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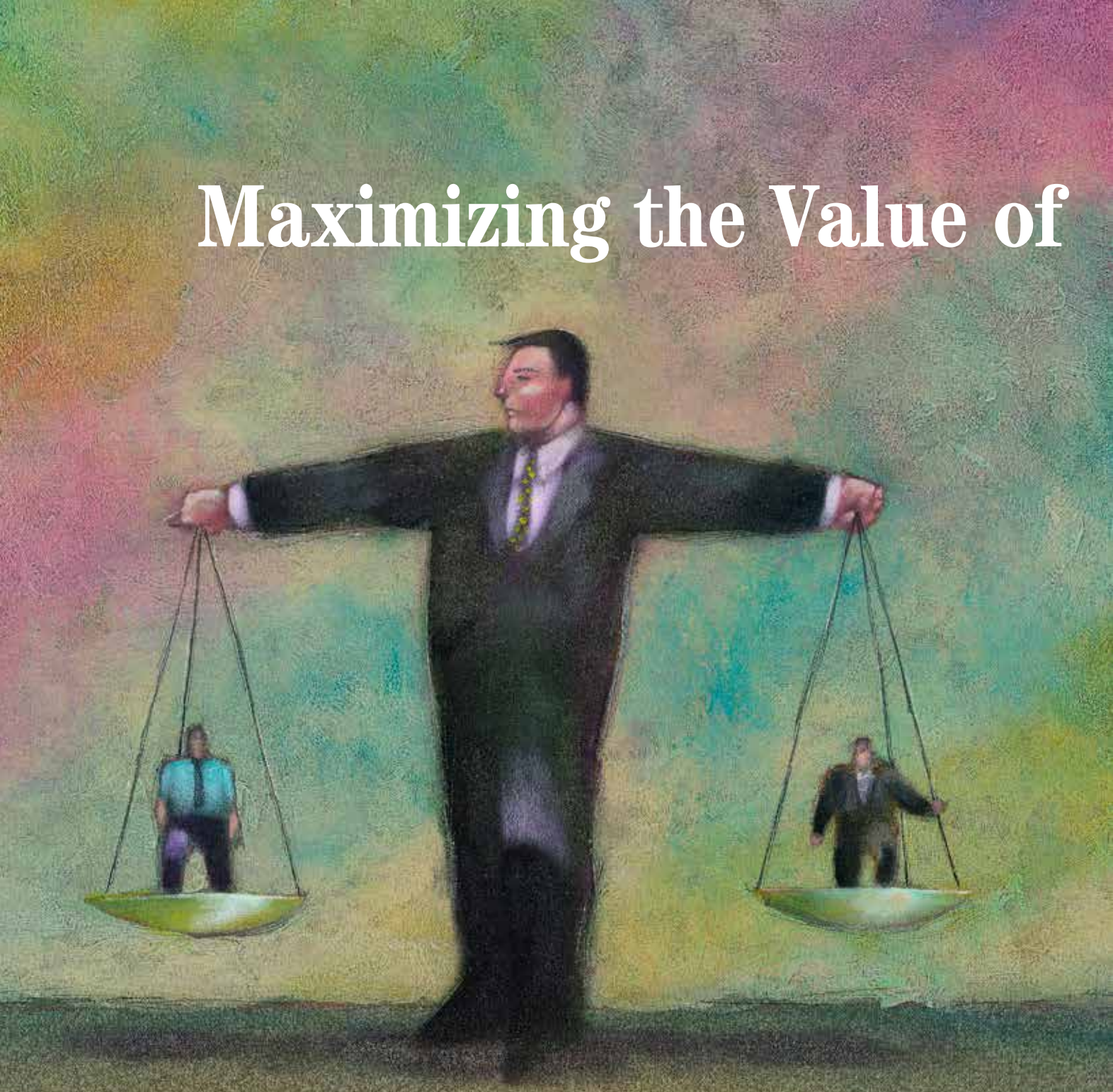

In today's economy, the legal industry is exploring ways to cut costs. To get the best possible legal representation for their money, in-house counsel should take aim at improving case management—one staffing decision at a time.

