative fee based upon the best available information. If the arrangement is not satisfactory, re-assess and learn from your experience. Persevere.
- **UTC Initiatives**
    - In view of the challenging economic times, UTC has had a moratorium on hourly rate increases in 2009 and 2010. The moratorium forced UTC and the firms to focus on alternative fee arrangements.
    - To measure UTC's progress, UTC refined its metrics to measure not only alternative fees at the matter level, but also firm and in-house lawyer performance relative to implementation of alternative fee agreements as a percentage of overall spend. This data is now captured in our matter management system to ensure robust reporting, and superb performance will be recognized.
    - To advance UTC's alternative fee initiative, hands-on workshops regarding alternative fee arrangements are being conducted in Europe, Asia and the United States to raise awareness of UTC's in-house lawyers about what works and what does not and to give them the tools to succeed. This will be a forum to discuss alternative fee examples, best practices and success stories.

#### Key Points from Ms. O'Brien's Presentation

- **CSX Transportation ("CSXT")**
  - CSXT is a freight railroad. The Company is based in Jacksonville, Florida. CSXT has a 21,000 mile rail network located in 23 states that serves the eastern United States and Canada. There are 30,000 employees and 2009 revenue was just over \$9B.
  - The Law Department has 31 lawyers with a diverse docket of legal matters that includes commercial and employment litigation, labor matters, regulatory work (STB), class actions, real estate transactions, tax and insurance. The Company's Law Department spends \$40-\$50M on legal fees annually. In 2009, CSXT paid 78 different law firms to do work.

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- The Company went through a convergence process several years ago that significantly reduced the number of firms it used and also resulted in a handful of firms being considered core counsel. CSXT considers its core counsel partners, and its strong relationships with these firms enabled the Company in 2007 to start discussing and then implementing alternative fee arrangements.
- **Where is your company with alternative fee utilization?**
  - CSXT now has various arrangements with outside counsel that are not based upon the traditional billable hour. CSXT got its feet wet in 2007 by negotiating an alternative fee structure in a very large matter that was expected to generate annual legal fees in the millions of dollars. It helped that CSXT was represented in the matter by a law firm with which it has a long-standing relationship.
  - Since then, CSXT has expanded the number of matters that have alternative fee arrangements. The Company found that appellate work is well suited for a flat fee. CSXT also has a non-standard arrangement for some of its employment litigation. In several matters, fees are negotiated using a phased approach, with incentives to the law firm based on the particular goal of the case. For example, if CSXT's goal is to settle a case early on, then fees can be adjusted accordingly, with a bonus to the law firm based on when the case is settled.
  - In sum, when a new matter comes in, the Company now always looks at whether and what kind of an alternative fee structure may be appropriate.
- **How did your company get started?**
  - In the early 2000s, CSXT revamped its litigation strategy. As a result, more internal and external resources were devoted to litigation and the Company tried more cases. While the strategy was successful as far as results, not unexpectedly the legal spend increased significantly.
  - In addition, the Company faced some large litigation matters with legal spends that ran over-budget and were unpredictable. CSXT found that in-house counsel did not have the tools to monitor case budgets effectively and that there were often no ramifications to a law firm for going over budget.
  - Alternative fee arrangements are part of an overall strategy to gain better control over CSXT's legal spend, particularly in this economic climate.
  - CSXT's law-firm partners were receptive to exploring alternative fee arrangements.
  - The Company invested in technology to assist it with managing its cases and the associated legal fees, including electronic billing and associated capabilities for reporting on matter spend.