BY LUCY MUZZY

Outside Counsel

Reports about changes to the legal industry caused by the weak economy are so prevalent that they no longer qualify as news. Two subjects seem to have garnered the most attention: the shrinking legal market,[1] especially for "premium" legal services,[2] and attacks on the billable hour by clients with increased negotiating power.[3] Despite all of the attention on the new buyer's market, however, surprisingly little discussion has been focused on clients' ability to influence things beyond the pure cost of legal services. Yet in this new environment, in-house counsel would do well to focus on another area ripe for change: improving law firm case management.

The rigid—and infamously expensive—hierarchy of partners and associates that dominates litigation teams has proven enduring even in the face of a recession. And for good reason: the chain of command is simple, makes money for law firms, and has the ironic feel of efficiency when viewed from the outside. In reality, however, large, overly stratified, hierarchical litigation teams too frequently result in poor communication, inefficiency, increased costs, and subpar work product.

Instead of directly addressing these problems, many companies hope to improve outside counsel with expedient but ineffective measures. Some try implementing alternate fee arrangements without addressing the quality of representation.[4] But the billable hour has shown no signs of surrendering, probably because alternative arrangements are often impracticable in the unpredictable world of litigation. Other common tactics, such as outsourcing routine tasks, expanding in-house legal teams, using the latest technology, and carefully scrutinizing bills help to control costs, but again, do not address quality. To get the best possible legal representation for their money, in-house counsel should roll up their sleeves and take aim at case management.

Luckily, there are a few simple ways to tackle the problem without actually managing all of the details of a given case. By monitoring staffing decisions on a weekly basis, limiting the number of attorneys working on each individual project (rather than simply shrinking the entire team), reconsidering the use of co-counsel in related cases, and addressing the general practice of overly anticipatory litigation, companies can secure efficient and effective representation while still delegating most day-to-day decisions to outside counsel. Many law firm partners already utilize these techniques; there is no reason why clients cannot implement them, too.

What's Wrong with the Way Cases Are Managed?

The typical litigation team at a large law firm includes attorneys with a mix of experience levels because it costs less money to have junior associates do the grunt work. Not entirely unwisely, associates are often encouraged to delegate tasks down the ladder as far as possible (and in some cases, to outsource them to contract attorneys). Although this type of stratification and delegation is sensible in theory, too often tasks are splintered between too many team members, resulting in inefficiency, poor communication, and a failure for any one person to take responsibility for the end product.

Take, for example, a motion to compel. If the team working on the motion is too large, junior associates or contract attorneys are relegated to discrete research and document-pulling tasks and are unlikely to understand the larger goal of the motion. Even if they are given a substantive explanation, they are not required to think critically about synthesizing the law, the documents, and

the circumstances of the case and therefore may miss opportunities to meaningfully build on the ideas of those senior to them.

Next, junior associates filter up the research and documents they unearth to midlevel associates who write the first draft of the brief. That draft then makes its way up to the top of the chain for edits and comments. Not only is efficiency lost in the process, but so is quality. Former judicial law clerks are all too familiar with choppy big-firm briefs that read like they were cooked up by a few too many chefs. More tragically, despite the many hours invested in the project, case law and arguments might be discarded in the process because the associate most responsible for surveying the legal terrain and reviewing the documents—the junior associate—is also least familiar with the broader issues in the case and will have the least input into what is actually filed. Good arguments are often lost as a result.

Then comes time for the oral argument, when the partner is likely to step in. A heavy hitter, billing at least $1,000 per hour will (hopefully) come with courtroom nimbleness and confidence but without his associates' intimate familiarity of the facts and case law. And the client will have paid for the partners' review of a set of materials that the associates billed to prepare for the argument.

There are also more subtle consequences. Splintering all of the major substantive tasks—reviewing documents, researching, writing, editing, and arguing—between too many people creates the distinct risk that no one person steps up and takes ownership of the project at hand. This is not unlike the "bystander effect" discovered by social psychologists: the more people involved in a group, the less responsibility an individual feels.[5] This diffusion of responsibility can cause those working in a group to lose motivation, feel less responsible, and hide their lack of effort.[6] An associate (or contract attorney) writing the first draft of a brief (or doing the first level of document review) expects his mistakes to be reviewed and corrected, his language to be altered beyond recognition when put through the wringer of multilayer editing, and his ideas to be lost and unappreciated.

A motion to compel is not an isolated example; it merely serves to illustrate one task that should be left entirely to one or two competent attorneys on a litigation team. The same problems occur when any project is split between too many attorneys. Similar to oral arguments, experienced partners often take depositions that have been prepared for by a combination of junior and midlevel associates. Interrogatory responses, substantive motions, and expert discovery all tend to follow a similar pattern if a project is staffed with too many layers. The pervasive splintering of assignments leads not only to increasing hours but also decreasing quality. If the partner who pitched the case lacks confidence in her associates to complete tasks with limited supervision, then the firm should reconsider its hiring methods.

Of course, overstaffing does not happen on every case at every firm. As a junior associate, I wrote many motions that were edited by a single partner; I also prepared for, took, and defended depositions with the input of a senior associate or partner given during one hour-long meeting—a fairly efficient process. Unfortunately, however, layering too many associates on individual projects happens too frequently at law firms to be ignored.

Why the End of the Billable Hour and the "Premium" Legal Market Remains Unlikely

Many critics of inefficiency propose eliminating the billable hour altogether.[7] If lawyers earn a flat fee, the argument goes, they'll be incentivized to work efficiently. Or, if paid a contingent fee, they'll be motivated to work efficiently and win. In an economy where the demand for legal services continues to shrink and realization rates continue to decrease, clients have growing leverage to negotiate these fee structures.[8] Similarly, because the use of contract or foreign attorneys can reduce the cost of hours spent reviewing documents or performing the simplest research tasks, many forecast that outsourcing will soon become the norm for low-level legal work, putting an end to some of the huge bills generated by big law firms.[9]

Yet after four years of a global recession and constant speculation about the demise of the billable hour, law firms continue to earn 81 percent of their revenue from hourly billing.[10] Further, despite the continued weak economy, approximately 75 percent of in-house counsel planned to hire the same amount or fewer contract attorneys in 2013 as they did in 2012.[11] Meanwhile, 67 percent of in-house counsel anticipated either no change or an increase in work for their outside counsel in 2013.[12]

Many factors are responsible for keeping big law firms and their expensive hourly rates in business, but chief among them is the very nature of legal work. The billable hour is protected by this country's adversary litigation system, one in which the ultimate responsibility for case management rests with the judge.[13] In complex cases, parties need the flexibility to respond to their adversaries' often unpredictable volleys of discovery requests and motion practice, which some judges will sit back and allow to proliferate.[14] The threat of Federal Rule 11 sanctions (and its state counterparts) does little to stymie floods of letters and motions over insignificant and meritless points of contention.[15] Moreover, while some judges are content to let litigants control the pace of lawsuits, a proliferation of "rocket docket" judges offer more aggressive case management. This may resolve cases more quickly (and cheaply) but may also lead to unpredictable last-minute scrambles to address court orders.[16] Thus, it is unrealistic to expect true flat fees to be the form of compensation in all high-stakes litigation. Many fee agreements must account for the possibility of prolonged hours—either by building in a monetary cushion or providing for periodic readjustments of the rate, resulting in what essentially is a billable-hour arrangement. Otherwise, when the money runs out, so too might outside counsel's dedication to the case, especially if resources can be shifted to another client still paying by the hour.