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- CSXT also instituted a robust law-firm evaluation process that included bi-annual discussions and scoring relating to meeting budgets and willingness to engage in alternative fee arrangements.
- **What are the obstacles and opportunities for implementing AFAS?**
  - CSXT in-house lawyers, like most in-house lawyers, were raised in law firms. The billable hour is what in-house counsel is familiar with. It is easy to calculate how much time is spent on a particular task and relatively easy to make comparisons between firms.
  - Law firms tend to have better financial data on case spend than do inside counsel. It is difficult to implement alternative fee arrangements without tools to review historical data. Likewise, it is difficult to track ongoing fee arrangements without good data. In addition, law departments do not always understand law firm economics. Both sides must be willing to share hard data so that a fair fee arrangement can be negotiated.
  - Inside lawyers are extremely busy and managing an alternative fee arrangement takes time.
  - Every case is different. Mutual understanding of the goals for a particular case is necessary; for example, whether to resolve at the earliest point in time or try the case and appeal if necessary to protect CSXT's reputation or support the Company's tort reform initiatives. The alternative fee arrangement needs to be tied to case-specific goals.
  - It can't be that a law firm makes a lot of money if the case is lost and a lot of money if the case is won. There has to be shared risk and shared reward.
- **What are the tools needed to succeed?**
  - As mentioned, CSXT has implemented alternative fee arrangements with law firms with which it has solid relationships built on mutual trust.
  - CSXT started with one matter and has expanded to other matters and buckets of work over the past three years. Flexibility and creativity are key. What works in one case may not work in another.
  - To be successful, law firms and law departments must share information at the front end when devising an alternative fee arrangement and throughout the life of the matter. Communication is central to success.
  - The goal of every case is not to win at all costs. Different cases call for different strategies and each alternative fee arrangement must fit the goal of the specific matter

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at hand.

- With the billable hour, the risk of a bad result is only with the client. The best alternative fee arrangements share that risk. On the other hand, rewards must be shared as well. These arrangements should build in incentives to the law firm for successful performance.

## **Managing Litigation as a Business: Gearing Up at Fennemore Craig**

### Key Points from Mr. Northup's Presentation

Mr. Northup, who chairs Fennemore Craig's Commercial Litigation Practice Group, summarized the perspective of Fennemore's senior management regarding the ACC Value Challenge and the firm's response.

- **General Reaction to ACC Value Challenge.** Even clients that haven't heard of ACC's Value Challenge are expressing concerns regarding the value of legal services and their cost. The ACC Value Challenge has heightened our sensitivity even more to client wants and needs. Our tight economy, plus ACC's Value Challenge, are driving us to look hard at all ways for providing high value services to our clients at reasonable costs. Our clients and our firm are benefitting in the process.
- **What We See as "Law Department Hot Points."** Increasing demands from management for greater efficiency, lower costs, more value from legal spend. Limited time, dollars and legal resources. Concern re escalating cost of litigation (discovery). Critical importance of predictable costs. Tough challenge of being "legal generalists." Need for state-of-art technology to facilitate communication, centralize knowledge / work product and control costs. Need for partnering and collaboration among preferred outside counsel. Need to improve skills to better manage legal processes and outside counsel.
- **Our Firm's Commitment.** To understand our clients better and respond meaningfully to their changing wants and needs. To look for new solutions to deliver legal advice and services more efficiently and at lower costs, while still striving to be profitable. To be a thought-leader in responding to ACC's Value Challenge and, particularly, in managing litigation in an effective, businesslike manner. Importantly, to "walk our talk" on all these fronts.
- **New Solution – Managing Litigation in a Businesslike Manner.** Fennemore Craig is taking a lead role as Project Director in a nationwide "Managing Litigation as a Business" initiative designed as an ongoing collaborative effort among participating companies and select law firms and legal suppliers to improve how in-house legal teams are managing their companies' litigation, share best practices, find new solutions to common challenges, marshal litigation management resources and tools in central online

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“Managing Litigation Portal” and assist law departments in acquiring needed skills and implementing continuous improvement programs to achieve better litigation results at lower costs..

- **New Solution – Managing Litigation Reference Model.** The “Managing Litigation as a Business” initiative has evolved into a new “Managing Litigation Reference Model” (MLRM) Project – a collaborative effort among seasoned risk, dispute and litigation management professionals to develop a national standard for managing disputes, claims and litigation in a businesslike manner. Fennemore Craig is taking a lead role. Copies of the MLRM Mission Statement and the latest outlines of MLRM Key Elements and structure and functionality of the proposed MLRM Portal are among the handout materials for this ACC Value Challenge session.
- **New Solution – Proposed ACC Value Challenge InfoNet.** Recognizing the challenge many law department leaders face as “legal generalists” to make decisions that involve areas of the law about which they have little or no knowledge or where the law is rapidly changing or particularly complex – Fennemore Craig is offering to establish an online facility through which in-house lawyers can access panels of outside counsel with expertise in diverse legal practice who would provide quick “top-of-the-head” information in response to posted questions. There would be no cost for the use of the proposed “InfoNet,” sample screen shots of which were included in the session handout materials.

## **Electronic Discovery – New Technologies That Drive Cost Efficiency**

### Key Points from Ms. Susan Taylor’s Presentation

The corporate perspective driving cost efficiencies at CSX Transportation, Inc.

- **The volume of ESI that must be considered for relevance continues to grow.** Since 2006, the data stored on CSX servers has more than doubled from 20 TB to 45 TB, and continues to grow at a higher rate.
- **E-Discovery Team Project Management.** Necessary elements:
  1. Construct proper teams comprised of Corporate, Law Firm(s), and Vendor(s)
  2. Determine initial project scope
  3. Attempt to agree on scope amongst parties (to cull data set)
  4. Requires open communication/collaboration
  5. Expect changes and an iterative process
  6. Corporations contract directly with vendors for reduced rates, familiarity with data and tools used, if services needed

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- **Use Case-by-Case Assessment Not One Size Fits All.** There are many tools available to assist in preserving and collecting data following the legal hold to drive cost efficiencies. Corporations are bringing tools in-house to reduce outside costs and risk to the company. It is not always necessary to hire vendors to forensically capture data. Proper Information Management will assist to purge out-of-retention data, reduce storage costs and fees by outside counsel or vendor. Hosting company data allows in-house counsel to monitor status and better manage costs by providing outside counsel, consultants, and expert witnesses secure access to data.

#### Key Points from Mr. Oot's Presentation

The Electronic Discovery Institute is a 501(c)(3) non-profit corporation dedicated to resolving the legal community's electronic discovery challenges. Mr. Oot offered the following observations:

- Litigation costs Are rising and the volume of discovery is a significant factor.
- Federal Rules of Civil Procedure reform initiatives are currently underway focusing on electronic discovery problems with the goals of meeting the mandate of FRCP Rule 1. - Scope and Purpose:
  - These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.
- Corporate Counsel must participate in the rulemaking process to protect legal rights and avoid costs.
- The Electronic Discovery Institute (EDI) has made suggestions in a Denver Law Review article included in the materials submitted to the FRCP Advisory Committee.
- EDI proposals include an advisory committee note to FRCP 26(g) suggesting that the use of advanced search technology and linguistic tools may be deemed as a reasonable inquiry in response to a discovery request.
- This is the same pitch EDI made to the Advisory Committee in 2006 for Federal Rule of Evidence 502; the Evidence Committee accepted the proposal and the Advisory Committee note now appears in FRE 502
- EDI is hoping for the same success with a 26(g) comment.

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**At the Conclusion of the Event:** Forms were provided requesting session participants to submit their ideas for advancing ACC's Value Challenge in North Florida, with the following comments:

*Today's program is just a start. The broad goal of ACC's Value Challenge is to find effective ways to better align the value and costs of legal services provided by law firms to corporate clients. Of course, meaningful change will not happen overnight – and it's very unlikely that it will happen at all if we don't keep the dialogue going among law department and law firm leaders and take steps to implement new, positive ideas.*

*Please take a moment to share your thoughts on things we might do to advance the goals of ACC's Value Challenge among North Florida in-house and outside counsel. We will combine your suggestions into a single document and send you the summary. Perhaps, we will find a project or other collaborative endeavor that everyone agrees is worth pursuing.*

In closing, Mr. Jenkins encouraged session participants to commit to finding effective ways to advance the ACC Value Challenge among North Florida ACC Chapter members and their respective outside counsel and achieve better alignment between the value and costs of legal services.

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