Equally important, paying the expensive, hourly rates of premier law firms ensures access to the most talented litigators and their teams of bright young associates. High hourly rates will remain the dominant fee structure in these shops until structural changes are made to our legal education. Thanks to the astounding cost of law school tuition, which leaves the average law student graduate with $200,000 of debt,[17] top law firms that pay the salaries necessary to even begin paying off that debt (to say nothing of college loans) have no shortage of associates willing to bill 12 or more hours per day, seven days a week. No strict contingent or flat-fee arrangement is likely to guarantee the constant flow of revenue necessary to employ the highest quality, debt-ridden lawyers whose ranks are annually reinforced by the thousands.[18]

Finally, large, expensive law firms are generally hired by large banks and corporations for complex cases in which many millions or billions of dollars are at stake—cases in which clients are willing to pay more to obtain better results.

To be sure, alternate fee arrangements do have a place in expensive litigation. Indeed, such arrangements are the bread and butter of prestigious boutique firms like Susman Godfrey LLP and Bartlit Beck

Herman Palenchar & Scott LLP. But they are unlikely to overtake the billable hour anytime soon and do not make sense in every case.

In order to effectively combat skyrocketing litigation costs without sacrificing quality, in-house counsel must craft realistic solutions that aim to regulate controllable variables while acknowledging and planning for uncontrollable contingencies, such as opposing counsel and the judge. Rather than simply demanding a flat-fee arrangement or outsourcing all low-level tasks, companies can get better and cheaper results with basic improvements to law firm case management.

Many factors are responsible for keeping big law firms and their expensive hourly rates in business, but chief among them is the very nature of legal work. The billable hour is protected by this country's adversary legal system, one in which the ultimate responsibility for case management rests with the judge.

A Few Simple Steps Toward Improving Case Management

So what specifically can a client do to cut costs and improve the quality of representation by outside counsel? A few of the easiest solutions include monitoring staffing decisions on a weekly basis, limiting the number of attorneys working on each individual project (rather than simply shrinking the entire team), reconsidering the use of co-counsel in related cases, and addressing the general practice of overly anticipatory litigation.

Limit the Number of Attorneys on Each Individual Project, Not Just the Case as a Whole

In-house counsel should supervise litigation closely enough to flatten law firm hierarchy and limit the number of attorneys on each individual project. To begin addressing the worst instances of overly stratified staffing, clients should insist that no more than a small, fixed number of attorneys can bill for any one motion, deposition, or other project. In concrete terms, this would mean that if the attorneys briefing and arguing a motion or taking a deposition are not doing the legal research or document review themselves, they are at least directly communicating with those who are. This ensures that all attorneys on a project are sufficiently engaged to learn the substance necessary to perform quality legal work. Eliminating the hours of unnecessary and expensive communication between layers is an added bonus.

Many in-house counsel already insist on lean staffing from the outset of litigation to improve case management—a good idea, but too blunt of a tool. To be effective, staffing needs to be lean on each individual project. Teams with a limit of 10 members can still subdivide each individual task by seniority. Simply limiting the number of billers also risks the possibility of being outgunned. The suggestion, by some, that any case, no matter how complex, should be staffed with a maximum of five attorneys[19] (or any other set number) is simplistic and misguided. Complex litigation can involve scores of projects, and if staffing on the entire case is far too limited, then so too will be the quality of representation. Imagine a team of five lawyers flying around the country preparing witnesses and taking and defending depositions matched up against attorneys dedicated to those tasks plus a team in the office supporting them, drafting discovery motions, and preparing for the next stage of the case. It is not difficult to predict who will have the upper hand (especially if you are litigating in a court, like the International Trade Commission, that has no limit on the number of depositions that may be taken). Keeping a case understaffed can also be counterproductive, as it may require a continual stream of "emergency help" from associates who are not familiar with the case, have little enthusiasm or dedication to details after having their schedules interrupted, and must bill additional hours to get caught up.

Instead of dumping new bodies onto the case every time another motion is filed, outside counsel should ensure a sufficient number of attorneys permanently staffed on the case and that all major projects are assigned to a small, set group. In determining the number of attorneys working on each major project, counsel should consider how many contract attorneys are utilized on any given task. For projects such as a motion to compel, contract attorneys can simply count toward the fixed number of attorneys permitted to bill to that task. For a privilege review, on the other hand, clients may wish to encourage the use of a team of contract attorneys and do away with any limits. Ensuring that each major project is being staffed with a limited number of lawyers precludes the inefficient splintering of discovery tasks between multiple associates and partners, none of whom take responsibility for any particular task.

Anticipate Your Opponents' Next Move, but Do Not Litigate It Until It Is Made

Like good chess players, seasoned attorneys anticipate their opponents' moves so that when the time comes, they can summon a defense or launch a counterattack. Yet lawyers have a tendency to take this tactic to the extreme, devoting hundreds of hours to prepare for contingencies that never materialize. Judgment here is key; if in-house counsel gets a weekly update of all major ongoing projects, then he or she will be in position to exercise that judgment. For example, researching the law for a prospective motion to dismiss is worthwhile; even if the motion is not filed, the research can be used for summary judgment or trial. Similarly, spending some time strategizing about how to avoid a motion to compel or considering reasonable grounds to oppose one before refusing to produce documents is unlikely to be a waste of time. On the opposite end of the spectrum, drafting and editing an entire opposition brief before the moving brief is even filed is usually a waste. Worse, it may prejudice the opposition brief before the opening brief is even read. Again, judgment and familiarity with the litigation are essential.

Avoid the Use of Co-counsel

Thinking twice before hiring multiple law firms to represent the same entity in closely related cases can also save some money. Just as layering too many attorneys onto a single project within one law firm can be counterproductive, layering multiple law firms onto the same case can sacrifice efficiency and quality.

Related cases that are not consolidated, stayed, or managed through the multidistrict litigation process often leave a single company litigating the same, or similar, issues in multiple cases at

the same time. In these situations, the company will often retain separate law firms as co-counsel in the different matters. Although this is a common solution, the more closely related the two cases are, the less sense it makes to divide them between multiple firms.

If two cases with significantly overlapping issues are divided between firms, work, such as time-intensive document review, is likely to be duplicated. Although two law firms can largely share the process of producing documents to an adversary (a given set of documents need only be reviewed for privilege once), they will both inevitably review substantively the same resulting production and that of the adversary, largely with an eye for the same shared issues, even if the productions in both cases are identical. The two separate teams must also coordinate and agree upon their responses to similar discovery—not always an easy or efficient matter when it requires attending conference calls. Even more jarringly, the two teams will likely prepare for, take, and defend the very same depositions, even if it is agreed that any resulting testimony will be used in both cases. Anyone who has sat at a deposition table crowded with multiple attorneys, many of whom spend the day reading their e-mails, has experienced the feeling that their presence is unnecessary.

Hiring co-counsel to represent a single party in related litigations may be necessary because of conflicts, diverging claims, or the sheer magnitude of the case. But doing so without considering the resulting duplication and inefficiency likely to result is a mistake, especially when paying by the hour. If co-counsel is really necessary, in-house counsel can limit the number of attorneys working on each project and force law firms to share some work product with one another, just as in the case of a single law firm.

Implement These Suggestions with the Weekly Check-in

How can in-house counsel remain engaged enough to regularly provide input on staffing, avoid useless, expensive drafts, and prevent duplication of work by co-counsel? The simplest tactic is to get a weekly update over the phone from the person managing the litigation team's day-to-day work. Many in-house counsel already use this approach.

Speaking with the most senior lawyer on the case might not be helpful—the senior partner may not know the ins and outs of what each member of the team is working on. The attorney who is involved in most or all aspects of the case and oversees the day-to-day work (often a midlevel or senior associate) is the more useful contact. Getting a rundown of the most time-consuming projects occupying the team, any upcoming deadlines, significant recent events, and a sense of who is working on each project should provide in-house counsel with enough knowledge of the case to offer high-level feedback and direction about staffing and time organization.

By obtaining this rundown orally, accompanied by a simple to-do list, in-house counsel can prevent law firms from wasting hours drafting unnecessary reports and updates. Of course, this type of oversight takes time and concentration. But a weekly phone call need not be long in order to be effective. And it need not result in either the overstepping into litigators' turf that some companies fear or the cost of hiring scores of former litigators as in-house counsel to oversee case management.

In sum, it appears that clients are already using their new-found leverage to obtain lower-cost and alternate-fee arrangements. But to get more bang for their buck, they should consider exerting some of that leverage over law firm case management. ⊙

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Endnotes

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[7]*See, e.g.*, Chesler, *Kill the Billable Hour, supra* n.4; Glater, *Billable Hours Giving Ground at Law Firms, supra* n.4; Turow, *The Billable Hour Must Die, supra* n.4.

[8]Center for the Study of the Legal Profession at Georgetown Law, 2013 Report on the State of the Legal Market, Feb. 1, 2013, *available at* www.law.georgetown.edu/continuing-legal-education/executive-education/upload/2013-report.pdf; *see also* Harper, *Pop Goes the Law, supra* n.2.

[9]*See, e.g.,* Clay & Seeger., *2010 Law Firms in Transition*, *supra* n.1; Barlyn, *Call My Lawyer ... In India*, *supra* n.1; *see also* Gibson, K. William, *Outsourcing Legal Services Abroad*, 35 Law Practice (5): 47 (Jul./Aug. 2008), *available at* www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articlar_v34_is5_pg47.html; Andrey

Ross Sorkin, *Big Law Steps Into Uncertain Times*, N.Y. Times, Sept. 25, 2012, *available at* dealbook.nytimes.com/2012/09/24/big-law-steps-into-uncertain-times.

[10]*See* Hildenbrandt Consulting LLC & The Law Firm Group at Citi Private Bank, 2013 Client Advisory, Jan. 14, 2013, at 7, *available at* hildebrandtconsult.com/uploads/Citi_Hildebrandt_2013_Client_Advisory.pdf.

[11]Altman Weil, 2012 Chief Legal Officer Survey, 2012, *available at* www.altmanweil.com/dir_docs/resource/ad3048ed-a438-4fd0-8c96-1597498c841f_document.pdf.

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[13]Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 Duke L.J. 669 (2010).

[14]Frank H. Easterbrook, *Issues in Civil Procedure: Advancing the Dialogue, A Symposium: Discovery as Abuse*, 69 B.U.L. Rev. 635 (1989).

[15]Fed. R. Civ. P. 11; Robert J. Jossen & Neil A. Steiner, *How the Second Circuit Liberalized Rule 11 Sanctions Availability*, N.Y. L. J., Aug. 20, 2012, *available at* www.dechert.com/files/Publication/e56df8bf-4948-4128-999e-8eb7e6ec116e/Presentation/PublicationAttachment/2990073f-ca67-4a22-8c95-ade8dfa9635f/07081221%20Dechert.pdf (recounting the history of Rule 11 and "sanction letters").

[16]*See, e.g.,* Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 Cal. L. Rev. 225 (1997), *available at* scholarship.law.berkeley.edu/californialawreview/vol85/iss1/4.

[17]Karen Sloan, *Think law school's expensive? You don't know the half of it*, Nat'l L. J., May 1, 2012, *available at* www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202550927184&Think_law_schools_expensive_You_dont_know_the_half_of_it. And that's just the average—students going to high-ranking schools like the New York University School of Law, which are the feeder schools for big law firms, will pay even more. *Id.* NYU students have a projected debt of $266,462. *Id.*

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[19]Stewart M. Weltman, *How to Manage Your Litigation Costs*, Corporate Counsel Newsletter, May 12, 2008, *available at* www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202421288817.